THE

TE ARAWA

SETTLEMENT

PROCESS

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THE TE ARAWA SETTLEMENT PROCESS REPORTS

WAI 1353

WAITANGI TRIBUNAL REPORT 2007

The cover photograph by Ian Baker shows the tekoteko of the whare tupuna at Te Papaiouru Marae in Ohinemutu, Rotorua. The figure is Tamatekapua, the captain of the Te Arawa waka.

The photographs on pages 223, 228, 245, 252, and 264 of central North Island pine forests are reproduced courtesy of Timberlands Limited, the forest manager of the Kaingaroa Timberlands estate.

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ABBREVIATIONS

AIP	agreement in principle
app	appendix
CA	Court of Appeal
CFRT	Crown Forestry Rental Trust
ch	chapter
cl	clause
CNI	central North Island
doc	document
ed	edition, editor
GSA	geothermal statutory acknowledgement
ha	hectare
J	justice (when used after a surname)
KEC	Nga Kaihautu o Te Arawa Executive Council
ltd	limited
NKOTA	Nga Kaihautu o Te Arawa
no	number
NZLR	*New Zealand Law Reports*
NZPD	*New Zealand Parliamentary Debates*
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
sec	section (of this report, a book, etc)
v	and
vol	volume

The term 'KEC affiliates' refers to all those hapu and iwi that supported the KEC.
'Overlapping' claims is the Crown's term for claims not within the KEC mandate.
'Mandate' claims is the Crown's term for claims disputing their representation on the KEC and Te Pumautanga o Te Arawa, the post-settlement governance entity.
'Wai' is a prefix used with Waitangi Tribunal claim numbers.
Unless otherwise stated, endnote references to claims, documents, papers, recordings, and statements, are to the Wai 1353 record of inquiry, a copy of which is available on request from the Waitangi Tribunal. For the sake of brevity, attachments to documents on the record are treated as subentries to the main document. For example, attachment 3 to document B3 appears in endnotes simply as document B3(3).

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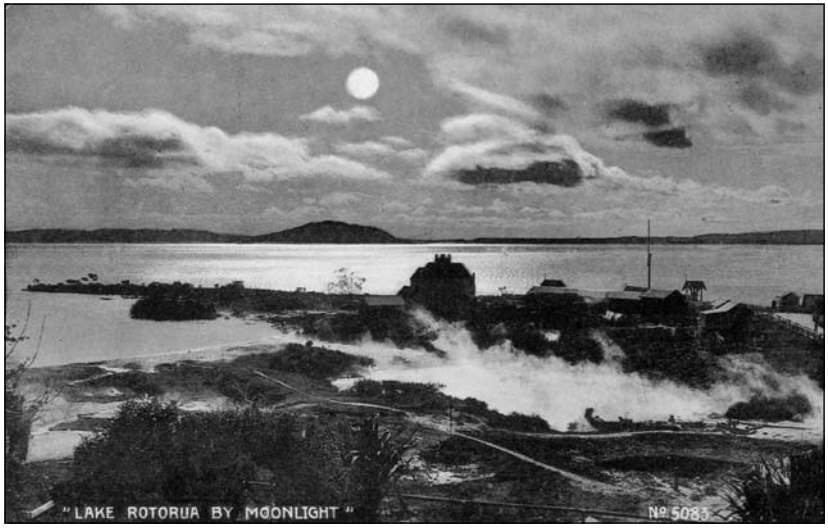

THE REPORT ON THE IMPACT OF THE CROWN'S TREATY SETTLEMENT POLICY ON TE ARAWA WAKA

Previous page: 'Lake Rotorua by Moonlight,' postcard, circa 1905–14

The Right Honourable Helen Clark
Prime Minister

The Honourable Mark Burton
Minister in Charge of Treaty of
Waitangi Negotiations

The Honourable Chris Carter
Minister of Conservation

The Honourable Parekura Horomia
Minister of Maori Affairs
Parliament Buildings
WELLINGTON

The Waitangi Tribunal
141 The Terrace
WELLINGTON

15 June 2007

E te Pirimia, tēnā koe e te Ariki Kahurangi. E te Minita Māori, te Kāhu Kōrako, tēnā koe e tū nei ki te kei o te Waka Māori. E te Minita nōna te mana whakarite take e pā ana ki te Tiriti ō Waitangi, tēnā koe e whakamoe nei i te wairua ohooho o te iwi Māori. E te Minita Papa Atawhai, tēnā koe karapoti nei i ngā uri ā Tāne, ngā whenua, tae noa ki ngā tini rau ā Tangaroa.

Tēnei rā te mihi manahau, te mihi matakuikui ki a koutou katoa.

Tēnā hoki koutou i ō tātou tini mate kua rauhingia ki te nohopukutanga o te tangata ki te whareahuru o ngā marae o Tuawhakarere.

This is the report of the Te Arawa Settlement Tribunal. It is a report that concerns one of the largest tribes in the country, the Te Arawa Confederation of the Rotorua district, with a population estimated to be between 36,000 and 40,000 people.

In March 2004, the Crown formally recognised a deed of mandate submitted by the executive council of Nga Kaihautu o Te Arawa (KEC). Formal negotiations ended in December 2006, when the KEC and the Crown finalised matters arising from a deed of settlement concluded in September. As a result of the settlement, the Crown has undertaken to introduce legislation into Parliament in August or September 2007 to give effect to the terms of the deed. You will recall that, from 2003, the process of negotiating this settlement with the Crown has consumed the time and energy of the KEC, which represents approximately one-half of Te Arawa. You will also recall that, from 2004, the other half of Te Arawa, who have chosen to pursue alternative representation in their attempt to enter into negotiations with the Crown, have equally been consumed with opposing the

imposition on them of the Crown's national 'large natural groupings' policy and its 'overlapping claims' policy. They have also challenged the Crown's effective refusal to accept the advice of the Waitangi Tribunal in the *Te Arawa Mandate Report: Te Wahanga Tuarua* (2005) that the Crown engage in contemporaneous negotiations with them.

We began our hearing of the evidence understanding that it is the function of this Tribunal to inquire into claims filed under section 6(1) of the Treaty of Waitangi Act 1975. The Tribunal will make findings and recommendations where the claims are well founded. We note that the Te Arawa mandate Tribunal's advice and recommendations are not binding on the Crown and it may choose to accept or reject them. All the Tribunal can do is independently assess the evidence and submissions of the parties and report on them in accordance with its jurisdiction. Given its judicial and inquisitorial function, experience, and independence, we do expect the Tribunal's findings and recommendations to be given due consideration. Where the Crown chooses an alternative course of action, and where new claims are generated as a consequence, the role of the Tribunal is to ascertain whether the Crown's alternative course of action was nonetheless consistent with the principles of the Treaty of Waitangi.

In the present case, that alternative course of action was to modify the Office of Treaty Settlements' overlapping claims policy and to provide no response on issues of mandate raised by the Te Arawa mandate Tribunal. Armed with this modified policy and the 'large natural grouping' policy, the Office of Treaty Settlements commenced its negotiations with the KEC.

The claimants before us represent the following hapu of the Te Arawa Waka: Ngati Whaoa, Ngati Rangiunuora, Ngati Tamakari, Ngati Rangiteaorere, Ngati Whakaue, Ngati Rangitihi, Ngati Makino, and members of Ngati Tahu. They allege that they have been prejudicially affected by the Crown's negotiation and settlement policies as applied in Te Arawa because their rights and interests will be either settled or partially settled by the KEC deed and the proposed legislation that will give effect to it. In considering their claims before us, we have dealt only with aspects concerning cultural redress and mandate at this point and have reserved the forestry components of the claims until after our hearing on those issues. Other claims have been filed by Sir Graham Latimer for the New Zealand Maori Council, Ngati Tuwharetoa, Ngati Tutemohuta, Tuhoe, and Ngati Haka–Patuheuheu, in addition to the parties that have already appeared before us, concerning the forestry redress offered to the KEC. The Tribunal is to hear all forestry claims from 25 to 27 June 2007. As you recall, we have not been able to hear these issues before now because they have been subject to litigation before the High Court. The decision of the High Court is now subject to an appeal, to be heard by the Court of Appeal on 19 June 2007.

The Office of Treaty Settlements has advised that it will be ready to present to the Minister in Charge of Treaty of Waitangi Negotiations a copy of the draft Bill for introduction into Parliament by the end of June. As indicated above, our hearing of the forestry

claims will take place from 25 to 27 June. This may mean that our ability to report on those aspects of the claims may clash with the introduction of legislation relating to the KEC settlement. We have been forced, thereby, to expedite the reporting process in terms of the issues we have heard and to report to you in stages, lest the introduction of legislation preempts our jurisdiction to report at all.

The claims of the iwi and hapu of Te Arawa before us are inextricably linked with the claims of the KEC affiliate iwi/hapu. They are co-existing, intersecting, interspersed, and interwoven claims. They are not overlapping claims that are characterised by territorial exclusivity, modified by one claim sharing a border zone overlapping with another or others from within their periphery. They are claims that are generated from within exactly the same circumference. In such circumstances, competing or contested claims to redress taonga will inevitably arise, and they will be far more frequent and intense. In such circumstances, the burden on the Crown to act consistently with the principles of the Treaty of Waitangi intensifies, as do the duties it owes to all Maori affected.

In this report, we have found that the Crown, through the actions of the Office of Treaty Settlements, has acted in more ways than one in a manner inconsistent with the principles of the Treaty of Waitangi with respect to all the claims before us. In exercising its undoubted kawanatanga, the Crown has crossed over and usurped the rangatiratanga of iwi and hapu, thereby committing grave breaches of the Treaty.

Te Arawa is now in a state of turmoil as a result. Hapu are in contest with other hapu and the preservation of tribal relations has been adversely affected. We are left fearing for the customary future of Te Arawa as a result.

There is no real way of addressing the situation fully without the Crown reprioritising its work programme for the Office of Treaty Settlements and commencing the negotiation process with all those tribes that stand outside the KEC, and by commencing now to negotiate with Ngati Makino. In the interim, and to prevent any significant and irreversible prejudice, we make several recommendations, which are listed in chapter 7 of this report.

We conclude by reassuring the Prime Minister and Ministers that we consider that the resolution of the historical Treaty claims through the negotiation and settlement process is vital to the future of Maori and all New Zealanders. All of us have an interest in encouraging the Crown and Maori achieve sustainable Treaty settlements. We also consider that the step the Crown has taken to settle the KEC claims was a bold step forward, representing as it did the bringing together of one of the largest settlement populations achieved to date. But such a step was only going to be successful in Treaty terms if the Crown, through the Office of Treaty Settlements, acted fairly and impartially towards the other half of Te Arawa (representing an almost equally large population). That was a duty incumbent on the Crown, because it is not consistent with the Treaty's spirit that the resolution of an unfair situation for one party should create an unfair situation for another.

Finally, we do not think that the tribes of the Te Arawa Waka that have supported the

KEC settlement should suffer for the Office of Treaty Settlements' failures, so we do not recommend that the settlement not proceed at this stage. But we believe that it must be varied. We will report to you further, assuming we will be given time, following our hearing on forestry issues.

Heoi ano

CHAPTER 1

BACKGROUND TO THE INQUIRY

Introduction

Since 2003, approximately one half of Te Arawa have been engaged in a process of negotiating a Treaty settlement with the Crown in recognition of historical grievances. The other half of Te Arawa have chosen to pursue a separate path towards settlement, but the Crown has refused to negotiate with them. In March 2004, the Crown formally recognised a deed of mandate submitted by the executive council of Nga Kaihautu o Te Arawa (KEC) representing those seeking immediate negotiations. Formal negotiations ended in August 2006, when the KEC and the Crown initialled a deed of settlement.

Since then the deed has been ratified and formally signed, and the Crown has recognised the establishment of the post governance entity (Te Pumautanga o Te Arawa) which will receive the benefits of the settlement. The settlement package contains an agreed historical account, an apology for past Crown actions, and cultural redress, together with financial and commercial redress comprising (a) the transfer of settlement Crown forest licensed land with a redress value of $36 million, and (b) the right for six months to purchase scheduled areas of deferred Crown forest licensed land.

All that is required now to complete the settlement process is the introduction and passing of legislation to enable the settlement. The Crown intends to introduce legislation no earlier than 30 June 2007. According to clause 4.1 of the deed of settlement, the Crown must introduce legislation no later than nine months after the deed has been ratified. The nine-month time frame took effect from 1 December 2006. This means that the latest date for introducing legislation is 1 August 2007.

The Crown's mandating process as it applied to iwi and hapu of Te Arawa has already been the subject of two previous reports of the Waitangi Tribunal issued in 2004 and 2005.[1] We discuss the Te Arawa mandate inquiry in further detail in this chapter as it provides important context for the claims now brought before this Tribunal.

This report deals with claims before the Tribunal in respect of two aspects of the Te Arawa settlement process. The first relates to the Crown's role in scrutinising the executive council's mandate to negotiate a settlement on behalf of certain hapu, who sought to withdraw from the settlement. The second aspect concerns the impact of the settlement package on Te Arawa iwi and hapu who are not included in the settlement.

The claims before this Tribunal were brought by members of Ngati Whaoa, Ngati Tahu, Ngati Tamakari, Ngati Rangiunuora, Ngati Makino (and Waitaha), Ngati Whakaue, Ngati Rangitihi and Ngati Rangiteaorere. We discuss these claimants at the end of this chapter and explore their claims in more detail in chapters 3 to 5.

The Te Arawa Mandate Inquiries

The Te Arawa Mandate Report

The Te Arawa mandate Tribunal considered the role and responsibility of the Crown in the mandating process during the Te Arawa settlement negotiations. In 2004, that Tribunal acknowledged that 'achieving a mandate is essentially an internal matter for iwi'. However, it considered that under its Treaty obligations the Crown was required to actively scrutinise and immediately correct faulty procedure at every stage of the mandating process.[2] In the case of the Te Arawa mandate, the Tribunal:

> found that the Crown had failed to adequately identify and address critical issues surrounding the representivity and accountability of the executive council to the kaihautu (the members of which were ultimately accountable to the iwi/hapu) . . . In our view, the mandating process had not allowed the people of Te Arawa adequate opportunity to debate and discuss these important matters.[3]

At that time, the Tribunal found that the flaws in the mandating process did not constitute a Treaty breach or result in actual prejudice to the claimants. Instead, the Tribunal identified some issues that the Crown would need to address in order to avoid being in breach. As a consequence of their analysis of those issues, the Tribunal considered that 'there was a fundamental need for reconfirmation of the executive council's mandate'. To achieve this, the Tribunal 'suggested that a properly advertised hui of all kaihautu members be held, at which members could vote to confirm the mandate'.[4]

The report then set out a number of suggestions regarding the role of the taumata (a group of Te Arawa leaders) in developing a reconfirmation process and the notification and conduct of the hui.[5] In particular the Tribunal suggested that KEC members vote on a number of matters that would address the issues of proportionality of iwi/hapu representation on the executive council and the accountability of the executive council to the elected KEC and of the negotiation team to the executive council.[6]

With regard to the groups represented in the current inquiry, the Tribunal considered that the Crown had 'both a moral and a Treaty obligation to negotiate with Ngati Makino separately and contemporaneously with the rest of Te Arawa'. As a result, the Tribunal suggested that, 'if Ngati Makino agree, Waitaha and Tapuika should be invited to join their negotiations'.[7] With respect to Waitaha, the Tribunal suggested that 'the Crown should afford priority status to negotiations with Waitaha, dependant on the findings of the Tauranga Moana Tribunal'.[8] The Tribunal considered that the issues of Ngati Whaoa and Ngati Tamakari, who sought to be decoupled from other hapu represented by the KEC, would be addressed at the reconfirmation hui. The Tribunal noted that 'the issue of the coupling and uncoupling of hapu was an internal matter, but one which needed to be discussed and debated by kaihautu members'.[9]

Finally, the Tribunal gave the claimants leave to come back to the Tribunal without further application for urgency if the Crown did not make an adequate response to the Tribunal's suggestions. The claimants made several requests to come back to the Tribunal. This resulted in a second hearing, and the Tribunal's *Te Arawa Mandate Report: Te Wahanga Tuarua*.

The Te Arawa Mandate Report: Te Wahanga Tuarua

Introduction

The Tribunal's second mandate report, released in 2005, assessed the Crown's response to its suggestion for a reconfirmation process and gave advice about the mandate issues of various claimants. The Tribunal also looked ahead to the need for the Crown to deal with overlapping claims and set out its concerns about that process.

As a consequence of the Tribunal's first mandate report, officials from the Office of Treaty Settlements (OTS) and the Crown Law Office assisted the executive council to design a reconfirmation strategy. By the end of August 2004, the Minister in Charge of Treaty of Waitangi Negotiations had

approved this strategy. The Tribunal noted that this strategy varied substantially from the one suggested by the Tribunal in its previous report. First, 'the executive council conducted its own review of its composition, rather than putting the matter to the kaihautu in the manner we suggested'. The Tribunal considered that this internal review 'was completed in isolation from the rest of Te Arawa and so could not be described as an open and transparent process.'[10] Secondly, rather than a single reconfirmation hui, a four-region hui approach was adopted followed by a final combined hui of all kaihautu representatives that became simply 'a discussion and report-back session'. However, the Tribunal was ultimately 'satisfied that the executive council ran the regional hui in an open and transparent manner, meeting our basic procedural requirements in that respect'.[11]

Finally, no preliminary hui of kaihautu members was held to discuss and vote on matters of accountability and withdrawal provisions. Instead 'the revision of the rules would take place within four months of the executive council being reconstituted'.[12]

Although the Tribunal had criticisms of the reconfirmation process, it considered that for:

> those iwi and hapu who had agreed and voted for the executive council's reconfirmation proposal, they accept any process deficiencies and wish to abide by their decision. That is a valid exercise of their rangatiratanga, and it is not appropriate for this Tribunal to try and unsettle their position.[13]

However, the Tribunal did 'have concerns for the remaining 48 per cent of the Te Arawa population' who lay outside the executive council's mandate.[14] Their recommendations for these iwi and hapu are summarised in the following sections.

Ngati Whaoa, Ngati Tamakari, and Ngati Rangiunuora

The Tribunal considered that 'Ngati Whaoa's situation is a good example of uncoupling that should have been addressed at a preliminary hui of kaihautu members, as we suggested in August 2004'.[15] The Tribunal found that in 'allowing certain issues and interests to be subsumed' in adjustments made to the executive council's composition during the reconfirmation process, 'the Crown might have been in breach of the Treaty principle of equity and equal treatment'. This applied to Ngati Tamakari, Ngati Rangiunuora and other hapu the Crown alleged were represented on the KEC by Ngati Pikiao representatives. However, the Tribunal considered that there was still an opportunity for the Crown to remedy the situation 'because the executive council has yet to address issues of accountability and develop a process of withdrawal'. The Tribunal made it clear that, when the review of the KEC trust deed took place in May 2005, 'the Crown should ensure that there is provision made for hapu such as these to withdraw or affirm their support for the executive council's mandate. This will enable the Crown to avoid a Treaty breach.'[16]

Ngati Makino and Waitaha

On 4 November 2004, after considering the Tribunal's recommendation that it enter separately and contemporaneously with Ngati Makino (possibly in a cluster with Waitaha and Tapuika), OTS advised the Ngati Makino, Waitaha, and Tapuika claimants that 'executive council seats were no longer being held open for them and, secondly, that the Crown could not afford to them the same priority in negotiations as it accorded to negotiations with the executive council'.[17] The Tribunal considered that this response by the Crown to its August 2004 suggestion that the Crown negotiate with these groups was 'unsatisfactory and inadequate'.[18] Essentially, the Tribunal believed that:

> In its approach to our suggestion of separate negotiations with Ngati Makino and Waitaha, the Crown has preferred to follow its CNI settlement targets rather than seek to act in accordance with Treaty principles. As a result, we consider that the Crown has breached the principles of partnership and of equal treatment in relation to Ngati Makino and Waitaha.[19]

The Tribunal found that prejudice was likely to result from the long delay in negotiating with Ngati Makino and from the continued refusal to consider a concurrent negotiation with them. Therefore, the Tribunal repeated its August 2004 recommendation that the Crown commence negotiations with Ngati Makino alone or in a possible cluster with Waitaha, and, with Ngati Makino's consent, possibly Tapuika.[20]

Ngati Rangitihi

In its August 2004 report, the Tribunal had recommended that the reconfirmation process not take place until Ngati Rangitihi had held a hui 'at which they, finally and in the fairest of circumstances, either elect KEC representatives or choose to stand apart'.[21] The Tribunal noted that the Crown had ignored that recommendation but that the claims of Ngati Rangitihi were being heard in the central North Island regional stage 1 inquiry. While that inquiry continued, the Tribunal considered that:

> The Ngati Rangitihi representative on the kaihautu must be sure to represent all Ngati Rangitihi interests on the executive council. That by necessity means that he should be actively engaged in dialogue with the Wai 996 claimants, if that is their wish . . . The Crown has a duty to ensure that the executive council requires that he perform his obligations in this regard.[22]

'Overlapping claims'

At the time of the Tribunal's second mandate inquiry, the Crown had not yet begun its 'overlapping claims process' with claimants outside the KEC mandate. However, the terms of negotiation signed in November 2004 had set out the Crown's proposed process for dealing with overlapping claims. The Tribunal noted that all parties recognised that 'the issue of "cross-claims" would be critical'.[23] For that reason, the Tribunal considered that it 'would not be properly exercising [its] role if [it] were to leave the Crown and executive council to proceed with the negotiations without [the Tribunal's] views on these issues'.[24]

The Tribunal observed that it had 'no doubt' that it would be 'extremely difficult for the Crown to settle the claims of those iwi/hapu of Te Arawa who have mandated the executive council, without prejudicing the interests of other Arawa groups'.[25] In particular, it noted the situation of Ngati Pikiao and Ngati Whakaue, where some hapu supported the executive council and some remained outside its negotiations.

The Tribunal outlined a number of concerns that it had about the Crown's policy and process, as set out in clauses 60 and 61 of the terms of negotiation, for resolving overlapping claims to redress assets. These concerns included weak provisions to protect the interests of the balance of Te Arawa outside the KEC mandate where their interests intersected. In particular, there was no requirement that the Crown ensure there had been full and effective consultation with overlapping claimants before the signing of an agreement in principle (AIP).[26]

The Tribunal was also concerned about the balance of power between those groups in negotiation and those with overlapping interests. While the ultimate decision to provide any redress for overlapping claimants who are outside the executive council mandate rests with the Treaty Negotiations Minister, his decision is largely based on the advice of OTS officials and, indirectly, that of the KEC. Therefore, the Tribunal considered that:

> the executive council is in a privileged position of being a party to, and potential beneficiary of, negotiations over 'cross-claims' on one hand, and a de facto provider of specialist advice to the Crown on the other.[27]

The Tribunal concluded that 'the process will unfairly favour those at the negotiation table over those who are not'.[28] As a result of its concerns, the Tribunal stated that the Treaty principle of equal treatment suggested that the Crown negotiate Te Arawa claims 'contemporaneously'

with more than one mandated group.[29] Such groupings could be formed around Ngati Whakaue, with separate negotiations with Ngati Makino, and, if they agree, Waitaha and Tapuika.

Events Subsequent to the March 2005 Report

Introduction

The next section describes the events following the release of the Tribunal's March 2005 report *The Te Arawa Mandate Report: Te Wahanga Tuarua*. There were three series of events that occurred roughly in parallel between the release of the second mandate report in March 2005 and the granting of urgency to claimants in this inquiry in 2006. One set of events took place within the framework of the central North Island regional inquiry before the Tribunal (Wai 1200). A second set of events took place within the framework of the process used by OTS to negotiate settlement. Finally, there were some changes to (and attempts to change) the composition of the groups that had mandated the KEC.

Central North Island regional inquiry

Claimants involved in the current inquiry were also participating in the Tribunal's central North Island regional stage 1 inquiry between 1999 and the end of 2005. That inquiry has its origins in a claim filed in August 1999 by the Right Reverend Manuhuia Bennett of Te Arawa, Tumu Te Heuheu of Ngati Tuwharetoa, and Rangiuira Briggs of Ngati Manawa. The claim was on behalf of the Te Arawa confederation, Ngati Tuwharetoa, Ngati Tahu, Ngati Whaoa, Ngati Manawa, Ngati Whare, Ngati Haka–Patuheuheu, and Ngati Rangi. These groups comprised the majority of groups with interests in the Tribunal's Rotorua, Taupo, and Kaingaroa inquiry districts. The area of claim was only slightly different from the final boundaries of the central North Island inquiry. Claimants referred to this area as the volcanic interior plateau and their claim was registered as Wai 791. A significant number of other claims were subsequently filed and included in the inquiry.

The Wai 791 claimants wished to design a process that would enable them to simultaneously progress their claims through the Tribunal and prepare to enter into direct negotiation with the Crown. Discussions regarding the claimants' suggestion began in September 2001. By June 2003, the Tribunal had formulated its two-stage 'modular new approach', designed to allow the claimants to opt out of the Tribunal process at specific stages in order to proceed solely with direct negotiations. Some did opt out, but there was agreement that stage 1 of the inquiry dealing with the 'generic' or big picture issues across the inquiry district should proceed. Hearings for stage 1 of the central North Island district inquiry were held over 10 weeks between 1 February and 9 November 2005. The release of the central North Island report is imminent.[30]

Changes to the composition of Nga Kaihautu mandate

There have been a number of significant changes to the composition of the KEC mandate since the release of the Tribunal's second mandate report in March 2005. These followed the withdrawal of Te Kotahitanga o Ngati Whakaue and of Ngati Wahiao in November 2004.[31] Ngati Wahiao later re-entered the negotiations and their decision to reaffirm their mandate for the executive council was confirmed by the Crown on 25 July 2005.[32] The Treaty Negotiations Minister also recognised the withdrawal of Ngati Rangitihi from the KEC on 25 July 2005.[33] At a mandate hui on 4 June 2006, itself the outcome of the round of facilitation between Ngati Rangiteaorere and the Crown discussed below, Ngati Rangiteaorere made the decision to withdraw their mandate from the KEC.[34] Their withdrawal was officially recognised by the Treaty Negotiations Minister on 7 August 2006.[35]

Post-mandate report facilitation

On 6 July 2005, members of Ngati Wahiao and Ngati Rangiteaorere filed applications for urgency.[36] Shortly afterwards Judge Fox (then Wickliffe) was appointed to deal with the Te Arawa urgency applications.[37] She directed that a report on the complaints be commissioned pursuant to schedule 2, clause 5A of the Treaty of Waitangi Act 1975.[38] This report was completed by Geoff Melvin and released on 23 August 2005. He found that there were flaws in the process adopted by the Crown in terms of scrutinising the process for how Ngati Wahiao and Ngati Rangiteaorere came to be represented or not by the executive council.[39] A judicial conference was held on 30 August to consider this report. Three options for the resolution of contested mandate were put to the parties at that conference:

- Steps could be taken in accordance with the Nga Kaihautu o Te Arawa (NKOTA) Trust deed in what counsel referred to as a 'two-stage approach'. Under this approach Ngati Rangiteaorere and Ngati Wahiao could remove their current representatives to NKOTA and/or replace them with representatives who may be more willing to call hui to withdraw from NKOTA.
- A facilitator could be appointed by the Tribunal and accepted by parties to resolve the disputes.
- The Presiding Officer could refer the matter to the Maori Land Court pursuant to section 30 of Te Ture Whenua Maori Act 1993 seeking advice on the group best able to represent Ngati Rangiteaorere and Ngati Wahiao. The suggestion was that the Maori Land Court could facilitate separate hui for both iwi and record the outcome of a vote on whether they should withdraw from the NKOTA process.[40]

The parties agreed to work through a facilitation process, an acceptable facilitator was selected, and the facilitation was arranged for February 2006. In the interim, on 6 February 2006, a further Ngati Wahiao mandate hui was held which confirmed that the KEC held the mandate to negotiate the settlement of Ngati Wahiao Treaty claims. This left Ngati Rangiteaorere to participate in the facilitation. As a result of this facilitation, a mandating hui for Ngati Rangiteaorere was held on 4 June 2006. The outcome of this hui was that the KEC acknowledged that they could no longer represent Ngati Rangiteaorere in their negotiation with the Crown.[41] The Crown also recognised the withdrawal of Ngati Rangiteaorere from the KEC mandate.[42]

'Overlapping and mandate' claims process

We turn now to events associated with the direct settlement negotiation process. This section serves to introduce the critical process milestones and the associated consultation phases at a general level. As the Wai 1353 hearing proceeded, we sensed some frustration amongst claimant groups with the arid language of process and procedure, and the focus on the precise details associated with that process and procedure. In dealing with the claims before us, we inevitably find ourselves using the same terminology. By using the language of process we are not according it any particular authority. We simply regard the process, and its associated 'milestones', as a measure of the way the Crown currently organises itself to complete its settlement negotiations. Moreover, in our deliberations on the matters before us, we have stepped outside the framework of process to ask ourselves the larger questions about the impact of the current settlement on those of the Te Arawa Waka who stand outside it.

The settlement negotiation process used has several important milestones:

- the Crown's recognition of mandate;
- the successful negotiation of an agreement in principle;
- the Ministerial decision on contested redress; and
- the signing of the deed of settlement by both the Crown and the KEC.

The settlement process includes a parallel process to

deal with overlapping interests. The overlapping interests process provides for formal consultation at three stages: phase I (pre-agreement in principle); phase II (post-agreement in principle); and phase III (after the Treaty Negotiations Minister has made a provisional decision on the redress).

Since the second Te Arawa mandate report in 2005, the Crown has conducted and completed all milestones and conducted a process of consultation with overlapping claimants. The Minister made his final decisions on contested redress on 7 August 2006. The processes associated with these decisions were the subject of the claims brought before us. We examine these claims in some detail in chapters 4 and 5 of this report.

Deed of settlement

During August and September 2006, hui were held to discuss the ratification of the deed of settlement. The deed of settlement was initialled and then ratified by KEC members of affiliate iwi/hapu in a postal ballot on 19 September 2006. The Treaty Negotiations Minister and executive council finally signed the deed on 30 September 2006.[43]

Post-settlement governance entity

A post-settlement governance entity, Te Pumautanga o Te Arawa, was established to hold and manage the settlement redress on behalf of the affiliate iwi/hapu of Te Arawa. The KEC has now formally been superseded. The trust deed for Te Pumautanga o Te Arawa is dated 1 December 2006, but the introduction to this trust deed states that:

> This Trust Deed and the trust created by this Trust Deed were ratified as the governance entity to receive the redress on behalf of the Affiliate Te Arawa Iwi/Hapu by a majority of 92% the votes cast [of KEC members] in a postal ballot of the eligible voters on 19 September 2006.[44]

The Inquiry

Application and decision on urgency

The initial applications for urgency

On 29 July 2005, Michael Rika filed a claim on behalf of Ngati Whaoa (Wai 1297), related to Crown mandating practices in the Te Arawa settlement negotiations, and sought an urgent hearing.[45] On 8 December 2005, two members of Ngati Whaoa, Michael Rika (Wai 1297) and Peter Staite renewed their call for urgency.[46] Mr Staite later filed a statement of claim that was registered as Wai 1311.[47] On 5 September 2005, Colleen Skerritt-White and Kelvin Cassidy filed a claim on behalf of Ngati Rangiunuora relating to the mandating policies and practices of the Crown in settlement negotiations.[48] To avoid the duplication of effort and because counsel for Ngati Wahiao and Ngati Whaoa were engaged in the facilitation efforts described above, the applications for urgency were deferred until August 2006. In its direction on 31 August 2006, the Tribunal asked both Ngati Whaoa claimants to indicate what they understood about the status of Ngati Whaoa in terms of the executive council and the Crown negotiation and settlement process. They were also asked to indicate whether the proposed hui concerning decoupling of Ngati Whaoa and Ngati Tahu had taken place.[49]

The Tribunal further noted that claims had been filed by Ngati Rangiunuora (Wai 1310) and Ngati Tahu (by Rawinia Reihana and Sharon Perkovich), but neither had formally applied for urgency. The Tribunal invited these two claimants to apply for urgency if they wished.[50]

In response to the Tribunal's direction of 31 August 2006, Ngati Tahu applied for urgency and filed a statement of claim by Joseph and Tony Reihana. This was registered as Wai 1350, superseding the unregistered claim by Rawinia Reihana and Sharon Perkovich.[51] On 15 September 2006, an application for urgency was also received from Ngati Tamakari (Wai 1349).[52] On 18 September, a statement by Colleen Skerritt-White, the named claimant for Ngati Rangiunuora (Wai 1310), was filed seeking urgency.[53]

On 29 September 2006, the Tribunal granted urgency to the claims of Ngati Whaoa (Wai 1297 and Wai 1311), Ngati Rangiunuora (Wai 1310), Ngati Tahu (Wai 1350), and Ngati Tamakari (Wai 1349).[54] Urgency was granted because it was considered that those claimants had been able to demonstrate that they and their hapu were likely to suffer significant and irreversible prejudice as a result of a current or pending action of the Crown. The Tribunal noted that both the Crown and counsel for the executive council have argued that these claimants have insufficient mandate to bring a claim on behalf of hapu. The Tribunal considered that evidence of mandate was sufficient to grant urgency (but would be further inquired into during the urgency hearing). Urgency was also granted on the basis that no alternative remedies were available to the claimants.[55]

Subsequent applications for urgency

From September to November 2006 a number of other claimants applied to be joined to the inquiry on the basis of urgency. On 29 September 2006, Te Kotahitanga o Ngati Whakaue filed an application for urgency.[56] This was followed by applications by Ngati Rangitihi (Wai 1370) on 24 October 2006 and by Ngati Makino on 27 October 2006.[57] In November, applications were received from Ngati Rangitihi (Wai 1375) and Ngati Rangiteaorere.[58] On 14 November 2006, the Tribunal granted urgency to Kotahitanga o Ngati Whakaue, Ngati Rangitihi (Wai 1370 and Wai 1375), Ngati Makino, and Ngati Rangiteaorere.[59]

Three further applications for urgency were made in November and December 2006. These were from Ngati Haka–Patuheuheu on 16 November, from Ngati Tuwharetoa on 5 December, and from Ngati Tutemohuta and Nga Karanga hapu on 8 December 2006.[60] The Tribunal granted urgency to these claimants on 14 December 2006.[61]

Judicial conference on Crown settlement policy

In addition to these applications for urgency, the Tribunal had received a number of others from around the country, all relating to aspects of the Crown's settlement policy and process. The deputy chairperson of the Tribunal decided to hold a judicial conference at Pipitea marae in Wellington. The judicial conference took place on 22 November 2006 and was presided over by the deputy chairperson, assisted by Joanne Morris. The purpose of the conference was to hear submissions from a large number of parties seeking urgency, remedies hearings, and inclusion in district inquiry hearings over matters relating to the Crown's settlement policies and processes. The concern was that as so many applications had been received across the country, there was a need to consider how the Tribunal could best deal with these claims effectively and efficiently.[62] Essentially, the Tribunal wished to hear submissions on the feasibility of hearing some or all of those claims in a single, generic inquiry.

The following claimants participating in the Te Arawa Settlement urgency were represented at this judicial conference: Nga Uri o Tahumatua (Ngati Tahu); Ngati Makino; Waitaha; Ngati Rangitihi (Wai 1370); Te Kotahitanga o Ngati Whakaue; Ngati Rangiteaorere; Ngati Haka–Patuheuheu; and Ngati Tuwharetoa.

The outcome of this judicial conference was that the Tribunal decided that a single inquiry to hear claims relating to Crown settlement policies and processes was not feasible. Instead, a number of urgencies and remedies proceedings continued or were commenced. In her decision, the deputy chairperson of the Tribunal noted that urgent matters pertaining to the proposed settlement between the Crown and the KEC were already before a Tribunal, of which Judge Fox was the presiding officer. The deputy chairperson was satisfied that those claims should continue to be heard in separate Te Arawa settlement urgency proceedings.[63]

Adjournment of Crown forestry redress issues

On 23 January 2007, the Federation of Maori Authorities and the New Zealand Maori Council initiated proceedings

in the High Court, alleging that the provisions in the Te Arawa settlement deed regarding Crown forestry licence land breached certain agreements and statutes. In its direction of 26 January 2006, the Tribunal noted that the claims of Ngati Rangitihi, Ngati Makino, Ngati Haka–Patuheuheu, Ngati Rangiunuora, Ngati Tuwharetoa, and Ngati Tutemohuta in the inquiry contained similar pleadings. As a consequence, the Crown and those claimants were asked to make submissions as to whether or not the Tribunal should proceed to hear those claimants on those issues during the hearing scheduled for the week of 26 February 2007.[64]

On 9 February 2007, as a result of those submissions, the Tribunal decided to adjourn all matters relating to Crown forestry assets pending a decision from the High Court. However, if the High Court's decision was not known by 25 April 2007, parties could make submissions at that point and the Tribunal could on its own motion reconvene to hear the Crown forestry issues.[65] This date was later revised when the Tribunal was notified that the High Court proceedings would take place on 26 and 27 April 2007 and that, as a result, the Crown had revised its date for the introduction of settlement legislation. On 5 April 2007, the Tribunal directed that the forestry issues remained adjourned until any one or more of the parties advised in writing that they wished the hearing to be reconvened.[66] Since this date the High Court has released its decision and the Tribunal has agreed to reconvene in late June 2007.

Filing of evidence

In an urgent inquiry such as this, time frames are necessarily condensed, so it is critical that all parties are able to comply with the filing timetable set out by the Tribunal in the lead-up to the hearing. The timely filing of all relevant evidence is particularly important when the evidence is to be heard over only a few days, as was the case in this inquiry. It is, therefore, disappointing that there were a number of problems with the evidence filed by the Crown. Both the filing of documents with excisions and the filing of a significant volume of additional documents by the Crown during and after the hearing raised concerns for us about whether the Crown had fully disclosed all the relevant evidence. This also frustrated claimant counsel, who had limited time to respond to this fresh evidence. We think this was unfortunate as it may, justifiably or not, have given some claimants the impression that the Crown had something to hide. Problems encountered by Ngati Rangitihi and Ngati Whakaue in obtaining documents from OTS under the Official Information Act will be discussed later in this report. The Tribunal has, on two occasions since the hearing, had to direct the release of further relevant documents that should have been filed.

The Tribunal hearings

The Te Arawa settlement inquiry was heard at the Hotel Grand Tiara, Rotorua, over four days from Monday 26 February to Thursday 1 March 2007. During the hearing, it became apparent that a further hearing day would be necessary to enable claimant counsel to cross-examine the Crown's witness on important evidence filed during the hearing. An attempt to continue the hearing on Friday 2 March was abandoned when it became clear that claimant counsel had not had time to read the new material filed by the Crown on Thursday morning. Instead, an unscheduled site visit took place to Whakarewarewa. The final day of hearing was held at the Tribunal's offices in Wellington on Friday 9 March 2007. During the hearing, claims from Ngati Haka–Patuheuheu to customary ownership of lands subject to the commercial redress component of the affiliate iwi/hapu settlement were partially heard. On 5 April 2007, the Tribunal directed that all such issues should be adjourned until any one or more of the parties advise in writing that they wish the hearing to be reconvened.[67]

Parties to the February–March 2007 Hearing

Ngati Whaoa

Two Ngati Whaoa claims were heard in this inquiry. Michael Rika filed a statement of claim dated 29 July 2005, which was later registered as Wai 1297. Peter Staite filed a statement of claim dated 12 October 2005, which was given the number Wai 1311. Mr Staite had initially supported the Wai 1297 application for urgency but later sought to bring a claim on behalf of Ngati Whaoa that would reflect the differences between Mr Rika and himself on factual matters.[68] Two earlier claims by the above claimants had been included in both the August 2004 and the January 2005 mandate hearings. As with the claims in this inquiry, those claims concerned the desire of Ngati Whaoa to be uncoupled from Ngati Tahu.

Ngati Tahu

On 14 September 2006, Joseph Reihana and Tony Reihana filed a statement of claim on behalf of Ngati Tahu, which was then registered as Wai 1350. Ngati Tahu claimants were not involved in either the August 2004 or the January 2005 mandate hearings.

Ngati Te Rangiunuora

Colleen Skerritt-White and Kelvin Cassidy filed a statement of claim on behalf of Ngati Te Rangiunuora on 5 September 2005. This was given the number Wai 1310. Ngati Te Rangiunuora participated in the January 2005 mandate hearing as part of a group of Ngati Pikiao hapu.

Ngati Tamakari claims committee

On 15 September 2006, David Whata-Wickliffe filed a statement of claim on behalf of Ngati Te Takinga, Ngati Hinekura, Ngati Whanarere, Ngati Rongomai, Ngati Te Rangiunuora, Ngati Rangiteaorere, Ngati Parua Haranui, and Ngati Tamakari insofar as it relates to their Waitangi Tribunal claims Wai 164, Wai 193, Wai 194, Wai 196, Wai 197, Wai 198, Wai 205, Wai 929, Wai 926, Wai 564, and Wai 1032. The claimant asserts all these claims are represented by the Ngati Tamakari claims committee. This claim was registered as Wai 1349. Ngati Tamakari participated in both the mandate hearings. The claims of Ngati Tamakari in that inquiry related to their opposition to the KEC mandate, and the refusal of the Ngati Pikiao KEC committee to recognise Ngati Tamakari as a hapu.

Ngati Makino

Te Ariki Morehu filed a statement of claim on behalf of Ngati Makino on 20 November 2006. This claim was given the number Wai 1372. Ngati Makino claimants were involved in the June 2004 and January 2005 mandate hearings. In that inquiry, Ngati Makino's claim related to the Crown's recognition of the KEC's mandate to negotiate on behalf of Ngati Makino and its impact on separate settlement negotiations with Ngati Makino.

Waitaha

On 14 February 1997, Thomas McCausland filed a statement of claim on behalf of Waitaha. This was later registered as Wai 664. The claim was amended on a number of further occasions, with the final amendments made on 7 March 2005.[69] Counsel for Waitaha referred to this statement of claim in a memorandum on 26 October 2006 requesting that (subject to the outcome of the judicial conference on the Crown's settlement policy) the Waitaha claimants be granted urgency.[70] On 9 November 2006, Waitaha notified the Tribunal that they would not participate fully in the proceedings.[71] However, counsel for Ngati Makino maintained a watching brief for the Wai 664 claimants at our hearing.[72]

Ngati Rangitihi

Ngati Rangitihi filed two claims in this inquiry. David Potter and Andre Paterson filed a statement of claim on behalf of Ngati Rangitihi on 13 October 2006, which was registered as Wai 1370. It was these claimants who were active in this inquiry. On 25 January 2007, Duke Kepa, Rinaha Kingi, Mavis Raponi, Mate Tangitu, Terewai Jones, John Toetoe, Kathleen Gardiner, Tim Taiatini, Anipeka Tuna, and Reuben Perenara filed a claim on behalf of Ngati Rangitihi, which was given the number Wai 1375. These claimants made no submissions but were represented at our hearings in a watching brief capacity by their counsel Lewis Bunge.

Ngati Rangitihi claimants were involved in the June 2004 and the January 2005 Te Arawa mandate hearings. At that time, claimants for Wai 1370 (under their previous claim, Wai 996) argued that they represented a large proportion, if not the bulk, of Ngati Rangitihi. They were not involved in the KEC mandate. It was the claimants for Wai 1375 (under their former claim, Wai 524) who were represented on the KEC. Claimants for Wai 996 argued that by their involvement in the KEC process, Ngati Rangitihi (Wai 524) claimants purport to represent the Wai 996 claims cluster as well, and are recognised by the Crown as having the authority to do so.

Te Kotahitanga o Ngati Whakaue

The late Ben Hona and Hokimatemai Kahukiwa filed a statement of claim on behalf of Te Kotahitanga o Ngati Whakaue on 29 September 2006.[73] This claim was later registered as Wai 1369. Ngati Whakaue claimants were involved in the January 2005 Te Arawa mandate hearing (but not in the June 2004 hearing). The Ngati Whakaue cluster's claims related to their attempts to withdraw from the KEC, and their efforts to have that withdrawal recognised by the KEC and the Crown.

Ngati Rangiteaorere

On 8 December 2006, Joan Kahukare Kanara filed a statement of claim on behalf of Ngati Rangiteaorere. This was later given the number Wai 1374. No specific Ngati Rangiteaorere claim was heard in the June 2004 or January 2005 mandate hearings. However, issues relating to the mandate of the KEC to represent the interests of Ngati Rangiteaorere were heard in the evidence given on behalf of Te Arawa Taumata (Wai 1150) at both hearings.

Ngati Haka–Patuheuheu

Robert Marunui Iki Pouwhare and Maaki Darwin Hokianga filed a statement of claim on behalf of the Ngati Haka–Patuheuheu Trust and for Ngati Haka–Patuheuheu on 16 November 2006.[74] This was later registered as Wai 1371. The Ngati Haka–Patuheuheu claim relates to the overlapping interests of Ngati Haka–Patuheuheu in Kaingaroa 1A block (the Wairapukao block), deferred licensed forestry land that has been included in the deed of settlement as an item of commercial redress. However, claimants presented evidence regarding their customary interests in this block during the hearings. Ngati Haka–Patuheuheu claimants were not involved in either of the Te Arawa mandate hearings.

Ngati Tuwharetoa

On 5 December 2006, Te Ariki Tumu Te Heuheu filed a statement of claim on behalf of Nga hapu o Ngati Tuwharetoa. This claim was given the number Wai 1373. The claim related to the inclusion of deferred licensed forestry land in the settlement package. As a result of these issues being adjourned pending the outcome of the Federation of Maori Authorities and New Zealand Maori Council High Court case, Ngati Tuwharetoa did not give evidence at this hearing. Ngati Tuwharetoa claimants were not involved in either of the Te Arawa mandate hearings.

Ngati Tutemohuta

On 8 December 2006, counsel for Ngati Tutemohuta and Karanga hapu, being Ngati Hinerau, Ngati Hineure, Ngati Te Urunga and Nga Uri o Kurakaiata (Wai 832, Wai 445, Wai 781, Wai 787, and Wai 786) filed a memorandum seeking leave to participate in the inquiry. Although counsel has not, to date, filed a statement of claim, this memorandum indicates that their issues are the same as those set out by Ngati Tuwharetoa and as a result they did not participate in these hearings.[75] Ngati Tutemohuta and Karanga hapu claimants were not involved in either the August 2004 or the January 2005 Te Arawa mandate hearings.

The Crown

At the hearing, the Crown was represented by the Crown Law Office and Robyn Fisher of OTS appeared as a witness.

Nga Kaihautu o Te Arawa/Te Pumautanga o Te Arawa

In November 2006, the executive council indicated that it could not actively participate in the inquiry.[76] At the hearing, the post-settlement governance entity Te Pumautanga o Te Arawa, represented by Ms Rangi, maintained a watching brief.

Notes

1. Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004); Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005)
2. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 4
3. Ibid
4. Ibid, p 5
5. Ibid
6. Ibid, pp 5–6
7. Ibid, p 6
8. Ibid
9. Ibid, p 7
10. Ibid, p 81
11. Ibid, p 85
12. Ibid, p 82
13. Ibid, p 86
14. Ibid, p 88
15. Ibid, p 101
16. Ibid, pp 100–101
17. Ibid, p 96
18. Ibid
19. Ibid, p 97
20. Ibid, p 98
21. Ibid, p 88
22. Ibid, p 89
23. Ibid, p 105
24. Ibid
25. Ibid
26. Ibid, p 107
27. Ibid, p 108
28. Ibid
29. Ibid, p 109
30. The Waitangi Tribunal's *He Maunga Rongo: Report on Central North Island Claims (Stage 1)*, 4 vols (Wellington: Waitangi Tribunal, 2007), was released in pre-publication form in July and August 2007.
31. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), pp 11–12, 17
32. Robyn Fisher, cross-examination by counsel for Ngati Whakaue, 1 March 2007
33. OTS to Ngati Rangitihi, 28 July 2005 (doc A16(b)(AP39))
34. Waitangi Tribunal, memorandum concerning applications for urgency, 31 August 2006 (paper 2.5.11) (citing Wai 1150 ROI, paper 3.5.55))
35. Minister in Charge of Treaty of Waitangi Negotiations to counsel for Ngati Rangiteaorere, 7 August 2006 (doc A28(2))
36. Waitangi Tribunal, memorandum concerning applications for urgency, 31 August 2006 (paper 2.5.11) (citing Wai 1295 ROI, claim 1.1; Wai 1296 ROI, claim 1.1))
37. Ibid (citing Wai 1150 ROI, paper 2.3.41)
38. Ibid (citing Wai 1150 ROI, papers 2.3.43, 2.5.4)
39. Ibid (citing Wai 1150 ROI, papers 6.2.1, 2.4.3)
40. Ibid. These options were originally set out in Wai 1150 ROI, paper 2.3.45.
41. Waitangi Tribunal, memorandum concerning applications for urgency, 31 August 2006 (paper 2.5.11) (citing Wai 1150 ROI, paper 3.3.56)
42. Ibid (citing Wai 1150 ROI, paper 3.5.55)
43. Deed of trust relating to Te Pumautanga o Te Arawa Trust, 1 December 2006 (doc A80), p 1
44. Ibid
45. Ngati Whaoa, statement of claim, 29 July 2005 (claim 1.1.1)

46. Counsel for Ngati Whaoa, application for urgency, 8 December 2005 (paper 3.1.9)
47. Ngati Whaoa, statement of claim, 12 October 2005 (claim 1.1.3)
48. Ngati Te Rangiunuora, statement of claim, 5 September 2005 (claim 1.1.2)
49. Waitangi Tribunal, memorandum concerning applications for urgency, 31 August 2006 (paper 2.5.11)
50. Ibid
51. Counsel for Ngati Tahu, application for urgency, 14 September 2006 (paper 3.1.28); Ngati Tahu, statement of claim, 14 September 2006 (claim 1.1.5)
52. Counsel for Ngati Tamakari, application for urgency, 15 September 2006 (paper 3.1.31); see also counsel for Ngati Tamakari, memorandum concerning urgency application, 15 September 2006 (paper 3.1.33)
53. Counsel for Ngati Te Rangiunuora, statement in support of urgency, 18 September 2006 (doc A11)
54. Waitangi Tribunal, memorandum concerning further applications for urgency, 29 September 2006 (paper 2.5.14)
55. Waitangi Tribunal, memorandum concerning applications for urgency, 31 August 2006 (paper 2.5.11)
56. Counsel for Ngati Whakaue, memorandum supporting application to join urgent inquiry, 25 October 2006 (paper 3.1.53)
57. Counsel for Ngati Rangitihi, application for urgency, 24 October 2006 (paper 3.1.49); counsel for Ngati Makino, memorandum concerning application for urgency, 27 October 2006 (paper 3.1.59); see also counsel for Ngati Rangitihi, memorandum responding to Crown memorandum, 9 November 2006 (paper 3.1.74)
58. Counsel for Ngati Rangitihi, memorandum supporting application to join urgent inquiry, 1 November 2006 (paper 3.1.65); counsel for Ngati Rangiteaorere, memorandum supporting application to join urgent inquiry, 14 November 2006 (paper 3.1.75)
59. Waitangi Tribunal, memorandum granting urgency, 14 November 2006 (paper 2.5.22); see also Waitangi Tribunal, memorandum concerning urgency, 14 November 2006 (paper 5.2.23)
60. Counsel for Ngati Haka–Patuheuheu, memorandum seeking leave to participate in inquiry, 16 November 2006 (paper 3.1.81); counsel for Ngati Tuwharetoa, memorandum seeking leave to participate in inquiry, 5 December 2006 (paper 3.1.88); counsel for Ngati Tutemohuta, memorandum seeking leave to participate in inquiry, 8 December 2006 (paper 3.1.89)
61. Waitangi Tribunal, memorandum granting urgency, 14 December 2006 (paper 2.5.27)
62. Waitangi Tribunal, memorandum concerning venue for mandating hui, 8 May 2006 (paper 2.5.8)
63. Waitangi Tribunal, directions concerning Ngati Rangiteaorere mandating hui, 27 June 2006 (paper 2.5.10)
64. Waitangi Tribunal, memorandum concerning Crown forestry issues, 26 January 2007 (paper 2.5.29)
65. Waitangi Tribunal, memorandum concerning hearing of Crown forestry issues, 9 February 2007 (paper 2.5.34)
66. Waitangi Tribunal, memorandum concerning Crown forests, 5 April 2007 (paper 2.6.8)
67. Ibid
68. Counsel for Ngati Whaoa, memorandum supporting application for urgency, 29 August 2005 (paper 3.1.5); Wai 1311 ROI, claim 1.1; counsel for Ngati Whaoa, application for urgency, 8 December 2005 (paper 3.1.9)
69. Thomas McCausland, statement of claim on behalf of Waitaha concerning Crown settlement and mandating policies in Te Arawa region, 14 February 1997 (Wai 1150 ROI, claim 1.1.6); Thomas McCausland, amendment to statement of claim, 2 November 2001 (Wai 1150 ROI, claim 1.1.6(a)); Thomas McCausland, amendment to statement of claim, 1 November 2004 (Wai 1150 ROI, claim 1.1.6(b)); Thomas McCausland, amendment to statement of claim, 7 March 2005 (Wai 1150 ROI, claim 1.1.6(c))
70. Counsel for Waitaha, application for urgency, 26 October 2006 (paper 3.1.55)
71. Counsel for Waitaha, memorandum concerning participation in inquiry, 9 November 2006 (paper 3.1.73)
72. Counsel for Waitaha, memorandum concerning issues affecting Waitaha, 20 February 2007 (paper 3.1.122)
73. These include Wai 94, Wai 268, Wai 316, Wai 317, Wai 335, Wai 384, Wai 410, Wai 533, Wai 1101, and Wai 1204.
74. The statement of claim dated 16 November 2006 on behalf of Ngati Haka–Patuheuheu states that they are a hapu of Tuhoe.
75. Counsel for Ngati Tutemohuta, memorandum seeking leave to participate in inquiry, 8 December 2006 (paper 3.1.89)
76. Counsel for KEC, memorandum concerning participation in inquiry, 9 November 2006 (paper 3.1.72)

CHAPTER 2

TREATY INTERPRETATION AND TRIBUNAL JURISDICTION

Introduction

In this chapter, we begin by briefly noting the scope of our inquiry before considering in more detail what principles of the Treaty of Waitangi are relevant to Treaty settlement negotiations. The second part of this chapter sets out what we consider to be the relevant duties of the Crown under these Treaty principles when dealing with mandate issues and overlapping claims. While doing so, we also examine the Crown's arguments that seek to limit the Tribunal's jurisdiction.

The Scope of the Inquiry

It is clear that the Tribunal can inquire only into events that occurred after the release of the second Te Arawa mandate report in March 2005. Events prior to this date have already been inquired into and reported on in the two previous mandate inquiries. As a result, we confine our inquiry to events after this date. However, it has been necessary to refer to some of these previous events in setting the context for what came later. We have also made it known to the parties appearing before us that we do not seek to assess the Crown's national settlement policies. Instead, we seek to understand the application of those policies and their implementation in the case of Te Arawa iwi and hapu that are (or consider themselves to be) outside the settlement.

Relevant Treaty Principles and Duties

Introduction

We first explore the principles of the Treaty relevant to the claims before us. In *The Te Arawa Mandate Report: Te Wahanga Tuarua*, the Tribunal determined that a number of principles of the Treaty of Waitangi apply to the negotiation of Te Arawa claims:

- the principle of reciprocity;
- the principle of partnership;
- the principle of active protection; and
- the principles of equity and equal treatment.

We are of the view that the analysis of these principles set out in the Tribunal's second Te Arawa mandate report is relevant to this inquiry, and we adopt that analysis in full. We include the findings of that Tribunal as appendix 1 at the end of this report. We do so to demonstrate what the Treaty standards were that the Crown should have attempted to meet while negotiating and settling the claims of the affiliate Te Arawa iwi/hapu.

We enlarge here upon the principle of partnership, and what is required for the Treaty partners to be able to truly work together in an equitable and mutually beneficial way. We consider that this is particularly important in settlement negotiations where the stakes are high for iwi and hapu, whether they are at the negotiating table or participating in the overlapping claims process.

The foundation of the Treaty partnership was the guarantee to Maori of the right to exercise their tino

rangatiratanga over all their taonga in exchange for the Crown's right to exercise kawanatanga, or to govern. The rights of each Treaty partner constantly constrain those of the other.[1] Fundamental to the ability to exercise tino rangatiratanga, literally 'the highest chieftainship', is the concept of mana, variously defined by the Williams Maori dictionary as 'authority', 'control', 'influence', 'prestige', 'power', or 'psychic force'.[2] It is mana or authority that enables individuals, whanau, hapu, and iwi to exercise rangatiratanga. As the Tribunal's *Ngai Tahu Report 1991* observed:

> Rangatiratanga signified the mana of Maori not only to possess what they own but to manage and control it in accordance with their preferences. That is, in accordance with Maori customs and cultural preferences.[3]

Therefore, we consider that for the Crown to work with Maori communities in a way that allows for those communities to exercise their tino rangatiratanga, the Crown must be able to identify and understand the customs and cultural preferences of those communities. This requires that the Crown has a sound understanding of, respect for, and engagement with tikanga.

The recognition of the importance of taonga in the context of the Te Arawa Waka (and particularly in terms of cultural sites) will thus turn on what Te Arawa tikanga is associated with those sites. That tikanga will vary, as major taonga such as mountains and rivers are likely to have significant cultural and spiritual value for many hapu and iwi other than KEC affiliate iwi/hapu. The taonga themselves will have a greater degree of cultural and spiritual significance for some rather than others. The Ngawha geothermal Tribunal noted the cultural and spiritual dimension of taonga, many of which are resources that they describe as:

> the object of protection and conservation, [which] acquired a value heightened by the formal attention paid to them by ritual prohibition and sanction, mythical explanation and the like. Accordingly they are known as taonga (valued possession, or anything highly prized) and invested with an aura of spirituality. The word 'anything' is used advisedly for taonga may include any material or non-material thing having cultural or spiritual significance for a given tribal group. Previous cases before the tribunal have thus included land, forests, fisheries, the Maori language and literature – all regarded as taonga, objects of guardianship, management and control under the mana or rangatiratanga of the claimant group, hapu or iwi.[4]

While many taonga can be used for economic benefit, iconic taonga have a greater significance to iwi and hapu being 'a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength'.[5] The Ngawha Tribunal noted further that the:

> nexus . . . of hapu, rangatiratanga, kaitiakitanga and taonga was given explicit recognition in the Treaty. Moreover, no Maori signatory to the Treaty could have had reason to doubt that the Crown would protect that nexus for as long as the Maori required it.[6]

It is clear that the duties of the kaitiaki involve protecting taonga not just for the present generation but for those that are yet to come. As the Muriwhenua fishing Tribunal observed, 'All resources were "taonga", or something of value, derived from gods. In a very special way Maori were aware that their possession was on behalf of someone else in the future.'[7]

When designing and implementing Treaty settlement processes, it is important for the Crown, through OTS, to know and understand the tikanga that gives practical expression to the cultural preferences underpinning the exercise of tino rangatiratanga, kaitiakitanga, mana, and Maori social organisation. Professor Hirini Moko Mead defined a tikanga as 'the set of beliefs associated with practices and procedures to be followed in conducting the affairs of a group or an individual'.[8] He went on to say that 'tikanga are tools of thought and understanding. They are packages of ideas which help to organise behaviour and

provide some predictability in how certain activities are carried out'.[9]

Tikanga also functions as a means of social control: it controls personal relationships, provides ways for groups to meet and interact, and determines how individuals identify themselves.[10]

For OTS, working in the Treaty settlement context, understanding and acknowledging the tikanga of various iwi and hapu is an important part of its obligation to cultivate the living partnership between the Crown and Maori. Alternatively, where it lacks in-house expertise on the subject, it should seek such advice from an independent source. Understanding and respecting tikanga is also important in making Treaty-compliant and well-informed decisions about the transfer of taonga in settlement packages. The tikanga of a particular iwi or hapu will indicate what it believes to be right or appropriate ways of owning or utilising a particular place. As Professor Mead points out, the word 'tikanga' is derived from the word 'tika', to be right. Knowing the tikanga of the iwi and hapu affected by a settlement negotiation enables the Crown to engage more effectively with those iwi and hapu that it must meet to talk through matters which are often contentious and emotionally charged. It enables the Crown to reach the 'right' decisions in tikanga terms. In the chapters that follow, we consider to what extent an understanding and engagement with tikanga Maori has informed the Crown's actions in terms of the KEC settlement and the Te Arawa Waka. This is important in understanding whether those actions have led to a breach of the principle of partnership and other related Treaty principles and duties.

Application of Treaty principles by the Te Arawa mandate Tribunal

As we noted above, the Te Arawa mandate Tribunal discussed the following principles of the Treaty of Waitangi:

- the principle of reciprocity;
- the principle of partnership;
- the principle of active protection; and
- the principles of equity and equal treatment.

It concluded that there was sufficient support among the KEC affiliates to reconfirm that body's mandate to negotiate the settlement of their claims with the Crown.[11] In its view, there had been no breach of the principles of the Treaty of Waitangi for those 10 hapu of Te Arawa who chose to support the KEC. Any remaining issues of mandate were to be rectified by amending the KEC deed of trust.

However, the Tribunal remained concerned for the remaining hapu and iwi – comprising at that stage some 48 per cent of the Te Arawa population.[12] The Tribunal considered that the principle of equity and equal treatment 'places an obligation on the Crown to act fairly and impartially towards Maori by ensuring it treats Maori hapu/iwi fairly vis-à-vis each other'.[13] In the Te Arawa situation, it was particularly important that the Crown:

> fulfil its duty to act fairly and impartially towards Maori' by not preferring 'to negotiate with one group of Te Arawa over another. It must act fairly and impartially towards all groups in Te Arawa.[14]

The Tribunal had no doubt that it would be extremely difficult for the Crown to settle the claims of those iwi/hapu of Te Arawa who had mandated the KEC, without prejudicing the interests of the rest of Te Arawa.[15] After considering the terms of negotiation and the process proposed to deal with 'overlapping' claims, the Tribunal found that the process would unfairly favour those at the negotiation table and leave the rest (almost half) of Te Arawa 'out in the cold'.[16] Although the Tribunal made no finding of Treaty breach, except in relation to Ngati Makino, it did suggest that the Crown negotiate all Te Arawa claims contemporaneously with those represented by the KEC.[17]

In terms of Ngati Makino, the Te Arawa mandate Tribunal found that the Crown had acted in a manner inconsistent with the principles of partnership and of

equal treatment under the Treaty of Waitangi.[18] It recommended that the Crown commence negotiation with Ngati Makino.[19] As a recommendation was made, we note that there has been jurisprudence from the Tribunal on what the Crown's responsibilities are in terms of implementation. That jurisprudence indicates that any failure to give effect to such recommendations must be a prima facie breach of the Treaty. In this regard, the Mohaka ki Ahuriri Tribunal found that:

> The Crown's failure to negotiate a settlement of Ngati Pahauwera's Mohaka River claim in the 14 years since the Tribunal reported on it, and its non-compliance with the Tribunal's particular recommendations . . . are breaches of the Crown's duty to act reasonably and in good faith and its duty to actively protect Ngati Pahauwera's interests.[20]

We note that in releasing its second report, the Te Arawa mandate Tribunal considered that all matters (including those of Ngati Makino) were at an end. But it acknowledged that there was the prospect of further claims being filed. Ngati Makino have filed a claim and fresh evidence has been placed before the Tribunal concerning what the Crown did in response to that Tribunal's recommendation. We are obliged to inquire into the matters raised by those claims and that evidence. We consider further the extent of the issues in terms of Ngati Makino in chapter 5 of this report. At that point, we will consider whether the standard that emerges from the decision in the *Mohaka ki Ahuriri Report* is applicable in the present case.

Relevant Duties under the Treaty

Introduction

We begin by examining the Crown's response to the Tribunal's suggestions in its second Te Arawa mandate report, regarding how the Crown ought to modify its negotiation policies to avoid breaching the principles of the Treaty. Secondly, we discuss the Crown's overlapping claims process as it stood at the beginning of the Te Arawa negotiations in 2003, and how that policy was modified in response to a number of the Tribunal's reports on overlapping claims.

Background: Crown policy responses to Tribunal findings and recommendations

In chapter 1, we summarised the findings and recommendations of the Te Arawa mandate Tribunal in its 2005 report.[21] Here, we briefly examine the Crown's policy response to those recommendations and outline the course of action that OTS officials finally took in regard to mandate claims.

'Overlapping claims'

Policy prior to 2005: Robyn Fisher advised us that in 2003, as a result of the *Ngati Awa Settlement Cross-Claims Report* and the *Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report*, OTS reviewed its overlapping claims policy. The outcome of this review was recorded in a briefing paper to the Treaty Negotiations Minister, and accepted by the Minister on 14 August 2003.[22] The terms of negotiation for the KEC did outline this policy, and in 2005 the Tribunal was not convinced that it would safeguard the interests of the claimants.

Policy following the second Te Arawa mandate report: In the 12 July 2005 briefing paper to the Minister, OTS advised that it would pursue a modified version of its 'well tested overlapping claims policy,' summarised above, rather than move into concurrent or contemporaneous negotiations with the remaining tribes of Te Arawa.[23] In addition, OTS considered that the Crown's engagement with claimants would be enhanced if overlapping claimants were provided with a summary of the office's research on overlapping interests, and asked to comment.[24] This briefing paper

also set out modifications made to the Crown's overlapping claims policies. We fully examine the evidence in relation to the Crown's overlapping claims process in this report, and discuss its application to particular cultural redress sites.

What we can say here is that by the time the 'overlapping claims' consultation process began in June and July 2005, OTS sought to:

- give priority to resourcing the negotiations with the KEC in order to conclude a settlement without undue delay; and
- not enter separate parallel negotiations with Te Arawa iwi and hapu outside that mandate, for the following reasons:
  - to ensure OTS's resources were not stretched beyond capacity;
  - to avoid destabilising the KEC's mandate; and
  - to avoid creating a precedent that would undermine the Crown's large natural groupings policy.[25]

Mandate claims

During our inquiry we received very helpful evidence from Ms Fisher, for OTS, on the Crown's response to the Te Arawa mandate Tribunal's recommendations concerning mandating. Ms Fisher was not able to identify any written record of any proposed policy response to the Tribunal's suggestions regarding the mandate of the KEC to act for those hapu of Te Arawa contesting its right to represent them. In particular, there appears to have been no paper prepared for the Treaty Negotiations Minister on this issue. Suffice to note at this stage that the failure to provide the Minister with a formal proposal for a policy response was clearly an omission. Owing to that omission, the only measure of what the Crown's response has been turns on what OTS did in practice, acting without any formal authority to do so from its Minister. We must assume that it acted alone, because there is no formal evidence that the Minister had any knowledge of its actions. We have assertions from Ms Fisher that OTS did keep the Minister informally briefed, but there is nothing in writing to substantiate that. We discuss this issue and its implications later in this report.

Relevant duties

The Crown's response to the Te Arawa mandate Tribunal's report immediately raises issues for us. It is clear that the Crown rejected the substance of the Tribunal's suggestions, developed to provide guidance to the Crown so as to avoid breaching the principles of the Treaty of Waitangi. Instead, the Crown pursued a policy that had been developed after selectively adopting aspects of previous Tribunal overlapping claims reports. This was a risk, because OTS's overlapping claims policy was designed to deal with disputes that had arisen between distinct and different iwi, as opposed to the circumstances that prevail in Te Arawa, where all parties are one and the same iwi, all from Te Arawa. We believe, therefore, that we must state again the obvious lest there still be some confusion. The claims of the iwi and hapu of Te Arawa before us are inextricably linked with the claims of the KEC affiliate iwi/hapu. They are co-existing, intersecting, interspersed, interwoven, claims. They are not overlapping claims, which are characterised by territorial exclusivity of the one having a border zone overlapping with another or others. They are claims that are generated within exactly the same circumference of interest. In such circumstances, competing or contested claims to taonga being used for redress will inevitably arise, and they will be far more frequent and intense. In such circumstances, the burden on the Crown to act consistently with the principles of the Treaty of Waitangi intensifies, as do the duties it owes to all Maori affected.

So, in rejecting the Te Arawa mandate Tribunal's suggestions to enter into concurrent or contemporaneous negotiations, OTS recommended to the Minister a particular settlement track that took it into uncharted waters. It was to apply a policy not designed for the situation where one tribe was divided right down the middle (or nearly so).

Or to put it another way, where one half of that tribe was in negotiation and the other half was outside. The office was, in effect, committing itself (with the approval of the Minister), to implementing its 'overlapping claims process', with only minor modifications, in a situation quite unlike those in which the process had previously been used. Given that the Crown chose to do so, the standards OTS was required to meet were *at least* those that previous Tribunal reports have highlighted with respect to overlapping claimants.

As a result of this unique situation, we believe it necessary to review in full what duties those Tribunals identified or inferred as duties the Crown must discharge to overlapping and mandate claimants during the negotiation and settlement of claims. We do so because a failure to meet basic standards of Treaty compliance with regard to overlapping claims suggests a design flaw in the policy process right from the start, even before implementation. If this proves to be the case, it is likely that OTS has acted in a manner inconsistent with the principles of the Treaty.

Previous Tribunal reports on the mandate and overlapping claims process of OTS have identified what we believe to be duties springing from the four principles of reciprocity, partnership, active protection, and equity and equal treatment discussed earlier in this chapter. From these principles, we have identified six duties we believe to be relevant. Five of these, we suggest, are generic duties of the Crown applying equally to mandate claims and the overlapping claims process. One duty applies only to the mandating process. We list these below:

- Generic duties:
  - the duty to act honourably and with the utmost good faith;
  - the duty to act fairly and impartially;
  - the duty to actively protect all relevant Maori interests during negotiations;
  - the duty to consult; and
  - the duty to seek to preserve amicable tribal relations.
- Duty applicable to the mandating process: the duty to avoid process error, misapplication of tikanga Maori, and irrationality.[26]

Generic duties

We begin by commenting that the Treaty imposes principles and duties. These principles and corresponding duties are imbued with a spirit; they are in effect about a living relationship. In achieving a settlement, the Crown is supposed to be putting things right and committing itself to a more equitable partnership. A Treaty settlement is not an end to anything except, hopefully, past grievances. Above all else, it is not a new beginning but an acknowledgement of an old relationship that is moving forward instead of backwards. Maori and the Crown can not go forward if fresh grievances are created for those who are affected by a failure to reasonably include all relevant Maori interests during negotiations and in settlements. We turn now to consider what the details of the Crown's duties are under the Treaty of Waitangi.

The duty to act honourably and with the utmost good faith

It is now a given that the parties to the Treaty must 'act towards each other with the utmost good faith'.[27] In the context of Treaty settlements, the people affected are not just the Crown and the iwi or hapu in negotiation. The Maori people include claimants who contest mandate (being the people who are in theory represented by the KEC) and those with 'overlapping claims'. The Crown must act equally reasonably towards them and with the utmost good faith, and all Treaty parties should make reasonable decisions during the settlement process. It is surely in the Crown's interests to do so, since it will presumably want to negotiate with these other groups in the future.

This must mean that the Crown should not pursue its nationwide Treaty settlement targets at the expense of some of its Treaty partners but instead should 'be prepared

to apply its policies in a flexible, practical, and natural manner' where particular circumstances warrant a more flexible approach.[28] Clearly, there may be occasions where some degree of flexibility on the part of the Crown in adapting its settlement goals, policies, and processes is required, so that it may address its particular Treaty obligations to different hapu and iwi at the local level.

We know that the Crown's job in meeting the competing demands of overlapping claimants, or claimants who contest redress or mandate, while trying to negotiate a settlement, is a tough one. The Tribunal has recognised this previously. In the case of Ngati Ruanui, the Tribunal determined that the Crown is:

> sometimes caught between what one might colloquially call a rock and a hard place. On the one hand the Crown needs to be in a position to confirm, in the interests of good faith, that claimants have been procedurally fair in managing their own settlement processes . . . Balanced against this imperative is the need on the other hand for the Crown to avoid offending the claimant community, often in the person of the settlement negotiation body, by being overly patriarchal, and by 'interfering' being seen as impinging on the claimant's tribal autonomy. This is indeed a difficult and narrow path to tread.[29]

We are also mindful of this problem, and we have been very much aware that we did not, for instance, have the affiliate iwi/hapu, or the KEC, or Te Pumautanga o Te Arawa actively participating in this inquiry as a party before us. Ms Rangi, present on their behalf, merely maintained a watching brief. The Crown itself emphasised to us that gap, by presenting us with many documents with parts deleted from our scrutiny.

However, we believe that there are situations where the Crown is obligated to take an active approach to resolving disputes. We also consider that in order to ensure the long-term robustness of settlements, 'it will sometimes be incumbent on the Crown to confront the reality of the breakdown of relationships within tribal groups'.[30] There are a number of techniques the Crown might use or promote in doing so, including mediation, hui, and workshops. In such fora, dissenting groups should be able to speak:

> If the views are substantive and do not find support, then the dissentient views are truly minority views that will only ever attract support at the margins, no harm will be done. If the views are substantive and do find support, then they are worthy of expression and should not be suppressed. The Crown by being too 'hands-off' in its approach to claimant processes, can be tacitly supporting the suppression of views that challenge the orthodoxy of the power elite. Officials must take care that the Crown's processes in the negotiation of settlements do not err in this way.[31]

We consider, as did the Te Arawa mandate Tribunal, that, although this is a difficult task, the Crown must at all times take a careful, fair, and practical response to overlapping claims or claims that contest mandate.[32] Where there are issues regarding the representative capacity of negotiating or non-negotiating groups, the Crown should give them the opportunity to explore the degree of support that they may or may not have by way of facilitated hui or mediation, unless of course the circumstances suggest that it would be unreasonable to expect this of the Crown. What is reasonable or unreasonable will turn on the facts of a case.

Where overlapping claims to settlement redress are involved, as they are here, acting in good faith requires the Crown to be fully informed of the historical, political, and tikanga dimensions of mandate and overlapping claimants and their interests. The Tuwharetoa ki Kawerau Tribunal was particularly concerned that this required OTS officials not only to be fully informed of the customary interests of overlapping claimants, but also to have a sophisticated understanding of the Maori world. This is necessary in order for the office to assess information appropriately and make sound decisions that protect Maori interests, for settlements to be durable, for the Treaty partnership

to be harmonious, and for the honour of the Crown to be upheld. That Tribunal said:

> We expect of OTS officials a sophisticated understanding of the many dimensions of the Maori world within which they are operating when they negotiate settlements. We think such a high standard is appropriate. It is not enough for the Crown to act in good faith, if that means half-informed good intentions. In order to act fairly, and protect the interests of all groups with which they deal in the context of a settlement, OTS officials must be highly skilled. They must have a sophisticated understanding of how Maori communities operate in general, and how the ones in question operate in particular. If they do not have these understandings, how will they appreciate how much there is to know, or develop an instinct for when they do not know enough? It is a hard job, and a demanding one, because the honour of the Crown is on the line, and the durability of these settlements, and the quality of the relationships that spring from them, will depend in large measure on how well these officials perform. It is, as they say, a big ask. But it is one underpinned by Treaty principle and the imperative of fairness. We should not hesitate to insist on high standards when lower ones can have such serious, and long-lasting consequences.[33]

Admittedly, this sets a very high standard for the Crown's overlapping claims and mandate monitoring processes, but it is one which we consider is appropriate, given what is at stake should those standards not be met. We agree with the Ngati Awa settlement cross-claims Tribunal that:

> the Crown should not be satisfied that cross-claims have been addressed until really no stone has been left unturned . . . The Crown has a duty in this regard, flowing from the principles of partnership and good faith under the Treaty of Waitangi.[34]

The ability of OTS to discharge this duty was clearly apparent in the Te Arawa context, which required that it be certain that the identification of cultural redress sites and all associated historical and cultural values be incorporated into its decision-making process. In relation to the mandate claimants, the duty required that OTS be certain that those in the KEC who profess to have a mandate to act on their behalf really do hold that mandate. Where there was obvious ambiguity, as in the case of Ngati Whaoa, Ngati Tamakari, and Ngati Rangiunuora, that would require taking action to clarify that ambiguity.

The duty to act fairly and impartially

We consider that the resolution of Treaty breaches through negotiated settlements is vital to the future of Maori and other New Zealanders. We also consider that the step that the Crown has taken to settle the KEC's claims was a bold move forward, representing, as it did, the bringing together of one of the largest settlement populations achieved to date.

But such a step was only going to be successful in Treaty terms if the Crown, through OTS, acted fairly and impartially towards the other half of Te Arawa (representing an almost equally large population). That was its duty, because 'it is not consistent with the Treaty's spirit that the resolution of an unfair situation for one party creates an unfair situation for another'.[35] We consider that there was a considerable risk that new grievances would result from the Crown's overlapping claims policy in the Te Arawa settlement negotiations once OTS advised the Crown to embark on the settlement track of its preference.

The difficulties in the standard overlapping claims situation were identified by the Ngati Awa settlement cross-claims Tribunal when it made the point that 'the management of cross-claims is a difficult area', where the outcome is unlikely to please all groups involved. It warned:

> Officials must be acutely aware that, in doing this work, they are moving in murky waters. There is much potential for misunderstandings and mixed messages that give rise to fear and resentment. Those involved must be at pains to be even-handed in their dealings with different groups, and open and transparent.[36]

That Tribunal noted that, for this reason:

> It is very important that the Crown's policy is well known and understood by those communicating it. It is critical that they are able to explain the reasons for it, so that when the Crown appears to prefer the interests of one group over another, the choice is understood, even if not agreed with.[37]

Overall, we think that much rests on the recognition by OTS of the difficulty of the settlement environment and the need to take great care to communicate its processes and expectations in a clear, timely, and explicit manner to all parties involved. We concur with the comments made by the Ngati Awa settlement cross-claims Tribunal already cited above, that communication with all parties must be even-handed, open, and transparent.

We also agree that good communication was critical to the successful completion of negotiations between OTS and the KEC. We consider that as OTS was responsible for this, it had to exercise a higher standard of care in Te Arawa because of the history of contest over mandate between the KEC and the other half of Te Arawa. We have focused in some detail on the manner in which the Crown's overlapping claims policy was communicated to all the claimants before us, in order to ascertain whether they understood what was expected of them during the negotiation process.

The duty to actively protect all relevant Maori interests during negotiations and in settlements

The Te Arawa mandate Tribunal considered that 'the principle of active protection arises from reciprocity and partnership'. It noted the findings of the Court of Appeal in *New Zealand Maori Council v Attorney-General* (1987), which stated that:

> The relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. The duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.[38]

The fiduciary duties arising with or from the Treaty and owed by OTS during the KEC negotiation and settlement process arise in part from the Crown's duty of active protection, and are:

> founded on trust and confidence in another, when one side is in a position of power of domination or influence over the other. One side is thus in a position of vulnerability and must rely on the integrity and good faith of the other . . . Because the Crown is in the powerful position as the government in this partnership, the Crown has a fiduciary obligation to protect Maori interests.[39]

We think this speaks particularly to the situation of Te Arawa.[40] Given that half of Te Arawa were potentially at risk of adverse effects from any redress offered in the settlement package, we consider that this duty of active protection was heightened with respect to them. Just as the Crown had a duty to actively protect the interests and taonga of the KEC, so it had a duty to actively protect the interests and taonga of the remaining half of Te Arawa.

In this regard, previous Tribunals have considered that the level of protection that the Crown is required to exercise depends on the nature and value of the taonga to be protected. The Tribunal's opinion in the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, in 1993, was that:

> The degree of protection to be given to Maori resources will depend upon the nature and value of the resource. In the case of very highly valued, rare and irreplaceable taonga of great spiritual and physical importance to Maori, the Crown is under the obligation to ensure its protection (save in very exceptional circumstances) for so long as Maori wish it to be so protected . . . The value attached to such taonga is essentially a matter for Maori to determine.[41]

Tribunals have also considered the level of care the Crown needs to afford Maori in terms of cultural sites included in settlements (or, at least, the level of care the Crown must exercise with regard to those interests). That

level of care is significantly greater than that which applies to commercial redress. The claimants before us regard the contested cultural redress items in the KEC deed of settlement to be valuable taonga, some so important and iconic that they go to the core of tribal mana, tapu, and tikanga. One is of such central importance it affects the entire Te Arawa Waka, namely the statutory acknowledgement over the geothermal resources of the entire Te Arawa Waka traditional region, yet only one half of the tribe negotiated the redress.

We note the warning of the Ngati Tuwharetoa ki Kawerau Tribunal, which considered that:

> cultural redress . . . lies squarely within the cultural domain and goes to mana, kaitiakitanga and tapu. It is, we think, different from commercial redress, which was the main focus of the Tribunal's *Ngati Awa Settlement Cross-Claims Report*. [In the case of commercial redress] the key issue becomes whether the Crown has the capacity to award the same kind of redress to those who settle later.
>
> We think cultural redress is another matter. Especially where, as here, the items of redress in question are located near marae, and which are, or may be, central to cultural identity, for the Crown simply to retain the capacity to give the same kind of redress to a range of groups may not be an answer at all.[42]

What this means, as the Ngati Tuwharetoa ki Kawerau found, is that the Crown must 'bring to bear a sophisticated understanding not only of the historical context, but also of the Maori political context' to such decision-making over cultural redress.[43] We also agree with the Te Ika Whenua energy assets Tribunal, that the Crown cannot escape this duty of active protection by saying that it has ensured that different cultural sites are available for later settlement with overlapping groups. Each site of cultural significance has particular meaning and utility to groups with customary interests in it. Rarely is such a site substitutable with another site, even if that site is similar in nature.[44] The Ngati Awa settlement cross-claims Tribunal noted this point, and their comments on land remain apposite to the facts before us:

> Land . . . is a taonga tuku iho; an integral part of Maori self-identification; and a tangible expression of whakapapa. Nor is land ever 'substitutable' in Maori terms, in that one piece of land is not like another. The connections of people to particular land mean that all land to which traditional links are known and understood will have special significance to the Maori groups who can make those connections.[45]

The nature of cultural redress sites means that the stakes are high for claimants with overlapping interests in those sites included in a settlement package. Therefore, the Crown, under its duty of active protection, must ensure that the decisions it makes to offer such sites as redress are only made exercising a high degree of care.

The duty to consult

We turn now to consider the duty of the Crown to consult, first defined in the 1987 Court of Appeal decision of *New Zealand Maori Council v Attorney-General*. In that case, Sir Ivor Richardson opined that 'an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty'. However, he considered that:

> The better view is that the responsibility of one Treaty partner to act in good faith fairly 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 which is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation, it will have discharged the obligation to act reasonably and in good faith.[46]

In the context of Treaty negotiations and settlement, where redress may be highly contested, the stakes are high. The Crown must be fully appraised of all competing Maori interests, the nature and extent of those interests, and how

losing such sites or redress will impact on Maori in economic, social, and cultural terms. That requires research and consultation. Previous Tribunals have highlighted the central role that the duty to consult has in the Crown's ability to fulfil its obligations under Treaty principles. We note that the Tribunal, in its *Ahu Moana: The Aquaculture and Marine Farming Report* in 2002, considered that:

> It is now well established that, in a matter of particular significance to Maori, the Crown has a duty to act reasonably, to make informed decisions, and to turn its mind to the future needs of Maori. This cannot be done without consultation. Full discussion should take place with Maori before the Crown makes any decisions on matters that may impinge upon the rangatiratanga of a tribe or hapu in relation to its taonga. It goes without saying that the Crown's duty of active protection cannot be fulfilled where the Crown does not have a full appreciation of the nature of the taonga (ie, all its attributes, including spiritual and cultural attributes). Those who exercise rangatiratanga over that taonga can assist with attaining that understanding. That is essentially why the duty to consult exists.[47]

Similarly, we consider that the duty to consult is of particular importance in the Crown's process for dealing with overlapping claims to cultural redress. The importance of the Crown's Treaty duty to consult is clear in the settlement context, given what is at stake for overlapping claimants. Potentially, they could lose cultural items that go to the core of their identity. Alternatively, they could be caught up in the process through non-exclusive redress instruments being applied to those cultural items. Such non-exclusive redress items may foreclose any possible alternatives for their own potential settlements. Yet they may claim these items as taonga, and their loss may impinge on their rangatiratanga in breach of Treaty principles.

So OTS must adapt its consultation procedures to accommodate the likelihood that it may be dealing with taonga that are capable of engendering much emotion. Here, we recognise that the office varied its consultation process with respect to the other half of Te Arawa not part of the KEC, and we examine the impact of the changes it made below. It may be that consultation took place at a point in the process where the Crown's view had already been firmly decided and we note that, if that was the case, the observations of the Ngati Tuwharetoa ki Kawerau Tribunal become relevant. They stated:

> We believe that it is very difficult to deal with cross-claimants fairly if they are bought 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.[48]

However, consultation cannot discharge the Crown from its Treaty obligations. In the context of those Te Arawa hapu and iwi not part of the KEC mandate, the Crown had a number of Treaty duties, including appropriate consultation, to discharge. In the circumstances as they exist in Te Arawa, competing or contested claims to taonga being used as settlement redress were inevitably going to arise and they were always going to be far more frequent and intense. The burden on the Crown to act consistently with the principles of the Treaty of Waitangi correspondingly intensified, as did the duties it owed to all Maori affected. The Crown would not be adequately discharging its Treaty duties if it negotiated the redress package with one half of Te Arawa (in confidence), but presented the agreement in principle and deed of settlement to the remaining half during a round of consultation about overlapping interests already determined. We consider whether that was actually what happened in the pages that follow.

We are also of the view that the rangatiratanga of the other half of Te Arawa should also have been respected and taken into account during the design of the Crown's overlapping claims process. This should have involved a form of consultation that recognised they needed an opportunity to come to their views during the overlapping claims

process in a way that took into account the operation of tikanga Maori. In particular, they should have been free to operate consensus models for decision-making, even if that required that additional time be provided for the design of the consultation framework. Although stated in a different context, we note how apposite the comments made by the Napier Hospital Tribunal are, when it found that 'adequate opportunity for collective discussion in a Maori cultural context' ought to be a key attribute of appropriate consultation, and that:

> Often, this will be in a marae setting, at a time that assists the community to come together, and with due advanced notice through networks accessible to Maori, thus allowing for sufficient meeting time, and an opportunity for reporting back and following up.[49]

We also note the helpful comment of the Te Whanau o Waipareira Tribunal, that the opportunity for consultation which allows for the operation of tikanga Maori enables Maori 'to gather together and weigh up a range of opinion, and develop a consensus which represents the views, and enhances the rangatiratanga, of all Maori present'.[50] Although both of these reports concerned decisions about social services, we believe their comments underline fundamental Maori values and ways of operating that should also apply to the design of an effective consultation process for overlapping claims.

In particular, it would be appropriate, during the different phases of the negotiation process, or when contesting, overlapping, or mandate claimants request it, that the Crown or OTS welcome meeting with them on a kanohi ki te kanohi (face to face) basis. The Crown definitely should not design a process that engages OTS staff and claimants in a series of long-range communications by complex letters, or emails. This is a recipe for disaster.

Finally, other Tribunals that have considered the Crown's settlement process have noted that the Crown, in designing and implementing the consultation elements of its overlapping claims process, should be mindful of the very great imbalance of resources between itself and overlapping claimants, and between overlapping claimants and parties in negotiations. In particular, it should be mindful that the overlapping claimants are not funded to participate in Treaty negotiation matters. In general, claimants rely on their own resources and time to read documents, attend hui, and make submissions. Iwi and hapu that are not in negotiation with the Crown are not funded to mandate representatives to deals with OTS in the overlapping claims consultation process. Therefore, when they receive consultative letters, they must rely on their own resources to consult with their own people. This represents a high degree of inequity when compared to the position of the negotiating group.

The duty to seek to preserve amicable tribal relations

With regard to the Crown's duty to seek to preserve amicable tribal relations, we have already touched on this matter in the context of the Crown's duty to respect the rangatiratanga of those involved in the mandating process. The Te Arawa mandate Tribunal perceived that any failure by the Crown to act equitably and treat all parties affected by the settlement equally ran 'the risk of entrenching or worsening extant tensions and divisions between groups within Te Arawa'.[51] Given this risk and its grave consequences, we agree with the Ngati Awa settlement cross-claims Tribunal, which concluded that the Crown had a responsibility to be proactive in preventing damage to inter and intra tribal relationships as a consequence of the settlement negotiations process:

> We think that the Crown should be pro-active in doing all it can to ensure that the cost of arriving at settlements is not a deterioration of inter-tribal relations. The Crown must also be careful not to exacerbate the situations where there are fragile relationships within tribes. Inevitably, officials become focused on getting a deal. But they must not become blinkered to the collateral damage that getting a deal can cause. A deal at all costs might well not be the kind of deal that will

effect the long-term reconciliation of Crown and Maori that the settlements seek to achieve.[52]

That Tribunal was also of the view that the Crown needs to be active in its attempts to repair any damage that may occur:

> The simple point is that where the process of working towards settlement causes fall-out in the form of deteriorating relationships either within or between the 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 the absolute minimum.[53]

The Ngati Awa settlement cross-claims Tribunal noted that this was not an easy task for Crown officials, but considered that this difficulty was balanced by the potential for long-term damage to the Treaty partnership between the Crown and Maori that damaged tribal relationships might cause. That Tribunal recommended that OTS work to find practical ways of minimising harm to tribal relationships, including the use of mediation and facilitation processes.[54]

Previous Tribunals have also scrutinised the impact on tribal relations of the Crown's practice of requiring settling groups 'to consult other iwi or claimant groups to identify and resolve (if necessary) any overlapping interests' in the first instance, OTS ultimately being responsible for ensuring that the 'overlapping claims must be addressed to the satisfaction of the Crown'.[55] We agree with the Ngati Tuwharetoa ki Kawerau Tribunal that:

> Settling claimants should assume responsibility for dealing with cross-claimants, at least in the first instance. This approach has the practical appeal of placing the onus on a party that is funded by the Crown, and which has an understanding of the tribal landscape better than the Crown's. Moreover, where possible it is obviously preferable that matters raised by cultural redress – matters of tribal mana and tapu – are addressed by the Maori parties concerned, and where possible in a Maori forum.[56]

However, we also endorse the feelings of that Tribunal that, where cultural redress is involved as it is here, the Crown must be responsive to the particular situation because 'this is not a context where a "one size fits all" approach will work well,' a description we consider apt in the Te Arawa situation.[57] In the Te Arawa situation, the KEC and claimants such as Ngati Makino and Ngati Whakaue were unable to sit together and discuss issues of concern to both. In such cases, the onus was on OTS to take the lead and make itself available to meet with the claimants, with or without the KEC. Alternatively, options for facilitating discussion included the Crown:

- sponsoring facilitated hui involving settling claimants and cross-claimants, and paying for a facilitator; and
- assisting in arranging and paying for a mediation of the matters in dispute and, as a last resort, where it is evident that attempts to reconcile the competing views have failed.

We note that OTS did assist with the facilitation of hui with Ngati Wahiao and Ngati Rangiteaorere during the KEC negotiations. We consider what it did in terms of the other mandate claimants in chapter 6.

One of the most important questions for OTS to consider in the design and implementation of its overlapping claims policy was whether such policies would 'enhance the solidarity and integrity of Maori communities and empower the people, or whether they would divide and rule them'.[58] If it was, or became, obvious to OTS prior to or during the settlement process that the negotiation process was dividing Te Arawa, it should have stopped the process for the time needed to deal with those divisions.

We do not consider that this would have been unfair to the KEC in 2005. In our view, it would have demonstrated a good faith attempt to bring all parties to the point where the agreement in principle and the settlement packages

were acceptable to all, and where all claimant interests were fully identified and discussed in accordance with tikanga Maori. In this way, time would have been taken to deal with these divisions openly, rather than behind closed doors with one party enjoying the privilege of setting the terms and conditions of engagement on cultural redress to which the balance of Te Arawa had to respond.

Duty concerning mandate claims: The duty to avoid process error, misapplication of tikanga, and irrationality

We note that the Pakakohi and Tangahoe Tribunal essentially set out three factors, that if present, would indicate that the Crown's decisions regarding mandate were so flawed that the Tribunal would be justified in recommending a change or changes to those decisions. These factors were 'clear error in process, misapplication of tikanga Maori, or apparent irrationality'.[59] The Crown has a duty to avoid process error, misapplication of tikanga, and irrationality in its decisions relating to mandate.

Tribunal's Jurisdiction on Mandate Claims

The Crown has called into question the nature of the Tribunal's jurisdiction with regard to claims in this inquiry, which relate to mandate, and we now turn to that issue. In its opening submission on mandate issues the Crown stated:

> In the context of Treaty settlements, the Tribunal properly takes an approach similar to that of a reviewing Court. It is not for the Tribunal to substitute its view on the appropriateness of, in this case, the decision to recognise a mandate, or whether or not to recognise an attempt to withdraw.[60]

The Crown considered that the following passage from the Tribunal's *Pakakohi and Tangahoe Settlement Claims Report* was relevant:

> It follows from the foregoing that we are clear as to what the Tribunal's role is not in the context of claims of this nature. It is not the role of this Tribunal in investigating claims of this nature to substitute its own view of matters, for that arrived at by the Crown and the working party . . . While the context of judicial review proceedings is significantly different to claims under section 6 of our Act, the principle of extreme caution which we instinctively adopt here, is echoed in High Court decisions. Thus, in *Kai Tohu Tohu o Puketapu Inc v Attorney-General*, Doogue J noted that 'the claims are claims entertained by the Crown as part of a political process and not part of a legal process.' Similarly, Hammond J in *Greensill v Tainui Maori Trust Board* considered 'to intervene now would be an outright interference in what is nothing more or less than an ongoing political process as opposed to a distinct matter of law'. A number of other cases have expressed that same sentiment. Accordingly, although the jurisdiction of the Tribunal is not circumscribed within the relatively narrow discipline of judicial review, there are a number of important considerations which militate against the Tribunal interfering in mandate decisions except in clear cases of error in process, misapplication of tikanga Maori, or apparent irrationality. These considerations include the political nature of the decision-making under challenge, the artificiality of treating internal disputes as if they were disputes against the Crown, and the inherent difficulty of the subject matter.[61]

The Crown accepted that the claims in this inquiry have been made against the Crown. However, it considers that the context of these claims is similar in a number of respects to those in the Pakakohi and Tangahoe case. First, they assert that:

> the decision as to whether or not to ultimately recognise a mandate, or the withdrawal of a mandate, is purely political. Matters of political judgement are involved. Caution is required.[62]

Secondly, they say that the evidence in this inquiry suggests that 'to a large extent, internal disputes are the central

issue'. And therefore there is 'some artificiality to the complaint against the Crown'.[63]

We turn now to examine the Crown's argument in more detail, taking in turn each of the two points of similarity the Crown found between the Pakakohi and Tangahoe case and the inquiry before us. We begin with the claim that the two cases are similar, in that to large extent they both involve internal disputes and that as a consequence there is some artificiality to the complaint against the Crown. The Crown further clarifies this point by saying that, in the case of claims in the Te Arawa settlement that deal with mandate issues:

> it is clear that there is some dispute within the Arawa confederation, and within certain groups that are represented by the KEC. It cannot be said that these disputes were caused by the Crown.[64]

The mandate claims before us arose from the context of settlement negotiations and ultimately a settlement. There are differences of opinion between members of iwi/hapu who support the KEC mandate and those who oppose it. However, we believe that regardless of the nature and extent of these differences of opinion, the real questions before this Tribunal are whether or not the actions and processes that OTS developed following the mandate Tribunal's second report were Treaty compliant, how these were implemented by OTS in the Te Arawa negotiations, and whether this led to a breach of the Treaty. These questions certainly are within the Tribunal's jurisdiction under section 6(1) of the Treaty of Waitangi Act 1975. What also needs to be emphasised is that the Pakakohi and Tangahoe Tribunal explicitly stated that the Tribunal's jurisdiction is *not* circumscribed within the relatively narrow discipline of judicial review. It did, however, qualify that by saying that 'there are a number of important considerations which militate against the Tribunal interfering in mandate decisions'.[65]

There are constraints on our jurisdiction which require that we focus on Crown action and that 'we should tread very carefully'.[66] Factors constraining the jurisdiction of the Tribunal include:

- the political nature of the decision-making under challenge;
- the artificiality of treating internal disputes as if they were disputes against the Crown; and
- the inherent difficulty of the subject matter.

So it is relevant for this Tribunal to ask itself whether any of these three factors would constrain its jurisdiction with regard to the mandate claims before us. It is clear from our discussion above that the Crown has conceded that the claims before this Tribunal are properly claims against the Crown. We consider this to be a concession that the primary issues before us are not the existence or otherwise of an internal dispute, but rather concern the application of Crown policies and processes. Therefore, the second factor above can only be secondary to the overall analysis of the evidence that we undertake below.

The third factor, as stated, concerns the inherent difficulty of the subject matter. The situation facing the Pakakohi and Tangahoe Tribunal was considered so difficult that the Tribunal felt it must tread carefully. It was extremely concerned, for example, that the claimants had not had the opportunity to sort out their own house, so to speak. Therefore, before a hearing was agreed upon, the chief judge referred the dispute to mediation under clause 9A of the second schedule to the Treaty of Waitangi Act 1975.[67] A similar approach was adopted here in the context of the claims of Ngati Wahiao and Ngati Rangiteaorere, as we have discussed in chapter 1. This Tribunal has also been concerned to give the parties an opportunity to sort through issues for Ngati Whaoa, Ngati Tamakari, and Ngati Rangiunuora. Unfortunately, the position of these hapu remains ambiguous.

This leaves us to consider the first factor, the political nature of the decision-making under challenge. This was the second reason why the Crown felt that the mandate

claims before this Tribunal were similar to those dealt with in the Pakakohi and Tangahoe report.[68] A closer reading of the passage from the report cited by the Crown indicates that the Tribunal referred to the decisions 'relating to the recognition of mandate for the purposes of Treaty settlements' as 'delicate and fundamentally political'.[69] We agree, and take this into account in our analysis that follows. Negotiations are usually about voluntary participation and mutual benefit for the groups participating and the Crown. Maori are giving away the benefits of the commission of inquiry process in the hope that the earlier negotiation of their claims will bring resolution and future development.

The Crown is attempting to meet its settlement targets and to advance other policy priorities that will ultimately benefit all New Zealanders. But these considerations cannot be elevated above its Treaty and fiduciary obligations to all affected Maori during the negotiation process. While there may inevitably be compromises during the negotiation process, and not every whanau or hapu will be happy with the outcome, there are Treaty-consistent mechanisms for at least taking their concerns into account in a manner that respects their dissent and provides some definition of what they can expect in the future for their relationship with the Crown. If it were not so, no settlements would ever be made. The real question turns on what is reasonable in the circumstances given the Crown's Treaty obligations.

Therefore, we do not think that there is reason to reduce our jurisdiction to one akin to judicial review of process, although process is important. These claims arise from a complex mandating process where significant suggestions have been made in two reports by the Te Arawa mandate Tribunal on how the Crown should proceed to deal with them. That distinguishes them from any other claims contesting mandate, including the claims in the Pakakohi and Tangahoe inquiry. In any event, the Pakakohi and Tangahoe Tribunal noted that the Tribunal may need to intervene in mandate decisions 'in clear cases of error in process, misapplication of tikanga Maori, or apparent irrationality'.

However, in terms of the Crown's (or OTS's) decisions regarding mandate in this inquiry, and depending on whether we find there have been breaches of the principles of the Treaty regarding mandate claimants, we may or may not need to consider applying the test adopted by the Pakakohi and Tangahoe Tribunal for the purpose of ascertaining the full nature and extent of any prejudice to them. That four-part test requires that this Tribunal ask:

- First, does tikanga or early colonial history (or both) recognise any or all of the iwi and hapu groups that contest mandate as a cultural and political entity distinct from the iwi they seek to be decoupled from, or from the iwi the Crown considers holds mandate on its behalf?
- Secondly, do any or all of the iwi and hapu who contest mandate have claims which are distinct from those iwi they seek to be decoupled from, or from the iwi the Crown considers holds mandate on its behalf?

If the answer to these questions is yes, we must then ask:

- Is there sufficient evidence of support within any or all of these iwi and hapu for a separate negotiation and settlement in their favour to warrant the Tribunal taking a hard look at the Crown's handling of decisions on decoupling and/or withdrawal?
- And lastly, if there is sufficient evidence to warrant a 'hard look' at the matter, were there flaws in the Crown's handling of decisions on decoupling and/or withdrawal of sufficient severity to warrant the Tribunal considering that the Crown's acceptance of the KEC's mandate to settle was unsafe?

We repeat that the existence or otherwise of dispute is not the main issue before us in terms of mandate. But it may go to the degree of prejudice that claimants will suffer, if we find their claims to be well founded.[70] Our

consideration of whether these conditions apply to the mandate claims we have heard is set out in our analysis in the chapters that follow.

Tribunal's Jurisdiction on Overlapping Claims

The Crown also considers that the Tribunal's jurisdiction over overlapping claims issues is limited. In its submission, the Crown argued that:

> The Tribunal's jurisdiction in relation to the Crown's consideration of overlapping claim issues is a limited one. The Crown contends that the Tribunal's focus should be on the process adopted by the Crown in relation to considerations of the important issue of overlapping claims. It is not the Tribunal's function to determine whether substantive decisions taken to include particular items of redress, such as those contested here, were appropriate in Treaty terms. The Tribunal should adopt the existing jurisprudence, namely, that it is for the Crown, through a process of negotiation with claimants, to determine the substantive content of any settlement package.[71]

We are of the view that there are a number of difficulties with an approach that rigidly separates an assessment of whether or not the Crown's overlapping claims process was Treaty compliant from a similar assessment of the substantive decisions taken to include particular items of redress. First, even if the Tribunal was simply to examine the Crown's policy and processes with regard to overlapping interests, this would necessitate an examination of how the Crown's policy and process was applied to particular items of cultural redress. Furthermore, the success or otherwise of this policy can only be established by an examination of its application in practice and how it applied to these particular claims.[72] Finally, if the Tribunal were to find that the overlapping claims process and its implementation was flawed to a significant degree, then this would naturally lead the Tribunal to consider whether the outcome (in terms of the redress offered) was also flawed.

We consider that an examination of the overlapping claims process, and the substantive decisions regarding various items of cultural redress, is necessary if we are to assess prejudice resulting from any Treaty breach with regard to the process that determined the redress package. It is not possible to assess prejudice without considering which cultural redress sites are to be returned in the settlement and the extent to which those with overlapping claims to those sites will be prejudiced as a result.[73] Where they are prejudiced in a significant way, the Treaty calls for redress. As the Tarawera Forest Tribunal noted:

> The principle of redress for Treaty breaches flows from the Crown's duty to act reasonably and in good faith as a Treaty partner. The Tribunal has emphasised that the redress of Treaty grievances is necessary to restore the honour and integrity of the Crown and the mana and status of Maori.[74]

This means that we need to be able to make findings on whether the giving of substantive redress to the KEC breached the Treaty rights of the claimants. If this is the case, we must be able to recommend redress that takes into account both the rights and the interests of the claimants and the KEC affiliates.

Summary

We find that the principles of the Treaty relevant to the claims before us are those defined by the mandate Tribunal as:

- the principle of reciprocity;
- the principle of partnership;
- the principle of active protection; and
- the principles of equity and equal treatment.

The Crown, in responding to the mandate Tribunal's *Te Arawa Mandate: Te Wahanga Tuarua Report*, made some

modifications to its overlapping claims process but effectively rejected the substantive suggestions and recommendation of that Tribunal.

We note that the Crown proceeded to enter into an agreement in principle in September 2005, and that it entered into a deed of settlement with the KEC in December 2006. During the time of the negotiations, it had certain Treaty duties that it should have discharged. Some of these duties are of a generic nature, and one is directly applicable to mandate claimants. These are:

- a duty to act honourably and with the utmost good faith;
- a duty to act fairly and impartially;
- a duty to actively protect all relevant Maori interests;
- a duty to consult;
- a duty to seek to preserve amicable tribal relations; and
- a duty to avoid errors in process, the misapplication of tikanga Maori and irrationality.

We turn now to the design of the overlapping claims process developed to meet, by the Crown's own admission, the 'special circumstances' of the Te Arawa Waka.

Notes

1. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 100
2. Herbert W Williams, *A Dictionary of the Maori Language*, 7th ed (Wellington: Government Printer, 1971)
3. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 3, p 824
4. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), p 20
5. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 180
6. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), p 20
7. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 179
8. Hirini Moko Mead, *Tikanga: Living by Maori Values* (Wellington: Huia Publishers, 2003), p 12
9. Ibid
10. Ibid, p 5
11. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), pp 87–88
12. Ibid, p 88
13. Ibid, p 73
14. Ibid, p 74
15. Ibid, p 105
16. Ibid, p 108
17. Ibid, pp 111–110
18. Ibid, p 97
19. Ibid, p 98
20. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), p 500
21. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005)
22. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32), p 4; OTS, internal memorandum, undated (doc A32(a)(BD3))
23. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed policy response to *The Te Arawa Mandate Report*, 12 July 2005 (doc A32(a)(BD3))
24. Ibid
25. Ibid, paras 15, 19
26. In setting out this duty, we draw on Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), pp 55–57.
27. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), pp 71–72
28. Ibid, p 72
29. Waitangi Tribunal, memorandum, 21 February 2002 (Wai 889 ROI, paper 2.67), pp 11–12
30. Ibid, p 12
31. Ibid
32. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 71
33. Waitangi Tribunal, *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wellington: Legislation Direct, 2003), pp 70–71
34. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), p 88
35. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 58
36. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), p 87
37. Ibid

38. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 642 (CA); Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 73
39. Waitangi Tribunal, *Te Maunga Railways Land Report*, 2nd ed (Wellington: GP Publications, 1996), p 68
40. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 73
41. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), p 32
42. Waitangi Tribunal, *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wellington: Legislation Direct, 2003), p 57
43. Waitangi Tribunal, *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wellington: Legislation Direct, 2003), p 57
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45. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), p 84
46. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 683 (CA)
47. Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), p 70
48. Waitangi Tribunal, *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wellington: Legislation Direct, 2003), p 67
49. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 72
50. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: Legislation Direct, 1998), p 226
51. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 74
52. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), pp 87–88
53. Ibid, p 88
54. Ibid
55. OTS, *Ka Tika a Muri, Ka Tika a Mua: He Tohutohu Whakamarama i nga Whakataunga Kereme e Pa Ana ki te Tiriti o Waitangi me nga 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: OTS [2002]); Waitangi Tribunal, *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wellington: Legislation Direct, 2003), p 59
56. Waitangi Tribunal, *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wellington: Legislation Direct, 2003), pp 63–64
57. Ibid, pp 69–70
58. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: Legislation Direct, 1998), p 26
59. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p 57
60. Crown counsel, submissions concerning mandate issues, 15 February 2007 (paper 3.3.13), para 24
61. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), pp 56–57 (cited in Crown counsel, submissions concerning mandate issues, 15 February 2007 (paper 3.3.13), para 25)
62. Crown counsel, submissions concerning mandate issues, 15 February 2007 (paper 3.3.13), para 27
63. Ibid, paras 28–29
64. Ibid, para 29
65. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), pp 56–57
66. Ibid, p 56
67. Ibid
68. Crown counsel, submissions concerning mandate issues, para 27
69. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p 56
70. Ibid, p 57
71. Crown counsel, submissions concerning overlapping claims, 19 February 2007 (paper 3.3.14), para 4
72. Counsel for Ngati Rangitihi, submissions in response to Crown submissions on overlapping claims, 22 February 2007 (paper 3.3.17), para 2.4
73. Ibid, para 2.9
74. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 29

CHAPTER 3

THE DESIGN AND IMPLEMENTATION OF THE CLAIMS PROCESS

Introduction

In this chapter, we outline the evolution of the Office of Treaty Settlement's (OTS) overlapping claims process both nationally and as it was specifically modified for the KEC negotiations. In particular, we focus on the design of this process to ascertain whether OTS was actively discharging the Crown's duties and obligations under the Treaty, as discussed in the previous chapter. In chapter 4, we undertake a detailed examination of how the overlapping process unfolded for claimants with significant interests in particular sites offered as cultural redress in the settlement between the Crown and the KEC.

Issue for Determination by this Tribunal

Prior to hearing, we posed a number of questions in relation to the claims brought before us. But it became clear from the evidence we heard during the hearing that the first issue for us to determine is this:

Was the Crown's development and implementation of its modified overlapping claims policy as applied in Te Arawa consistent with the principles of the Treaty of Waitangi?

Before turning to analysis of the issue, however, we begin by laying out a chronology of the events that gave rise to the allegations against the Crown.

Overlapping Interests Consultation Process

In the narrative that follows, we have woven the key overlapping claims events into the narrative of the settlement negotiations. In this way, we are better able to understand the timing of various phases of the consultation process in relation to key decisions made by the Crown in its negotiations with the KEC.

Phase 1 consultation – pre-AIP

On 12 July 2005 – the same day that OTS officials briefed the Treaty Negotiations Minister on the proposed response to the *Te Arawa Mandate: Te Wahanga Tuarua Report* – the Minister was also advised that officials had gathered a large amount of information on the interests and associations of the KEC in lands and resources within the KEC area of interest.[1] Officials had reduced the scope of potential redress to some 30 priority sites (out of a total of around 300 sites of significance within the rohe) located on Crown lands.[2] They informed their Minister that the cultural redress part of the settlement package would need to contain the return of maunga (significant peaks) and key wahi tapu sites, along with meaningful redress over geothermal resources and waterways. The package would also need to be consistent with previous Treaty settlements. Officials sounded a note of caution that some of the elements of the proposed package might result in adverse reaction from key third parties. They had, therefore, 'developed strategies to allay the concerns of the key third parties and the broader public

community'.[3] They would also develop a media strategy before signing the agreement in principle (AIP).

On 21 July 2005, OTS presented the KEC with the Crown's cultural redress offer.[4] No information on this offer was made available to us by the Crown, other than the fact that it did not contain any cultural redress in the Whakarewarewa geothermal valley. The Crown made its settlement offer to the KEC, including quantum, on 25 July 2005.[5]

A day later, on 26 July, OTS wrote to Te Arawa non-KEC groups asking them for information in relation to their negotiation intentions and state of readiness to negotiate. The letter asked a series of specific questions about the future progress of claims:

- When did the group wish to enter into direct negotiations with the Crown?
- If the group were currently participating in the central North Island inquiry, did they wish to participate in further stages and await publication of the report, or enter into direct negotiations?
- What was the size of the groups with whom they wished to enter into direct negotiations, and what was their present representative structure?
- Did their current representatives have the authority to negotiate over historical Treaty claims?
- If their group included other hapu or iwi, they were asked to identify these.
- Were there existing agreements or arrangements with these other groups for entering into direct negotiations as a collective? If so, they were asked to provide documents.

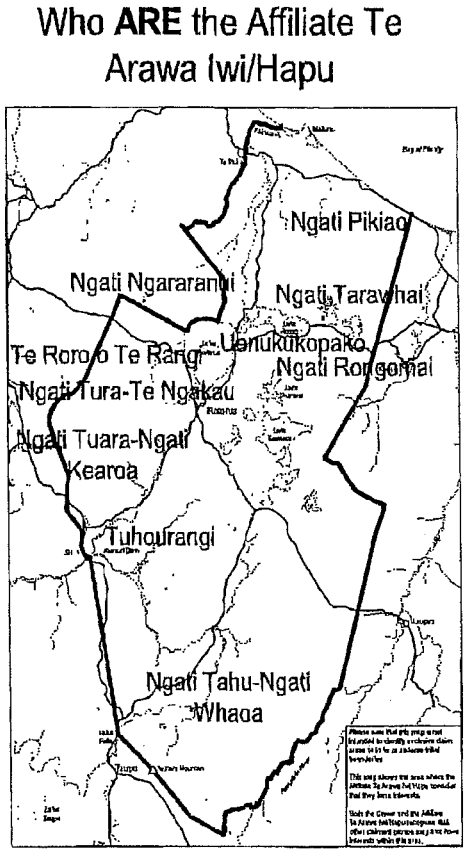
This letter also summarised Crown policy regarding the possibility of separate negotiation:[6]

- The KEC negotiations are a priority.
- Concurrent negotiations with other groups outside the KEC would unfairly prejudice the KEC negotiations.
- There are significant practical limitations on Crown to accommodate further priority negotiations.
- The Crown prefers to deal with large natural groups.
- The Crown will not negotiate while groups are engaged in litigation or proceedings before the Waitangi Tribunal.

Two days later, on 28 July (a week after the Crown's offer of cultural redress to the KEC), OTS wrote to these same groups, exploring the overlapping claims policy and process and seeking information on their interests within the area of interest to be settled by the KEC mandate. A number of specific pieces of information were sought:

- the boundaries of the general area in which the iwi/hapu have exercised customary interests;
- the ancestor, iwi or hapu through which they identify those customary interests;
- any specific land block interests within the area of interest and the basis for those interests;
- details of Native Land Court awards of customary land within the area of interest;
- any pa or kainga;
- any other sites of major significance (eg, wahi tapu or mahinga kai);
- any information about use of rivers or other waterways; and
- any other information which might be useful for the Crown in assessing overlapping interests, including ancestral connections.

OTS acknowledged that information regarding interests in certain sites or resources might be sensitive. In such cases, only general information would need to be provided. The letter made it clear that until the deed of settlement was initialled, the proposed redress package could be altered to 'take account of relevant overlapping claims considerations'. The Crown and KEC could decide, based on submissions, that it was not appropriate to offer a particular item of redress. The letter also indicated that any information supplied would be passed on to the KEC. The KEC would seek to discuss overlapping interests directly with such groups. The iwi were encouraged to discuss their interests with the KEC and would have a further opportunity to provide information on their interests once the



Document produced by OTS to illustrate which iwi and hapu were and were not engaged in the KEC negotiations (doc A82)

Crown and the KEC had reached an agreement in principle (by August or September 2005). Non-Te Arawa overlapping claimants had been asked on 24 June to respond by 29 July 2005. Non-KEC Te Arawa overlapping claimants were given until 3 August 2005 to respond.

The Crown recognised the decision of Ngati Wahiao to reaffirm its mandate for the executive council on 25 July 2005.[7] The KEC made their counter-offer some time between 21 July and 5 August 2005. Again, we have no detail of the counter-offer. But we do know that, as a result of discussion between the Crown and the KEC, officials proposed site-specific redress for Ngati Wahiao.[8] This included four sites: Whakarewarewa geothermal valley, Roto a Tamaheke (both sites administered by the Minister of Tourism), Moerangi maunga, and an urupa in the Crown forestry licence land. OTS advised its Minister that the redress over the thermal valley and the Maori Arts and Crafts Institute was 'central to the Crown securing a settlement with Ngati Wahiao of all their claims'. OTS proposed to report further with the Minister of Tourism on

the Whakarewarewa proposals on 15 August. In the meantime, the KEC counter-offered on the rest of the settlement package on 8 August.[9]

On 12 August 2005, OTS reported further to its Minister on the proposed response to the KEC's counter-offer.[10] This report states that the counter-offer contained further provisions for redress in relation to the geothermal valley, and that the Minister sought separate comment on these proposals. This report discusses in some detail the amended cultural redress proposal in relation to the Whakarewarewa geothermal valley. The Treaty Negotiations Minister and the Minister of Conservation approved the Crown's response to the counter-offer on 11 August 2005. The Crown's response to the counter-offer on cultural redress was presented to the KEC on the same day. A follow-up letter that dealt with the proposed redress in the Whakarewarewa geothermal valley was sent on 16 August 2005.[11] The KEC met with the Crown to receive the Crown's response to the counter-offer on the rest of the settlement package on 17 August 2005.

The date of 17 August 2005 is also of some significance for 'overlapping' claimants. This was the closing date for submissions received in response to phase I of the consultation process. Among the responses received, the Crown heard from Ngati Rangitihi, Ngati Whakaue, and Ngati Makino, who appeared before this Tribunal. At this point in time, Ngati Rangiteaorere cannot be described as overlapping claimant, because they remained within the KEC mandate.

In their reply, Ngati Whakaue sought information on the specific sites that the KEC claimed within the area of interest.[12] They also criticised the summary of information about Ngati Whakaue's interests, and suggested that OTS should meet with Ngati Whakaue, if they thought an overlap existed. OTS responded by explaining that the gathering of information was preliminary only, and that they would be consulted further on specific sites once an agreement in principle had been signed.[13]

Ngati Rangitihi sought an extension until 26 August 2005, on account of their need to file closings in the central North Island inquiry.[14] They also drew attention to the fact that providing information on customary interests was akin to preparing a manawhenua report for Tribunal purposes. Ngati Rangitihi had received no funding for that purpose. They pointed out that they had not been contacted by the KEC to arrange a meeting to discuss overlapping interests. They sought substantive consultation with the Crown prior to the agreement in principle.

Two days later, Ngati Rangitihi filed an urgent request for information under the Official Information Act.[15] The scope of their request extended to official information regarding the proposed agreement in principle between the Crown and the KEC, including the draft agreement in principle, correspondence on the draft agreement in principle, and information received by OTS from iwi and hapu whose interests had been identified on the KEC area of interest map. Ngati Rangitihi filed their response on 26 August 2005, identifying interests in nine blocks.[16]

Phase II consultation – post-AIP

Phase II of OTS's consultation with overlapping claimants commences with the agreement in principle signed on 5 September 2005 between the Crown and the KEC.[17] The announcement was made at least a week before OTS sent notice to overlapping claimants.[18] These letters were sent on 14 September, to all parties identified as overlapping claimants. The letters were tailored to the specific interests (as identified by OTS) of each overlapping claimant group, and promised that a copy of the agreement in principle would be sent in two weeks' time.[19] OTS sought feedback by 4 November 2005.

The Crown received a large number of responses from the following groups: Ngati Whakaue, Ngati Tuwharetoa, Ngati Raukawa, Waikato-Tainui, Ngati Manawa, Ngati Rangitihi, Ngati Rangiwewehi, Ngati Rangiteaorere, Ngati

Wahiao,[20] Ngai Tamarawaho, Pouakani, Tuhoe, Ngati Tahu–Ngati Whaoa, Ngati Tahu, and Ngati Rangiita, and Ngati Taka.[21] OTS received no response from Ngati Whare, Ngati Makino, or Waitaha. It considered (and in some cases granted) extensions for filing submissions. On 20 December 2005, OTS provided a preliminary response to the parties who had filed submissions.[22] Because of the number of detailed responses received, OTS indicated that it would be unable to provide a comprehensive response until February 2006. In the event, the promised responses were not prepared until at least April 2006.

By 16 February 2006, OTS officials had summarised the submissions.[23] In March 2006, the KEC provided a table listing cultural redress sites, affiliate iwi/hapu by region and name, and the evidence that supported claims to interests.[24] In their 6 April 2006 briefing to the Minister, officials noted the 20 responses received and their plan to hold meetings with key groups before reporting to the Minister.[25] Whereas, previously, officials had defined three groups of overlapping claimants, they now referred to four kinds of overlapping claimants:

- Te Arawa iwi/hapu who had not mandated the KEC;
- non-Te Arawa groups;
- claimants to the Waitangi Tribunal whose claims are made on behalf of groups that include both KEC iwi/hapu and overlapping claimants; and
- 'groups who have already had their historical claims settled', including Ngati Whakaue in respect of the lands covered by the 1993 deed of agreement which settled the Wai 94 claim.

The key areas of contested redress were:

- Ngati Rangitihi: Te Ariki, Mount Tarawera overlay classification, and statutory acknowledgement of part of the Tarawera River.
- Ngati Whakaue: Mount Ngongataha scenic reserve (vesting of 50 hectares) and overlay classification over the whole reserve; vesting of 45 hectares of the Whakarewarewa thermal springs reserve.
- Ngati Tuwharetoa: commercial redress offer over three Crown forestry licence areas.

OTS officials noted that there was a marked difference in the way that overlapping claimants presented information and the level of detail they supplied to support their claims of shared or exclusive interests. Officials were preparing responses to the letters, taking account of any KEC meetings. They intended to complete the responses by mid-April 2006. They were also reviewing their understanding of KEC interests and carrying out further research in the respective interests of KEC groups and the overlapping claimants in respect of contested redress. Finally, they noted their plan to meet with representatives of Ngati Makino, Ngati Whakaue, and Ngati Rangitihi.

On 10 July 2006, OTS officials briefed their Minister in respect of four contested sites prior to officials undertaking further consultation in respect of the four sites.[26] The sites were:

- Whakarewarewa geothermal valley;
- Matawhaura and Otari Pa;
- Te Ariki; and
- Whakarewarewa Forest.

Officials summarised the Crown's understanding of the history of shared interests at each site, briefly reviewed the historical evidence and research, and outlined the rationale for the proposed redress. They also summarised the concerns of the overlapping claimants and their response to those concerns. The Minister approved the recommendation for OTS to consult further with the affected groups. The consultation would take the form of a letter seeking comment by the end of July and an invitation to meet with officials before the Minister made final decisions.

The Minister was briefed again the following day on the provisional decisions for overlapping claims.[27] As a result of the information gathered (including one or two meetings between OTS officials and overlapping claimants), and further consultation with the KEC, the proposed redress was modified in respect of seven items of redress.[28] The

Minister accordingly made provisional decisions on the redress on 10 July 2006.

Phase III consultation – between the Minister's provisional and final decisions on cultural redress

We begin this section with the letters written to overlapping claimants on 14 July 2006, notifying the Minister's provisional decisions.[29] Overlapping claimants were offered a limited amount of time (until 3 August 2006) to respond. Invitations were made to key groups to meet within the two-week period together with KEC representatives.

By 3 August 2006, officials had received five responses from overlapping groups. They met with two of these groups (Ngati Rangitihi and Wai 316 Ngati Whakaue claimants). Te Kotahitanga o Ngati Whakaue declined to meet OTS within the timeframe. Ngati Makino also declined to meet to discuss overlapping claims. The five responses covered six groups: Ngaitamarawaho, Ngati Rangitihi, 'non-KEC Ngati Whakaue', Ngati Hangarau, Ngati Rangiwewehi, and Ngati Raukawa. Three of these groups had objected to the provisional decisions: Ngati Rangitihi, 'non-KEC Ngati Whakaue hapu', and Ngati Makino.

Officials concluded that overlapping claimants had not provided any significant new information concerning their interests in the redress offered to the KEC. They therefore recommended no changes to the provisional decisions. On 4 August 2006, the day following the close of consultation, the Minister approved OTS recommendations for final decisions on the contested redress.[30] Claimants were informed of the Minister's final decision on the redress package by letter on 7 August 2006.[31]

At the end of July, officials had briefed the Minister on progress with the affiliate Te Arawa iwi/hapu settlement, attaching a paper prepared for the Cabinet Policy Committee.[32] The paper went to the committee on 3 August 2006 (the closing date for submissions on redress). The Cabinet paper contained a brief summary of the Te Arawa settlement negotiations, highlighting the strategic significance of this settlement for meeting the Government's target of addressing all historical Treaty claims by the year 2020.[33] The paper provided Cabinet members with some detail on the cultural redress sites, but did not mention that certain items of redress were contested. The paper did, however, refer to mandate issues and specifically mandate challenges, noting an 'unprecedented amount of litigation challenging the mandate decisions of both the Crown and Te Arawa KEC'.

In the lead-up to signing the deed of settlement, the Minister sought authorisation from Cabinet for himself, and the Ministers of Conservation and Finance, to make minor variations within the general parameters of the Treaty settlement framework.

The deed was initialled on 8 August, the day after the Minister had sent letters to the overlapping claimants. It was finally signed on 30 September 2006.

We turn now to the cases presented by the parties.

The Claimants' Case

Generally, the claimants were concerned about the Crown's response to the Te Arawa mandate Tribunal's reports, and the design of the overlapping claims process that OTS finally implemented. Counsel for Ngati Whakaue argued that the Crown did not consult in good faith, and criticised the Crown's process for ascertaining their views as 'woefully inadequate, at best perfunctory'. Ngati Whakaue also criticised the timeframes provided for consultation. Counsel maintained that Ngati Whakaue were entitled to:

- the receipt of adequate information of what was proposed;
- a reasonable opportunity to state their views;
- fair account taken of their views, even if these were an outright objection; and
- transparency of process.

They claimed that Ngati Whakaue did all that they could to engage with the Crown, but that, because they

fundamentally objected to the process, the Crown singularly ignored their position. It was their view that OTS entered the consultation process with closed minds, given that the KEC negotiations were already well under way before the overlapping claims consultation began. They believe that OTS presented them with a fait accompli and that nothing Ngati Whakaue did or said to challenge that determination could have changed that.

Counsel for Ngati Rangitihi expressed the same general concerns and also submitted that the Crown had failed to respond to requests for information both before and after the agreement in principle. Ngati Rangitihi had been unable to respond in an informed manner as a result. They objected to a process whereby the information they sent to the Crown was shared with the KEC but, when Ngati Rangitihi asked for information provided by the KEC, there was no reciprocity.

They also submitted that, even based on minimum standards such as those from the *Wellington International Airport* case, the process did not meet the minimum standards of what constitutes proper consultation.[34] Using that test, important decisions were made with minimal time available at the crucial stage, such as pre-agreement in principle. Counsel also claimed that, although the agreement in principle purported to deal with proposed redress, the impression was that the decisions had largely been made.

It was submitted that there were process failures and unfairness, despite the Treaty duty on the Crown to act reasonably and in good faith. Any discussion that occurred was conducted by correspondence with few face-to-face meetings. Where meetings were held, claimants felt that they had not been listened to and their concerns not been addressed. In any case, most of their requests for meetings were repeatedly ignored. Although Ngati Rangitihi met with the KEC on 24 November 2005, they felt that there was no opportunity at the meeting to discuss their concerns. They finally met with OTS in July 2006, but by then the Crown had already made up its mind. Counsel submitted that it was OTS, not the KEC, that had a Treaty obligation to resolve Ngati Rangitihi's concerns over overlapping interests.

The submissions on behalf of Ngati Makino reflect the special circumstances of Ngati Makino. However, their submission in relation to the Crown's early attempts to obtain information from Ngati Makino on their interests is relevant to general concerns about the overlapping claims process. Counsel argued that this information had already been provided to the Crown in the context of engagement at several levels with Crown officials and Ministers around their customary interests.

We received no submissions from Ngati Rangiteaorere relevant to the question of design and implementation of the overlapping claims process.[35]

The Crown's Case

In general terms, the case for the Crown is that the modified overlapping claims process used in Te Arawa was designed and implemented in a manner consistent with the principles of the Treaty of Waitangi. The Crown accepted that consultation was an important feature of the process, but it submitted that consultation was not negotiation. When the Crown consulted it was not required to negotiate claims. It regarded consultation as a Treaty duty to ensure that the Crown made informed decisions, especially about customary interests.

The Crown submitted that its consultation process during the overlapping claims process in Te Arawa was lengthy and robust. Consultation began well before the provisional decisions were made in August 2006. There was a good deal of communication, in particular with Ngati Whakaue and Ngati Rangitihi. In the Crown's view, Ngati Makino chose not to be involved.

The Crown conceptualised the settlement negotiation process as beginning with general discussion about the bones of a settlement. The general discussion then moved towards an agreement in principle. At that stage, events

moved more swiftly as the details were nailed down. The Crown, it was submitted, made a genuine and conscientious effort to engage earlier in the process with overlapping claimants (following the suggestions of previous Tribunal reports on overlapping claims). It did identify and send out a summary of the information it had on overlapping claimants' interests. The Crown contended that 'substantive consultation' could only occur once the agreement in principle had been concluded.

However, the Crown reminded the Tribunal of the dynamics of political negotiation. It contended that the overlapping claimants had different objectives. One group might want to settle, while other groups were not in settlement mode. Sometimes, overlapping claimants would not give feedback unless the Crown was in negotiation. If an overlapping claimant group was not mandated, it was also difficult to enter into negotiation.

The Design of the Overlapping Claims Process

Introduction

In the terminology employed by OTS, iwi and hapu that stand outside the deed of settlement, whose interests may be affected by that settlement, are referred to as 'overlapping claimants' (or occasionally 'cross-claimants'). The Crown identified three kinds of 'overlapping claimants' with whom they needed to consult:

- non-KEC Te Arawa groups;
- non-Te Arawa groups that were yet to settle their claims with the Crown; and
- non-Te Arawa groups that had settled their claims with the Crown.

In this case, almost half of Te Arawa remain outside the KEC mandate and are therefore designated as 'overlapping claimants' alongside other non-Te Arawa iwi and hapu affected by the KEC settlement. In applying the term 'overlapping' to non-KEC Te Arawa, we consider that OTS failed to recognise the situation for this half of the Te Arawa Waka whose interests co-exist with, are interspersed and interwoven with, and are related to the interests of, the KEC affiliates. Such interests lie not at the margins of the KEC's area of interest, as the term 'overlap' suggests, but squarely within it.

In this report we are solely concerned with Te Arawa 'overlapping' claimants. Our next report concerning Crown forestry licence land and other commercial redress will provide an analysis of the experience of overlapping claimants who are from other tribes. We turn now to trace how the 'overlapping claims' process was modified to meet the circumstances of the Te Arawa Waka for the purposes of the KEC negotiations. Although this section of the chapter is long, it is necessary to fully rehearse the development of the overlapping claims process as applied in Te Arawa, in order to assess whether the process that OTS developed and implemented was consistent with the principles of the Treaty of Waitangi.

National policy on overlapping claims

Following the release of several Waitangi Tribunal reports that commented on the overlapping claims policy and process, OTS amended its 2002 guide to Treaty negotiations, *Ka Tika a Muri, Ka Tika a Mua*, in 2004. In doing so, it set out its national policy on 'overlapping claims'. The key policies can be summarised as follows:

- The settlement process is not designed to establish, recognise, or give effect to claimant group boundaries.[36]
- The Crown can only settle the claims of the group with which it is negotiating, not other groups with overlapping interests.[37]
- The overlapping claims process is not a substitute for a negotiation process.[38]
- Where there are overlapping interests, the affected groups are encouraged to discuss these 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.

- The Crown will assist this process by providing information on proposed redress items to all groups with a shared interest in a site or property.[39]
- Where a number of groups have an interest in a site or property and these interests can be recognised and accommodated, the Crown will consider a form of redress that is non-exclusive.[40]
- The Crown prefers disagreements about redress to be settled by Maori, but the Crown will make a decision if necessary.
- In such cases, the Crown is guided by two principles:
  - to reach a fair and appropriate settlement with the claimant group in negotiations; and
  - 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.[41]

National policy on redress

Robyn Fisher, for OTS, told us that by July 2005, when the Crown made its redress offer to the KEC, its policy regarding settlement packages could be summarised as follows:

- The Crown does not require that there is necessarily a nexus between the redress sites offered and Treaty breaches.
- The Crown takes an interests-based approach that aims to recognise the claimant group's historical, cultural and spiritual interests in respect of particular sites.
- The Crown balances the interests of the claimant group, the interests of overlapping groups, and the interests of the public and any third parties.[42]

'Cultural redress' is the term used by the Crown to describe items within the settlement package which give cultural recognition to the claimant group. Such items are not 'counted' for the purposes of quantum (the total dollar value of the settlement package). Indeed, the aim of cultural redress is to meet cultural rather than economic interests of claimant groups.[43] The Crown recognises that interests in cultural redress can be more complex than in economic redress.[44] The Crown may agree to provide cultural redress during negotiations, and if the cultural redress sought by a mandated group cannot be provided, it may review the range of possible cultural redress options available to it, to identify alternatives.

We note that some 30 sites formed part of the cultural redress package for the KEC, and that we have only dealt with 10 of these sites in this inquiry. That was, in part, because the interests of claimants whose issues relate to mandate have not been fully appraised either by OTS or this Tribunal. For now, we have confined ourselves to a review of the 'overlapping' claims which only deal with 10 items of contested cultural redress, and we consider those claims in chapter 4.

Prior to KEC terms of negotiation

OTS reviewed its overlapping claims policy and process in 2003. This review resulted in the production of a briefing paper, dated 14 August 2003, prepared by OTS officials for their Minister. This paper set out the Crown's approach to overlapping claims, summarised as follows:

- The Crown encourages the settling group to 'discuss their interests with neighbouring groups at an early stage and establish a process by which they can reach agreement on how such interests can be managed'.
- The Crown acts as a facilitator to assist groups to reach agreement.[45]
- If the claimant groups cannot reach agreement on contested redress, the Crown will make a decision as to whether or not to continue with the offer.

- In coming to such a decision, the Crown considers the need to:
  - reach a fair and appropriate settlement with the settling group; and
  - maintain, as far as possible, its capacity to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims.[46]
- This decision-making is informed by information from:
  - the settling group;
  - cross-claimants;
  - in-house research;
  - independent research; and sometimes;
  - archaeological surveys and site visits.[47]
- In considering redress, the Crown 'is likely to take a cautious approach where uncertainties exist', only offering exclusive redress in specific circumstances.[48]

This August 2003 briefing paper accepted the recommendation of the Ngati Tuwharetoa ki Kawerau Tribunal that 'the Crown [should] put in place a policy to ensure that it commences consultation with cross-claimants and potential cross-claimants at an early stage in negotiations'.[49]

This involved initiating contact by letter with potential cross-claimants once terms of negotiation were signed, explaining the Crown's approach on cross-claims and seeking information as to their interests in the claim area. Follow-up meetings could be held.[50] This initial contact with cross-claimants was informed by in-house research conducted by OTS to identify all possible cross-claimant groups, and scope cross-claim interests and any dialogue that had taken place between the settling group and cross-claimants. As was previously the case, once the agreement in principle was signed, 'the Crown formally notifies cross-claimant groups of the settlement offer and invites their comment'.[51]

In addition, OTS officials noted eight other 'emerging issues'.[52] Four of these emerging issues were ones that OTS had identified itself. These related to difficulties encountered by settling groups and cross-claimants in resolving cross-claims issues, and to the ability of cross-claimants to participate in that process. These issues were:

- the reluctance of settling groups to engage in dialogue with cross-claimants;
- the problem of seeking agreements with cross-claimant groups that had not yet had their mandates assessed or recognised or both;
- the lack of engagement from cross-claimants; and
- limited cross-claimant resources to engage with the Crown and claimant groups in negotiations.

A variety of measures aimed at resolving these issues were noted. Most involved providing clearer information to all parties involved about the Crown's processes, expectations, and needs, and explaining the benefits of participating in the cross-claims process. Additional assistance (facilitation or funding or both) could also be made available on a 'case-by-case basis'.

The other four emerging issues were traced directly to Tribunal reports:

- the appropriate level of effort that the Crown should put into resolving issues raised by cross-claimants;
- whether the Crown should undertake an honest broker role;
- whether the Crown should disclose to cross-claimants the Crown's policy agenda as part of the cross-claim process; and
- whether the Crown should seek to preserve amicable tribal relations.

The first two of these issues concerned Tribunal recommendations about the role of the Crown in working with the settling group (in this case the KEC) and overlapping claimants to resolve issues raised by overlapping interests. The third relates to the consultation process, and the fourth to the Crown's obligation to seek to preserve amicable tribal relations. We deal with each of these in turn.

In considering what level of effort the Crown should put into resolving issues raised by cross-claimants, OTS officials noted that the Ngati Awa settlement cross-claims Tribunal

commented that 'the Crown should not be satisfied that cross-claims have been addressed until really no stone has been left unturned'. Officials considered that:

> the Tribunal has set the bar too high in terms of its 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 group and those of cross-claimants.[53]

OTS weighed up the Tribunal's suggestion that, if fall-out were to occur, the Crown should exercise an honest broker role to effect reconciliation through facilitating hui, mediation, and independent research. It outlined several difficulties in following such a practice. First, some cross-claimants would not accept a compromise even if it were reached by facilitation and, secondly, achieving reconciliation could be at the cost of a considerable delay in reaching settlement. However, OTS had and would continue to consider using such measures on a case-by-case basis. We pause to note that this provides the first inkling that OTS did not give sufficient weight to the duties that the Crown owes to all Maori affected by the negotiation and settlement process. We return to this point in our analysis below.

OTS also cited comments by the Ngati Awa settlement cross-claims Tribunal that, because the Crown had not disclosed its policy agenda to cross-claimants, they often did not understand those policies and the reasons behind them. OTS considered that the pre-agreement in principle consultation they had put in place would address this concern.[54]

The briefing paper cited the *Ngati Awa Settlement Cross-Claims Report*, in which the Tribunal commented that the Crown should be proactive in seeking to preserve amicable tribal relations between groups, and ensure that the cost of arriving at settlements is not a deterioration of those relationships. OTS felt that it would be difficult to act on the Tribunal's comments because the state of tribal relations 'will depend on a range of factors, not just Treaty settlements'. They concluded that:

> given the interplay of the Treaty settlement process with tribal politics, longstanding antagonisms, mana rivalry, and tribal imperatives to safeguard customary interests, in certain situations some degree of fall-out is inevitable.[55]

We pause to note that this indicates again the narrow view that OTS takes of the duties it owes during settlement negotiations. We return to this theme below.

So by August 2003, the overlapping claims process at a national level had been reviewed in response to various Tribunal reports dealing with the settlement process. As a result, the existing overlapping claims process was confirmed with two significant modifications:

- There would be a pre-agreement in principle phase of consultation.
- A case-by-case review would ascertain whether the Crown should provide facilitation and mediation opportunities, where disputes and contest existed.

It seems that this policy review led to the amendments made to *Ka Tika a Muri, Ka Tika a Mua* in 2004.

Terms of negotiation for KEC affiliates

We turn now to consider how the overlapping claims process, developed at the national level, was incorporated into the negotiation process for the KEC. The terms of negotiation signed by the Crown and KEC on 26 November 2004 embodied the process that OTS had developed for dealing with 'overlapping claims'. The agreement sets out the roles and responsibilities of the Crown and of the KEC in working with overlapping claimants to resolve conflicts over customary interests in items of redress to be included in the settlement package.[56]

Following the terms of negotiation, the Crown would inform potential overlapping claimants of its intention to negotiate a comprehensive settlement of Te Arawa

historical claims. It would seek their views on their interests in the Te Arawa area of interest and describe the Crown's policy and processes for dealing with overlapping claims.

The KEC would then initiate dialogue to attempt to establish a process for addressing issues of common interest. Prior to making an initial redress offer, the Crown would ensure that:

- it knew the interests of both Te Arawa and overlapping claimants;
- it had considered if redress could be provided in a way that accommodated those interests; and
- following the signed agreement in principle, the Crown would consult with overlapping claims.

If the KEC and overlapping claimants were unable to reach an agreement on their respective interests, the Treaty Negotiations Minister would make a provisional decision on contested redress. He would invite comment from overlapping claimants and the KEC on that provisional decision. The Minister would make a final decision on contested redress after taking account of any additional responses.

Response to Tribunal's *Te Arawa Mandate Report: Te Wahanga Tuarua*

We referred in chapters 1 and 2 to the Te Arawa mandate Tribunal's concern that the Crown would not be able to adequately safeguard the interests of non-KEC Te Arawa groups in the settlement negotiations with the KEC. To a significant degree, the concerns focused on the relative advantages enjoyed by the KEC as the party with whom the Crown was in negotiations. For that reason, the Tribunal urged the Crown to consider according priority to negotiations with Te Arawa iwi and hapu who had not mandated the KEC, so that their negotiations could occur contemporaneously.

In a briefing paper to the Minister on 12 July 2005, OTS made a detailed response to the Tribunal's second Te Arawa mandate report in respect of the 'overlapping claims' process. The briefing paper contained significant discussion of the Tribunal's recommendation that the Crown commence negotiations with Ngati Makino (possibly clustered together with Waitaha and/or Tapuika) and its suggestion that the Crown also negotiate with Ngati Whakaue (and others who might cluster with them). As we noted in chapter 2, OTS advice was an effective, rather than a direct, rejection of the Tribunal's suggestions and recommendations regarding negotiations with these groups. On our reading, this was because OTS was at all times concerned to:

- give priority to negotiations with the KEC in order to conclude a settlement without undue delay; and
- not enter separate parallel negotiations with Te Arawa iwi and hapu outside the mandate, for three reasons:
  - to ensure OTS resources were not stretched beyond capacity;
  - to avoid destabilising the executive council's mandate; and
  - to avoid creating a precedent that would undermine the Crown's large natural groupings policy.

We note that this last aspect is interesting because the entire Te Arawa Waka may be considered a 'large natural grouping,' whereas dealing with only half of Te Arawa creates a new grouping but not a 'natural' one.

OTS advised, instead, that it had reviewed the existing overlapping claims process to identify any changes required to meet the Tribunal's concerns regarding the Te Arawa situation. It concluded:

> the existing overlapping claims process for collecting and testing information is well designed and has proved effective to date in identifying and appropriately protecting the interests of claimants, and has maintained the Crown's capacity to provide appropriate redress to overlapping claimants.[57]

OTS also noted that past Tribunal reports had 'found the process to be generally consistent with the Treaty principles'

and considered that the process did not require extensive modification.[58] We pause again to note that the Minister was not advised that the previous Tribunal reports referred to here concerned real overlapping claims from different tribes. They did not relate to a situation involving tribes from within the same broad area, whose interests were interwoven and intersecting and many of whom might be said to belong to the same 'large natural grouping'.

However, OTS acknowledged that the nature of the overlapping claims issues in the Te Arawa context required that particular care be exercised. OTS considered that these 'special circumstances' warranted 'the development and implementation of additional steps or enhancing existing steps to safeguard all claimants' interests'. In order to assist the Minister in deciding whether additional steps were required, it was decided to continue with the process already agreed on but to 'enhance the Crown's engagement with claimants by providing a summary of OTS research on overlapping claim matters direct to overlapping claimants for their comment'.

OTS would also write to non-KEC Te Arawa iwi and hapu (providing copies to all relevant claimants) seeking information on their future negotiation intentions. Once that information was received, OTS would 'consider whether additional steps, or enhancing existing steps, of the overlapping claim processes' were 'justified'.[59] This additional information, it was claimed, would assist the Minister to make decisions about the overall priorities for OTS and would assist him to decide whether additional negotiations could be accommodated. In other words, it would 'provide the Crown with useful planning information'.[60] We pause here to note that this suggests some attempt to gather information for the purpose of resource planning and prioritisation of the work programme for OTS, which if followed through would have been a useful step towards meeting the Te Arawa mandate Tribunal's concerns. Indeed, it may have been that claimants thought this letter signaled an intention on the part of the Crown to begin negotiations with them in the near future. We return to this point below.

OTS did not advise how this policy response was consistent with the principles of the Treaty of Waitangi identified in the second Te Arawa mandate report; namely, the principle of reciprocity, the principle of partnership, the principle of active protection, and the principles of equity and equal treatment.

The Minister approved the process – a modification to the national overlapping claims policy – on 17 July 2005,[61] on the basis that this would meet the particular circumstances of the Te Arawa Waka. The modification made to the process was effectively the introduction of a pre-agreement in principle phase of consultation, based on a summary of OTS research of overlapping claims.

Proposed overlapping claims process for KEC negotiations

The briefing paper to the Minister had been informed by an internal OTS review. That review appears to have resulted in a June 2005 internal OTS memorandum describing the proposed 'overlapping claims strategy' for central North Island negotiations.[62] The proposed process, it was claimed, built upon past OTS practice, certain Tribunal observations, and possible redress in the central North Island area.[63] This proposed six stages: preliminary in-house research; coordination with claimants; initiating contact with potential overlapping claimants; initial decisions on redress; substantive consultation with overlapping claimants; and ministerial decision on contested redress.

Three consultation phases were discussed in some detail:

- *Phase* 1 – *post-terms of negotiation:* OTS would provide information to overlapping claimants regarding the consultation process and the information required to assist the Crown to assess their interests. OTS would encourage them to discuss their interests with the

settling group and establish a process for reaching agreement. An indicative timeline would be sent to overlapping claimants.

- *Phase* II – *post-*AIP*:* OTS would send a letter to overlapping claimants and a reminder after six weeks, informing them of the agreement in principle contents and inviting them to express their concerns about the proposed redress.
- *Phase* III – *after the Minister's provisional decision on redress:* If agreements were not reached between overlapping claimants and the settling group, the Minister would assess the overlapping claimants' submissions. He would then make a provisional decision, notify the overlapping claimants, and invite them to make a final response by a set time (specified as a four-week period).[64]

The process described above may have worked if there were substantive timeframes that could accommodate the need for claimants to undertake their own historical research with assistance through OTS, and if it enabled such claimants to consult in accordance with their own tikanga for as long as was reasonable given the circumstances of the iwi or hapu. Historical research and reasonable consultation periods were therefore critical to the design and successful implementation of the modified process as applied in Te Arawa.

In the same internal memorandum, OTS's criteria for considering overlapping claims were set out. Specifically, the criteria applicable to cultural redress were:

- Does the settling group have a demonstrated interest in the proposed redress site?
- What is the nature of the interest?
  - Is there a range of interests (is occupation permanent, seasonal, or sporadic), guardianship, domain over an area, or use or kinship rights?
  - Do some groups have an association that is direct and longstanding, while others have an indirect or transitory association? Other considerations could include the degree of cultural significance attached to a site.
- Have overlapping claimants demonstrated an interest in the proposed redress site?
- What is the nature of the overlapping claimants' interest?

In light of the nature of the overlapping claimants' interest in the site:

- Does the strength of the claimant groups' association with the site justify the offer of exclusive redress to the groups in negotiations?
- If overlapping claimants also have strong associations with the site, are there other ways in which the Crown can recognise their associations? Or should non-exclusive redress be offered to the claimants (ie, the groups in negotiations)?[65]

Implementation of the Modified Overlapping Claims Process

We turn now to a brief outline of how this process was actually implemented for the 'benefit' of the Te Arawa Waka. To assist in understanding the analysis that follows in the remainder of the report, we have set out chronologically in table 1 the key events that occurred during the overlapping claims process. We have placed these alongside the significant points in the progress of the negotiations between the Crown and the KEC.

Table 1 also shows how the overlapping claims policy was implemented in three distinct phases. During each of the first two phases, each claimant group before us received only two standard letters containing tailored sections. These represented two opportunities to provide information to OTS relevant to the question of safeguarding their 'overlapped' interests. During the final phase, each claimant group received only one letter, which represented a final opportunity to provide information relevant to the

question of safeguarding their 'overlapped' interests. In addition, they were told they could meet with the KEC or with OTS and the KEC together at important points during the three phases.

- *Phase* I – *pre*-AIP *(June 2005 – August 2005):* two letters from OTS.
- *Phase* II – *post*-AIP *(September 2005 – July 2006):* two letters from OTS.
- *Phase* III – *period between the Minister's provisional and final decisions regarding the settlement package (July 2006 – August 2006):* one letter, post-provisional decision.

There was also one letter on 26 June 2005, asking for claimants to indicate their negotiating intentions, sent during phase I.

Defining adequate consultation

As we have discussed above, the Crown chose to pursue its modified 'overlapping claims' policy in Te Arawa. That policy included provision for 'consultation'. From OTS's briefings to its Minister in 2003 and 2005, as well as from previous reports of the Waitangi Tribunal on 'overlapping claims', we know that certain ingredients for successful consultation with Maori affected by negotiations should have been adopted. We conclude, from that material, that the Crown's consultation concerning cultural redress should have met the following criteria:

- Information should have been clearly and explicitly communicated to all claimants and their legal counsel at the same time and in the same manner.
- If a major decision unfavourable to the claimants was to be communicated, it should have been no ambiguity as to its meaning. For example, all claimants should have been told that the Crown was not going into contemporaneous or concurrent negotiations with them, and that it did not intend to immediately follow the advice of the Tribunal.
- Information should have been communicated early, before the Crown had formed a fixed view of the 'overlapping' interests. This should have been done before each negotiation and settlement milestone was reached.
- All Maori affected, as much as possible, should have been encouraged to participate in the early phases of negotiations. To facilitate this, OTS should have run joint hui, meetings, and seminars that explained clearly the 'overlapping claims policy', explained what the Crown needed from claimants in some detail, and provided explanations about what OTS would do with the information. At those events, OTS could have encouraged claimants to discuss areas of interest, important tribal sites, and reciprocal expectations of claimants.
- The consultation should have been based on the presumption that all information gathered would be reciprocally shared, which would have meant giving information from the KEC on their areas of interest to the 'overlapping claimants'.
- Consultation should have sought to add value to the sum of knowledge needed to make 'right' decisions on customary associations with all potential redress sites. This required exchanging information freely and undertaking research on customary interests, and/or assisting groups outside the negotiation process to participate fully either through the provision of research or the opportunity to commission and present their research in response to material held by the Crown. It could also have employed the 'Telling Your Stories' approach taken with the KEC, which we consider would have been an important innovation, that would have been fair and reflective of impartial treatment.
- The Crown should have been consistent in its message about the consultation process – where the message varied there should have been clear reasons given.

	Date	KEC negotiation	Non-KEC overlapping claims process
Phase 1 consultation – pre-AIP	30 March 2005		OTS preliminary briefing to Minister on *Te Arawa Mandate Report* signals that Tribunal's findings do not take account of financial and policy implications
	29 June 2005		OTS sends letter sent to Te Arawa and non-Te Arawa iwi and hapu seeking information on their interests
	12 July 2005	OTS seeks Minister's approval for proposed cultural redress offer to KEC	OTS briefs Minister on response to Tribunal's findings in respect to contemporaneous negotiations; Minister signs off on process to be used to deal with overlapping claims
	21 July 2005	OTS makes cultural redress offer to KEC	
	25 July 2005	OTS makes quantum offer to KEC	
	26 July 2005		OTS sends letter to all overlapping claimants seeking information on their intentions regarding future negotiations
	28 July 2005		OTS sends letter to Te Arawa iwi and hapu overlapping claimants seeking information on their interests
	29 July 2005		Deadline for non-Te Arawa iwi and hapu to reply in pre-AIP consultation phase
	Some time between 25 July 2005 and 5 August 2005	KEC makes its counter-offer for complete settlement package	
	5 August 2005	OTS briefs Minister regarding KEC counter-offer	
	11 August 2005	Minister responds to counter-offer and KEC told	
	13 August 2005		Deadline for Te Arawa iwi and hapu to reply in pre-AIP consultation phase
	5 September 2005	Agreement in principle (AIP) signed	

Downloaded from www.waitangitribunal.govt.nz

Phase II consultation – post-AIP	14 September 2005	OTS sends letters to all overlapping claimants outlining AIP redress and seeking feedback (summary placed on website and published)
	Mid-October 2005?	AIP document sent and deadline for feedback extended
	4 November 2005	Original deadline for feedback on AIP
	? November 2005	Amended deadline for feedback on AIP
	20 December 2005	OTS acknowledges feedback on AIP and indicates it will respond in February 2006
	16 February 2006	OTS drafts summary of overlapping interests submissions and proposed responses to overlapping claimants
	16 March 2006	OTS summary table of KEC interests in items in redress package
	6 April 2006	OTS briefs Minister on overlapping interests
	Mid-April 06	OTS sends letters responding to feedback on AIP
	10 July 2006	OTS briefs Minister on contested redress sites
	11 July 2006	OTS briefs Minister on provisional decision on overlapping interests
Phase III consultation – pre-final decision	14 July 2006	OTS sends letters to all overlapping claimants conveying Minister's provisional decision on redress and asking for further feedback
	3 August 2006	Deadline for feedback on provisional decision
	4 August 2006	OTS briefs Minister on final decision on redress and final decision is made by Minister
	5 August 2006	OTS briefs Minister regarding response to KEC counter-offer
	7 August 2006	OTS sends letters to all overlapping claimants conveying Minister's final decision on redress
	8 August 2006	Deed of settlement initialled
	30 September 2006	Deed of settlement signed

Table 1: Chronology of key events in the negotiation and overlapping claims process

- The process should have been applied consistently across groups – although we acknowledge the need for flexibility in the consultation process depending on the circumstances of the iwi or hapu involved.
- It should have been transparent and receptive to new ways of looking at things.
- Reasonable timeframes should have been allowed for iwi and hapu to respond, especially given their lack of resources, the need to allow for the exercise of tikanga in coming to decisions, and their involvement in other important events, such as the central North Island stage 1 generic inquiry.
- The process should have been able to give serious consideration to iwi and hapu submissions, and actively consider opportunities to explore mediation as a way of addressing contest over significant and/or iconic sites.
- The process should have engaged with all Maori affected by cultural redress proposals as often as was reasonable, both before and after the Minister made his final decisions.

This approach to consultation, coupled with extra care taken to discharge the other equally important Treaty obligations of the Crown, could have led to a 'safeguarding of interests' for the claimants before us. We now turn to consider whether OTS achieved this result.

Offers and counter-offers to KEC

On 12 July 2005, OTS briefed the Minister on its response to the suggestions and recommendations of the Te Arawa mandate Tribunal's second report. On 12 July, the very same day, OTS informed its Minister that the KEC represented 10 Te Arawa iwi and hapu, just under 50 per cent of the total Te Arawa population of 40,000 identified in the 2001 census.[66] The Minister was advised that officials had gathered a large amount of information on the interests and associations of the KEC and on lands and resources within the KEC's area of interest.[67] The Minister was told that a key part of the process for gathering information on cultural sites was inter alia the 'innovative telling their stories process' and a four day hikoi.[68] OTS had reduced the scope of potential redress to some 30 priority sites located on Crown lands (out of a total of around 300 sites of significance identified by the KEC). The Minister was told that to secure the KEC settlement, the cultural redress package would need to include the return of mountain peaks/maunga and key wahi tapu sites across the four regions created by the KEC, along with meaningful redress over geothermal resources and waterways. The package would also need to be consistent with previous Treaty settlements 'including Te Ariki'. On this basis, OTS advised the Minister that it had prepared a cultural redress offer that aimed to meet the above features, was broadly consistent with previous Treaty settlements, and largely employed standard redress instruments.[69]

It seems that on 18 July 2005, the Minister approved the Crown's cultural redress offer.[70] The redress included 15 discrete sites (including five peaks of maunga and other key wahi tapu) plus other items of redress.[71]

In terms of 'overlapping claims', the Minister was advised that OTS had undertaken preliminary research on the nature and extent of overlapping interests, based on the large body of information made available in the Waitangi Tribunal's central North Island inquiry, and had factored this into the development of the offer. They also advised that they had written to all overlapping claimants and were awaiting their response to confirm the officials' analysis.[72] We know this is simply not true, because the letter recording the interests of the other half of Te Arawa not in negotiation was not sent out until 28 July 2005.

On 21 July 2005, OTS presented the KEC with the Crown's cultural redress offer.[73] The Crown did not file this offer with the Tribunal. The KEC then presented a counter-offer. That counter-offer included sites to meet the interests of Ngati Wahiao, whom the Minister had recently recognised as having mandated the KEC.[74]

On 25 July 2005, the Crown made its entire settlement

offer (including commercial redress) to the KEC at a meeting attended by the Minister.[75]

On 5 August 2005, OTS reported on the state of negotiations. We know that, as a result of the discussions between the Crown and the KEC, OTS accepted the inclusion of site-specific redress for Ngati Wahiao.[76] They identified four sites of interest for Ngati Wahiao: Whakarewarewa geothermal valley and Roto a Tamaheke (both sites administered by the Minister of Tourism), Moerangi mountain, and an urupa in the Whakarewarewa Crown forestry licence land. OTS advised the Minister that the redress over the Whakarewarewa geothermal valley and the Maori Arts and Crafts Institute was 'central to the Crown securing a settlement with Ngati Wahiao of all their claims'. OTS proposed to report further on the Whakarewarewa proposals by 17 August 2005.

On 8 August 2007, the KEC counter-offered on the rest of the settlement package.[77] Again, we have no detail of the counter-offer because the Crown did not file it. The Minister was going to attend this meeting with the KEC to receive their counter-offer.[78] We asked for a copy of the KEC cultural redress counter-offer.[79] The response from the Crown, by memorandum of counsel to us, was:

> The Tribunal has requested a copy of the KEC counter-offer (the Crown understands that this relates to the counter-offer in respect of cultural redress as noted in Attachment 7 to #A43). Counsel understands that the counter-offer was not presented in written form to the Crown, but was received by the Crown at a meeting on 22 July 2005. The briefing provided to the Tribunal as Attachment 7 to #A43 sets out the Crown's response.[80]

On 11 August 2005, the Treaty Negotiations Minister and the Minister of Conservation approved the Crown's response to the counter-offer.[81]

The following day, OTS reported further to its Minister on the KEC counter-offer, noting that it contained provisions for redress in relation to the Whakarewarewa geothermal valley.[82] This report discusses in some detail the amended cultural redress proposal in relation to the Whakarewarewa geothermal valley, namely a full vesting of the sites within the valley. A follow-up letter to the KEC finalised the offer from the Crown concerning redress regarding Whakarewarewa. It is dated 16 August 2005.[83]

The KEC met with the Crown to receive the Crown's response to the counter-offer on the rest of the settlement package on 17 August 2005. We asked the Crown to file the minutes from the meetings that took place on this day between the Crown and the KEC, to which it responded:

> It appears that there were two meetings on 17 August 2005. The first concerned the Crown response on outstanding cultural redress issues and the KEC's commercial redress counter-offer. The second, which was also attended by the Minister, concerned the Minister's response to the KEC counter-offer. Counsel is advised that there appear to be no written minutes for either meeting on file.[84]

We pause here to note the number of instances where OTS does not appear to have maintained an adequate written record of what were clearly significant events, and to suggest that this should be a cause of considerable concern to the Crown.

Phase 1 consultation – pre-AIP

On 29 June 2005, and before the Minister's approval of the overlapping claims process, OTS sent out standard letters to 'overlapping' claimants. These letters do not appear to have been circulated to all legal counsel. These letters made it clear that negotiations with the KEC were in progress and OTS was wanting information to 'enable the Crown' to take the interests of overlapping claimants into account when considering what redress it could offer to groups represented by the KEC.[85] A map of the area of interest of the KEC affiliates was attached. That map portrayed the entire boundary of the Te Arawa Waka. No date for responding was given. It was announced that a further letter would be sent, outlining the type of information that OTS needed

and the process the Crown would use to ensure that the overlapping claimants' interests were taken into account.

On 26 July 2005, after the Crown had made its offer of cultural redress to the KEC, OTS wrote to the other half of Te Arawa outside the KEC mandate ('overlapping claimants'), asking them for information in relation to their negotiation intentions and state of readiness to negotiate. The letter asked a series of specific questions about the future progress of claims:

- When did the 'group' wish to enter into direct negotiations with the Crown?
- If the 'group' was currently participating in the central North Island inquiry, did they wish to participate in further stages and await publication of the report, or enter into early direct negotiations?
- What was the size of any other 'groups' with whom they wished to enter into direct negotiations, and what was their present representative structure?
- Did their current representatives have the authority to negotiate over historical Treaty of Waitangi claims?
- If their group included other hapu or iwi, they were asked to identify them.
- Were there existing agreements or arrangements with these other groups for entering into direct negotiations as a collective? If so, they were asked to provide documents.

This letter also summarised the Crown's standard policy that separate negotiations were unlikely, but it did not say explicitly, unambiguously, or directly that the Crown would not enter into simultaneous but separate negotiations with the non-KEC Te Arawa hapu and iwi claimants before us.[86] OTS listed a number of points summarising Crown policy, including:

- that the KEC negotiations were a priority;
- that the Crown prefers to deal with large natural groups; and
- that the Crown cannot negotiate while groups are engaged in litigation or proceedings before the Waitangi Tribunal.

We discuss the detail of each of these letters as sent to the claimants in the chapters that follow.

On 28 July 2005, almost a week after the Crown's offer of cultural redress to the KEC, OTS wrote to these same groups concerning the overlapping claims policy and process and seeking information on their interests within the area of interest to be settled by the KEC mandate. OTS provided a summary of the Minister's decision to adopt the overlapping claims process in Te Arawa but with 'enhanced steps to safeguard their interests'. A number of specific pieces of information were sought within the KEC area of influence. That area was now defined by reference to a revised map excluding the interests of Ngati Rangitihi, after the Crown recognised their withdrawal. OTS listed the types of information that might be made available:

- the boundaries of the general area in which the iwi and hapu have exercised customary interests;
- the ancestor, iwi, or hapu through which they identified those customary interests;
- any specific land block interests within the area of interest and the basis for those interests;
- details of Native Land Court awards of customary land within the KEC area of interest;
- any pa or kainga;
- any other sites of major significance, such as wahi tapu and mahinga kai;
- any information about use of rivers or other waterways; and
- any other information which might be useful for the Crown in assessing overlapping interests, including ancestral connections.

OTS conceded that the information regarding the iwi and hapu's interest in certain sites or resources might be sensitive. Only general information would in such cases need to be provided. The letter also indicated that preliminary information had been collected by OTS. This was provided as a summary appendix. The letter listed the information relied upon by OTS to identify overlapping interests, with a particular emphasis on a historical report entitled

'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report'.[87] The letter indicated that any information supplied would be passed on to the KEC, which would seek to discuss overlapping interests directly with such 'groups'. The 'overlapping groups' were encouraged to discuss their interests with the KEC and were advised they would have a further opportunity to provide information on their interests once the Crown and KEC had reached an agreement in principle (in August or September 2005). Neighbouring tribes had been asked on 24 June 2005 to respond by 29 July 2005. The Te Arawa overlapping claimants were given from 28 July until 17 August 2005 to respond, fewer than three weeks. The letter attached, as appendices 3 and 4, a summary of the historical Treaty settlement process and the Crown's policy in relation to overlapping claims.[88]

As we know from our discussion above, the KEC met with the Crown to receive the Crown's response to the counter-offer on the rest of the settlement package on 17 August 2005. The date of 17 August 2005 is also of some significance for overlapping claimants. This was the closing date for submissions received in response to phase 1 of the consultation process. Among the responses received, the Crown heard from Ngati Rangitihi, Ngati Whakaue, and Ngati Makino, who appeared before this Tribunal. At this point in time, Ngati Rangiteaorere cannot be described as overlapping claimant, because they remained within the KEC mandate. We discuss in detail the nature of these responses in the chapters that follow.

Phase II consultation – post-AIP

On 5 September 2005, the agreement in principle was signed.[89] The announcement was made at least a week before OTS sent notice to 'overlapping claimants'.[90] These letters were sent between 14 and 19 September to all parties identified as 'overlapping claimants'.[91] The letters were tailored to the specific interests (as identified by OTS) of each overlapping claimant group, and OTS promised to send them a copy of the agreement in principle in two weeks (but failed to do so). In this letter, OTS sought feedback by 4 November 2005. This date had to be changed because OTS did not send out the agreement in principle until the week of 4 to 8 November 2005. As a result, the deadline for submissions was extended to 28 November 2005.

On 28 November 2005, the Crown received a large number of responses from the following groups: Ngati Whakaue, Ngati Tuwharetoa, Ngati Raukawa, Waikato-Tainui, Ngati Manawa, Ngati Rangitihi, Ngati Rangiwewehi, Ngati Rangiteaorere, Ngati Wahiao,[92] Ngai Tamarawaho, Pouakani, Tuhoe, Ngati Tahu–Ngati Whaoa, Ngati Tahu, and Ngati Rangiita, and Ngati Taka.[93] OTS received no response from Ngati Whare, Ngati Makino, and Waitaha. They also considered (and in some cases granted) an extension for sending feedback.

On 20 December 2005, OTS provided a preliminary response to the parties who filed submissions.[94] Because of the number of detailed responses they had received, OTS indicated that it was unable to provide a comprehensive response until February 2006. The promised formal response was not received until much later.

By 16 February 2006, OTS officials had summarised the submissions.[95] In March 2006, the KEC provided a table listing the cultural redress sites, the affiliate iwi/hapu by region and name, and the evidence that supported their claims to interests.[96] We note that this table draws on information in the historical report 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report'.

On 6 April 2006, OTS officials briefed their Minister. OTS noted that 20 responses had been received to the agreement in principle. The Minister was told that OTS planned to hold meetings with key groups before reporting further to the Minister.[97] As previously noted, OTS referred to four kinds of 'overlapping claimants':

- Te Arawa iwi/hapu who had not mandated the KEC;
- non-Te Arawa groups;
- claimants to the Waitangi Tribunal whose claims were made on behalf of groups that include both KEC iwi/hapu and overlapping claims; and

- 'groups who have already had their historical claims settled' including Ngati Whakaue in respect to the lands covered by the 1993 deed of agreement which settled the Wai 94 claim.[98]

This list appears to reflect some refinement as a result of the submissions received, compared with an earlier document that had only referred to three categories.

OTS identified that the key areas of contested redress were:

- *Ngati Rangitihi:* Te Ariki, Mount Tarawera overlay classification, and statutory acknowledgement of part of the Tarawera River,
- *Ngati Whakaue:* Mount Ngongataha scenic reserve (vesting of 50 hectares) and overlay classification over the whole reserve, and the vesting of 45 hectares of the Whakarewarewa thermal springs reserve.
- *Ngati Tuwharetoa:* commercial redress offer over three areas of Crown forestry licence land.

OTS officials noted that there was a marked difference between various overlapping claimants in the way that they presented information and the level of detail that they supplied to support their claims of shared or exclusive interests. Officials were preparing responses to the letters, taking account of any KEC meetings. They intended to complete the responses by mid-April 2006. They were also reviewing their understanding of KEC interests and carrying out further research in the respective interests of KEC groups and the overlapping claimants in respect of contested redress. Finally, they noted their plan to meet with representatives of Ngati Makino, Ngati Whakaue, and Ngati Rangitihi.

On 10 July 2006, OTS officials briefed their Minister prior to OTS undertaking further consultation with third parties.[99] Consultation with these parties was necessary in relation to the Whakarewarewa geothermal valley, Matawhaura and Otari Pa, Te Ariki, and the Whakarewarewa Forest. Officials reported that these redress proposal sites included:

> Areas that are significantly overlapped by Ngati Rangitihi, Ngati Makino and certain hapu of Ngati Whakaue hapu, who have each chosen to pursue their Treaty claims separate from the Te Arawa KEC.[100]

OTS summarised the Crown's understanding of the history of shared interests at each site, briefly reviewed the historical evidence and research, and outlined the rationale for the proposed redress. They also summarised the concerns of the overlapping claimants and the response of OTS to those concerns. The Minister approved the recommendation for OTS to consult further with the affected groups. The consultation would take the form of a letter seeking comment by the end of July and an invitation to meet with officials before the Minister made final decisions.[101]

On 11 July 2006, the Minister was briefed again on the decisions for overlapping claims and approved the release of provisional decisions.[102] As a result of the consultation carried out and further consultation with the KEC, the proposed redress was modified in respect of seven items of redress.[103] These are summarised in table 2.

Phase III consultation – between the Minister's provisional and final decisions on cultural redress

We begin this section with the letters written to 'overlapping claimants' on 14 July 2006, notifying the Minister's provisional decisions.[104] Overlapping claimants were offered a limited amount of time (until 3 August 2006) to respond. Invitations were made to key groups to meet with OTS and KEC representatives together within the two-week period.

By 3 August 2006, OTS had received five responses from overlapping groups and met with two (Ngati Rangitihi and Wai 316 Ngati Whakaue claimants). Te Kotahitanga o Ngati Whakaue declined to meet OTS within the timeframe. Ngati Makino also declined to meet to discuss overlapping claims. OTS concluded that overlapping claimants had not provided any significant new information concerning their

Iwi or hapu group notifying interest	Site	Change to redress proposals
Ngati Whakaue	Mount Ngongotaha	Offer to vest up to 50 hectares of the Mount Ngongotaha scenic reserve was withdrawn.
Ngati Whakaue	Moerangi	Boundaries of the approximately 50 hectares around the summit of Moerangi were modified. The vesting area will now exclude a segment of the summit that was formerly within the Rotomahanga Parekarangi 4 block awarded solely to Ngati Whakaue by the Native Land Court.
Ngati Whakaue	School sites offered as sale and leaseback under a deferred selection	Two of the eight school sites offered in the agreement in principle were withdrawn in recognition of the strong interests that Ngati Whakaue have in the lands.
Ngati Rangitihi	Te Ariki	Draft trust deed establishing the Te Ariki Trust was altered to make explicit reference to the fact that Ministers may appoint a member of Ngati Rangitihi to the trust.
Ngati Rangiteaorere	Rangitoto	Boundaries of the 50-hectare area to be transferred in the settlement to be so drawn as to ensure that an appropriate area with access to part of the summit of Mount Rangitoto remains available, in recognition of Ngati Rangiteaorere's shared interest in that maunga.
Ngati Manawa	Crown forestry licence land	KEC and Ngati Manawa agreed that the deed will acknowledge Ngati Manawa's associations with five wahi tapu within these forest lands.
Not specified	Area of interest	Modified to exclude two areas over which the KEC does not demonstrate a strong interest.

Table 2: Changes to contested cultural redress items made between agreement in principle and deed of settlement

interests in the redress offered to the KEC. They therefore recommended no changes to the provisional decisions.

On 4 August 2006, only one day after the close of consultation, the Minister approved OTS's recommendations for final decisions on the contested redress.[105] On 7 August 2006, claimants were informed of the Minister's final decision on the redress package by letter.[106]

At the end of July, OTS briefed its Minister on the KEC settlement.[107] A revised paper was prepared for the Cabinet Policy Committee, which went forward on 3 August 2006 (the closing date for submissions) under the hand of the Minister. The Cabinet paper contained a brief summary of the Te Arawa settlement negotiations, highlighting the strategic significance of this settlement for meeting the Government's target for addressing all historical Treaty claims by the year 2020:

> With a priority status, the Crown and Te Arawa KEC have made rapid progress in negotiations, achieving an agreed draft Deed of Settlement in less than two years from signing of the Terms of Negotiations. This settlement, once concluded, will be of significant strategic importance for the Government's target of addressing all historical Treaty claims by the year 2020.[108]

The Minister advised the Cabinet committee that the Te Arawa KEC represented a cluster of 11 Te Arawa iwi or hapu of around 24,000 people, 'or just over 50 per cent of the estimated total Te Arawa population.'[109] We note that this

Categories of redress	Items of redress	Iwi or hapu affected
Non-exclusive statutory acknowledgements	Geothermal statutory acknowledgement	Te Arawa Waka and Waitaha
	Part of Tarawera River	Ngati Rangitihi
	Otari Pa	Ngati Makino and Waitaha
Vestings	Vesting of the Whakarewarewa geothermal springs reserve, Roto a Tamaheke, and part of Moerangi	Ngati Whakaue
	Vesting of Te Ariki	Ngati Rangitihi
	Vesting of Matawhaura and Otari Pa	Ngati Makino and Waitaha
Change of name	Change of name of Whakapoungakau to Rangitoto	Ngati Rangiteaorere
Overlay classifications	Whenua rahui classification of Matawhaura (Part Lake Rotoiti scenic reserve)	Ngati Makino
	Whenua rahui classification of Part Lake Tarawera scenic reserve	Ngati Rangitihi

Table 3: Cultural redress instruments used in KEC deed of settlement and affected Te Arawa claimants

figure is at odds with the numbers mentioned by OTS in previous briefings. The paper provided Cabinet members with some detail on the cultural redress sites, but did not mention that certain items of redress were contested. The paper did, however, refer to mandate issues and specifically mandate challenges. The Minister noted:

> Since the Crown recognised the Te Arawa KEC mandate in April 2004, it has maintained broad support from its affiliate iwi/hapu. However there has been an unprecedented amount of litigation challenging the mandate decisions of both the Crown and the Te Arawa KEC. The Te Arawa KEC undertook a mandate reconfirmation process in late 2004. Since the original mandate, the Crown has recognised the withdrawal of Ngati Rangiwewehi and the majority of Ngati Whakaue hapu (in late 2004) and also Ngati Rangitihi (in early 2005).[110]

The Minister reported that, despite challenges in the High Court and before the Waitangi Tribunal, the mandate of the Te Arawa KEC had been upheld, but noted the likelihood of a further urgent inquiry before the Tribunal.[111]

In the lead-up to signing the deed of settlement, the Treaty Negotiations Minister, together with the Ministers of Conservation and Finance, sought authorisation from Cabinet to make minor variation within the general parameters of the Treaty settlement framework.[112] The deed was initialled on 8 August 2006, the day after the Minister had sent the letters to the overlapping claimants, and finally signed later that year.

The Crown has proposed a number of instruments to transfer the cultural redress to the KEC affiliates and the associated benefits of each. The cultural redress instruments used and the affected Te Arawa claimants are shown in table 3.

An overlay classification allows for recognition of the interests and values of the affiliate Te Arawa iwi/hapu. It is a non-exclusive instrument, which means that the Crown may offer such redress to other Te Arawa hapu and iwi. This is also true of the non-exclusive statutory acknowledgements.

Finally, the package included two other proposals. The first proposal was the promotion by the Crown of the relationship between the Rotorua District Council and the affiliate Te Arawa iwi/hapu in relation to various recreation reserves and the land where the Karamuramu baths are located. The other initiative proposed that the Crown would encourage the regional councils to enter into a memorandum of understanding with the post-settlement governance entity set up by the affiliate iwi/hapu, in relation to a number of matters including the Rotorua regional geothermal system.

Tribunal's Analysis of the Design and Implementation of the Overlapping Claims Process

We begin by noting that the following section of this chapter includes the drawing together of some strands of evidence that we will not examine in detail until chapters 4 and 5. That examination relates largely to the discussion of other issues and is extensive, requiring several hours of reading. Some of it, however, also has a bearing on the overlapping claims process. To ensure that the relevant points can be taken into account in the present discussion, we have taken the unusual step of bringing forward some analysis, findings and recommendations from those chapters to this one.

Flaws in general OTS approach to overlapping interests

We begin our analysis with some general observations regarding the position of OTS in the Treaty negotiations process. The evidence shows that neither OTS nor the Treaty Negotiations Minister seems to have yet fully grasped why OTS must act as an honest broker in pursuing the Crown's settlement targets. We note that, in the realm of Treaty policy and settlement negotiations, ultimately it is the Crown's policy processes that determine how Maori demands for redress are dealt with and how overlapping interests are identified and provided for. OTS is responsible to the Minister, and the Minister is in turn responsible to the Cabinet and the Parliament. Both are responsible for upholding the honour of the Crown.

The policy process developed by OTS is thus pivotal to an enduring and lasting result for all New Zealanders. An enduring result is a list of sustainable settlements. But whether a sustainable settlement is achieved depends on doing business in a Treaty-focused way, rather than in an expedient way. That is why there is potential for conflict for OTS. OTS is policy and process driven. But, and despite the policy imperative, it has an operational role during negotiations to ensure that it 'safeguards' the interests of others who stand outside the negotiations. If it is to act on behalf of the Crown and discharge the Crown's fiduciary and Treaty duties to Maori, then it must discharge them equitably to all Maori.

In its policy role, OTS provides advice to the Minister on what cultural redress sites are available for settlements, who has interests in them, and how they should be transferred during settlement negotiations. Its advice goes to the core of how the Crown will respond to Treaty settlement negotiations and overlapping claims contesting cultural redress. By the same token, however, OTS must implement the Crown's policies, which require that certain priorities be addressed during the negotiation process to meet the Crown's settlement targets.

In its operational role during negotiations, OTS makes the Crown's offers or counter-offers. It responds to requests for research and information, financial resources, and all else that might be needed to facilitate the negotiations. It identifies its own negotiators, who then spend time in intensive

negotiations over a lengthy period. The Crown negotiators, thereby, can not help but forge strong associations with the negotiating group. OTS cannot but help develop empathy with the hapu and iwi in negotiations because they both share the same objective of reaching a final settlement. As a matter of policy, OTS has determined that it need take only the negotiating group's advice on matters of cultural and spiritual significance.

OTS is also in the unenviable position of explaining the Crown's negotiation policy and its proposals for redress to overlapping claimants. It must be prepared in this role to be fair and impartial in order to truly communicate with and engage overlapping claimants.

We think that the Minister and OTS should at all times be mindful that because of these multiple roles, OTS holds a powerful position in the negotiation process: it becomes the negotiator, the dispenser of justice, and the policy adviser to the Minister who has the final power. This makes it critical that OTS is rigorous in its endeavours to uphold the honour of the Crown, and to discharge the Crown's Treaty duties. In the context of overlapping claims, it must do so in a manner that is fair and impartial. It must be an honest broker, and it must remain independent.

As we have discussed in chapter 2, OTS staff must have the requisite skills to move in and out of the Maori realm if they are to truly understand the tikanga underpinning Maori cultural preferences. These understandings must then be reflected in the development of policies and processes that respect those preferences, without relying solely on the advice of those standing to benefit the most from the settlement process.

The evidence before us, however, shows that during the KEC negotiation process OTS became dependent on the KEC to assist it to develop responses to overlapping claims and provide tikanga advice. This suggests that OTS has not understood that it has Treaty duties to all Maori, and not just those with whom it is negotiating at any given time, and it underscores OTS's own lack of expertise in tikanga matters. It also indicates a failure in management terms because, as we will see in chapter 4, it calls into question the ability of OTS to remain independent, given that the process is open to being influenced in this way by people who, while leaders in their own right, also have much to gain from that process.

Our second observation relates to the overall quality of OTS's ongoing monitoring and development of its overlapping claims process. A 'best practice' approach was emphasised by Crown counsel Peter Andrew and OTS witness Ms Fisher as the hallmark of OTS processes in relation to the Te Arawa settlement negotiations and as providing a formula for a Treaty compliant approach. The 'best practice' concept stems from quality management theory and can be defined as:

> a management idea which asserts that there is a technique, method, process, activity, incentive or reward that is more effective at delivering a particular outcome than any other technique, method, or process.

The idea is that, with proper processes, checks, and testing, a desired outcome can be delivered with fewer problems and unforeseen complications. 'Best practice' can also be defined as the most efficient (least amount of effort) and effective (best results) way of accomplishing a task, based on repeatable procedures that have proven themselves over time for large numbers of people.

During our urgent inquiry, neither Crown counsel nor Ms Fisher provided an adequate explanation of what 'best practice' meant in relation to the KEC negotiations, how OTS policies and processes complied with 'best practice', and whether, when their policies and processes were applied, they could be objectively measured as 'best practice'.

On examination of the evidence, it is apparent to us that OTS has failed to meet its claim of 'best practice'. We come to this conclusion after noting that the process design and implementation shows numerous failings in relation to:

- the internal process of ensuring that OTS policy received an independent tikanga audit, which, by the staff's own admission, they did not have the

qualifications to undertake (we might add that contracting expertise for attendance at hui is not sufficient);
- the internal process of keeping its Minister adequately informed of significant tikanga issues and major developments, through timely and well-documented briefings;
- the internal process of meeting its own deadlines for responding to overlapping claimants; and
- the external processes of engaging with overlapping and mandate claimants in a Treaty-compliant, fair, and impartial manner.

The KEC negotiations can be distinguished from other settlement negotiations in that they did not predominantly involve different tribes but instead sub-tribes within the same overall tribe of the Te Arawa Waka. As a consequence, OTS's 'best practice' approach as applied to the KEC negotiations was fundamentally flawed. An approach based on 'repeatable procedures that have proven themselves over time for large numbers of people' will not serve in circumstances that are substantially different from the norm. OTS's 'best practice' was developed for situations where there are overlapping claims from different competing tribes. It cannot be assumed to be appropriate for the new and unusual situation of having multiple affected kin-groups from within the same overall tribe. In the chapters that follow, we tell the story of each claimant's experience with the overlapping claims policy and its implementation process. That review indicates that this was a policy unsuitable for application to Te Arawa.

The Crown's duties under the Treaty extend to the protection of Te Arawa's customs around consensus decision-making and incumbent procedures. The consensus approach works patiently towards agreement and aims at reaching a solution which the whole tribe, sub-tribe, or community will own as theirs. Consensus means more than simply agreeing to accept the will of the majority that can leave up to 49 per cent of the tribe, sub-tribe, or community dissatisfied. It means more than simply compromise that can leave everyone dissatisfied. Rather, it implies that the tribe, sub-tribe, or community commits itself to a process which seeks to find a solution or course of action which everyone can accept and own, and where people agree that what has been decided is in the best interests of all. Consensus cannot be achieved quickly and needs to be built. This will often take much longer than more conventional forms of decision-making, and can be very frustrating for those used to voting and 'getting the numbers'. However, in the long term it achieves much better and more enduring results and provides a much stronger base for tribal, sub-tribal, or community development. It does also imply a willingness and commitment on the part of tribal, sub-tribal, and community members to achieve a consensus and make a commitment not to deliberately block the consensus being sought. Consensus basically means working through an issue, however long it takes, until everyone is comfortable with the outcome.

Having made these initial observations, we turn to discuss the design of OTS's overlapping claims process as implemented during the KEC negotiations. We consider there are three key issues raised in the design of the process:
- Did OTS fail to significantly adjust its national policies to address the true nature of the shared interests held by the other half of Te Arawa who were not at the negotiation table through the KEC?
- Was the 'overlapping claims' policy capable of safeguarding interests of those of Te Arawa outside the KEC mandate?
- Was there some predetermination regarding the cultural redress, leaving no opportunity to challenge decisions already made?

We deal with each of these in turn.

Did OTS fail to significantly adjust its overlapping claims process?

As we noted above, OTS reviewed its 'overlapping claims' process for this inquiry in July 2005. OTS advised its

Minister that the overlapping claims process used with previous settlements was sound, and should be followed here with minor modifications. As we have already said, all the affiliate and non-affiliate Te Arawa interests co-exist, are interwoven with, adjoin, or overlap with one another.

We think that OTS erred in not significantly redesigning its 'overlapping claims' process to take account of that reality. All they did was acknowledge for their Minister that there were 'special circumstances' in Te Arawa which required sending out OTS's summaries of 'overlapping interests' before the agreement in principle was signed. But the summaries went out too late to impact at all on the agreement in principle. Partly, this was because OTS developed the cultural redress package with the KEC before it consulted in any substantive manner. So, whether deliberately or through error, OTS failed to meet its own 'best practice' standards.

Furthermore, a key cornerstone of any quality management system is the need to document all major developments so there can be not only a record of the process but also the opportunity for continuous improvement. OTS failed to document all developments and omitted to even mention some, which means that there is limited evidence of them being able to take a 'best practice' approach that can build on experience in previous inter-claimant negotiations.

The contentious nature of the KEC settlement is indicative that a desired OTS 'best practice' outcome of 'safeguarding overlapping claimant interests', with fewer problems and unforeseen complications, has not been achieved. Improper processes, lack of tikanga expertise, and insufficient timeframes, checks, and testing have been the key causes of this failure. As we signalled at the beginning of this section, some of the evidence for this will be examined in later chapters.

These problems indicate a systemic failure in both management and best practice terms. Achieving its own organisational goals and the Crown's national settlement targets have been the imperatives for OTS in Te Arawa. It has pursued these at the expense of implementing an inclusive Treaty process. OTS has become so intent on doing the 'right' thing for the KEC and the Minister that it has failed to achieve a more important result: the 'right' thing for all Te Arawa, and for all New Zealanders interested in achieving sustainable settlements. The haste in implementation, the flaw in the design process that did not take into account sufficient periods for all phases of consultation – each of these signals the intense pressure that OTS was under to conclude a large settlement with central North Island iwi and hapu. OTS was rushing, in our view, to achieve the national policy goal of settling with a 'large natural grouping' during the negotiations with the KEC. Predictably, the pursuit of this policy has brought the Crown into conflict with the other half of Te Arawa who were not at the negotiation table. The Crown knew, or should have known, that nearly all the items of cultural redress would be subject to claims of shared interest by one or more Te Arawa iwi or hapu not affiliated to the KEC.

Taking such an approach meant that the policy and its implementation would work against empowering tribal communities. In fact, they were disempowered. These claimants have been through several Waitangi Tribunal hearings to maintain their right to pursue their rangatiratanga with respect to their claims. Instead of working with the claimants, OTS has inflicted an alien 'conflict' model upon them. Such an approach had inherent transactional costs for Maori, as it was based on the rationale of achieving efficiency. The 'conflict' model emphasises winning, outmaneuvering an opponent, or achieving something at the expense of something or someone else. The problem is that it produces 'losers' as well as 'winners', and the 'losers' will be marginalised and alienated as a result. Ironically, and given the long-term effects of the KEC settlement process on customary associations, all Te Arawa may be the 'losers'. In producing 'losers' (those whose relationships to important items of cultural redress are being affected), it has left a trail of emotional and spiritual despair. The effect, whether intentional or not, of not understanding

and recognising the nature of the Te Arawa interests within the KEC area of interest, has been the maintenance of OTS's large natural groupings policy at the expense of serious prejudicial results for those of Te Arawa not affiliated to the KEC.

Was the overlapping claims process capable of safeguarding interests?

As we have discussed earlier in this chapter, the modification by OTS of its overlapping claims process was limited to the inclusion of two additional steps to 'safeguard' the interests of overlapping claimants. We consider that these steps were inadequate to meet the obligation on the Crown to act consistently with the principles of the Treaty of Waitangi in a situation where those obligations were intensified because of the settlement track the Crown and KEC chose to take.

We consider the process was flawed because there were several weaknesses in the quality and scope of the information gathered by OTS about the 'overlapping interests'. First, the information was primarily information designed for the Tribunal's central North Island generic stage 1 hearing process. This research was never designed to answer definitive questions concerning customary interests. Even the report relied upon in the summaries, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', tells us nothing more than which tribes appeared in the Native Land Court when that court heard original block titles for the Rotorua and Kaingaroa area. It is not a comprehensive customary tenure report. Any reliance on it, without overlapping claimants being given the opportunity to obtain funding to commission research in response, was therefore a serious omission. This reliance on research that does not give a comprehensive picture of customary interests appears to be a fundamental design flaw resulting in an equally fundamental disadvantage for the claimants. So, far from 'safeguarding their interests,' the process led to prejudice.

The second weakness in the gathering of information relates to the limited time available to claimants to provide it. They simply did not get sufficient time to respond to all OTS requests for information throughout the different phases. In this respect, not only did it fail its Treaty obligations, it also failed its own policy objective, since the point of adding this step to the overlapping claims process had supposedly been to help 'safeguard overlapping claimants' interests'.

Furthermore, the additional steps factored into the process were only partially implemented. OTS acknowledged, in its briefing to the Minister in July 2005, that the 'nature of the overlapping claims issues that arise in the Te Arawa context require that particular care be exercised'. Therefore, they proposed to ascertain whether any further steps might be required to safeguard all claimants' interests by writing to overlapping claimants and asking them to indicate their future negotiation intentions. This information was purportedly intended to assist an evaluation of whether any further negotiations could be accommodated by the Crown. On 26 July 2005, OTS wrote to overlapping claimant groups asking them a series of specific questions about their future negotiation intentions. No evidence was produced to us to indicate that any further steps were taken as a result of the information gathered. Nor, so far as we can tell from the evidence submitted by the Crown, was the issue ever addressed again through a written briefing to the Minister. Effectively, he was never formally briefed in written form again. This appears to be another serious internal process and management failure.

In short, we consider that given what the claimants were being asked to respond to, the modified overlapping claims process needed to be more comprehensively designed and managed and include a detailed scheme for consultation. But OTS prioritised the maintenance of the KEC mandate to ensure that its resources were not stretched and to ensure the 'success' of its own 'large natural grouping' policy in the context of Te Arawa. It did this by focusing its resources and effort on achieving a settlement at the expense of fair

process. This was to the detriment and prejudice of the other half of Te Arawa.

We can also see, in the policy design, a reflection of OTS's position that it has limited responsibility to resolve tensions raised by overlapping claimants. We believe that is because it had already rejected, before the process was implemented, an 'honest broker role' of the type recommended by the overlapping claims Tribunals. Nor did OTS consider it had responsibility for ensuring its policies and processes should seek to preserve amicable tribal relations. Consequently, the design process did not address the issue. We know, for example, that the policy was based on an approach of deliberately not disclosing negotiation information to overlapping claimants, thus exacerbating tensions. All of the above points indicate to us that in the design of the process to 'safeguard' overlapping claimants' interests, there were several significant and prejudicial flaws, which played themselves out over the period between July 2005 and August 2006.

Was there predetermination?

Perhaps the clearest flaw in the design of the overlapping claims process for Te Arawa was that the key decisions had already been made about which redress items the Crown could put on the table for KEC negotiations, even before phase I of the consultation had begun. In order to advance the negotiation, OTS had also already made assessments about the relative strengths of associations with particular sites that they offered to the KEC. Secondly, OTS recommended the general contents of the cultural redress package to the Minister on the same day, 12 July 2005, as they sought approval for the overlapping claims process. Finally, the redress offer to the KEC was made on 21 July 2005, just over a fortnight after the first letter was sent to the overlapping claimants. Given that OTS decided to offer these items to the KEC without any substantive consultation with the claimants whom it knew, or should have known, would be affected, we fail to understand how OTS could have entered into the substantive consultation round with an open mind.

In phase I of the consultation, the first letter to overlapping claimants on 29 June 2005 made no disclosure that an offer was soon to be made. As far as claimants knew, they were merely being asked to provide information responding to a letter with an attached map encircling the entire Te Arawa tribal territory. The request was as vague as that. Likewise, there was no notification that OTS had already made an offer to the KEC before it sent out its second letter at the end of July. At this point (before the critical milestone of the agreement in principle), claimants were effectively being asked to respond to a set position without knowing it. They had no knowledge that, after the second letter on 26 July 2005, they were effectively being asked to convince OTS to reverse or amend a position it had already arrived at, based on all the historical reports used in the central North Island inquiry. It is clear that the delay in initiating early consultation impacted on the ability of the Crown to provide sufficient time to seek meaningful input in phase I of the process. Most of the major decisions on the contested redress had been taken before the Crown entered into phases I and II of the consultation process. The decisions had all been made by the time the Crown entered into phase III of the consultation process.

We note that at face value the Crown's policy suggests that an offer to a negotiating party was subject to consultation with overlapping claimants. In reality, the Crown was heavily constrained in its ability to make changes in response to information received during the consultation process, because such changes were contingent upon reaching agreement with the KEC. Once redress items were put on the negotiating table, and once they had been the subject of counter-offer, and further Crown response, it became increasingly difficult for the Crown to vary or withdraw such an item without disturbing the rest of the settlement package and damaging its relationship with

the KEC. The fact that the Crown withdrew some items, or modified the proposed method for transferring some items, does not detract from our understanding. Given our knowledge of Te Arawa, proposals regarding iconic sites were always going to be subject to contest. A compromise was achieved with respect to Ngongotaha Mountain and a limited number of other sites, but we fail to understand why equally important compromise results could not be achieved so far as Whakarewarewa thermal springs, Roto a Tamaheke, Te Ariki, Ruawahia, the Tarawera River, Matawhaura, and Te Otari were concerned. We consider that given the nature of these sites, the fact this was not done indicates that OTS and the KEC had predetermined the issues concerning them.

Having looked at the design of the Crown's process, we turn now to its implementation and ask two questions:

- Were there implementation flaws with regard to consultation?
- Was there a failure of tikanga?

Were there implementation flaws with regard to consultation?

We note the claimants received two standard letters during each of the first two phases of consultation. Furthermore, notification appears to have been haphazard, with some claimants from some groups receiving letters while others did not, and some lawyers receiving letters while others did not. We are also concerned that during the consultation round, OTS never fully explained what it was doing with the information entrusted to it by claimants. For example, Ngati Rangitihi sought to challenge the vesting of the Te Ariki site during phase II but were told that they could not. They could only give information. Yet, phase II was the only time they had to indicate their concerns and provide material that could challenge the decisions made. What they were seeking was meaningful interaction.

From an internal process point of view, there were several developments that should have been notified to the Minister but were not, and several failures of process:

- During phase I, and the 12 July 2005 ministerial briefing, the Minister was not advised and, therefore, did not consider the effect on overlapping claimants of receiving two letters in close succession: one asking about their negotiations intentions; the other describing the overlapping claims process, identifying their interests, and seeking further information to feed into that process.
- During phase I, OTS had intended to begin consultation prior to the agreement in principle, share information with overlapping claimants by sending a summary of research in each letter to Te Arawa overlapping claimants, and encourage overlapping claimants to meet with the KEC to discuss their overlapping interests. But the significant delay in contacting claimants and giving them information and time to respond cancelled out any beneficial effect. This delay was never advised to the Minister in a formal briefing paper.

OTS failed to share information and act in a transparent manner on issues concerning cultural redress. The 28 July letter attached a data-based summary of overlapping claimant interests which effectively required a full and detailed mana whenua report to be produced in response, all in fewer than 20 days. The sources cited included some secondary sources, including the March 2005 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report'. Other sources cited included Native Land Court minute book references and statements of claim from the central North Island region. The Tribunal's experience is that it would take at least six months' work by a paid full-time professional historian to respond to the list of sources cited. Rightly, Ngati Rangitihi and Ngati Whakaue questioned the Crown's use of these historical sources.

Ngati Makino were not formally advised of the use of one report, which was used later to justify the inclusion

of Matawhaura and Otari Pa sites as cultural redress. The same report was used as a basis to try to join them into the KEC settlement when, ironically, they are expressly excluded from the definition of Te Arawa in the deed. Ngati Rangitihi had to compel OTS to disclose another report that the Crown had in its possession at this time through Official Information Act procedures.

Furthermore, it seems odd to us that OTS, having read all the claimants' evidence from the central North Island, including the 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report' and various other sources, set about demanding more information at the point when they did. OTS knew at least as much as the claimants knew about the historical record produced for the central North Island. Therefore, unless the claimants had their own (readily available) tribal records, OTS knew or should have known they would not be able to respond by adding any additional material to its process in the timeframes available. Even supposing the claimants had access to significant resources to pay for further historical or mana whenua research, that research could not have been made available within the timeframe stipulated:

- During phase II, OTS failed to produce any formal briefing paper to their Minister explaining the continuing expectation held by the claimants before us that negotiations were possible, and their requests for some direction about how to respond. Instead, OTS management and staff focused on managing claimant expectations and concerns, and responding to any of the claimants' criticisms of the overlapping claims process. The claimants wanted to negotiate, but OTS wanted them to participate as overlapping claimants.
- During all phases, consultation with overlapping claimants was inadequate in terms of the timing, intent, and disclosure of relevant information. Nor were overlapping claimants given adequate time to respond. The *Wellington International Airport* case defines a bare minimum standard for consultation. These standards, while not a measure of the nature of consultation that the Crown must engage in Treaty terms, do set a bare minimum set of standards that the Crown should attempt to meet during the 'consultation phases'. The consultation process designed by OTS did not incorporate these basic principles, let alone a Treaty of Waitangi standard for consultation that we set out earlier in this chapter.
- By the close of phase I, we think that confusion was almost inevitable. The situation could only be retrieved by virtue of the substantive consultation intended in phase II, but we know that did not happen. We do not consider the consultation design in phases I and II to have been adequate under the circumstances. OTS had already noted, in 2004, the difficulties encountered in resolving cross-claims issues. Those difficulties had been identified as:
  - the reluctance of settling groups to engage in dialogue with cross-claimants;
  - the problem of seeking agreements with cross-claimant groups that do not have mandates;
  - lack of engagement from cross-claimants; and
  - limited cross-claimant resources to engage with the Crown and claimant groups in negotiations.
- Despite this knowledge, OTS did not brief the Minister in any significant way on how its modified policy was going to meet these challenges in the 'special circumstances' of Te Arawa. Those circumstances included consulting with multiple interconnected groups, most of whom were not yet formally mandated, let alone funded, and they were never factored into the consultation process. Providing clearer information about the Crown's processes, expectations, and needs to all parties involved, and explaining the benefits of participating in the overlapping claims process, did not happen. Information was sent out, but was not sufficiently explained. Neither was additional assistance provided to facilitate or fund overlapping claimant participation.
- The design of the policy should have incorporated

appropriate timeframes to allow for a number of matters. First, the claimants' lawyers would need time to confer with their clients, and the clients might need time to confer amongst themselves, with a view to achieving consensus amongst themselves. In this critical period, we are also mindful of the fact that the central North Island hearings were coming to an end, with both counsel and claimants engaged in developing or responding to closing submissions until November 2005. The claimants were still waiting for the Crown's response to the Te Arawa mandate Tribunal's second report, and to find out whether there would be contemporaneous negotiations. Ngati Makino actively wanted to commence negotiations. The central North Island Tribunal was hearing claimant and Crown closings. Other groups were underfunded. All these circumstances should have been taken into account in the design of the consultation process.

- But in designing and implementing the consultation elements of its overlapping claims process, OTS appears to have acted without regard to the very great imbalance of resources between itself and overlapping claimants, and between overlapping claimants and the KEC. In general, the claimants have had to rely on their own resources to attend hui and make submissions. The Crown does not provide funding to iwi and hapu to mandate tribal leaders to respond to the consultation process. In general, representatives from hapu who receive consultative letters must rely on their own resources to confer with hapu members. There is a degree of inequity as compared with the position of the KEC that OTS knew was inevitable. Yet the design of the policy for the 'special circumstances in Te Arawa' had not taken that into account.
- We observe further that the length of the engagement between OTS and the overlapping claimants in phase II (from September 2005 through to April 2006) is somewhat misleading when we consider what actually occurred within that timeframe. As far as overlapping claimants were concerned, they responded to the agreement in principle by 28 November 2005. But they did not receive a formal response to their submissions and concerns until April 2006 at the earliest. Although OTS wrote acknowledgement letters, and advised claimants of the delay in responding, this long period was characterised by nil direct engagement from the Crown on matters of substance.
- We do not accept that the final phase of consultation from 14 July 2006 to 3 August 2006 was adequate under any test, much less that of a Treaty partner. It was marked by three characteristics: haste, expediency, and failure to signal clearly to overlapping claimants the purpose of the final consultation round. The haste accorded to this final phase of consultation extended to the timeframe within which officials sought to process the results of consultation and inform their Minister. They gave themselves one day only. The tight timeframe can be partly explained by the obvious fact that a public relations exercise had been planned to coincide with the initialing of the deed of settlement on 8 August 2006. The Cabinet Committee was informed that any changes made to the deed of settlement after 3 August 2006 (the closing date for submissions) would only be of a minor nature. Overlapping claimants were never told that the only information sought at this stage was 'new and compelling evidence'.
- It is interesting to juxtapose the possible receipt of 'new and compelling evidence' with the authority given by Ministers to make only 'changes of a minor nature'. Clearly the mind of the Crown was closed, and the settlement was a fait accompli, apart perhaps from 'dotting an "i" and crossing a "t"'.
- OTS failed to act fairly and impartially towards all the claimants, demonstrating an obvious preference for taking the KEC's advice on matters of custom. In this manner the KEC affiliate hapu and iwi customary

interests assumed primacy over the interests of the others.

- OTS owed no more nor less to KEC affiliates than it did to the entire Te Arawa Waka. But the modified 'overlapping claims' policy developed and implemented by OTS is characterised by missed opportunities to improve the relationship between the Crown and the claimants. Rather, the relationship becomes characterised, after the agreement in principle, as one of attack and counter-attack. OTS, for example, felt it necessary to respond to a story published in the local media about the negative impact of the Crown's actions on Ngati Whakaue's tribal structure. OTS wrote to the claimants denying vehemently that it was doing any wrong and asserting that 'the principle of hapu autonomy should be allowed to apply' for the three hapu of Ngati Whakaue who supported the KEC mandate. One would have thought that the same principle should be recognised as applying to the majority of Ngati Whakaue hapu who, as an expression of their autonomy, have chosen to stand outside the KEC. Also in stark contrast to the sentiments expressed in the letter is OTS advice to the Minister that Ngati Whaoa, Ngati Rangiunuora, and other hapu cannot exercise hapu autonomy by exiting the mandate of the KEC.
- OTS further expected that the KEC would meet with overlapping claimants in this period, when it knew that the mandating of the KEC had led to some tension with the majority of the claimants involved in the hearings.
- From our review of the correspondence, there were several examples of mixed messages given to claimants by OTS, which suggests that its chosen process of communication was a poor one in policy terms.
- During all phases, OTS insisted on unreasonable timeframes for claimants to respond to the 'consultation' – a term that we consider was an unfortunate misnomer. The process, in effect, was only ever about information gathering. It was a 'one-way street', not an opportunity to talk issues through, or to challenge redress proposals. There was also a failure on the part of OTS to respond within reasonable timeframes to claimant submissions. We note that claimants began to express anxiety and frustration at the possibility of being presented with the agreement in principle as a fait accompli. They were told by OTS not to be concerned, as the agreement in principle was to be 'subject to consultation'. In our view, the Crown's failure to engage sufficiently early in the process exposed 'overlapping' claimants to the risks that the Te Arawa mandate Tribunal had warned of.
- OTS failed to clearly communicate to 'overlapping' claimants what was required in response to the summary of their interests that OTS sent to them. This explains why there was such a varied response to the document. We have not seen each and every letter, but copies of the letters sent to Ngati Whakaue, Ngati Makino, and Ngati Rangitihi were filed in this inquiry. In the case of Ngati Rangitihi, we note that the summary of research included a list of claimed areas, 19 block references, and 28 specific site references. Each reference listed the block name or site and the reference relied on (eg, a statement of claim or a publication). In the case of Ngati Whakaue, OTS had identified claimed areas, 38 block references, and 35 sites of significance. No other detail was given, such as the nature or extent of the interest. OTS provided 20 days for overlapping claimants to respond (the 17 August 2005 deadline). We asked ourselves what was required of overlapping claimants in the time available to them? Did OTS expect overlapping claimant groups to audit these lists to ensure that their base line data was correct? If they did, this expectation was not communicated clearly. In any case, such an audit would have required that each group check each site or block against the reference given before checking other sources to ensure that coverage was comprehensive. No clue was given in the 28 July 2005

letter as to how overlapping claimants might respond (in writing) to the broader questions about their sites of significance.

- During phase I, OTS never made it clear to overlapping claimants why the Crown was seeking information about negotiation intentions. Overall, we consider that the first phase of consultation (consultation by letter) failed to hit the mark.
- During phases I and II, OTS did not adequately describe the process it was engaged in when dealing with overlapping claimants. The claimants believed that they were in a position to commence discussing preparations for negotiations. OTS never explicitly clarified their status in this regard.
- During phase II, and after the agreement in principle, the tone of the correspondence from the claimants starts to reflect real concern about what was happening. During this period, OTS was told by all claimants before us that they were ready to negotiate, indicating that was their expectation.
- During phase III, the purpose of this round of consultation was not made clear to overlapping claimants. When assessing the submissions they received during phase III, OTS would later report that they had received no significant new information that would cause them to revise the provisional decisions. But, as Ms Fisher accepted under cross-examination from counsel for Te Kotahitanga o Ngati Whakaue, the 14 July 2006 letter failed to disclose the fact that the Crown was just three weeks away from initialing the deed of settlement, and therefore that overlapping claimants should confine their comment to new and compelling evidence at this stage.
- During no phase did OTS advise the claimants in methodological terms how their interests in a cultural site were to be assessed vis-à-vis the interests of the KEC, as the Crown moved negotiations with the KEC through the critical milestones during the consultation process.
- During no phase did OTS indicate when claimants would have a chance of lining up for negotiation. Claimants do not know where they sit in the negotiation line and our questions to OTS witness Ms Fisher and Crown counsel provided no reassurance that they will be involved in negotiations any time in the near future. Instead, we were told that the Minister is responsible for setting priorities for the work of OTS, in accordance with the Crown's own national policies.

Implementation flaws: a failure of tikanga?

In tikanga terms, there are a large number of design and implementation failures that we have identified from the evidence. These include the following:

- The manner in which almost half of Te Arawa and their interests are described in the deed of settlement, in policy documents and reports to the Minister and to Cabinet, and in the historical account, are often culturally offensive or minimise the claimants and their concerns. In respect of the historical account, there are issues about the Treaty-consistency of a policy that allows only half of a tribe to recount the history of the entire tribe without the other half participating. The historical account and the statements of association impact on the claimants and their claims as much as they do on the KEC. It begs the question what the Crown will apologise for, in any future settlement with the balance of Te Arawa outside the KEC mandate. OTS and the KEC have effectively captured the opportunity to tell Te Arawa's history without the other half of Te Arawa present or involved.
- OTS failed to fully address the cultural significance of cultural sites in the design and implementation of the overlapping claims process. Anyone looking at the discussion on these sites could be forgiven for believing that these sites, outside of Whakarewarewa, were reasonably insignificant. That is because of the manner

in which they are described in OTS documents. Such an approach masks the true impact of the process on the claimants of allowing these sites to be used as currency during the negotiation process. In this process, sites have become substitutable. Traditional understandings of customary or legal interests can be modified, and the claimants' interests in iconic sites can be subordinated or subsumed. But in the hearts and minds of the claimants, their interests in most of these sites (eg, Ruawahia/Tarawera) can never be substituted, subordinated, or subsumed.

- OTS did not directly draw the geothermal statutory acknowledgment proposal to the attention of any of the claimants. The association of the entire tribe with the geothermal resource was not brought to the attention of the Minister (at least from the evidence we were given), and yet all people of Te Arawa have an interest in the Rotorua regional geothermal system.
- Overall, there seems to us to have been a failure on the part of OTS to fulfill its own policy to ensure that it 'safeguards the interests' of overlapping claimants. OTS has a duty to carefully assess whether the Crown's national overlapping claims process is appropriate to the particular tribal context of a negotiation. This is especially important because tikanga will vary between iwi and hapu, and site identification and rights associated with such taonga may have layers of complexity not readily penetrable by those who are not experts in Maori culture and language. OTS must recognise that the interests of the claimants go beyond property. The interests go to issues of mana, rangatiratanga, kaitiakitanga, and wairua. By failing to address in any depth the significance of the sites, the true nature of the claimant groups, and their relationships with the sites, there must have been a failure to safeguard their interests in policy terms, let alone Treaty terms.
- The assessment of the significance of particular taonga is made from the Maori realm, which the Crown, through OTS, must pierce. It is not for OTS to say where hapu and iwi stand, with and against what markers in the landscape, where their wahi tapu are located, what moveable and immovable objects in their physical environment constitute their taonga, and the turangawaewae of hapu and iwi. Consequently, and in respect of cultural redress, it is for Maori to identify such sites or taonga and to actively make them known to the Crown. That is part of their duty of loyalty and good faith. In all but the rarest circumstances, if any, it is not for OTS to determine the identity of the iwi and hapu associated with cultural redress without consulting a negotiating group and other Maori who may have an interest. For cultural redress, the Crown must maintain standards that are fair and impartial. That is because the Crown owes Treaty duties, including fiduciary duties, to all Maori with similar interests. It certainly should not seek to return cultural sites or grant such redress as a reward system.
- We consider that OTS should also have had regard for the cultural preferences of Maori in the way in which it engaged with the Te Arawa Waka. In particular, the claimants were asking to meet with OTS, at least during some stages in the consultation process: they wanted hui to take place kanohi ki te kanohi (face-to-face). OTS should have met with the claimants, even if this meant stepping outside of its formula. We cannot understand why OTS did not initiate its consultation round by seeking to meet with the affected groups, take the time to explain the process, and establish a relationship between the officials and the overlapping claimants, before commencing its letter writing campaign. OTS should have left no stone unturned to address their concerns to the fullest extent that it reasonably could to ensure a balance in this important respect. That is because OTS is the keeper of the Treaty negotiation and settlement process, squarely positioned at the interface of Crown and Maori relations, no matter how much it tries to deny that. Consulting

with a group of people by letter from Wellington was unlikely to be fruitful. The letter approach appears to have wrong-footed the Crown's overlapping claims process right from the outset. OTS should have risen above its own discomfort to meet with the other partner to the Treaty beyond the KEC more regularly, because it was responsible for discharging the Crown's Treaty and fiduciary duties to all of them. The evidence is that it did not, unless it was to advance each settlement milestone.

- OTS's insistence that overlapping claimants meet with the KEC to try and broker an agreement about interests in contested cultural redress was a denigration of the mana and rangatiratanga of overlapping claimants. The claimants wanted to have a Treaty relationship with the Crown, but OTS kept referring them to the KEC. Overlapping claimants were told to discuss or sort it out with the KEC. Why OTS believed that some of the claimants could talk to the KEC without facilitation is beyond understanding, given the tension that exists and the fractured nature of relationships that have occurred following the KEC mandating process. In the case of Ngati Makino and Ngati Rangitihi, we would say that there was a limited chance of success through the 'sort it out yourself' approach. Ngati Makino had never mandated the KEC to represent their interests. The Crown had finally accepted Ngati Rangitihi's withdrawal of mandate from the KEC just prior to phase 1 of the consultation process. Ngati Whakaue had initially mandated the KEC, but most hapu had subsequently withdrawn their mandate. However, OTS agreed to meet with the claimants only at a stage of the process when all decisions regarding Whakarewarewa had already been made. It must have been obvious to OTS that the relationships between the balance of Te Arawa and the KEC had deteriorated to a point where the Crown's preferred option for the parties to resolve issues amongst themselves was no longer viable.
- Because OTS failed to take into account tikanga responsibilities, it saw refusals to meet with the KEC as uncooperative behaviour. It made it clear to claimants that they should have stayed with the KEC to progress their claims.

Tribunal's Overall Findings and Recommendations on the Impact of the Crown's 'Overlapping Claims' Policy on the Te Arawa Waka

After considering all the evidence, we find that in the design and implementation of its overlapping claims policy OTS has acted in more ways than one in a manner inconsistent with the principles of the Treaty of Waitangi, with respect to all the claims before us. In particular, during the implementation of the Crown's policies in Te Arawa, OTS failed to act as an honest broker in the negotiation process. OTS failed to discharge its Treaty and fiduciary duties to all Maori including its duty of active protection where the Crown is obligated to protect Maori taonga, including tikanga and the customary processes that flow from this. In our view, OTS did not act honourably and with the utmost good faith.

Te Arawa is now in a state of turmoil as a result. Hapu are in contest with other hapu and the preservation of tribal relations has been affected. OTS is the interface between Maori and the Crown charged with the responsibility of upholding the honour of the Crown and yet, because of their practices, the claimants face real and serious prejudice. There is no real way of addressing the situation fully without the Crown reprioritising its work programme for OTS and commencing a negotiation process with all those tribes that stand outside the KEC, and commencing immediately to negotiate with Ngati Makino. In the interim, and to stop any significant and irreversible prejudice we make the following recommendations.

Geothermal statutory acknowledgement

The deed of settlement provides for a non-exclusive statutory acknowledgement in favour of the KEC to the Rotorua regional geothermal system, namely all 12 geothermal fields of the Rotorua region. We recommend that this statutory acknowledgement should apply to all of the peoples of the Te Arawa Waka.

Cultural redress contested by Ngati Whakaue

In terms of the Whakarewarewa geothermal valley sites, we recommend that the Crown find some process to re-engage with Ngati Wahiao and Ngati Whakaue to discuss an appropriate division of responsibility and ownership in relation to this site. We do not make any recommendation concerning Moerangi.

Cultural redress contested by Ngati Rangitihi

In terms of Ruawahia Maunga and Lake Tarawera scenic reserve, the Crown should provide exactly the same form of non-exclusive redress to Ngati Rangitihi upon the introduction of the legislation giving effect to the KEC deed.

In terms of the Tarawera River, the Crown should provide for a non-exclusive statutory acknowledgement of Ngati Rangitihi's associations with the river upon the introduction of the legislation giving effect to the KEC deed.

In terms of Te Ariki, the Crown should find some process to re-engage with Ngati Rangitihi and Tuhourangi to discuss an appropriate division of responsibility and ownership in relation to this site.

Cultural redress contested by Ngati Rangiteaorere

In relation to Whakapoungakau, we concur with the claimants that the Crown should reconsider with Ngati Rangiteaorere this aspect of the settlement to ensure Whakapoungakau and the name Rangitoto remain in place for this maunga and range.

Separate negotiation with Ngati Makino

We recommend again that the Crown discharge its long overdue responsibility to commence negotiations with Ngati Makino immediately.

Cultural redress contested by Ngati Makino

In relation to Matawhaura and Otari Pa, we recommend that the Crown should find some process to re-engage with Ngati Makino and Ngati Pikiao to discuss an appropriate division of responsibility and ownership in relation to these sites. The whenua rahui and statutory acknowledgements proposed for these sites should be extended to Ngati Makino upon the introduction of the legislation giving effect to the KEC deed.

Notes

1. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed cultural redress for KEC, 12 July 2005 (doc A43(6)), para 13
2. Ibid, para 17
3. Ibid, para 5
4. OTS and Ministry of Tourism, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations and Minister of Tourism concerning KEC negotiations in relation to Whakarewarewa geothermal valley, 12 August 2005 (doc A43(15)), para 3
5. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning response to KEC cultural redress counter-offer, 5 August 2005 (doc A43(7)), para 3
6. OTS to Ngati Rangitihi, 26 July 2005 (doc A32(a)(BD8))
7. Robyn Fisher, cross-examination by counsel for Ngati Whakaue, 1 March 2007
8. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning response to KEC cultural redress counter-offer, 5 August 2005 (doc A43(7)), para 17
9. Ibid
10. OTS and Ministry of Tourism, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations and Minister of Tourism concerning KEC negotiations in relation to Whakarewarewa geothermal valley, 12 August 2005 (doc A43(15)), para 4
11. Ibid
12. Counsel for Ngati Whakaue, memorandum responding to OTS request for information, 17 August 2005 (doc A32(a)(BD35))

13. OTS, memorandum responding to issues raised by counsel for Ngati Whakaue, 2 September 2005 (doc A32(a)(BD36))
14. Counsel for Ngati Rangitihi, memorandum responding to OTS request for information, 26 August 2005 (doc A32(a)(BD10))
15. Counsel for Ngati Rangitihi, Official Information Act request, 19 August 2005 (doc A16(a)(AP42))
16. Counsel for Ngati Rangitihi, further memorandum responding to OTS request for information, 26 August 2005 (doc A16(a)(AP43))
17. 'Agreement in Principle for the Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu', 5 September 2005 (doc A32(a)(BD6))
18. A summary of the AIP was posted on the KEC's website.
19. OTS to Ngati Rangitihi, 14 September 2005 (doc A32(a)(BD12)); OTS to Ngati Whakaue, 14 September 2005 (doc A32(a)(BD37))
20. We note that this section of Ngati Wahiao sought the withdrawal of the mandate acknowledged to the KEC.
21. OTS, memorandum giving draft summary of overlapping claim submissions and proposed responses, 16 February 2006 (doc A43(8))
22. OTS to Ngati Rangitihi, 20 December 2005 (doc A32(a)(BD20))
23. OTS, memorandum giving draft summary of overlapping claim submissions and proposed responses, 16 February 2006 (doc A43(8))
24. KEC, evidence of historical connections to cultural redress properties offered in AIP tabled at meeting with OTS, 16 March 2006 (doc A43(9))
25. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 6 April 2006 (doc A32(a)(BD7))
26. OTS, response to Ngati Whakaue request for documents concerning their interests, 31 August 2006 (doc A32(a)(BD61))
27. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning provisional decisions on overlapping claims, 11 July 2006 (doc A43(1))
28. OTS, table of affiliate Te Arawa iwi and hapu redress changes, AIP to DOS, undated (doc A32(a)(BD7A))
29. OTS to Ngati Rangitihi, 14 July 2006 (doc A32(a)(BD23))
30. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning final decisions on overlapping claims, 4 August 2006 (doc A43(2))
31. See, for example, Minister in Charge of Treaty of Waitangi Negotiations to Ngati Whakaue, 7 August 2006 (doc A32(a)(BD60))
32. OTS to Minister in Charge of Treaty of Waitangi Negotiations, revised paper to Cabinet Policy Committee seeking approval for KEC settlement, 31 July 2006 (doc A43(3))
33. Ibid, para 7
34. *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA)
35. We note that this may be a consequence of the Crown not recognising the withdrawal of Ngati Rangiteaorere from the KEC until after the overlapping claims consultation had been completed.
36. OTS, *Ka Tika a Muri, Ka Tika a Mua: He Tohutohu Whakamarama i nga Whakataunga Kereme e Pa Ana ki te Tiriti o Waitangi me nga 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: OTS [2002]), p 58
37. Ibid
38. Ibid
39. Ibid, p 59
40. Ibid
41. Ibid
42. Robyn Fisher, supplementary brief of evidence, 19 February 2007 (doc A43), pp 3–4
43. Ibid, p 96
44. Ibid, p 97
45. OTS, paper concerning Crown's approach to cross-claims, including response to Tribunal's *Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report*, 14 August 2003 (doc A32(a)(BD1)), para 4
46. Ibid, para 6
47. Ibid, para 7
48. Ibid, paras 8–9
49. Ibid, para 17
50. Ibid, para 22
51. Ibid, para 23
52. Ibid, para 35
53. Ibid, annex A, para 21
54. Ibid, annex A, paras 18–19
55. Ibid, annex A, paras 12–13
56. KEC and Crown, 'Terms of Negotiation', 26 November 2004 (doc A32(a)(BD2))
57. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed policy response to Tribunal's *Te Arawa Mandate Report: Te Wahanga Tuarua*, 12 July 2005 (doc A32(a)(BD3)), para 13
58. Ibid, para 3
59. Ibid, para 16
60. Ibid, paras 4, 20
61. Ibid, p 10
62. OTS, internal memorandum concerning application of overlapping claims strategy to CNI negotiations, undated (doc A32(a)(BD3))
63. Ibid, para 4
64. Ibid, annex 1
65. Ibid, annex 2
66. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed cultural redress for KEC, 12 July 2005 (doc A43(6)), para 10
67. Ibid, para 13
68. Ibid
69. Ibid, paras 17, 22, 23

70. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning response to KEC cultural redress counter-offer, 5 August 2005 (doc A43(7)), para 2
71. Ibid, para 2
72. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed cultural redress for KEC, 12 July 2005 (doc A43(6)), para 47
73. OTS and Ministry of Tourism, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations and Minister of Tourism concerning KEC negotiations in relation to Whakarewarewa geothermal valley, 12 August 2005 (doc A43(15)), para 3
74. Ibid
75. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning response to KEC cultural redress counter-offer, 5 August 2005 (doc A43(7)), para 3
76. Ibid, para 17
77. Ibid, para 4
78. Ibid
79. Waitangi Tribunal, memorandum concerning filing of documents and record of inquiry, 8 June 2007 (paper 2.5.43)
80. Crown counsel, memorandum responding to Tribunal's 8 June 2007 memorandum, 11 June 2007 (paper 3.4.16), para 6
81. OTS and Ministry of Tourism, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations and Minister of Tourism concerning KEC negotiations in relation to Whakarewarewa geothermal valley, 12 August 2005 (doc A43(15)), para 5
82. Ibid, para 4
83. Ibid
84. Crown counsel, memorandum responding to Tribunal's 8 June 2007 memorandum, 11 June 2007 (paper 3.4.16), para 3
85. See, for example, the letter from OTS to Ngati Whakaue filed with Hamuera Mitchell, brief of evidence, December 2006 (doc A24), p14.
86. See, for example, OTS to Ngati Rangitihi, 26 July 2005 (doc A32(a)(BD8))
87. Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O'Malley, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', 2 vols, report commissioned by CFRT, 2005 (docs A107, A108)
88. See, for example, the letter from OTS to Ngati Whakaue filed with Hamuera Mitchell, brief of evidence, December 2006 (doc A24), p18.
89. 'Agreement in Principle for the Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu', 5 September 2005 (doc A32(a)(BD6))
90. A summary of the AIP was posted on the KEC's website.
91. OTS to Ngati Rangitihi, 14 September 2005 (doc A32(a)(BD12)); OTS to Ngati Whakaue, 14 September 2005 (doc A32(a)(BD37)); Crown counsel, memorandum responding to Tribunal's 8 June 2007 memorandum, 11 June 2007 (paper 3.4.16); OTS to Ngati Makino (Wai 334), 28 July 2005 (doc A32(c)(1)); OTS to Ngati Makino (Wai 459), 28 July 2005 (doc A32(c)(2)); OTS to Waitaha and Ngati Makino (Wai 1053), 28 July 2005 (doc A32(c)(3)
92. We note that this section of Ngati Wahiao sought the withdrawal of the mandate acknowledged to KEC.
93. OTS, memorandum giving draft summary of overlapping claim submissions and proposed responses, 16 February 2006 (doc A43(8))
94. See, for example, OTS to Ngati Rangitihi, 20 December 2005 (doc A32(a)(BD20))
95. OTS, memorandum giving draft summary of overlapping claim submissions and proposed responses, 16 February 2006 (doc A43(8))
96. KEC, evidence of historical connections to cultural redress properties offered in AIP, tabled at meeting with OTS, 16 March 2006
97. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 6 April 2006 (doc A32(a)(BD7)), paras 4–5
98. Ibid, para 12
99. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed cultural redress for KEC, 10 July 2006 (doc A32(a)(BD65))
100. Ibid, para 2
101. Ibid
102. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning provisional decisions on overlapping claims, 11 July 2006 (doc A43(1))
103. OTS, table of affiliate Te Arawa iwi and hapu redress changes, AIP to DOS, undated (doc A32(a)(BD7A))
104. See, for example, OTS to Ngati Rangitihi, 14 July 2006 (doc A32(a)(BD23))
105. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning final decisions on overlapping claims, 4 August 2006 (doc A43(2))
106. See, for example, Minister in Charge of Treaty of Waitangi Negotiations to Ngati Whakaue, 7 August 2006 (doc A32(a)(BD60))
107. OTS to Minister in Charge of Treaty of Waitangi Negotiations, revised paper to Cabinet Policy Committee seeking approval for KEC settlement, 31 July 2006 (doc A43(3))
108. Ibid, para 7
109. Ibid, para 8
110. Ibid, para 52
111. Ibid, para 53
112. Ibid, para 61

CHAPTER 4

THE CONTEST OVER CULTURAL REDRESS

Introduction

In this chapter, we examine claims brought before us by a number of tribes of the Te Arawa Waka who were not parties to the negotiations and final settlement between the Crown and the KEC. As we have discussed in chapter 3, these claims concern the modified overlapping claims process that was implemented in the Te Arawa region during the KEC negotiations. We have broken the chapter into the following sections:

- non-exclusive geothermal statutory acknowledgement;
- Ngati Whakaue;
- Ngati Rangitihi; and
- Ngati Rangiteaorere.

Summary of the cultural redress items under contest

As we noted in chapter 3, the Crown has proposed a number of instruments to transfer cultural redress items to the KEC affiliates. We repeat here, for convenience, the list of cultural redress items and instruments proposed, along with the Te Arawa Waka who contest the redress:

- Non-exclusive statutory acknowledgements:
  - geothermal statutory acknowledgement (Te Arawa Waka and Waitaha):
  - part of Tarawera River (Ngati Rangitihi): and
  - Otari Pa (Ngati Makino and Waitaha).
- Vestings:
  - the vesting of the Whakarewarewa geothermal springs reserve, Roto a Tamaheke, and part of Moerangi (Ngati Whakaue);
  - the vesting of Te Ariki (Ngati Rangitihi): and
  - the vesting of Matawhaura and Otari Pa (Ngati Makino and Waitaha).
- The change of name of Whakapoungakau to Rangitoto (Ngati Te Rangiteaorere).
- Overlay classifications:
  - Whenua rahui classification of Matawhaura, Part Lake Rotoiti scenic reserve (Ngati Makino); and
  - Whenua rahui classification of Part Lake Tarawera scenic reserve (Ngati Rangitihi).

An overlay classification allows for recognition of the interests and values of the affiliate Te Arawa iwi/hapu. It is a non-exclusive instrument, which means that the Crown may offer such redress to other Te Arawa hapu and iwi. Both the whenua rahui classification and statutory acknowledgements are non-exclusive redress instruments. The package also includes two other proposals that are effectively a form of redress and benefit. The first is the promotion by the Crown of the relationship between the Rotorua District Council and the affiliate Te Arawa iwi/hapu in relation to various recreation reserves and the land where the Karamuramu baths are located. The other initiative is for the Crown to encourage the regional councils to enter into a memorandum of understanding with the Maori post-settlement governance entity in relation to a

number of matters including the Rotorua regional geothermal system. We begin our analysis in this chapter by considering the item of cultural redress that will have implications for the entire Te Arawa Waka, the non-exclusive statutory acknowledgement.

We then examine the individual experience of each of the iwi/hapu listed above as they were affected by the modified overlapping claims process and its implementation by OTS in Te Arawa. Although this means telling the same story several times, it is necessary to do so to understand that, although the impacts were different, the fundamental flaws in the design and implementation of the overlapping claims process are the same. We have previously dealt with these common flaws in chapter 3.

Issue for determination by this Tribunal

Prior to hearing, we posed a number of questions in relation to the claims brought before us. We condense them here to one reformulated generic issue: Has the Crown, in settling the historical claim of the KEC affiliates, retained sufficient capacity to provide adequate and appropriate redress to the claimants in the future?[1] In particular, has the Crown 'safeguarded' the interests of the claimants with respect to each of the contested items of redress?

We have reduced the issue in this way because the initial question in the Tribunal's statement of issues was only of relevance while the KEC affiliates were participating. As they did not participate in this inquiry, the issue of whether the KEC settlement package was a fair settlement is one that only the Crown and the affiliate iwi/hapu can answer.

We will answer and make findings on the issue before us with respect to each claimant group before us. Our concern has been focused on whether the Crown 'safeguarded' the claimants' interests and retained sufficient capacity to provide adequate and appropriate redress for these claimants, who represent approximately 50 per cent of Te Arawa, when they achieve a future settlement. Within our discussion on each item of redress, however, we do consider a number of additional questions that are specific to the claimants or the redress item (or both).

Proposed Geothermal Statutory Acknowledgement

Introduction

We now turn to consider what is the nature and extent of the geothermal statutory acknowledgement (GSA) provided for in the deed of settlement. The deed provides for a statutory acknowledgement of the affiliate Te Arawa iwi and hapu's association with the geothermal water and geothermal energy located in the 'Rotorua Region Geothermal System' covering 12 geothermal fields.[2] The deed refers to the system (comprising 12 fields located from the coast to Rotokawa) as the 'geothermal resource'. The geothermal resource is defined in the deed as 'the geothermal energy and geothermal water located in the Rotorua Region Geothermal System', but it does not include 'any geothermal water and geothermal energy above ground on land that is owned by the Crown'. Schedule 3 lists the 12 geothermal fields that make up the system. These are Rotoma, Taheke–Tikitere, Rotorua, Horohoro, Waikite–Waiotapu–Waimangu, Reporoa, Atiamuri, Te Kopia, Orakei Korako, Ohaaki/Broadlands, Ngatamariki, and Rotokawa.

The historical account in the deed of settlement acknowledges that the affiliate Te Arawa iwi/hapu consider the system to be a taonga.[3] The historical account states:

> The geothermal resource has always been highly valued and treasured by the Affiliate Te Arawa Iwi/Hapu, who consider it a taonga over which they have exercised rangatiratanga and kaitiakitanga.
>
> Over time Affiliate Te Arawa Iwi/Hapu lost ownership of some geothermal lands through purchase and public works takings. . . .

> Despite the loss of lands containing geothermal surface features the geothermal resource was, and still is, central to the lifestyle and identity of Affiliate Te Arawa Iwi/Hapu. For example, hot pools and ngawha were, and are, used for cooking, bathing, heating and medicinal purposes.
>
> With the passing of the Geothermal Energy Act 1953, the Crown established for itself, without the consent of the affiliate Te Arawa iwi and hapu, the sole right to regulate use of the geothermal energy resource. The Affiliate Te Arawa Iwi/Hapu harbour a strong sense of grievance over this Crown action and consider that the Crown has failed to protect the interests of the affiliate Te Arawa Iwi/Hapu in relation to the geothermal resource.[4]

When legislated, the deed will settle the geothermal claims of the KEC affiliates. We received submissions from Ngati Whakaue, Ngati Rangitihi, Ngati Makino, and Ngati Rangiteaorere on the impact of the proposed GSA. We note the deed will also impact on the claims of Ngati Whaoa, Ngati Tamakari, and Ngati Rangiunuora to geothermal resources.

The claimants' case

Ngati Whakaue

Counsel for Ngati Whakaue indicated that they regard the geothermal resource as a taonga under article 2 of the Treaty and vital to Ngati Whakaue identity.[5] He outlined various past statutory mechanisms by which Ngati Whakaue lost control over their geothermal resources.[6] Counsel then went on to state that Ngati Whakaue regard the proposed statutory acknowledgement as:

> a serious inroad on both Ngati Whakaue's claim and its continued participation in the wider community of Rotorua when its very right to proprietorship is being questioned by the Crown.[7]

In terms of the principle of partnership, as traditional users of geothermal resources, Ngati Whakaue say they have acted reasonably and in good faith with the Crown and therefore expect the Crown to actively protect Ngati Whakaue in its use of its taonga. They argue that:

> the statutory acknowledgement would disallow Ngati Whakaue from being recognised as having a 'say' on the usage of a 'taonga' under their land which would be to the detriment of Ngati Whakaue within the community in a wider sense.[8]

In closings, counsel submitted that the Crown had not given any proper justification or reasoned basis for 'giving away what in effect will be preferential treatment to the affiliate Te Arawa iwi and hapu in respect of *all* geothermal fields within Te Arawa'. The proposed GSA would not require the holder to have title to the land or contiguous land on which there are surface manifestations of geothermal activity.[9]

The GSA raised the potential threat of members of the affiliate Te Arawa iwi/hapu claiming association with that resource, without having any connection to the land or recognition of the mana whenua to that land whatsoever. Moreover, Ngati Whakaue have a serious concern that the combination of the GSA and the settlement provisions for the vesting of Whakarewarewa in the affiliate Te Arawa iwi/hapu will effectively create a 'double whammy', which might in practice deny anyone else such rights at the same level. Ngati Whakaue asked the Tribunal to recommend the withdrawal of settlement provisions relating to Whakarewarewa and to the GSA.[10]

Ngati Rangitihi

Ngati Rangitihi objected to the inclusion of the GSA because of the impact it will have on their associations with the Waikite–Waiotapu–Waimangu geothermal site. Ngati Rangitihi claim interests in all geothermal fields in the Tarawera valley, including the Rotoma–Tikorangi field and the Puhi Puhi field.[11] They also consider that they have interests in the Rotorua regional geothermal system

at Humphreys Bay and the Horohoro. They argued, therefore, that the GSA is of real concern. Counsel argued that the GSA would prejudice their interests, especially at a time when New Zealand is moving to find alternative, carbon-neutral energy sources.[12]

Ngati Rangiteaorere

Ngati Rangiteaorere's submission relates to the impact of the statutory acknowledgement on their rights in relation to the geothermal field at Tikitere (Hell's Gate), which is on the Rotorua–Whakatane highway, about three miles east of Te Ngae junction.[13] They claim that they have customarily used the geothermal field at Tikitere to the present day. Pirihira Fenwick told us that their interests were not disputed:

> We signal that we have since been contacted by the Chair of Manupirua Trust who have considered and agreed with the submissions that were tendered which were not to deny the Ngati Rangiteaorere interests and relationships but to confirm that they have subsisted since time immemorial with other hapu of the area.[14]

Counsel referred to the Waitangi Tribunal's *Ngati Rangiteaorere Claim Report 1990*, which stated that the Government should not pass legislation that dealt with geothermal resources until it had consulted with Maori. Counsel submitted that the Crown had repeated the breach complained about in 1989 and compounded this by failing to recognise Ngati Rangiteaorere's rights. In counsel's view, the wording of the GSA is 'so wide that they could easily misguide consent authorities into believing that Ngati Rangiteaorere's geothermal field is included'. Counsel acknowledged that one land trust involved in the settlement has interests in the Tikitere field, but say that these interests are secondary to those of Ngati Rangiteaorere.[15]

Ngati Makino

Ngati Makino object to the GSA, especially in relation to the Rotoma field.[16] They list the five advantages that the holder of the GSA will have over Makino, who say that they are kaitiaki of the Rotoma field. These alleged advantages are:

- the promotion of a relationship with regional councils and formalisation of that relationship within certain instruments;
- automatic standing before consent authorities and the Environment Court;
- recording of the GSA within statutory planning documents;
- receiving notice and summaries of consent applications; and
- power to veto any non-notified resource consent if the consent authorities determine that the GSA holder is an affected party.

The case for the Crown

The Crown points out that the GSA is not an exclusive instrument.[17] The Crown denies that non-affiliate Te Arawa groups will be disadvantaged when it comes to the extent of knowledge of the relevant authorities about the identity of groups with geothermal interests.[18] It argued that the GSA will not disentitle other groups from participation in resource consent processes. The Crown's case is that essentially it has safeguarded the interests of the overlapping claimants by ensuring that the statutory acknowledgement may be extended to include them in the future.

Crown response to Ngati Whakaue

The Crown disputed the claim that the geothermal statutory acknowledgement was not drawn to Ngati Whakaue's attention prior to the hearing.[19] The Crown says evidence can be seen in document A32(a)(BD37) (a letter of 14 September 2005, which referred to details in the appendices, but did not expressly refer to the GSA).[20] This, the Crown argued, 'clearly' put Ngati Whakaue on notice.

Crown response to Ngati Rangiteaorere and Ngati Makino

The Crown does not accept that Ngati Makino and Ngati Rangiteaorere have exclusive interests in certain fields. Moreover, they say that the GSA 'does not preclude all Te Arawa iwi and hapu from working together constructively to protect their general interests in the geothermal resource'.[21]

Tribunal analysis and findings on OTS consultation over the GSA

We consider first the issue of whether OTS 'safeguarded' the claimants' interests with respect to the GSA. We do so by reviewing the three phases of the Crown's consultation about overlapping interests in the redress package.

Phase I consultation – pre-AIP

On our analysis, none of the pre-agreement in principle letters sent to overlapping claimants asked them to identify their interests in the 'Rotorua Region Geothermal System' or suggested that information on their interests in a geothermal field or fields be tendered.[22] We note, however, that these letters included a summary of the information that OTS held on the interests of the overlapping claimants. The information had been gleaned from statements of claim, evidence, and submissions to the Waitangi Tribunal in the central North Island inquiry. The information, which overlapping claimants were invited to comment on, was restricted to general areas of interest (rohe descriptions), specific block interests, and sites of significance. In the case of Ngati Whakaue, despite naming one of its sources as the Ngati Whakaue geothermal resource claim, OTS failed to identify the Rotorua regional geothermal system as an interest of Ngati Whakaue.[23]

Phase II consultation – post-AIP

After the agreement in principle had been signed in September 2005, the Crown sought comment on the specific redress proposals. We do know that the letters sent to Ngati Whakaue, Ngati Makino, and Ngati Rangitihi on 14 and 19 September 2005 made no specific mention of the statutory acknowledgement.[24] Appendices 1 and 2 to these letters were referred to by Ms Fisher in cross-examination. Appendix 1 did refer to the GSA and named the 12 fields.[25] At this time, it was intended to send a copy of the agreement in principle within two weeks to overlapping claimants. In fact, copies of the agreement in principle were not posted to overlapping claimants until late October 2005. As overlapping claimants were asked to submit their comments on the agreement in principle by 4 November 2005, the late delivery of copies of the agreement in principle would have impacted on their ability to meet the 4 November deadline.[26] The deadline was extended, in view of this delay. We note that OTS did provide a summary of the agreement in principle on its website, together with the full copy of the unsigned agreement in principle. The 14 September 2005 letters had drawn the attention of counsel to the website version.

Despite the lack of emphasis on the proposed GSA in the letter of 14 September 2005, counsel for Ngati Rangitihi did react to the proposed statutory acknowledgement. Ngati Rangitihi pointed out that their associations with the geothermal resources in their claimed rohe (in particular the Waikite–Waiotapu–Waimangu field) at Rotoma had been explained in closing submissions in the central North Island inquiry.[27] Ngati Whakaue, on the other hand, appeared not to comment on the proposed GSA in their submissions on the agreement in principle.[28] We consider it relevant that both groups sought further information or discussion with the Crown. Ngati Makino and Ngati Rangiteaorere did not respond to OTS on the GSA. We also note that all these hapu or iwi were engaged with the central North Island hearings at this time.

Phase III consultation: between the Minister's provisional and final decisions

As we noted in chapter 3, the overlapping claimants were advised of the Minister's provisional decisions regarding

the settlement redress on 14 July 2006. Comments were sought by 3 August 2006. The letters sent to Ngati Whakaue and to Ngati Rangitihi failed to mention that the Minister had provisionally approved the GSA.[29] Counsel for Ngati Rangitihi was informed on 22 June 2006 of the GSA, but were also advised by the Crown that such recognition did not seek to deny the interests of others in those fields.[30] In formally responding to the Crown's provisional decision on the settlement redress, neither Ngati Rangitihi nor Ngati Whakaue mentioned the GSA.

In making his provisional decisions on the contested redress, the Minister was not informed by OTS that he was also making an important set of decisions in relation to the GSA. The GSA was only mentioned in an appendix to OTS's briefing paper.[31] Two groups were identified as having raised an objection: Ngati Rangitihi and the Tauhara hapu of Tuwharetoa. Their respective interests were summarised as:

> Ngati Rangitihi claim a dominant interest in certain geothermal fields covered by the statutory acknowledgement. Tauhara hapu of Tuwharetoa claim an interest in geothermal fields north of Taupo.[32]

OTS advised that the Rotorua regional geothermal system was an 'important resource used by affiliate iwi/hapu in the entire KEC area of interest'. Remember that the area of interest was the entire tribal territory of the Te Arawa Waka, including overlap into northern Taupo, but excluded the Ngati Rangitihi area of influence. On that basis, OTS advised that no change was recommended. OTS advised that the redress was non-exclusive and therefore 'allowed for the interests of other iwi and hapu to be recognised in the future'.[33]

Tribunal findings on OTS consultation over the GSA

It became clear to us as the hearing proceeded that only Ngati Rangitihi fully appreciated the nature and extent of the rights that attach to the GSA. They have had prior experience of statutory acknowledgements being used against them while defending their interests. We were left wondering about why the remaining claimants did not. This raised several questions for us about the manner in which the inclusion of the GSA was communicated to the claimants. Even after the deed of settlement was signed, the impact of the GSA, covering as it did the entire Rotorua regional geothermal system, comprising 12 very important geothermal fields, was still not understood by most claimants. We cannot understand how this has been allowed to happen.

We do know that, as Ms Fisher conceded, OTS knew of the importance of geothermal resources to all of the Te Arawa Waka. In fact, the historical account in the deed of settlement tells us this. But it is equally clear from the evidence that only Ngati Rangitihi recognised the full import of the GSA.[34]

The appendix to the 14 September 2005 letter enclosing the agreement in principle did list the GSA as part of the agreement in principle. We also accept that the GSA is outlined very clearly in the agreement in principle. But we find virtually no evidence of it having been explained or discussed with anyone other than in a perfunctory manner with Ngati Rangitihi. This does not constitute 'active protection'. Our review also raised the issue of whether OTS has understood how the geothermal resource of the Rotorua regional geothermal system is administered in customary or tikanga terms between the different hapu and iwi of the Te Arawa Waka. We asked this question because we believe that it could not escape the notice of any reasonable person, no matter what end of the district they stood in, that geothermal resources are central to the lives of the entire tribe of Te Arawa. In order to understand the impact the GSA might have on the claimants, there surely had to be some discussion with all of Te Arawa on the topic.

Having reviewed the process for consultation, we are left in no doubt that this was a communication flaw that should have been directly and explicitly dealt with. It was also a serious failing on the part of the Crown, for it raises

questions about its ability to discharge its Treaty and fiduciary duties towards the remaining tribes of the Te Arawa Waka. Overall, we must conclude that the consultation process in respect of the geothermal statutory acknowledgement was inadequate to safeguard the interests of overlapping claimants.

The weak consultation process also leaves us with little confidence in the quality of OTS's briefings to the Minister on this issue, especially in relation to the final decisions over contested redress. We are of the view that a proper consultation process would have revealed information and raised questions that should then have formed the basis for a more rigorous analysis of the effect of the GSA on overlapping claimants, before the Minister made his final decision.

Tribunal analysis on the nature of non-exclusive statutory acknowledgements

We begin this section by elaborating further on what the non-exclusive statutory acknowledgements are and what they confer. We do so because, while on their face they may appear innocuous, in fact they have some significant implications. In explaining the nature of non-exclusive statutory acknowledgements we draw almost exclusively on the Crown's submissions on the nature of the non-exclusive geothermal statutory acknowledgement (GSA). We include some limited discussion of other statutory acknowledgements in the deed of settlement. The Crown submitted that the reason for offering the GSA was:

> to address in some way concerns held by Affiliate Te Arawa Iwi and Hapu and most of the claimants in the Central North Island that Maori interests are not adequately taken into account in decisions under the Resource Management Act.[35]

Curiously, however, much of the Crown's description of the GSA involved defining what it is not, rather than what it is. We were told, for example, that it is 'not intended to confer undue advantage on particular groups or to pre-determine the outcome of particular resource management decisions'.[36] The Crown, again defining in the negative, stated that 'the statutory acknowledgement will not disentitle the non-affiliate Iwi and Hapu from participating in the resource management decision-making process'.[37]

What became clear to us is that redress, by definition, must have some meaning, purpose, and value to one or more parties. Therefore, non-exclusive statutory acknowledgements cannot be meaningless pieces of information: they must confer some advantage. We understand that such an acknowledgement would act henceforth to alter the relative positions of hapu in the perceptions of those making applications for resource consents to consent authorities and courts. We consider that a non-exclusive statutory acknowledgement gives something significant in the way of standing and status before resource consent authorities, the Environment Court and the Historic Places Trust. It effectively separates hapu and iwi into two groups before those bodies and vis-à-vis applicants. There are those who have the benefit of a GSA and those who do not. Clearly, they no longer have the same status. A council or court will inevitably assume that the holder of a statutory acknowledgement has a position that requires it to be preferred, at the very least, when all else is otherwise equal.

When we sought to understand the meaning, purpose, and weight of a non-exclusive (site specific) statutory acknowledgement, Ms Fisher told us that 'it was a piece of information'.[38] This expression of the instrument cannot be right. Rather, at one end it may amount to little – merely a piece of information. But at the other end it may confer rights to the exclusion of others. For Maori, their status is determined by being the holder of such an instrument or being a party without one. The acknowledgment, for them, is not just 'a piece of information': it goes to their mana and their identity.

Our understanding is confirmed by a consideration of the Resource Management Act 1991 and the Historic Places Trust Act 1993. Both these statutes provide for formal participation in certain kinds of consent processes.

Section 274 of the Resource Management Act deals with representation in proceedings. It provides that a person, with an interest in any proceedings greater than the public generally, or representing a relevant aspect of the public interest, can be a party before the Environment Court.[39] In the ordinary course of events, parties who claim an interest in a resource, site, or taonga which is the subject of an application under these statutes, must establish their right to be heard based on their interest or stake in the resource, site, or taonga in question. If granted, they then present their case and have recourse to an appeals or review process, should they be unsuccessful.

But their case falls at the first hurdle if they are not recognised by the relevant consent authority. A statutory acknowledgement removes the need for parties to establish their claim in the first place. Section 274(6) of the Resource Management Act provides as follows:

> For the purposes of determining whether a person has an interest in proceedings greater than the public generally, the Environment Court must have regard to every relevant statutory acknowledgement (within the meaning of an Act specified in Schedule 11) in accordance with the provisions of the relevant Act in that schedule.

We note that schedule 11 of the Act lists 10 settlement statutes containing provision for a statutory acknowledgement, and that the actual effect of a statutory acknowledgement depends on the precise specification of the acknowledgement in any Treaty settlement legislation.

In the case of South Island's Ngai Tahu, to take one example, the legal effect of the acknowledgement was:

- to require consent authorities to forward summaries of relevant consent applications to the governance entity;
- to require consent authorities to have regard to the statutory acknowledgement including local authorities notifying the acknowledgements on plans;
- to enable the governance entity or any member of Ngai Tahu to cite the statutory acknowledgement as evidence of their association; and
- to empower relevant Ministers to enter into deeds of recognition.[40]

In summary, the statutory acknowledgement recognised Ngai Tahu's right to advocate on matters concerning their interests as defined in the statutory acknowledgement.

The impact of statutory acknowledgements might also be felt in other ways. For example, Ngai Tahu have a policy that production companies will need to consult with Ngai Tahu if they wish to film on lands within statutory acknowledgement areas not administered by the Department of Conservation.[41]

In the case of the Pouakani settlement, OTS explained the effect of a statutory acknowledgement as follows:

> A statutory acknowledgement indicates an area or site on Crown-owned land with which Maori communities have a special cultural, spiritual, historic or traditional association. It places notification requirements on local bodies when considering resource consent applications. This instrument aims to avoid past problems with land development for roading and other purposes when areas of significance to iwi or hapu, such as burial grounds, were simply cleared or excavated without either permission or consultation. It does not give a Maori community any specific property rights.[42]

The statutory acknowledgement, as contained in the Pouakani Claims Settlement Act 2000, specified its purpose.[43] It appears to closely follow the model used for Ngai Tahu, so arguably confers similar rights. Section 49 of the Pouakani Claims Settlement Act provides that the statutory acknowledgement does not affect the lawful rights or interests of a person who is not a party to the deed of settlement, but there are benefits conferred, as we noted in relation to Ngai Tahu.

Upon our analysis, then, a non-exclusive statutory acknowledgement can confer a substantial benefit: namely, the benefits of information, standing, and status. Whether

'The Inferno, Tikitere, New Zealand', postcard, circa 1900–06

it does or does not turns on the subject matter of the acknowledgement and other matters that we discuss below.

Tribunal analysis on the nature of the benefits the GSA confers

In this section, we look specifically at what the deed of settlement provides for in terms of the GSA. We have not seen the proposed settlement legislation for the affiliate Te Arawa iwi/hapu, but the deed of settlement explains the purpose and effect of the GSA and describes the 12 geothermal fields within the Rotorua regional geothermal system. These are listed in part 1 of schedule 3 of the deed. As we noted above, the 12 fields are Rotoma, Taheke Tikitere, Rotorua, Horohoro, Waikite–Waiotapu, Reporoa, Atiamuri, Te Kopia, Orakei Korako, Ohaaki/Broadlands, Ngatamariki, and Rotokawa.[44]

Given the definition of the system in the deed of settlement, the resource covers the entire underlying geothermal thermal water/fluid, heat, and energy system of the fields. Therefore, the non-exclusive statutory acknowledgement will confirm the legacy of Ngatoroirangi for those who hold it, and potential adversely effect those who do not. We say this, because clause 11.1.6 of the deed states that relevant consent authorities and the Environment Court are to have regard to the GSA when they form a view as to whether the governance entity (Te Pumautanga o Te Arawa) might be adversely affected by the granting of a resource consent under section 14(1) of the Resource Management Act (in respect of the geothermal resource). The same applies in relation to the granting of a resource consent for activities within, adjacent to, or impacting directly on the area subject to the statutory acknowledgement. Similar constraints apply to the Historic Places Trust and the Environment Court when they consider whether the governance entity

may be affected in relation to an archaeological site within the statutory area (cl 11.1.7).

Under clause 11.1.8, the deed also provides that all relevant consent authorities will have to record the GSA on all statutory plans relevant to the area covered by the acknowledgement. The relevant consent authorities will provide a summary of resource consent applications for a period of 20 years to the governance entity (cl 11.1.10). The statutory acknowledgement may be used by the governance entity as evidence of their association with and use of the Rotorua regional geothermal system in proceedings involving the taking, use, damming, or diverting of geothermal water or energy from the system (cl 11.1.14).

The Crown says it can, if appropriate, give a statutory acknowledgement over the same site to more than one claimant group.[45] Indeed, clause 11.25 of the deed of settlement provides that the GSA:

> does not prevent the Crown from doing anything that is consistent with that cultural redress including providing the same or similar redress to a person other than non-affiliate Te Arawa iwi/hapu or the Governance entity.

But whether it is offered over a particular site or geothermal field in the area of interest to a non-affiliate iwi and hapu within the Rotorua regional geothermal system remains to be seen. And even if it is, there remains the issue of interim advantage to the group currently settling.

Tribunal analysis and findings on prejudice for the claimants

We have examined Ngati Rangitihi's submissions on the GSA in depth, particularly their view that geothermal energy will become increasingly more important as an alternative energy source. We note that within weeks of the signing of the deed of settlement on 30 September 2006, the Government published a discussion document aimed at greater emphasis on renewable energy resources and responding to climate change. This brought the North Island geothermal resource to the forefront of public attention. State-owned enterprise and private sector electricity generators have recently announced major geothermal electricity developments.[46] Therefore, we do not think we risk overstating the position to say that there will be a number of significant resource consent applications relating to the use of geothermal resources in or near the rohe of Te Arawa over the next few years. The results could lead to the full utilisation and final allocation of the resource in some subregions for decades to come. This may have all occurred before the rest of Te Arawa have had an opportunity to negotiate the settlement of their claims with the Crown.

In this environment, the GSA takes on a significance that may not have been appreciated when it was being developed as a possible item of redress in the Te Arawa claims settlement process. Groups that do not have a GSA may find themselves ignored, their interests diminished, or their participation opposed. In any of those situations, heavy legal costs may have to be incurred to get to a position equal to that which the 'anointed' will have had at no further cost to them via the GSA.

What the Crown has ignored is the likely impact on such groups in relation to applicants for major resource consents. Faced with the complex issue of whom to deal with in developing a project which is sustainable in the full meaning of that term, applicants could be excused for seeing the GSA as having solved the problem for them and at the highest level. A glance at significant resource projects operating in and near the region reveals to even the casual observer that significant cultural, educational, scientific, economic, and other relationships between Maori and developers are now a feature of life at Mokai, Kawerau, and Rotokawa. In fact, projects have been entered into with hapu and iwi of standing in relation to a particular area and the relationships forged have supported and enhanced the standing of the applicant's resource consent application.

In one view, the difference between the position of those obtaining a GSA over the Rotorua regional geothermal

system now, and other claimants who might obtain one in a later settlement, is only a matter of timing. We accept that it is not reasonably within the power of the Crown to negotiate with every iwi/hapu or grouping of them at the same time over a matter such as this GSA. Some may have benefits earlier and some later. That cannot be a breach of the Treaty of Waitangi per se. But here in the central North Island, and in the rohe of Te Arawa in particular, timing may be everything, especially if other settlements may be three to five or more years away. Facing the prospect of participating in crucial processes in relation to the geothermal resource over the next few years when one's position might turn out to have been weakened, if not made impossible, by the actions of the Crown, would be a prejudice that would create new and lasting grievances. The claimants' common fear that any Crown response to their geothermal claims may not occur until the resource has been wholly or substantially allocated to their possible prejudice is soundly based, in our view.

This probable outcome should have been analysed by OTS, but we can find no evidence that the Minister was adequately briefed on this point.

It would be ironic indeed if participation of iwi and hapu holding a GSA became an argument to exclude iwi and hapu who did not. That a GSA might become a patu in the hands of its holders, or applicants for consent, against non-holders could see hearings become a battle ground. Any hope of amicable tribal relations being restored after the divisive process of the KEC settlement would be shattered. Thus, the potential for iwi and hapu to find themselves pitted against other iwi and hapu is a cause for concern.

A GSA awarded over the extensive Rotorua regional geothermal system to only half of Te Arawa will, in our view, likely lead to further friction between the new governance entity and the remaining half of Te Arawa. We are of the view that the latter will not have the same information, standing, or status in the circumstances contemplated by the deed. Friction between the two halves of Te Arawa could be compounded by the development of a memorandum of understanding between the new governance entity and the two regional councils (Environment Waikato and Environment Bay of Plenty). In turn, this understanding is likely to be reflected in regional policy statements and regional plans and would cement in place the GSA provisions of the settlement deed. This has enormous implications in tikanga terms for the non-affiliates throughout the entire Rotorua region, not just the city of Rotorua.

Overlapping claimants variously claimed that they had been told that they would have to wait five years before negotiations might begin. Another claimant advised they were told they have 'to go to the back of the queue'.[47] Whether true or not, there is reason for fear in relation to important processes that are likely to occur in the next few years. There is real reason for them to be concerned that they will effectively be prejudiced during the Resource Management Act process if they do not hold a GSA.

The Crown, in response to such concerns, argued that the local bodies in the central North Island were 'relatively well informed' regarding the identity of groups with interests in geothermal resources.[48] Such a contention assumes that the current players within the consent authorities will remain the same. With new generations of administrators, and as the KEC affiliates settlement is embedded, a new definition of who is Te Arawa may emerge. We also note the effective creation of four new tribal rohe in the form of the four districts described in Te Pumautanga o Te Arawa's trust deed.[49]

We fail to see how the Crown can maintain such confidence that the award of a GSA to the governance entity will meet its Treaty obligations to Te Arawa 'overlapping claimants'. Furthermore, we had evidence from Ngati Rangitihi, who were not party to the statutory acknowledgements that formed part of the Ngati Tuwharetoa ki Kawerau settlement, on the impact of these instruments on those without one. The experience of Ngati Rangitihi as set out in the evidence given before this Tribunal is that local authorities have overlooked their interests where there have been statutory acknowledgements given to other groups in

Whakarewarewa, postcard, circa 1905–10

settlement. There is no reason for them to be reassured that this will not also happen in this case, in respect of their geothermal resources.[50]

OTS, therefore, places enormous pressure on claimants before us to obtain a place in the negotiating line, and to settle subsequently with the Crown without a GSA is an option most claimants are probably not willing to countenance. To do so could so easily be interpreted as meaning that the iwi or hapu concerned do not have any interest in the Rotorua regional geothermal system. In this respect, the use of the GSA and statement of association has, for future negotiations, prejudiced the benefit of the settlement of their claims. The other half of Te Arawa will be, effectively, faced with a fait accompli.

Tribunal general findings on the GSA

We have asked whether the Crown, in settling the historical claims of the affiliate Te Arawa iwi/hapu to geothermal resources by including the GSA, retained sufficient capacity to provide adequate and appropriate redress to other claimant groups in the future.[51] In particular, has the Crown 'safeguarded' the interests of the claimants with respect to each of the contested items of redress?

In response, we find that the answer to this question must be that while it has retained the capacity to provide equal redress in terms of the GSA by extending its application to the claimants before us, that does not indicate that the redress would be adequate and appropriate. To meet that test would require full consultation with the entire Te Arawa Waka.[52] But there was no substantive consultation beyond the KEC, and as a result there was a process failure. Ministerial briefings regarding this instrument indicate the Minister was not fully briefed on the nature of competing customary interests in the Rotorua regional geothermal system, a resource that cuts to the core of who it is to be Te Arawa. Owing to this process failure, it cannot be said that the claimants' interests have been 'safeguarded'.

The GSA over the geothermal system will provide an advantage to Te Pumautanga o Te Arawa as the governance

entity of affiliate Te Arawa, and a disadvantage to the remaining half of Te Arawa. We consider it not inconceivable that at some stage in the future someone from a non-affiliate Te Arawa hapu or iwi at a consent hearing will have to prove they have an interest in the geothermal system because they do not have a GSA. This may well be in contrast to a representative from Te Pumautanga o Te Arawa or one of its affiliate iwi or hapu, who will have automatic standing. We have concerns that the longer this inequity exists the more difficult the task of repairing fractured tribal relationships will become.

We find that the Crown's failure to turn its mind to the full implications of this cultural redress item on all of the Te Arawa Waka, including the claimants, is a breach of the principles of the Treaty of Waitangi and their associated duties as outlined in chapter 2. Should these outcomes be the net result of the Treaty of Waitangi claim settlement process in this region it would be ironic, inequitable, unfair, and wrong. This should be avoided by swift and decisive action in accordance with recommendations we made in the letter of transmittal and at the conclusion of chapter 3.

Proposed Vesting of Whakarewarewa and Moerangi

Introduction

We turn now to the experience of Ngati Whakaue. Here we examine the evidence before us to ascertain whether OTS ensured that in employing cultural sites of concern to Ngati Whakaue to settle the historical claims of the KEC, the Crown retained sufficient capacity to provide adequate and appropriate redress for Ngati Whakaue in the future.[53] In particular, we ask whether the Crown 'safeguarded' the interests of the claimants with respect to each of the contested items of redress.

The deed of settlement proposes to vest three properties exclusively in the post-settlement governance entity:

- the Whakarewarewa thermal springs reserve;
- Roto a Tamaheke; and
- part of Moerangi Maunga.

The settlement legislation will:

- revoke the recreational reserve status over the Whakarewarewa thermal springs reserve and Roto a Tamaheke;
- remove the jurisdiction of the Tourist and Health Resorts Control Act 1908;
- vest the fee simple in the governance body; and
- reserve both sites as recreation reserves subject to section 17 of the Reserves Act 1977, with the governance entity as the administering body.

The Whakarewarewa geothermal valley includes the 45-hectare Whakarewarewa thermal springs reserve and the 14-hectare Part Arikikapakapa reserve on which the Maori Arts and Crafts Institute stands, and of which the institute has a lease in perpetuity. It is otherwise taken up with a large car park and indigenous regenerating vegetation or forest. The Arikikapakapa reserve extends to the main entry, across the Puarenga Stream, to the Whakarewarewa village and on to the Whakarewarewa thermal reserve on which is situated Pohotu geyser and the thermal attractions. The valley also includes the Roto a Tamaheke reserve of 4304 hectares and part of the Whakarewarewa Forest. We have referred to these areas generally because no one provided us with a definitive or complete map of the Whakarewarewa geothermal valley.

The Whakarewarewa thermal springs reserve itself is located on the Whakarewarewa 3 block, which was awarded to Ngati Whakaue and Ngati Wahiao in 1893.[54] The reserve is subject to a lease in perpetuity, which covers the whole of the reserve together with the southern part of the adjoining Arikikapakapa reserve (which is not included in the proposed settlement). We note that the issue of who are the customary owners of the Whakarewarewa thermal springs has vexed officials since the first Native Land Court investigations into the block. The matter of customary ownership is glossed over in 'Nga Mana o te Whenua

o Te Arawa: Customary Tenure Report', upon which OTS has relied heavily. However, any review of the Native Land Court minutes shows that the thermal springs were so shared and so interwoven with the lives of both Ngati Wahiao and Ngati Whakaue that the Native Land Court took several years to finalise boundaries.

But in 2007, the Crown has agreed with the KEC to legislate Ngati Whakaue out of the land and the geothermal springs. The Whakarewarewa thermal springs reserve will be vested in Te Pumautanga o Te Arawa, who will receive half of the annual rent from the lease.[55] Separate leases will be created over the reserve areas to recognise the respective interests of all the different groups affected.[56] Roto a Tamaheke is a small lake in the vicinity of Whakarewarewa. The deed of settlement will also provide for the Moerangi site and the Roto a Tamaheke reserve to be vested exclusively in the post-settlement governance entity, Te Pumautanga o Te Arawa.[57] Moerangi is the mountain situated on the old Rotomahana Parekarangi 4 block, now known as Moerangi. The title to the block was awarded to Ngati Whakaue by the Native Land Court in 1887.

We turn now to consider the claims before us, once we have examined the identity of Ngati Whakaue and the nature of their relationship with these sites.

Social organisation of Ngati Whakaue

Ngati Whakaue are principally associated with the Rotorua township, but have traditional interests in a large area of the district. There are six major Koromatua hapu (principal sub-tribes) of Ngati Whakaue. Those six are: Ngati Hurungaterangi, Ngati Te Rorooterangi, Ngati Tunohopu, Ngati Pukaki, Ngati Rangiiwaho, and Ngati Taeotu.

Ngati Hurungaterangi, Ngati Taeotu, and Te Kahu have also been traditionally associated with Whakarewarewa, the Moerangi area and Ngapuna.[58] According to the late Ben Hona, who gave evidence to this Tribunal:

> Whakarewarewa and Moerangi are integral land features of the three hapu of Ngati Hurunga Te Rangi, Ngati Taeotu, me Ngati Te Kahu o Ngati Whakaue.
>
> As I have already said to this tribunal the area is under the mana of Tuteata and it was the marriage of Hurunga Te Rangi and Whaingarangi that sealed the line of Ratorua and Tuteata to the land. Under the mana the three hapu of Hurunga Te Rangi, Taeotu and Te Kahu came together to ensure that that mana continued from that source. It is also the place on the Whakarewarewa land where these hapu are only found together.
>
> The old names at Whakarewarewa, particularly around the geothermal features and hot pools are named after direct line descendants of Tuteata. There is Patewharangi and Parekohuru and of course Tamaheke for the lake.
>
> The land is us and we are the land. That infusion and interleaving happened many centuries ago and cannot be disrupted or extinguished without our full legitimate consent. We have never given that consent.[59]

Of all the hapu, Ngati Te Roro o te Rangi is the only Koromatua hapu that does not stand with Ngati Whakaue. Rather, it has chosen to participate in the KEC settlement.

The other five hapu were represented before us by Hamuera Mitchell from Te Kotahitanga o Ngati Whakaue. This body is now the representative body for the claimants with extant claims filed on behalf of hapu of Ngati Whakaue registered with the Waitangi Tribunal.[60] It was formed in 2001 and comprises representatives of Pukeroa Oruawhata Trust, Ngati Whakaue Tribal Lands Incorporated, key leaders of the Koromatua of Ngati Whakaue, and the important tribal members who are making contributions to Ngati Whakaue on a daily basis.[61] The claimants represented by Te Kotahitanga o Ngati Whakaue have a number of claims to the Moerangi block, Whakarewarewa Forest, and Whakarewarewa geothermal valley. The deed of settlement will effectively operate to settle the Whakarewarewa

geothermal valley claims as there will be nothing left to transfer for a future settlement, once vested exclusively in the post-settlement governance entity Te Pumautanga o Te Arawa.

The claimants' case

Ngati Whakaue made a number of submissions on the nature of these claims that we consider deal with four themes:

- cultural identity;
- predominant interest;
- effect of vesting on Ngati Whakaue's claims to these three properties; and
- relationship with the Crown.

Cultural identity

Counsel for Ngati Whakaue told the Tribunal that Ngati Whakaue revere and regard the Whakarewarewa properties as being part of what defines and identifies Ngati Whakaue.[62] Counsel also challenged the notion that there will be plenty of redress opportunities left for Ngati Whakaue. He argued that for Ngati Whakaue the Whakarewarewa properties were not substitutable for other redress.[63] He also argued that, because the Whakarewarewa properties are, in traditional terms, predominantly and principally owned by Ngati Whakaue, the settlement between KEC and the Crown will inflict disproportionate loss on Ngati Whakaue. He stated: 'Without these properties there is no question that the mana of Ngati Whakaue will be irreparably eroded and the tikanga changed forever.'[64]

Predominant interest

Ngati Whakaue say that the Crown relied on the occupation of Whakarewarewa village by Ngati Wahiao (since the Tarawera eruption) as the basis for deciding that Whakarewarewa properties should be returned to Ngati Wahiao. This basis, they say, is seriously flawed. Counsel noted that the Tribunal's *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* did say that Ngati Wahiao have rights to the village, but the rights to the valley have yet to be determined.[65] Counsel also argued that Ngati Wahiao's claims were about the geothermal resource (in relation to tourism) and not land. Ngati Whakaue assert that, since before 1840, Ngati Whakaue have held a dominant and majority tenure over the Whakarewarewa properties.[66] As evidence of this they cite customary law and the effective corroboration of customary law by the Native Land Court in the first title investigation.[67]

Counsel noted that all properties were currently vested in the Crown. With the exception of Moerangi 6L, he submitted that the properties were wrongfully acquired by the Crown (by purchase in a monopoly environment).[68] Counsel laid out the evidence Ngati Whakaue relied on:

- the Fenton agreement and Thermal Springs Districts Act 1881;
- clause 10 of the Wai 94 agreement with Crown in 1993 (which specifically notes the Ngati Whakaue interest in those properties); and
- the Native Land Court decision of 1893.[69]

The Native Land Court had awarded interests in the Whakarewarewa 3 block (on which the thermal valley reserve and Roto a Tamaheke sit) in the proportion of a five-sixths share to Ngati Whakaue and a one-sixth share to Ngati Wahiao in 1893. Counsel submitted that as the Native Land Court award was not appealed or reheard, this therefore negates the view of OTS that the Native Land Court awards were and remain hotly contested.[70]

Counsel referred to the Crown's suggestion that Ngati Whakaue's title (as with all other overlapping claimants) was generally problematic because such title was 'multi-layered and complex'. He contended that this was not an

accurate characterisation of the penultimate Native Land Court decision of 1893 regarding Whakarewarewa 3 block. He acknowledged, however, that Ngati Whakaue interests were predominant but not exclusive.

Effect of vesting on Ngati Whakaue's claims to the three properties

Ngati Whakaue argued that the proposed vesting would effectively extinguish their title and showed wanton disregard for their mana.

Relationship with the Crown

Ngati Whakaue evidence and submissions described three aspects of the impact of the settlement in relation to their relationship with the Crown:

- Ngati Whakaue's historical loyalty to the Crown;
- clause 10 of their agreement with the Crown in relation to the Wai 94 claim; and
- the Crown's inherent fiduciary duty to Ngati Whakaue under the Fenton agreement and Thermal Springs Districts Act 1881.

Ngati Whakaue's historical loyalty to the Crown was, they said, evidenced by them fighting for the Crown and laying down their lives for more than five generations. Counsel regarded the cultural redress decisions as a threat to the continuation of that relationship and their ongoing sense of loyalty to the Crown.[71]

The 1993 Ngati Whakaue agreement

Counsel for Ngati Whakaue argued that there had been substantive unfairness with regard to the Wai 94 agreement of 1993:

> In failing to acknowledge its contractual commitments recorded in clause 10 [of the Wai 94, 1993 agreement], we submit that the Crown is now in breach of contract. This is because Clause 10 is in our submission rendered meaningless and nugatory in two important respects: first, implicit in Clause 10 is the legitimate expectation that the Crown would only deal with Ngati Whakaue on Whakarewarewa, or at least in the sense of priority given over anyone else, there is a legitimate expectation given Ngati Whakaue to reach an arrangement with the Crown regarding ownership to such lands. Now that the fee is to be transferred to Nga Kaihautu exclusively, that promise has been unilaterally avoided by the Crown, and the contractual promise has been broken.[72]

The exclusive vesting arrangements were not, in counsel's view, 'consistent with the Crown's obligations of loyalty and of trust and confidence'.[73]

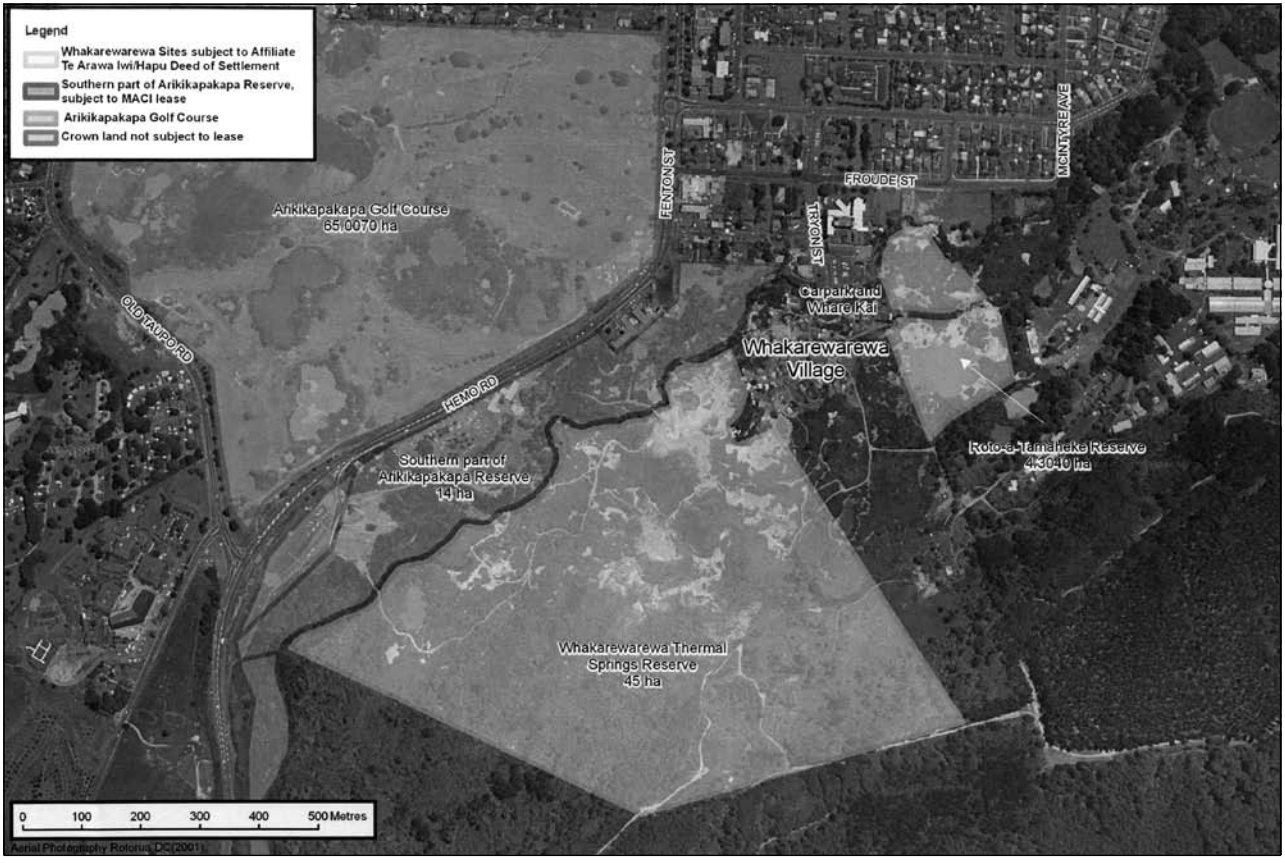
The Crown's case

The Crown's arguments focused on the following heads:

- the significance of the Minister's decision to include the Whakarewarewa thermal springs reserve in the settlement;
- Ngati Wahiao's claims to the geothermal valley;
- options considered by the Minister;
- title to the geothermal valley will be heavily encumbered; and
- novel redress mechanism.

Significance of Minister's decision to include Whakarewarewa thermal springs reserve in settlement

Crown counsel described the Whakarewarewa thermal springs reserve as iconic. It was, in his submission, politically very significant that the Minister agreed to its availability for redress.[74] Moreover, the Minister's decision to include this site in the settlement package would enable a possible settlement with Ngati Whakaue later on to include the Arikikapakapa reserve. Counsel suggested that the particular vesting and leasing arrangements approved were instrumental in the Minister's decision to offer the Whakarewarewa thermal springs reserve as redress for the affiliate Te Arawa iwi/hapu.[75] Counsel also maintained



Aerial photograph showing the Whakarewarewa thermal springs, Roto a Tamaheke, and Arikikapkapa reserves (doc A93(a))

that the Minister's decision had been well informed.[76] He had considered a breadth of material before approving the inclusion of the Whakarewarewa thermal springs reserve in the settlement.[77]

Ngati Wahiao's claims to the geothermal valley

The Crown rejected Ngati Whakaue's submissions that Ngati Wahiao's claims did not encompass land, and that their claim related only to the geothermal resource.[78] Crown counsel cited the claims by Ngati Wahiao under Wai 204 and Wai 282, which did include land. Counsel also refuted Mr Kahukiwa's statement that Ngati Wahiao did not contest the 1893 decision of the Native Land Court. The Wai 282 claimant alleged that the Native Land Court had made a disproportionate allocation of the Whakarewarewa lands when they awarded 92 per cent of the land to Ngati Whakaue. Evidence subsequently placed before the Tribunal's central North Island inquiry queried the 1893 Native Land Court decision that Ngati Whakaue relied on.[79]

Options considered by the Minister

Crown counsel argued that the Minister considered a wide range of material before approving the inclusion of the Whakarewarewa thermal springs reserve in the settlement. The Minister had considered a tenancy in common proposal for Whakarewarewa, but rejected this option for commercial reasons.[80] The Crown rejected any suggestion that in making the decision about this contested redress it had not acted in accordance with tikanga.[81] The Crown maintained that at all times it had access to advice on tikanga from the KEC, and in particular it sought advice from Ngati Wahiao.

Title to the reserve will be heavily encumbered

The Crown also emphasised that it was important to understand the details of the redress, in particular the fact that the reserve land would be vested in the governance entity, Te Pumautanga o te Arawa, in a heavily encumbered way.[82]

Novel redress

The Crown noted that the redress sought to recognise shared interests by:

- Putting aside the southern part of the Arikikapakapa reserve for future settlement purposes;
- a 50 per cent split of the rental between the Whakarewarewa thermal springs reserve and the southern part of the Arikikapakapa reserve;
- the creation of separate leases in perpetuity over the reserve to recognise respective interests; and
- the inclusion of provisions in the leases to ensure that one party could not disadvantage the other.[83]

Moerangi

The Crown noted that the proposed Moerangi vesting was amended on account of input from Ngati Whakaue. That vesting now excludes a segment of the summit (formerly within the Rotomahana Parekarangi 4 block awarded by the Native Land Court to Ngati Whakaue).[84]

Roto a Tamaheke

The Crown acknowledged that Ngati Whakaue have interests in Roto a Tamaheke, but considered there were sufficient other lands available for potential settlement purposes, as the Crown still retained land in the vicinity of the Arikikapakapa reserve.[85]

Tribunal analysis on consultation over the proposed vesting of the Whakarewarewa properties

In chapter 3 we have already found flaws with the Crown's overlapping claims process in breach of the principles of the Treaty of Waitangi. In this section, we examine the detail associated with our findings, and in particular:

- the consultation process in relation to these three cultural redress sites;
- the adequacy of the Crown's assessment of Ngati Whakaue interests relative to Ngati Wahiao's interests in the proposed redress; and
- the extent to which Ngati Whakaue was consulted and their interests in these properties safeguarded.

Phase 1 consultation – pre-AIP

OTS commenced its standard letter-writing process during this stage. On 29 June 2005, it sent its first standard letter with a map encompassing the entire Te Arawa district. By this time, OTS had also turned its mind to specific cultural redress sites where there was a known overlapping interest. These sites were Te Ariki, Otari Pa, Matawhaura, and Ngongotaha Maunga. The Whakarewarewa thermal springs reserve was not considered. We know that at some stage a tenancy in common arrangement for the reserve was mooted, but it never found its way into the agreement in principle.[86] We review how this decision came about below, and what followed between the Crown and Ngati Whakaue.

The return of Ngati Wahiao to the KEC in July 2005 required the Crown to rethink aspects of their cultural redress offer to the KEC. We recall that the Crown had made

an initial cultural redress offer on 21 July 2005 to the KEC, and presented a response to the KEC's counter-offer before 5 August 2005. What we know about these events is that by the end of July 2005, the proposed site-specific redress for Ngati Wahiao included four sites: Whakarewarewa geothermal valley, Roto a Tamaheke, Moerangi maunga, and an urupa in the Crown forestry licence land. The inclusion of the Whakarewarewa geothermal valley and the Maori Arts and Crafts Institute in the redress package was considered by OTS to be central to the Crown's attempt to secure a settlement that included Ngati Wahiao.

According to OTS's recommendation of 12 July 2005, information on Ngati Whakaue's negotiation intentions would be sought (along with that of other Te Arawa overlapping claimants).[87] Such letters were sent out on 26 July 2005. This standard letter contained a request for claimants to indicate their future negotiation intentions.[88] After the Whakarewarewa valley and Moerangi were identified as cultural redress for the KEC negotiations, Ngati Whakaue received their third standard letter from OTS, dated 28 July 2005. This letter made no mention of the negotiations with the KEC, but did refer to the Crown's overlapping claims policy and the Tribunal's *Te Arawa Mandate: Te Wahanga Tuarua Report*. OTS's letter advised that the Minister had considered the Tribunal's concerns for overlapping claimants but had concluded that the Crown's existing overlapping claims policy had proved effective in identifying and protecting such interests in the past. OTS advised that, in the case of Te Arawa, the Minister had agreed that 'special circumstances' existed to warrant the development and implementation of additional or enhanced steps in the process to 'safeguard' their interests. The letter noted that, as a result, the Minister had directed OTS to enhance the Crown's engagement with overlapping claimants. This was to be accomplished by, first, providing a summary of Crown research on overlapping interests directly to overlapping claimants for their comment. In addition, OTS would write to the remaining half of Te Arawa (non-KEC), asking them about their future negotiations intentions (copying to Wai claimants). Once information was received, OTS would consider whether additional steps were appropriate.[89]

The 28 July 2005 letter provided a summary of what OTS understood to be Ngati Whakaue interests, 'claimed areas', 'specific blocks', and 'sites of significance'.[90] The summary was derived from statements of claim and selected evidence given in the central North Island inquiry.[91] Ngati Whakaue were invited to identify their interests in the area of interest (under negotiation with the KEC) by 17 August 2005, ahead of the agreement in principle, and to comment on the preliminary understanding of OTS as to their interests. Whakarewarewa was referred to as both a land block of interest and a site of significance to Ngati Whakaue. Moerangi did not appear in the appendix at all.

On 15 August 2005, two days before the deadline closed for submissions from overlapping claimants, OTS briefed its Minister on the proposed Whakarewarewa geothermal valley redress.[92] It reminded him that it had made a cultural redress offer to the KEC on 21 July 2005. The KEC had placed a counter-offer on the table which addressed the interest to Ngati Wahiao, who had rejoined the KEC. OTS had previously given the Minister a counter-offer proposal on 5 August 2005 which made provision for redress in the valley, but he had requested a separate report. The Minister had sought a joint report from the Ministry of Tourism and OTS on the Whakarewarewa geothermal valley proposed redress. The 15 August briefing described the four properties that make up the geothermal valley: the Roto a Tamaheke reserve, Whakarewarewa village, the Whakarewarewa thermal springs reserve, and the Arikikapakapa reserve (southern part only).[93] OTS reported that the Arikikapakapa reserve was subject to the Crown's 1999 Ngati Whakaue gifted lands policy. They summarised the existing leasing provisions to the Maori Arts and Crafts Institute, noting the perpetual right of renewal. They drew attention to the iconic status of the area and the need to protect the Crown's continuing tourism policy interest. The report also referred to extensive evidence presented to the central North Island Tribunal on the:

> shortcomings of the Native Land Court rulings on allocation of lands within the valley, the Crown's preferential treatment of Ngati Whakaue hapu over Ngati Wahiao, the Crown seeking control of the tourism industry and the impact of the establishment of the MACI [Maori Arts and Crafts Institute] on Ngati Wahiao's ability to participate in the tourism industry.[94]

OTS had also identified a need to provide substantive redress for Ngati Wahiao over either the Whakarewarewa Forest or the Whakarewarewa geothermal valley.[95] The Minister had, however, already decided to limit the forest redress to two discrete wahi tapu sites. The ability to offer the Whakarewarewa geothermal valley as cultural redress was itself constrained by a number of considerations. Any redress in that area was:

- not to impact adversely on current and future tourism development;
- to be acceptable to the Rotorua and New Zealand public; and
- to protect the interests of certain Ngati Whakaue hapu.[96]

Officials reassessed the redress proposals in relation to the Roto a Tamaheke reserve and the Whakarewarewa thermal springs reserve. There were two changes made that affected any proposal to transfer the thermal springs reserve. The initial proposal had been to transfer the title, subject to a 50 per cent tenancy in common arrangement, with a 50 per cent share held in trust by an agreed nominee. That was to be replaced by a simple transfer of title to the post-settlement governance entity, subject to a perpetual lease to the Maori Arts and Crafts Institute. The briefing paper indicated that this transfer would be subject to further Crown exploration of the proposal in consultation with Ngati Whakaue and the Maori Arts and Crafts Institute. The benefit of this change was that it allowed for more consultation before the formal decision was made. Officials also noted that: 'The proposal is amended so that any transfer of title is largely symbolic and the situation is simplified to remove complex lease issues.' The Minister approved these recommendations and informed the KEC of this decision on 16 August 2005.[97] There was no policy advice provided to the Minister on the implications in terms of tikanga in this paper.

We note at this point that these important decisions were made ahead of consultation with Ngati Whakaue (scheduled for September 2005) on the specific proposals relating to the Whakarewarewa valley, including Moerangi. What is more, it seems that Ngati Whakaue were never told this, nor were they told that consultation at this stage would be nothing more than a fact-finding mission. So without any specific direction from OTS, Ngati Whakaue claimants were cautious in their response to an invitation for early consultation (in July 2005) until they had further information on the specific sites that the KEC claimed lay within their area of interest.[98]

In asking that OTS provide details about the particular areas or properties that the KEC consider they have interests in, Mr Kahukiwa used the term 'by way of reciprocation.'[99] The notion of reciprocity is of course an expression of Treaty obligation, which invokes the concept of the Treaty partners owing to each other reciprocal duties of cooperation. At this point Ngati Whakaue were engaging with the Crown, in that they took issue with the Crown's summary of their interests, and pointed out that there was a larger body of evidence of Ngati Whakaue interests (filed in the central North Island inquiry), which was not represented in the summary appended to the July 2005 letter. So Ngati Whakaue had responded to the 28 July 2005 letter. They had not closed off the possibility of discussions, were prepared to meet, and were watching the process with interest rather than anger at this point. For example, Mr Kahukiwa wrote that his clients 'have restricted their claims to the lands and properties belonging to them and do not seek to go beyond their own mana.'[100] This, in tikanga terms, exactly reflects what the Maori approach to such issues requires. He ended his letter with the reasonable statement

that, 'if the Executive Council and the Crown however believe that an overlap exists, then we invite you to make contact with me to arrange a convenient time to discuss.'[101]

On 2 September 2005, OTS responded to this letter, advising Ngati Whakaue that the information that was being sought from them and the work being developed was of a preliminary nature only. They assured Ngati Whakaue that after the agreement in principle had been signed and released 'detailed historical research and analysis' would be undertaken, and that OTS would be in touch again regarding components of the agreement in principle that affected Ngati Whakaue.[102] These assurances are highly significant given that, as we have seen, the critical decisions had been made ahead of this preliminary consultation round, yet this was not made clear to Ngati Whakaue.

Phase II consultation – post-AIP

A week after the agreement in principle had been signed, OTS wrote to Ngati Whakaue with relevant details of the proposed settlement and asked them to respond by 4 November 2005.[103] OTS also encouraged Ngati Whakaue to discuss their interests with the KEC, as the Crown preferred them to resolve any issues themselves. Three of the claimant groups from Ngati Whakaue responded before this deadline.[104] The Wai 316 claimants made a preliminary response and sought more information on specific redress items.

On 14 October 2005, Te Kotahitanga o Ngati Whakaue wrote to the director of OTS, expressing some real concerns about the reduction of Ngati Whakaue's interests in the valley and forcefully rejecting 'the AIP proposals of using its hapu's traditional lands to satisfy its settlement with a grouping that has no links stronger than Ngati Whakaue's to this land.'[105] So, by now, Ngati Whakaue were starting to get very anxious and upset. That is obvious in the tone of their responses. They reject the label of 'overlapping claimants' and any further consultation by the Crown on that basis. They make it clear that until the Crown has acknowledged Ngati Whakaue as a large natural grouping in its own right for the purpose of direct negotiations, they are not prepared to engage in the consultation process outlined in the deed.

The Pukeroa Oruawhata Trust also opposed the settlement and would not consult until the Crown formally acknowledged the matters still outstanding under the 1993 agreement relating to Wai 94. Malcolm Short, the chairman of the trust, supported the position of Te Kotahitanga o Ngati Whakaue, advising OTS:

> The inclusion of the specific Ngati Whakaue sites (Whakarewarewa Geothermal Valley, Whakarewarewa and Horohoro Forests, Patetere and part of Ngongotaha mountain – all specifically covered under Wai 268, Wai 317, Wai 316 and Wai 1240 respectively) means that the Crown is not only arrogant but also ignorant of the strong tribal, historical and cultural links of Ngati Whakaue to these particular sites. It will be a travesty, an injustice (let alone a further breach under the Treaty) if the Crown proceeded to deal with these sites as it intends to under the AIP it has with the NKOTA [Nga Kaihautu o Te Arawa].
>
> Furthermore there is absolutely no trust in the Crown's 'consultation' process as set out and described in the AIP with overlapping claims as that sets the benchmark far too low of only 'satisfying the Crown.'

Mr Short further stated: 'The Geothermal valley is offered as a "carrot" to NKOTA in the AIP. Ngati Whakaue hapu were granted this land in the Native Land Court sittings of the late 19th Century.'[106]

OTS responded to the submission of Te Kotahitanga o Ngati Whakaue on 4 November 2005. In that letter, OTS stated that it would like the opportunity to present the full context of the proposals in the agreement in principle to Te Kotahitanga o Ngati Whakaue and other appropriate Ngati Whakaue representative groups. The director, Andrew Hampton, then stated his view regarding cultural redress and future negotiations:

> Potentially, some agreement may be found on the way forward, and/or the Crown may agree that some of the proposed cultural redress needs to be withdrawn from the offer. In this regard, we would like to seek a meeting with representatives of Te Kotahitanga o Ngati Whakaue in the near future.

He also informed Ngati Whakaue that:

> The Crown recognises that Te Kotahitanga o Ngati Whakaue seeks separate negotiations for Ngati Whakaue, for the settlement of its outstanding claims. The priority of potential negotiations is a matter for the Ministers to consider, in the context of all claimant groups that are seeking to progress towards negotiations. Although Ngati Whakaue has a substantial population, it has benefited from two settlements already (the Wai 94 settlement and the Te Arawa lakes settlement), and has had the opportunity to participate in a wider collective negotiation, if it wished. The Crown also needs to consider the priority of other groups that have not had similar opportunities.[107]

However, neither Mr Hampton nor the Minister ever expressly stated there would be no negotiations in the foreseeable future.

For the Wai 533 Ngati Whakaue claimants, the public announcement of the agreement in principle had been their first notification that the specific properties had been included in the settlement to the KEC. They nevertheless responded fully by 28 November 2005, and sought further information of the basis upon which properties had been included in the agreement in principle and how the various constituent members of the governance entity would deal with these properties. They sought a meeting with the relevant Ministers.[108] The Wai 1204 claimants also complained of a lack of notice. They argued that the agreement in principle effectively determined who had the predominant interest in the properties. In substance, their submission was similar to that of the Wai 533 claimants.[109]

There followed a period of some delay before OTS gave a preliminary response to the agreement in principle submissions. OTS stated that it did not accept that Ngati Whakaue had the sole right to claim interests in the Whakarewarewa valley.[110] In point of fact, the Wai 1204 claimants had only asserted 'principal' title and interests.[111] The Wai 286, Wai 317, and Wai 335 claimants did state that there were Ngati Whakaue hapu who held the Ngati Whakaue mana at Whakarewarewa.[112] The Wai 1204 claimants were assured that the agreement in principle was not legally binding.[113] OTS indicated that it would organise a meeting to discuss the issues in the New Year. In late January 2006, Te Kotahitanga o Ngati Whakaue decided that it would be inappropriate to meet with the KEC before OTS had fully responded to their November 2005 submission.[114]

It is clear that not all Ngati Whakaue claimants provided, in their submissions, the kind of information required by OTS to consider their overlapping claims.[115] When OTS sought more information in regard to the Wai 316 claim, the claimants said in turn that they needed more information themselves first, including the nature of interests claimed by the KEC in relation to Mount Ngongotaha.[116] Meanwhile, the Minister declined to meet with Ngati Whakaue, instead insisting that they hold discussions with the KEC and OTS.[117]

In March 2006, OTS responded further to letters from the Ngati Whakaue groups.[118] It was still trying to meet with Ngati Whakaue claimants. At the end of March, it responded in detail to the Wai 1204 submission.[119] This response contained a broad explanation of how the Crown determines the interests of a claimant group (with whom it is in negotiation) in specific sites and resources that might form part of the cultural redress package upon settlement of the claim.[120]

The next important event was OTS's briefing to the Minister in April 2006.[121] This identified two key areas of contested redress affecting Ngati Whakaue: the vesting of 50 hectares of Mount Ngongotaha scenic reserve and an overlay classification over the whole reserve, and the vesting of 45 hectares of land within the Whakarewarewa

thermal springs reserve. In a summary table, they identified the other items of redress contested by Ngati Whakaue. OTS pointed out that the agreement in principle acknowledged the interests of Ngati Whakaue in some of these lands. Where that was the case, they informed the Minister that the KEC redress proposals provided for recognition of those interests. In particular, they pointed out that another portion of the Whakarewarewa thermal springs reserve was available for a future settlement. We observe that this was a reference to the Arikikapakapa reserve. We signal, at this point, that officials now introduced the Arikikapakapa reserve into the equation and by doing so muddied the waters, because that reserve was already earmarked for future return to Ngati Whakaue under the 1993 gifted lands policy agreement (we will make further comment on this agreement shortly).

OTS presented its recommendation on contested redress to the Minister on 10 July 2006, ahead of the final round of consultation.[122] This referred to the proposed redress for the Whakarewarewa thermal springs reserve, excluding the southern part of the Arikikapakapa reserve on which the Maori Arts and Crafts Institute buildings are located.[123] It also referred to the 1993 Ngati Whakaue settlement, which noted the interests of Ngati Whakaue in the geothermal valley and their wish to negotiate with the Crown on the matter of future ownership and management of the valley.

Officials outlined (in four paragraphs) the shared interests in the geothermal valley, referring to the 1893 Native Land Court award. They stated: 'The Whakarewarewa No 3 block was the subject of a number of hearings and rehearings in the late 19th century.' The analysis of the shared interests placed emphasis on the evidence given by Ngati Wahiao at the central North Island hearings. OTS cited Angela Ballara's 1998 book *Iwi: The Dynamics of Maori Tribal Organisations from c 1768 to c 1945*, and the following observation from the Waitangi Tribunal's 1993 *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*:

> The Tribunal is satisfied that Ngati Wahiao and their close relationship with Tuhourangi, between them have rangatiratanga over the land occupied by them at Whakarewarewa and over their highly valued taonga of which they are, and have been for more than a century, the kaitiaki.[124]

Finally, OTS referred to the extensive evidence put before the central North Island inquiry in relation to competing claims for interest in the valley, the Native Land Court title determination, Crown purchasing, the development of the tourism industry, and the impact on Ngati Wahiao of the development of the Maori Arts and Crafts Institute. Officials concluded: 'These issues are sensitive ones, and this evidence was highly contested on all sides.'

In two brief paragraphs, officials noted the response from 'certain Ngati Whakaue hapu' on the agreement in principle proposal. The first paragraph recorded their opposition on the basis that three Ngati Whakaue hapu had been awarded title to the Whakarewarewa geothermal valley and the Native Land Court had not awarded title to any other group within the KEC. The second paragraph noted OTS's view that the KEC could demonstrate traditional interests in these areas and that these should be appropriately recognised in the settlement package. Moreover, the Crown took account of what similar cultural redress could be offered in the same area (or nearby) in the future.

Officials concluded that the proposed redress struck a 'pragmatic balance that recognises the shared interests of Ngati Wahiao and certain Ngati Whakaue hapu in the Whakarewarewa Thermal Valley'. They cited the rental split, creation of separate leases and inclusion of provisions reflecting the connected nature of the leases as provisions that would safeguard the interests of Ngati Whakaue. The Minister made provisional decisions on the basis of this paper. These provisional decisions triggered the third and final round of formal consultation.

In summary, as a result of consultation up to this stage, the Minister would withdraw the offer to return 50 hectares of Mount Ngongotaha to the KEC and consult further with

Ngati Whakaue on an appropriate alternative. There would be a variation in respect of Moerangi, but no change in relation to the Whakarewarewa geothermal valley redress.

Phase III consultation: between the Minister's provisional and final decisions

In notifying Ngati Whakaue of the Minister's provisional decisions, OTS informed Ngati Whakaue that they would be available to meet with Ngati Whakaue (together with the KEC) within the following two weeks.[125] On 20 July 2006, Ngati Whakaue again sought further information about the basis on which the Minister had made his provisional decisions.[126] OTS was eventually forced to release the ministerial briefing papers pursuant to the Official Information Act. Before this happened, OTS sent out a list of sources it said officials had drawn on in advising the Minister.[127] The named sources were: Merata Kawharu et al's, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report'; volume 1 of Don Stafford's *Landmarks of Te Arawa*; Angela Ballara's *Iwi*; the Tribunal's *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*; the Ngati Whakaue deed of agreement; Duncan Moore and Judi Boyd's report 'The Alienation of Whakarewarewa'; and unspecified statements of claim and briefs of evidence presented on behalf of Ngati Whakaue.[128]

In the meantime, a meeting had been planned for 27 July 2006. It never took place, as Ngati Whakaue did not wish to meet OTS with the KEC present.[129] Ngati Whakaue met the 3 August 2006 deadline for responses to the provisional decision, noting their objection to the two-week timeframe that was, in their view, inadequate for debating the issues amongst the largest iwi in Te Arawa.[130] While acknowledging there were some concessions in the proposed redress, they objected again to the redress as it affected their interests. They sought to meet the Minister before he made his final decision and suggested an extension of the deadline. Again, they also asked for further information on the process for awarding specific redress to the KEC. That was not provided.

As we know, the Minister made final decisions the following day (4 August 2006).[131] OTS informed Ngati Whakaue of these decisions a few days later. In relation to the claims of inadequate consultation, OTS claimed that consultation had begun over a year ago and that further delay would prejudice the KEC unfairly. OTS also reminded Ngati Whakaue that they were aware, when they withdrew their mandate from priority negotiations with the KEC, that the Crown had a limited ability to pursue separate negotiations.[132]

A round of further correspondence commenced. OTS provided documents (maps and briefing papers) on 31 August and met with Ngati Whakaue on 26 September 2006.[133] The deed of settlement was signed on 30 September 2006.

Tribunal analysis on consultation over the Whakarewarewa properties

We are left deeply concerned about this process as it evolved for Ngati Whakaue, the largest tribe of the Te Arawa Waka. There are a number of reasons for our concern:

- During phase I, the Crown had agreed by mid-August 2005 to negotiate the transfer of the Whakarewarewa geothermal valley to the KEC, albeit subject to consultation with Ngati Whakaue. It did not, however, give any early warning of this to Ngati Whakaue prior to the agreement in principle.
- OTS did not act in an open and accountable manner. Nor did it comply with the concept of natural justice when it failed to give Ngati Whakaue adequate opportunity to respond to a number of different developments during the negotiations before they became embedded. For example, Ngati Whakaue never had the chance to respond in full to the historical sources that OTS used to assess their customary interests involving their shared 'taonga'. The Tribunal has said in a number of reports, such as *The Whanganui River Report*, that the significance of taonga is a matter for Maori to determine.[134]

- During phase II, Ngati Whakaue were confronted with the agreement in principle. OTS had advised the Minister that the proposed redress for Whakarewarewa valley was subject to further consultation with Ngati Whakaue (amongst others). But we know that the consultation on the Whakarewarewa geothermal valley was pointless, as it was never going to be negotiable after 5 August 2005. OTS had already predetermined the outcome of any consultation process over overlapping claims concerning Ngati Whakaue and the Whakarewarewa geothermal valley.
- On 4 November 2005, OTS wrote to Ngati Whakaue and advised that the Minister set priorities for negotiations.[135] However, it was never made explicit that the Crown was not going to comply with the suggestions of the Waitangi Tribunal by moving into contemporaneous negotiations. The director of OTS also noted that Ngati Whakaue had already had two settlements, one being the Te Arawa lakes settlement designed for all Te Arawa (including Ngati Wahiao, who have had thereby the same benefit) and the other being the Wai 94 railway lands settlement. We discuss the Wai 94 settlement below. Reference to having the opportunity to participate in a wider collective negotiation was also made. This was obviously a reference to the KEC negotiations. So by this stage, even before the end of submissions on the overlapping claims process, OTS was already demonstrating to Ngati Whakaue that their interests were being weighed against a range of factors that had little to do with what OTS said it wanted to consult them about, and little to do with the need to 'safeguard' their interests. Under such circumstances, it would not have been unreasonable for Ngati Whakaue to conclude that consultation was pointless and that OTS had determined that they had already received sufficient for now.
- While OTS did send out two requests to meet with different Ngati Whakaue claimants, there was no real attempt to bring all Ngati Whakaue together to discuss the Whakarewarewa geothermal valley offer to the KEC. OTS left stones unturned when it could so easily have taken the lead.
- Also in the letter dated 4 November 2005, the director of OTS engaged in an unfortunate exchange relating to the publication of an article in the media concerning the impact of OTS policy on Ngati Whakaue. Taking exception to aspects of the article, he wrote:

> First, the one page spread suggests that the Crown has undermined the legitimacy of the collective mana of the six koromatua hapu of Ngati Whakaue by recognising the mandate of individual Ngati Whakaue hapu. The Crown acknowledges that three groups associated with Ngati Whakaue (Ngati Tura/Ngati Te Ngakau, Ngati Ngararanui, Ngati Roro-o-te-rangi) have elected to remain in the collective negotiations, and to reach settlement with other Te Arawa groups. These Ngati Whakaue hapu have entered negotiations in good faith, and are prepared to negotiate as part of a larger collective. In these circumstances, the Crown considers that the principle of hapu autonomy should be allowed to apply, and should not be overridden by the wish of other hapu of Ngati Whakaue to withdraw from the negotiations.
>
> The proposed settlement will not affect the legitimacy of Te Kotahinga [*sic*] o Ngati Whakaue or any other body wishing to represent Ngati Whakaue as a whole.[136]

- The obvious response to this is that if it was important for OTS and the Crown to respect 'hapu autonomy', why had OTS and the Crown not recognised the hapu autonomy of the Ngati Pikiao hapu, Ngati Whaoa and Ngati Tahu? The spectre raised is one of OTS being selective and partial in favour of anyone who supported the KEC mandate, and dismissive of anyone who did not.
- Given these circumstances and the tone adopted by OTS in response to genuine Ngati Whakaue

consternation, as well as their delay in responding to the overlapping claim submissions filed on 28 November 2005, meetings that could have taken place did not. Ngati Whakaue say they needed some formal response to know how to conduct any meeting that might have taken place. The delay was therefore of OTS's own making. The evidence suggests that OTS made no similar attempt to meet with Ngati Whakaue between the ministerial briefing in April and the last phase of the consultation round. Ngati Whakaue, on the other hand, were responding to letters, writing submissions and generally using other forms of communication. They were happy to meet, so long as they knew what was happening to their overlapping claims submission and how it was being used during the KEC negotiations. From the evidence before us it is clear that Ngati Whakaue were wanting to engage, but that they pulled back when OTS insisted on the presence of the KEC.

- So, by 27 July 2006, the date for a meeting with OTS, the negotiation process was nearing completion. With only two days left before the Minister's final decision, the window of opportunity for effecting any change was small in the extreme, and the likelihood of success correspondingly small.
- Should Ngati Whakaue have tried harder to meet? Would that have made a difference? In our view, given the internal commitment from OTS and the decisions made by the Minister as early as August 2005 about the transfer of the Whakarewarewa geothermal valley, it was unlikely to have yielded a positive result for Ngati Whakaue.
- It seems to us that OTS used the consultation rounds with Ngati Whakaue to identify where their significant modern interests lay, and to take from that information sufficient to balance the loss of the Whakarewarewa geothermal valley, as might be done with commercial, rather than cultural, redress. In our view, that is definitely not a process that seeks to 'safeguard' interests. It is a process that seeks to substitute interests with similar redress. In our view, there are at least two significant flaws in this approach. First, in the matter of culturally significant sites, there can be no 'similar redress'. Secondly, even if there were, it is not for others to gauge the significance of a particular site to any given group and to decide what alternative would make an appropriate substitute. In this instance, only OTS and KEC got to decide what the alternatives should be with regard to 'similar redress' for Ngati Whakaue.
- During phases I and III, OTS should have tried harder to overcome the barriers between it and Ngati Whakaue. OTS advised its Minister that the proposed redress for the Whakarewarewa geothermal valley was subject to further consultation with Ngati Whakaue (among others). This consultation did not happen before the final sign-off, and the Minister was not advised of that.

We turn now to consider whether these flaws in consultation impacted upon the assessment made by the Crown to include the Whakarewarewa geothermal valley and Moerangi site in the cultural redress items for the KEC settlement.

Tribunal analysis on the adequacy of Crown's assessment of Ngati Whakaue interests

We have already summarised the case for claimants and the Crown, and the positions they have taken on the manner in which the Crown assessed the relative interests of Ngati Whakaue and Ngati Wahiao.

The essential points for the Crown were made by OTS witness Ms Fisher, who outlined the factors that the Crown had taken into account when assessing the relative strength of interests held by both groups to the Whakarewarewa geothermal valley and reserve.[137] In addition to the Native Land Court award, these were the factors that the Crown cited:

- the fact that the reserve adjoined the main papakainga of Tuhourangi/Ngati Wahiao;
- the finding in the Tribunal's *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* that Ngati Wahiao and Tuhourangi had rangatiratanga over the land they occupied at Whakarewarewa;
- the previous settlements to Ngati Whakaue and the subsequent Ngati Whakaue gifted lands policy; and
- the availability of 'similar' redress options.[138]

We turn now to discuss each of these matters.

Papakainga and Rangatiratanga

As noted above, the Crown provided further evidence of the key information they had relied on in relation to assessing the interests of Ngati Whakaue vis-à-vis the Ngati Wahiao interest in the Whakarewarewa thermal springs reserve.[139] These sources included Native Land Court records, the Tribunal's report on Te Arawa geothermal resource claims, Angela Ballara's 1998 book *Iwi*, and extensive claimant evidence filed in the central North Island inquiry.

We note that in providing advice to its Minister, OTS accepted that both Ngati Wahiao and Ngati Whakaue have rights at Whakarewarewa. OTS concluded that neither group has dominant interests.[140] There could not, in our view, be any other view of the evidence, as both iwi have coexisted together in this region for many years. OTS said as much, acknowledging the shared interests of Ngati Wahiao with 'certain Ngati Whakaue hapu', in its briefing to the Minister on 10 July 2006. In making this assessment, OTS referred to evidence on the central North Island record of inquiry.[141] For example, 'Nga Mana o te Whenua o Te Arawa' gives a description of occupation and use by both Ngati Whakaue and Ngati Wahiao at Whakarewarewa.[142] That report was available to the Crown in March 2005 and formed one of the primary sources for the summaries of interest that were sent to all 'overlapping claimants' at the end of July 2005.

But we note in that in advising the Minister, OTS erred in its interpretation of the Tribunal's report on Te Arawa geothermal resource claims. That report did not say that Ngati Whakaue did not have an interest in the geothermal valley. We note that whilst acknowledging Ngati Wahiao's undoubted interests, rangatiratanga, and kaitiakitanga, that Tribunal also said:

> The claimants freely acknowledge the interests of Ngati Whakaue in the geothermal surface manifestations at Ohinemutu adjoining Lake Rotorua. Claims to extensive geothermal surface pools, springs and geysers at present in Crown ownership at Whakarewarewa, and elsewhere in and around Rotorua, are yet to be heard and determined as is the interest of certain hapu of Te Arawa in the geothermal resource under privately owned land in Rotorua city.[143]

That Tribunal offered no comment on the extent of Ngati Whakaue claims in that part of the geothermal valley in Crown ownership, as that matter was still to be heard. And in reaching this finding, the Tribunal did not comment on any relative weighting of the Ngati Whakaue interests vis-à-vis Ngati Wahiao in the Whakarewarewa 3 block, where the thermal springs reserve sits.[144] Therefore, the advice given by OTS in this respect was not accurate.

We note also that, in the agreement in principle, the Crown acknowledges the shared interests of Ngati Wahiao and certain Ngati Whakaue hapu. In respect of the Whakarewarewa geothermal valley, the agreement in principle records, in our view rather disingenuously, that 'certain Ngati Whakaue hapu (an overlapping Te Arawa group) have interests in this site'. We use the term 'disingenuous' because the use of the terms 'certain hapu' and 'an overlapping Te Arawa group' does not accurately reflect the political position of Ngati Whakaue in relation to the KEC negotiations. The majority of Ngati Whakaue were not part of the KEC; rather, only 'certain hapu' were part of the KEC. Also, none of the Ngati Whakaue hapu represented by the KEC held the Ngati Whakaue mana whenua at Whakarewarewa. In Maori terms, that is a significant tikanga issue. The late Ben Hona put it this way:

> I am opposed to this deed for the reason that these lands will be given over to someone else who are not of the correct mana. We are the mana to that whenua. Nga Kaihautu is not, nor is any member group of Nga Kaihautu. Part of Te Roro o Te Rangi o Ngati Whakaue is a member of Nga Kaihautu but they are not of the mana. They are of Ngati Whakaue but they are not tangata whenua. The fact that the crown is in effect replacing us is a severe injustice to us.[145]

Ngati Whakaue are the largest Te Arawa iwi and are really a confederation of hapu. Indeed, they are larger than many other iwi in New Zealand. We had evidence that each hapu is autonomous, but all those who form the core Koromatua hapu of Ngati Whakaue usually work together to maintain their tribal base. So a restriction of interests to those of 'certain hapu' signals a potential failure to recognise and safeguard the entire Ngati Whakaue interest in the Whakarewarewa thermal springs reserve. In tikanga terms this is significant, because it appears that none of the Ngati Whakaue hapu who align with the KEC have the requisite mana whenua to have any claim to the lands at Whakarewarewa without the participation of Ngati Hurunga Te Rangi, Ngati Taeotu, and Ngati Te Kahu. There was no advice from OTS to the Minister on this point. As a result of this process flaw, winners and losers have been created and tribal cohesion has been sacrificed. Mr Hona described it this way:

> The Crown is in a position to do the right thing, but has chosen to go the other way.
>
> The only treasure we have left is in our lands. It is our inheritance and this deed amounts to outright stealing. With these lands we are able to ensure our children's future. Without it we are unable to ensure anything.
>
> The wrongful dealing with our land is the same as declaration of war. According to our tikanga only two things spill blood, that is women and land:
>
> *E rua ano nga take e hekenga te toto – ma te wahine, ma te whenua.*
>
> *I cannot stand by or sit in silence and let our lands be taken.*[146]

Similar redress

We now turn to consider how OTS came to the result it did in agreeing to transfer, albeit heavily encumbered, the fee simple of 45 hectares of the Whakarewarewa thermal springs reserve solely to the post settlement governance entity, as well as the proposed transfers of Moerangi and Roto o Tamaheke.[147] We also consider whether, by retaining 'similar redress' (the southern part of the Arikikapakapa reserve) for consideration in a future settlement with Ngati Whakaue for the remainder of their Treaty claims, the Crown safeguarded their interests.[148]

In an update to the Minister on 6 April 2006, OTS summarised the overlapping claims policy.[149] Appendix 3 of that briefing paper recorded the responses that OTS received from overlapping claimants during the consultation round. For Ngati Whakaue, it stated that the agreement in principle acknowledged that some Ngati Whakaue (outside the KEC mandate) have interests in some of the lands included in the agreement in principle. 'Where this is the case, the redress provides for recognition of those interests.' In respect of Whakarewarewa geothermal valley, the Minister was told that another portion of 'this reserve' was 'left available for future settlement purposes' – a reference to the southern part of the Arikikapakapa reserve.[150] The agreement in principle specifically notes that Ngati Whakaue outside the KEC have interests in the site and will be consulted over the redress. On a first reading, you could be forgiven if you assumed that the area available for future redress was within the geothermal springs reserve. It is not. Rather, it is essentially land that encircles the reserve and its predominant use, beyond the buildings, is for car parking.

It should be noted that OTS sought to offer exclusive redress to recognise Tuhourangi/Ngati Wahiao interests while preserving the ability to offer similar redress to Ngati

Whakaue in the future. We would ask whether a car park can ever be 'similar'? We observe that this raises a key question, namely, whether what is preserved is similar in cultural value, or merely nearby or adjoining, and how OTS applies this 'similar' land test. We know in this case that the redress capacity held by the Crown for Ngati Whakaue certainly carries an equal amount of rent, but significant as that is, it is not the issue.

The issue here, as we were told by Ngati Whakaue, is about mana, tikanga, rangatiratanga, and kaitiakitanga, not money. In the words of Ngati Whakaue witness Andrew Te Amo:

> Whakarewarewa was clearly within the area defined by the Fenton Agreement and therefore within the mana whenua area of Ngati Whakaue. It also is part of the definition of who we are, containing so many unique geographical and thermal features. We have wahi tapu there.[151]

This evidence demonstrates that Whakarewarewa was never going to be 'substitutable' for Ngati Whakaue, in the same way that it can never be substitutable for Ngati Wahiao. We would venture to say that there is evidence that neither wants the other excluded, but both were very vulnerable during the negotiation and settlement process and needed to secure their interests.

Given these impacts, we, like the claimants, were left wondering about the methodology used by OTS to assess whether the site should be transferred. We asked whether having 'similar' land earmarked for future settlement would be adequate and appropriate where customs and emotional bonds run as deep as do those concerning Whakarewarewa. Should OTS, as the face of the Crown, be developing policies that depend on substituting 'similar' redress for sites that cannot in fact be substituted? Could OTS and the Crown 'safeguard' Ngati Whakaue's interests in circumstances where a decision on transfer had been predetermined, and where it was obviously favouring the position of one side over the other? What analysis, in tikanga terms, was undertaken when reviewing what sites should be made available during the KEC settlement negotiations? There is nothing in the evidence, other than the national cultural redress policy and briefings to Ministers, to assist us to understand what objective methodology OTS adopted to make this critical assessment over a site where customary interests are so obviously shared and which has such iconic value.

In trying to understand exactly how OTS made this assessment, we begin by noting that, in seeking the Minister's approval for the transfer, OTS advised him that it had been mindful to ensure that:

- the interests of Ngati Wahiao in this area were appropriately recognised;
- the day-to-day operations of the Maori Arts and Crafts Institute remained unaffected and the lease continued to be held in perpetuity; and
- the interests of certain Ngati Whakaue hapu were appropriately safeguarded.[152]

OTS advised the Minister that, having considered the responses from Ngati Whakaue, the historical evidence, and independent research, it had concluded that the cultural redress proposed in the agreement in principle struck 'a pragmatic balance' that recognised the shared interests of Ngati Wahiao and certain Ngati Whakaue hapu in the Whakarewarewa geothermal valley.[153] OTS explained that this 'balance' could be achieved through:

- the transfer of the Whakarewarewa Thermal Springs Reserve to the Te Arawa KEC and retention of the southern part of the Arikikapakapa Reserve for consideration in a future settlement with Ngati Whakaue for the remainder of their Treaty claims. The Puarenga Stream forms a natural boundary between these two Reserves and is a pragmatic allocation of the two key areas over which the tourism business operates;
- a 50% split of the rental between the Whakarewarewa Thermal Springs Reserve and the southern part of the Arikikapakapa Reserve;

- the creation of separate leases over the Reserve areas to recognise the respective iwi/hapu interests; and
- the inclusion of provisions that reflect the connected nature of the two separate leases and to ensure that one party does not disadvantage the other – provisions that may include, for example, a joint rent review process and consultation on any future developments on the reserves areas.

In addition, OTS considered that this proposal appropriately safeguarded the interests of certain Ngati Whakaue hapu (in the context of a potential future Treaty settlement for the remainder of their Treaty claims) by providing the Crown with the ability to provide 'similar redress' to them. OTS was concerned to establish an appropriate arrangement to accommodate any potential change in ownership of the southern part of the Arikikapakapa reserve during a future settlement. OTS was confident that, by making provision for such an eventuality, there would be very little disruption to the operations of either the Maori Arts and Crafts Institute or the governance entity at that time.[154]

Previous Ngati Whakaue Treaty settlements

The final reason that Ngati Whakaue are about to be ousted from the Whakarewarewa geothermal valley relates to the notion that took hold within OTS that they have already received the benefits of two settlements. The first settlement that is cited in the 4 November 2005 letter is the Te Arawa lakes settlement. As this was a settlement that Ngati Wahiao also benefited from, it is hard to see how this could be held against Ngati Whakaue. The second settlement relates to the 1993 Wai 94 agreement, and we discuss this further below.

The Whakarewarewa geothermal valley and the contested cultural redress sites within it were considered (but not settled) during previous negotiations between the Crown and Ngati Whakaue, during the lead-up to the signing of the Ngati Whakaue settlement agreement in 1993. This settlement was designed to settle the claims of Ngati Whakaue in the Rotorua township blocks first created following the Fenton agreement between Ngati Whakaue and the Crown. Ngati Whakaue claim that actions of the Crown in breach of the Fenton agreement resulted in loss and prejudice to them. The settlement was for the transfer of certain railway lands to Ngati Whakaue. The land transferred was valued at $5 million and the Crown paid the cost of it directly to Railcorp.[155] Ngati Whakaue received no cash, but did receive the lands. In this agreement, the Crown and Ngati Whakaue recorded, at clause 10, Ngati Whakaue's interests in the Whakarewarewa geothermal valley and Roto a Tamaheke.

In the addendum to the agreement, it was recorded that for the:

> reserve lands acquired by the Crown *outside* the Fenton Agreement, Ngati Whakaue still wish to negotiate ownership and management of (a) Te Roto a Tamaheke reserve, and (b) Whakarewarewa thermal valley.

The Arikikapakapa reserve was also included in the 1993 agreement. It later became subject to Cabinet's Ngati Whakaue gifted lands policy of 1994 (amended in 1999) and to a right of deferred pre-emption in favour of Ngati Whakaue at no cost to Ngati Whakaue. The issue of the future ownership and management of the thermal reserve was carried forward into the 1999 amendment to that policy by Cabinet. The amendment records that, 'if in future this reserve becomes surplus to the Crown, the land (excluding improvements) should be offered to Ngati Whakaue in the first instance at no cost'.[156]

From this material, it is clear to us that Ngati Whakaue have:

- interests in Roto a Tamaheke reserve;
- interests in the Whakarewarewa geothermal valley; and
- the sole interest in Arikikapakapa, if it becomes available, and Ngati Whakaue desire it.

As we noted above, the 1993 agreement records the interest of all Ngati Whakaue, no particular hapu being named.

We cannot know what the Crown had in mind when it agreed to the reference to the Whakarewarewa geothermal valley and to Te Roto a Tamaheke in clause 10 and addendum A, paragraph 4, of the agreement of 23 September 1993. However, we can say that those areas were definitely excluded from the Wai 94 settlement and that, therefore, the Crown has always understood that they were outstanding matters still to be addressed by a future settlement with Ngati Whakaue.

So the one outcome of any negotiation over the future ownership and management of the Whakarewarewa geothermal valley and Roto a Tamaheke that seems inconceivable to us is that Ngati Whakaue should be forever excluded from both.

On 14 October 2005, Te Kotahitanga o Ngati Whakaue advised the Crown that they rejected 'the AIP proposal of using its hapu's traditional lands to satisfy its settlement with a grouping that has no links stronger than Ngati Whakaue's to this land'. As we have already observed, OTS's response to this was a reminder that Ngati Whakaue have had the benefit of two settlements already. Ngati Whakaue claim that they alone had the sole interests in Arikikapakapa and that the Crown had acknowledged this as recently as 1999.

However, the Crown proposed to use Arikikapakapa as 'currency' to meet its need to safeguard its own interests and the interests of others. It failed, in other words, to discharge its duties fairly and impartially, and in accordance with its fiduciary and Treaty duties to Ngati Whakaue. We are left with the clear impression that the Crown regards the retention of Arikikapakapa as the answer to every issue raised in association with Whakarewarewa, and that there is an underlying message that Ngati Whakaue have had enough already.

Underlying motives for the transfer of Whakarewarewa geothermal valley

We turn now to consider why the Crown sponsored this result. OTS had initially attempted to accommodate Ngati Whakaue interests in the Whakarewarewa thermal springs reserve by considering a tenancy in common in equal shares for the benefit of the affiliate Te Arawa iwi/hapu and eventually Ngati Whakaue.[157] We note that this was never discussed with Ngati Whakaue.

We do know that the proposal to transfer the Whakarewarewa thermal springs reserve posed significant challenges, including the need to construct a consultation process with third parties in accordance with OTS policy that redress should:

- not adversely impact on current and future tourism investment;
- be acceptable to the Rotorua and New Zealand public; and
- protect the interests of Ngati Whakaue.[158]

Prior to the release of the agreement in principle, the tenancy in common idea was dropped in favour of a transfer in fee simple to the post-settlement governance entity (not Ngati Wahiao), and that idea carried through unchanged into the deed of settlement.[159] Priority appears to have been given to some mix of:

- responding to the KEC's demand for significant redress for Ngati Wahiao in the geothermal valley;
- having one owner of a heavily encumbered fee simple site, for simplicity of dealings with the Maori Arts and Crafts Institute and thereby protecting the tourist business; and
- satisfying the concerns of the citizens of Rotorua and the people of New Zealand.

Ngati Whakaue interests were to be 'safeguarded' by the Crown retaining the Arikikapakapa reserve for a possible future settlement, including the prospect for Ngati Whakaue of a substantial rental income. How Ngati Whakaue were to be appropriately 'safeguarded' by being totally excluded from the Whakarewarewa thermal springs reserve is clear only to OTS. Meanwhile, as we shall see, a tenancy in common was viewed by the Crown as appropriate to safeguard Ngati Rangitihi (in relation to Tuhourangi's interest in the Te Ariki site) and considered

to be an incentive for both parties to work together. This could have been considered for Whakarewarewa.

Any perceived concerns held by third parties with regard to having both the KEC affiliates (Ngati Wahiao) and Ngati Whakaue as lessors of the Maori Arts and Crafts Institute site could have been addressed by pointing to the widespread evidence that there are many leases which work perfectly well for lessees, despite the large number of owners. Such is the norm for leases of Maori freehold land. There seems to have been insufficient work done by OTS to construct a practical structure that could allay perceived fears or difficulties concerning the lease and tourist business. The price of that failure has been Ngati Whakaue's exclusion from the Whakarewarewa thermal springs reserve.

Hints as to why OTS took such a flawed approach can be obtained from a number of sources. There is a reference to Ngati Wahiao re-entering the KEC and the need to address their interests in the settlement. There are further hints that as Ngati Whakaue have had two Treaty settlements and Ngati Wahiao have had nothing, it is Ngati Wahiao's turn. As we have explained, those settlements were restricted and the situation concerning Arikikapakapa had already been dealt with. We note here that in the *Tamaki Makaurau Settlement Process Report* that Tribunal observes that the Crown has chosen to negotiate with Ngati Whatua o Orakei, who have had four previous settlements. One of those settlements was the 1993 surplus Auckland railway lands on-account settlement valued at $4 million. In 1991 and 1996, they received $3 million and $8 million respectively.[160] We merely point to these facts to demonstrate that the fact that Ngati Whakaue has had a previous settlement should not have been used as part of the assessment process adopted by OTS to exclude them from the thermal springs reserve.

During these negotiations, OTS was using Arikikapakapa as currency to claim it had retained sufficient to safeguard Ngati Whakaue interests, when the Crown had agreed as far back as 1999 that it was already available for redress. This circumstance flies in the face of OTS claims that it was concerned to 'safeguard' certain Ngati Whakaue hapu interests. By the same token, OTS was using the Whakarewarewa thermal springs reserve as currency to secure the re-entry of Ngati Wahiao under the mandate of the KEC, and to alleviate any commercial concerns held by third parties. In doing so, OTS was treating the thermal springs reserve as substitutable for Ngati Whakaue. There are, in addition, suggestions that OTS was concerned about equality between the iwi and hapu in the number of cultural sites they could expect to receive as redress, with OTS being the arbiter of who receives which sites and how many sites are returned to each. As we have seen, OTS also determined that Ngati Wahiao deserved to get more in this situation. In giving the Whakarewarewa thermal springs reserve to Ngati Wahiao, OTS was meeting the Crown's twin objectives: it could assist the KEC in maintaining its mandate and meet the Government's national settlement targets.

Tribunal findings on the adequacy of OTS's assessment with regard to all Ngati Whakaue cultural redress sites

Our findings focus on the Whakarewarewa properties contested by Ngati Whakaue. We note that the proposed Moerangi vesting was amended on account of input from Ngati Whakaue. That vesting now excludes a segment of the summit (formerly within the Rotomahana Parekarangi 4 block awarded by the Native Land Court to Ngati Whakaue).[161] We do not know for certain whether other iwi have interests here, so we prefer not to consider the matter any further at this point.

What is clear to us, and we find accordingly, is that the Crown's overlapping claims policy could not address the sensitive issue of contested cultural redress in circumstances such as those that exist in Te Arawa. The proposal to transfer the Whakarewarewa thermal springs reserve is an example in more ways than one of how difficult it was always going to be, for no matter how hard you try you can not 'fit a square peg into a round hole'. By this, we mean

that in the usual overlapping claims situation you do not have people who are essentially whanaunga from the same tribe being asked to compete to demonstrate who they are and how they have the better claim, or in this case the more worthy claim, to a 'taonga' that everyone agrees they both share. The demands on the Crown are heavy in such a situation, and we say they were made more so by the settlement path it chose to take. We do not talk here with the benefit of hindsight. Nor do we believe that the Crown could say 'but we did not realise': the Tribunal's two reports on the Te Arawa mandate covered this very possibility.

The duty of the Crown to actively protect iwi and hapu with which it is not in negotiation, in the provision or recovery of their taonga, is at least as great as its duties to the party with which it is negotiating. Overall, we agree with the claimants that the evidence shows that OTS demonstrated, at best, some ignorance and, at worst, enormous disrespect and disregard in its treatment of Ngati Whakaue and their interests. Whichever it was, and whether intentional or not, OTS's actions amount in pure human terms (let alone tikanga and Treaty terms), to a failure to act fairly and with the utmost good faith. As we noted above, the notion that the redress the Crown has retained is 'similar' and therefore adequate cannot be sustained, as the issue here is not about similar or adjacent sites, or money. It is about a taonga so significant in the hearts and minds of the people that to have it taken away, with what almost amounts to a cavalier disregard of their interests, was a denigration of mana, tikanga, rangatiratanga, and kaitiakitanga. Ngati Whakaue witness Mr Te Amo told us about the impact of OTS actions for all of Ngati Whakaue:

> However the decision to vest lands around Whakarewarewa in others will have the effect of undermining the mana of Ngati Whakaue in respect of Whakarewarewa and will have the effect of preventing Ngati Whakaue from safeguarding that wairua.[162]

Mr Te Amo also described the grief to all of Ngati Whakaue from this vesting as 'unimaginably severe.'[163] A significant dimension of that grief must surely lie in the prospect of being separated physically and emotionally from their taonga and consigned to gaze at it from across the Puarenga Stream, able to re-enter only on the same basis as the large number of New Zealand and overseas tourists.

Mr Te Amo gave us examples of the strained relationship now evident between the hapu of Ngati Whakaue and the affiliate Te Arawa iwi/hapu. Where previously the leaders of Te Arawa tribes gathered at Tamatekapua, he could recall no hui held there since the direct negotiations process had begun. He referred to the likelihood of tensions at hui in the future which would 'likely undermine our natural inclinations to host each other as guests, support each other'.[164] We were saddened to hear this and believe that this result was avoidable. It was a result that occurred because of what was, in our view, the careless disregard of tikanga Maori associated with these contested cultural redress site. OTS knew, or should have known, that the use of this site as cultural redress, without adequate care, was bound to cause deep offence, create new grievances, and promote disputes and divisions between iwi/hapu, and between iwi/hapu and the Crown.

OTS's claim that it was safeguarding 'certain Ngati Whakaue hapu' interests cannot be sustained in the wake of this review. OTS must have known that all of Ngati Whakaue had an interest in the Whakarewarewa thermal springs reserve because that is what the Wai 94 settlement provided for. Therefore, the presentation of facts to the Minister was skewed, and this was compounded by assurances to the Minister that the Crown could provide 'similar' redress, when any reasonable person can see that clearly it could not. OTS knew, and should have told the Minister, that the Whakarewarewa thermal springs reserve was a taonga of great importance to both Ngati Wahiao and Ngati Whakaue. It could, therefore, never be substituted, nor could the connection with it. To think otherwise is not to grasp tikanga and the importance of rangatiratanga and mana.

The criteria listed by OTS witness Ms Fisher as those used by OTS in assessing the interests in the Whakarewarewa geothermal valley, which ultimately led to the decision to vest the properties in the post-settlement governance entity, are not suggestive of a rigorous analytical framework or an understanding of tikanga. We have already demonstrated the lack of analysis by revisiting the Tribunal's preliminary report on Te Arawa geothermal claims, by exploring OTS's notion that Arikikapakapa is similar, and by examining claims that Ngati Whakaue had received major benefits from previous settlements. Ngati Whakaue already had a commitment from the Crown, before negotiations began with the KEC, that Arikikapakapa would be returned. But Arikikapakapa somehow became the subject of OTS attempts during the KEC negotiation process to balance the transfer of the geothermal valley and 'safeguard certain hapu of Ngati Whakaue' interests. OTS viewed Arikikapakapa as available to provide 'similar' cultural redress in any subsequent final settlement of Ngati Whakaue Treaty claims. That is carried through to the agreement in principle of 5 September 2005.

The failure, in tikanga terms, included failing to accurately record that the majority of Ngati Whakaue remained outside the KEC mandate. It included OTS's advice to the Minister that its proposal for the transfer of the Whakarewarewa geothermal valley 'safeguarded' Ngati Whakaue interests, which was simply wrong. When the failure to assess which of the hapu of Ngati Whakaue held mana whenua at Whakarewarewa is added to these failures, it becomes clear to us that there are real problems here. Finally, there was a failure to assess what the cultural cost was in offering this package to the KEC, including the tribal relations that will need somehow to continue between Ngati Whakaue and Ngati Wahiao.

As a result of our review of what the Crown relied upon in assessing the interests in Whakarewarewa properties, we fail to see how OTS could deduce sufficient evidence to support the position it ultimately adopted on the Whakarewarewa thermal springs reserve and Roto a Tamaheke. We must find that such assessment was flawed and did not result in the Crown safeguarding Ngati Whakaue's interests.

OTS could and should have engaged with Ngati Whakaue, together with Ngati Wahiao, in a far more Treaty-compliant manner, so as to achieve a redress result that all of Ngati Whakaue and Ngati Wahiao could live with. After all, Ngati Whakaue have never said that their interests in the Whakarewarewa geothermal valley, including the thermal springs reserve, are exclusive. Nor have they sought to exclude Ngati Wahiao. Whereas, in deep contrast, OTS has sought just that. Through the advice it tendered to the Minister, OTS worked to produce a result whereby Ngati Whakaue's interests are now effectively excluded for all time, unless the settlement legislation fails in Parliament. This was an issue where OTS could have played the role of a meaningful honest broker.

Rather, it engaged in a course of action that has been inconsistent with the four principles of reciprocity, partnership, active protection, and equity and equal treatment. It was a result in breach of the Crown's duties to act fairly and impartially as between Ngati Whakaue and the KEC, its duty to protect Ngati Whakaue interests in their taonga, its duty to consult in a substantive way over a site as iconic as this one, and its duty to seek to preserve amicable tribal relations.

We must find that, owing to the actions of OTS and the advice that it tendered, the Crown breached its Treaty duty to actively protect Ngati Whakaue's rangatiratanga and interests in the Whakarewarewa thermal springs reserve and Roto a Tamaheke.

The magnitude of the breach in the case of these Ngati Whakaue redress sites is great, because there is no provision for Ngati Whakaue to come in at a later date – the sites are to be vested exclusively. It is not enough to offer

other adjacent land which is largely a car park. The sites are not substitutable. Herein lies the very real and substantial prejudice for Ngati Whakaue.

For a cultural site as contested, as culturally nuanced, as iconic, as historic, and as spiritual as this area of Whakarewarewa, and as shared, the onus was on OTS to assess this transfer proposal with great care and to take into account all the interests of Ngati Wahiao/Tuhourangi and all the interests of Ngati Whakaue.

Cultural Redress Sites and Ngati Rangitihi

Introduction

We turn now to consider the experience of Ngati Rangitihi. In comparison to Ngati Whakaue, and despite their importance to the history of Te Arawa, Ngati Rangitihi are not an iwi that are well known outside the Maori realm.

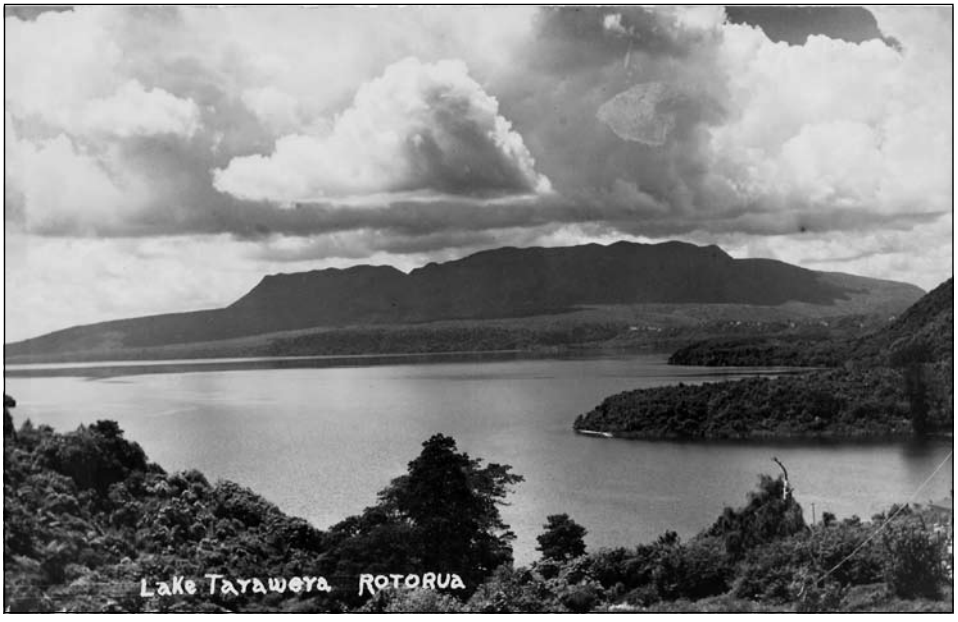
In 'Nga Mana o te Whenua o Te Arawa', upon which the Crown has relied for some of its information to assist with the KEC negotiations, the eponymous ancestor of Ngati Rangitihi is described as follows:

> Rangitihi is a central figure in the history of descent and kinship in Te Arawa. He is perhaps the most celebrated Te Arawa ancestor for it was he who established the Te Arawa people in the Rotorua lakes district. He has consequently been referred to as the nucleus of Te Arawa. As Waaka notes, Rangitihi is considered to be an integral link in the chain of Te Arawa history because, through his children, we are able to trace all the present hapu of Te Arawa.
>
> The importance of Rangitihi, his four wives and their eight children is represented in the Pouhake o Te Arawa. These are the two carved pou or flagpoles that stand beside the tupuna whare Rangiaohia at Matata and Tamatekapua at Ohinemutu. These pou whakairo depict Rangitihi and each of his eight children as the central pillar of descent and mana within Te Arawa. . . . Rangitihi married four times and as mentioned had eight children. These children are in turn referred to as 'nga pumanawa e waru o Te Arawa,' translated as the eight stout or beating hearts of Te Arawa. The children and their lines of descent represent the genealogical spine that connects all members of Te Arawa.[165]

Today, on marae around the Rotorua district and wherever the Te Arawa Waka is present, the oratory reflects the cultural importance of Rangitihi in the saying 'Nga Pumanawa e Waru o Te Arawa' (the eight beating hearts of Te Arawa).

After living at Tarawera, Rangitihi moved to the coast where he died. According to the 'Nga Mana o te Whenua' report, his bones were subsequently exhumed and interred on Ruawahia.[166] This peak is the central peak of the Tarawera Mountain.[167] Tuhourangi and Ngati Rangitihi once held broad interconnecting and overlapping interests within Te Arawa's tribal domain. Today, Ngati Rangitihi interests focus around two key areas, from Te Awa o Te Atua on the coast at Matata, and along the Tarawera River to Tarawera/Ruawahia, encompassing Lake Tarawera and Lake Rotomahana. The land and resources claimed by Ngati Rangitihi in the Tarawera area overlap with the tribal interests claimed by Tuhourangi, and vice versa.[168] The general area known as Te Ariki, for example, is within the southern bay of Lake Tarawera at the foot of the Tarawera Mountain.[169] Both tribes had pa, cultivations, and settlements in this area. Ballara records:

> The people who continued to regard themselves primarily as Ngati Rangitihi were a more select group. The grandchildren of Ngati Rangitihi who were especially associated with him and beginning to regard themselves as Ngati Rangitihi lived around the Tarawera Lake. While there were many hapu of Ngati Rangitihi based around the eastern Tarawera Lake, towards Rotomahana and Rerewhakaaitu, and spreading



'Lake Tarawera, Rotorua', postcard, circa 1915–25

towards Rotoiti in one direction and Putauaki, Paeroa East and Kaingaroa in the other, their various pa came to be clustered around Moura and Tapahoro in the eastern arm of the Tarawera Lake or at Rotomahana. Despite many wars – with Ngati Hineuru and Tuhoe, with Rahurahu and Ngati Tahu, with Tutanekai and Wahiao – this remained the core rohe occupied by Ngati Rangitihi.[170]

Tuhourangi and Ngati Rangitihi have strong kinship connections to each other, with shared genealogy and relationships through certain hapu who have direct whakapapa to both iwi.[171] But, these tribes also have a history of contest over land and resources. This contest was particularly evident during the early years of title investigations before the Native Land Court.[172] It was during these investigations that the Court divided the tribal lands of Ngati Rangitihi and Tuhourangi, where there had previously been no such defined boundaries.[173] Mount Tarawera and most of Lake Tarawera were included in the early Ruawahia block.[174] But the southern end of the lake (where Te Ariki is located) became part of the Rotomahana Parekarangi block.[175] Te Ariki is associated with the last major battle that took place between Tuhourangi and Ngati Rangitihi.[176] It was fought (according to 'Nga Mana o te Whenua') to determine 'the rights of mana and control over resources in the southern bay of Lake Tarawera from Moura down to Te Ariki and also Lake Rotomahana'.[177] Who won and who lost this final battle was and is contested. The battle featured in evidence brought before the Native Land Court during hearings to award the Ruawahia and Rotomahana Parekarangi blocks.[178] The 1887 Native Land Court awards are reviewed in 'Nga Mana o te Whenua'. It reports that Ruawahia was awarded to Ngati Rangitihi, and that the Rotomahana Parekarangi block was divided, with Tuhourangi receiving the bulk of the block known as the number 6 Tuhourangi tribal commons, and Ngati Rangitihi receiving the number 5 block.[179]

These original blocks incorporate Te Ariki, Ruawahia Peak, parts of the Tarawera River, and the Waikite–Waiotapu–Waimangu geothermal area, all identified as

cultural redress or covered by statutory acknowledgements in the KEC affiliates deed of settlement. We deal with each of these sites in turn.

Te Ariki

We have already outlined the general Treaty principles and Crown duties applicable to the Ngati Rangitihi claims in chapter 2. However, because at least part of the site was compulsorily acquired under the Public Works Act 1905, we examine what this means in terms of the Crown's duty to actively protect the interests of Ngati Rangitihi.

The compulsory acquisition of Maori land for public works has been the subject of a number of Waitangi Tribunal reports, including *The Turangi Township Report 1995* and the *Report on the Crown's Foreshore and Seabed Policy*. In summary, the jurisprudence is that the expropriation of the legal property rights of Maori should take place only as a last resort, in the national interest and only after all alternatives have been considered and fair compensation paid.[180] To do otherwise is inconsistent with the Treaty principle of active protection in article 2, and the principle of equity to be found in the article 3 of the Treaty of Waitangi. Maori were to be accorded the active protection of their taonga and the full rights and duties of citizenship, including the right to compensation for public works takings. The *Whanganui River Report* sums up the need for Maori legal property rights to be respected, in the following terms:

> The Crown assumed the governance of New Zealand on the basis of a promise that Maori authority or rangatiratanga over their possessions would be guaranteed. It thus subscribed to a tenant of English law as old as the Magna Carta that private property interests are to be respected, and to a principle of colonial common law that dates at least from the 1600s that, upon British annexation of other lands, the same applies to the properties of indigenous peoples.[181]

We turn now to consider how the Crown acquired the Te Ariki site, before reviewing how the Crown assessed whether it was consistent with the Treaty for the site to be made available as cultural redress.

According to the evidence before us, Te Ariki was a settlement area that encompassed a number of fortified pa, smaller settlements, cultivations, and burial grounds.[182] On 10 June 1886, an eruption from Mount Tarawera smothered the entire Te Ariki settlement beneath 30 to 50 feet of mud. The inhabitants of Te Ariki and the neighbouring settlement of Moura were all killed.[183] So this general area, which is essentially the area including the isthmus between Lake Tarawera and Lake Rotomahana, is of spiritual as well as cultural importance to both Tuhourangi and Ngati Rangitihi, containing as it does the ancestors of both iwi killed there by the eruption.[184] In other words, it forms part of the core interests of both iwi. It was once their home, and but for the eruption it may have remained so to this day. After the eruption, those Tuhourangi who survived moved to join their kin at Whakarewarewa or Paeroa near Moehau.[185] The Ngati Rangitihi survivors moved to the coast at Matata.

The historical accounts before us indicate that in 1908 the Crown took the Te Ariki site from its Maori owners under the Public Works Act 1905 for 'internal communications purposes'.[186] In 1982, the trustees of the Maori land known as 'Rotomahana Parekarangi 6Q section 2B – Te Ariki Trust' filed a claim with the Waitangi Tribunal (Wai 7). A research report by Nikki Dalziell was completed.[187] In January 1997, after reviewing the internal Treaty of Waitangi Policy Unit historical report written by Dalziell, and the work of an external referee advising the Crown Law Office, officials assessed whether the land may not have been used for the purpose for which it was acquired.[188] They noted there were two different theories that might explain the Crown's intentions at the time it acquired the land. The first suggests that the land was acquired for civil defence purposes.[189] The second, that it was taken to secure the Tourism Department's operation known as the

'Waimangu Round Trip'.[190] This trip involved taking tourists on a launch across Lake Tarawera to a landing place near the site. They then trekked across the isthmus to Lake Rotomahana, where they were ferried across that lake to the Waimangu thermal valley.

Officials considered that the second theory was sound:

> after all the Crown had been using the land as part of the 'round trip' for 6 years, [and] following the acquisition of the land under the Public Works Act it continued to be used for the 'round trip'.[191]

The Treaty of Waitangi Policy Unit recognised that, regardless of why the Crown had acquired the land, there was 'still an issue about whether the Crown had a right to acquire the land for "Internal Communications Purposes" and in "continuing using it for Tourism purposes"'.[192]

This evidence was available to OTS when it identified Te Ariki as a cultural redress site for the purposes of the KEC negotiations. These assessments certainly indicated that the site may have been taken under dubious conditions and in a manner that was 'to say the least devious'.[193] Dalziell described it as an acquisition that was 'in violation of the spirit of the Treaty of Waitangi' and that 'any form of redress will have to recognise and re-establish the mana of Tuhourangi and Ngati Rangitihi over the land'. Dalziell said something equally apposite when she went on to observe: 'This is a case which could be easily resolved; as the Crown has much to give and little to lose.'[194] Finally, we note that not all of the owners received compensation.[195]

As a result of our short review of the historical material before us, we know:

- that the Te Ariki area is geographically important for access from Lake Tarawera to Lake Rotomahana;
- that there were Maori settlements on the isthmus;
- that it was traditionally a shared and later contested area between Tuhourangi and Ngati Rangitihi;
- that two Maori settlements were destroyed in this area during the Tarawera eruption;
- that as a result it is considered to be wahi tapu;
- that a contest between these two iwi featured in the judgement of the Native Land Court 1887, when titles to the parent blocks were determined;
- that Ngati Rangitihi received Native Land Court orders granting them the Ruawahia block and a portion of the Rotomahana Parekarangi block, within which Te Ariki is situated;
- that the Crown took the land under the Public Works Act 1905 and not all owners received compensation; and
- that the Crown took the land in circumstances that may have been in breach of the principles of the Treaty of Waitangi.

We turn now to consider how the deed of settlement deals with the Te Ariki site and how the Crown assessed whether it was consistent with the Treaty for the site to be made available as cultural redress.

The Te Ariki site is currently held as a scenic reserve under the Reserves Act 1977. The Crown acquired the site under the Public Works Act in 1908. The deed of settlement will revoke the reservation over the Te Ariki site, vest an undivided half share in the Te Ariki site in fee simple Te Pumautanga o Te Arawa, and vest the remaining undivided half share in the trustees of the Te Ariki site as tenants in common.[196] These vestings are dispositions for the purposes of section 4A of the Conservation Act, but section 24 of that Act does not apply to the dispositions.[197] The governance entity must enter into a management deed with the trustees of the Te Ariki Trust. Both parties must provide a public walkway easement under section 8 of the New Zealand Walkways Act 1990 over part of the site described in part 4 of schedule 2 of the deed.[198] Te Ariki Trust will be a public entity named in or described in a schedule of the Public Finance Act, and will as a result have obligations under that Act. But the deed establishing the Te Ariki Trust will be enforceable in accordance with its terms as a private trust, despite any enactment or other rule of law.[199]

The Crown recognises Ngati Rangitihi interests in the

Te Ariki site and acknowledges and agrees that the trustees of the Te Ariki Trust will hold the Te Ariki Trust's undivided half share in the Te Ariki site in trust for the Crown for future potential Treaty settlements.[200] The Crown must ensure the trustees of the Te Ariki Trust enter into the Te Ariki management deed and the Te Ariki walkway easement prior to the settlement date.[201]

The claimants' case

In terms of the Te Ariki vesting proposal, Ngati Rangitihi's claims can be reduced to two central concerns:

- the award of the site in a 50:50 split between the governance entity and Ngati Rangitihi; and
- that the management regime under the Te Ariki Trust deed and management deed does not provide adequately for their interests.

They also raise a number of concerns about the Crown's processes, such as a lack of information and time, and the Crown's failure to invoke section 40 of the Public Works Act 1981 (the 'offer back provision').

The award of the site in a 50:50 undivided share: Ngati Rangitihi acknowledged that both Tuhourangi (whose interests will be represented by the governance entity) and Ngati Rangitihi have associations with this site.[202] Their claim relates to the decision to award the site in half shares, when Ngati Rangitihi were originally awarded two-thirds of the interests by the Native Land Court. One-third was awarded to Tuhourangi.[203]

Counsel for Ngati Rangitihi provided the legal description of the site as follows:

- section 1, block XII, Tarawera survey district (previously part of the Ruawahia 1 block), seven acres;
- section 2, block XII, Tarawera survey district (previously part of the Rotomahana Parekarangi 6Q2B block), 37 acres;
- section 3, block XII, Tarawera survey district (previously part of the Rotomahana Parekarangi 5B5 block), 53 acres; and
- section 4, block XII, Tarawera survey district (previously part of the Rotomahana Parekarangi 5B5 block) 19 acres.

In 1970, section 4 was resurveyed and became two separate sections: section 1 SO 354515 and section 2 SO 354515.

Section 1 came from the Ruawahia 1 block, which was awarded to Ngati Rangitihi in 1891. Sections 3 and 4 came from the Rotomahana Parekarangi 5B5 and 5B6 blocks awarded by the Native Land Court to Ngati Rangitihi. Section 2 from the Rotomahana Parekarangi 6Q2B block was part of the land awarded to Tuhourangi. Therefore, more than two-thirds of the land at Te Ariki was owned by Ngati Rangitihi before it was taken under the Public Works Act 1905.

Counsel for Ngati Rangitihi noted that the Wai 7 claim filed in 1982 by the Tuhourangi owners of 6Q2B was later amended to include the Ngati Rangitihi sections of the Te Ariki site.[204] After it was filed, the Waitangi Tribunal recommended direct negotiations between the parties to settle the claim. From what we can tell, the claimants and the Crown then engaged in a direct negotiation process over this claim. In 1991, three Ngati Rangitihi kaumatua and the Crown, and Tuhourangi and the Crown signed an agreement in principle. Under this agreement, the lands would have been returned to the descendants of the original owners. This would have returned the land in a way that reflected the original Native Land Court award (one-third to named Tuhourangi owners or their successors, and two-thirds to named Ngati Rangitihi named owners or their successors).[205] The claimants before us called this the 'Tuturu agreement'.

However, the 1991 agreement in principle did not result in a settlement. Further negotiations took place between 1991 and 1999. It noticeably changed the nature of the arrangements reached in 1991. A new agreement in 1999 envisaged a joint governance entity for Tuhourangi and Ngati Rangitihi (rather than returning the land to the original owners) and proposed a return of the land in equal shares. This deed was not ratified by Tuhourangi but was

accepted by some Ngati Rangitihi, whom the claimants before us do not support.[206]

The current proposal for vesting the Te Ariki site under the affiliate KEC deed of settlement follows the 1999 model. As indicated above, under the deed of settlement, the Te Ariki site is to be vested in 50:50 shares with an undivided 50 per cent share vested in the governance entity for the affiliate Te Arawa iwi/hapu and the remaining 50 per cent share vested in Te Ariki Trust for the benefit of the Crown.[207] The Crown will hold the shares until it settles with Ngati Rangitihi. Ngati Rangitihi understand that if the Crown has not settled within 15 years, the Trust can sell its interests in the property and the proceeds will go to the Crown.

The second aspect of Ngati Rangitihi's concern is that the Crown has decided not to invoke the section 40 'offer back' provisions under the Public Works Act 1981, which would see the site offered back to the descendants of the original owners. Ngati Rangitihi object to OTS's decision not to invoke the Public Works Act 'offer back' process or even to seek a section 40 clearance. Their position, as stated in closing submissions, is that the Crown should offer the site back to the descendants of the original owners as defined by the Native Land Court awards. Counsel referred to the Crown's settlement policy that states that all section 40 takings would require clearance before handing back as part of a settlement.[208] The Crown, in this instance, had said a clearance report was never prepared. The Crown maintained that the site was not surplus to the Crown. Counsel asked: if the site was not surplus, why was it offered for settlement purposes? Counsel further stated:

> In 1996 OTS stated that they are satisfied that Ngati Rangitihi are the rightful owners of 72 acres [ie, two-thirds] of the Te Ariki site. Yet in 1999 the Crown accepts that a 50/50 split of the site is fair. The Crown has not been able to point us to any research that it conducted or had commissioned between 1996 and 1999 which would support this new formulation of the distribution between the two groups.[209]

Counsel submitted further that, even though Ngati Rangitihi 'signed up' to the 1999 deal, this does not change the fact that the Crown 'should have assured itself that the basis on which the site was now being offered in two equal shares was fair and supported by the historical record'. The Crown should have investigated the fairness of the 1999 settlement package because it left Ngati Rangitihi worse off than it would have been under the 1991 agreement in principle, and because there were questions raised about the mandate of the Ngati Rangitihi representative in the 1999 negotiations.

Counsel challenged the assertion of the Crown that the current 50:50 split proposal for the Te Ariki site was a better and more 'Treaty compliant' way of dealing with the site 'as the Native Land Court determination cannot be trusted'. Counsel noted that the Crown rejected the Native Land Court award in respect of Te Ariki, although its usual stance was to defend Native Land Court awards in historical inquiries. Counsel emphasised that the Crown had not provided any historical or legal analysis in support of its position that the Native Land Court award was wrong in the case of Te Ariki. Indeed, counsel submitted that the Crown's decision to split the ownership in half:

> flies in the face of the findings made by the Crown's own research in 1990 which supported the two thirds/one third split, and totally disregards the agreement made in good faith between the Crown and Ngati Rangitihi kaumatua in 1991.[210]

Counsel also submitted that the 'offer back' provisions under the Public Works Act provide a way for Te Ariki to be taken out of the settlement package and returned without unpicking the settlement.[211]

The management regime under the Te Ariki Trust and management deed: The case for the Ngati Rangitihi claimants is that they consider the Te Ariki Trust deed contains elements which are unfair and which fail to protect their interests for any future settlement.[212] Ngati Rangitihi say that because the beneficiary of the trust is the Crown, not Ngati

Rangitihi, the Te Ariki trustees only owe fiduciary duties to the Crown and not to Ngati Rangitihi.[213] The trustees are to be appointed by the Crown, although it is acknowledged that there is a place for a Ngati Rangitihi member on the trust.[214] However, that does not mean that Ngati Rangitihi's interests will be protected.[215] They also say that while the land is to be held in trust pending a future settlement, there is no indication or undertaking given as to when that might be.[216] If none is entered into after 15 years, or contemplated within a reasonable time after that, the trust can sell the property with the proceeds from the sale going to the Crown.[217] The same concerns were expressed regarding the management deed, noting in particular that there is no provision for a Ngati Rangitihi representative on the management committee.[218]

Counsel explained that, on 14 July 2006, the Crown advised Ngati Rangitihi that there would be no change to the proposed redress set out in the agreement in principle. Submissions were invited by 3 August 2006. However, the Crown stated that it was unlikely the redress would be reconsidered unless it received significant new information.[219] Ngati Rangitihi say that they are concerned about this for two reasons. First, they did not see the drafting instructions for the management deed until 14 July 2006, when submissions needed to be made by 3 August 2006.[220] It was contended that the draft was developed without consultation with them, yet Ngati Rangitihi will be bound by the new management regime. Ngati Rangitihi were concerned that, despite clause 29 of the agreement in principle (that the Crown would explore its proposal for the Te Ariki site in consultation with Ngati Rangitihi), the Crown did not do this in relation to the management deed.[221] Counsel had met with the Crown on 28 July 2006 and had been told that the claimants 'would not be involved in drafting the management deed and could not provide any further input other than what was given at that meeting'.[222]

Ngati Rangitihi's second concern about the consultation process relates to the Crown's consideration of additional information they supplied after the provisional decision on 'overlapping interests' was made. Submissions on the provisional decision closed on 3 August 2006, and Ngati Rangitihi filed a submission by that date. This gave only one working day for OTS and the Minister to consider the new and significant issue of public works that was raised in their submission.[223] Ngati Rangitihi acknowledged that before this date the issue of public works had not been raised, but contends that it should have been more fully considered as a new and significant issue.[224] OTS replied on Monday 7 August 2006, to the effect that it would make no change to the settlement package. The following day, on 8 August, the deed of settlement was initialled. OTS gave assurances at a subsequent meeting, held on 7 September 2006, that the Crown would respond to the new concerns raised in the 3 August 2006 submission. This was later recorded in an OTS letter dated 6 September 2006. This did not occur, and a substantive response was not received on the issue until 11 October 2006, after the settlement deed was signed.[225]

The Crown's case

In opening submissions Crown counsel emphasised that the Te Ariki redress had been developed as a novel and inclusive item. The Crown acknowledged that until it settled with Ngati Rangitihi, the Crown effectively became one of the landowners in the trust.[226]

The Crown emphasised that Ngati Rangitihi had accepted the 1999 arrangements, which involved a very similar redress package. It acknowledged there are some different views within Ngati Rangitihi but maintained it was clear that they ratified the 1999 proposal.[227]

With reference to the claimants' argument that the Crown should return the land via section 40 of the Public Works Act, the Crown said the return of the site in tenancy in common is a better and more Treaty-compliant option than returning the land to descendants of the original owners as named by the Native Land Court. Crown counsel referred to the fact that decisions of the Native Land Court were heavily criticised in Waitangi Tribunal inquiries,

where individualisation was said to be at odds with Maori custom. Counsel found it ironic that claimants now suggested the Crown should recognise the Native Land Court decision. The Crown's intention was to protect the interests of all parties.[228]

The Crown denied the allegation that it was unlawful not to invoke section 40 of the Public Works Act, on the ground that the land will be vested by statute and in this way bypassing the Act. The Crown also relied on section 42(a) of the Act, which expressly recognises that the Crown can sometimes bypass the 'offer back' provisions, for example for settlement purposes.[229]

In summary, the Crown stated that there is no legal requirement to offer back Te Ariki under the Public Works Act as there is to be a statutory vesting.[230] In response to Ngati Rangitihi's view that the Crown's own settlement policy requires a section 40 clearance in respect of the Te Ariki site, the Crown submitted: 'Crown policy is a general guide that will not always be applied to each and every case in a wholly rigid way'. Section 40 contemplates that for good reason, surplus lands need not be offered back to original owners.[231]

In the Crown's view, the tenancy in common arrangement will avoid replicating the contentious Native Land Court determination. The Crown says this arrangement is fair and Treaty-compliant. There is no valid reason to revisit the 1991 agreement in principle, which was never finalised.[232]

The Crown rejects Ngati Rangitihi's arguments that the Te Ariki redress will have a negative impact on tribal relationships. On the contrary, the Crown holds that inclusive instruments provide a real opportunity for Ngati Rangitihi to work together and share with their whanaunga Tuhourangi in the ownership and management of Te Ariki.[233] Moreover, the redress would benefit all Ngati Rangitihi, not just the descendants of the original owners.[234]

Acknowledging Ngati Rangitihi's concerns about the interim management arrangements, the Crown had amended the trust deed to allow for the appointment of a Ngati Rangitihi member on the trust.[235]

Crown counsel denied that the Minister's decision in respect of the Te Ariki site was uninformed.[236] They also rejected Ngati Rangitihi's complaints that they had not had sufficient time and resources to undertake their own research, and had been hampered in responding to the consultation round by a lack of information provided by the Crown in response to requests, including those made under the Official Information Act. By the time the decision was made, lengthy consultation had been carried out.

Tribunal analysis on consultation and process with regard to Te Ariki

In chapter 3 we found flaws with the Crown's overlapping claims process, resulting in Crown actions and omissions inconsistent with the principles of the Treaty of Waitangi. In this section, we examine carefully the consultation process in relation to the Te Ariki redress; the adequacy of the Crown's assessment of Ngati Rangitihi's interests relative to Tuhourangi's interests in the proposed redress; and the extent to which Ngati Rangitihi's interests in this significant site have been safeguarded.

Unlike some of the other hapu and iwi involved in the overlapping claims process developed by OTS, these Ngati Rangitihi claimants were fully engaged with the process, even before its implementation. They seemed to appreciate right from the start that a failure to participate could result in potential prejudice to their interests. This was because of their previous experiences with OTS in relation to the Ngati Awa and Ngati Tuwharetoa ki Kawerau settlements.[237] We turn now to consider whether that made a difference in terms of how their interests were 'safeguarded'.

Phase 1 consultation – pre-AIP: Before the Tribunal's second mandate inquiry, OTS's position was that the majority of Ngati Rangitihi supported the outcome of a 17 June 2004 hui which had resolved to support the KEC mandate.[238] At that time, the Tribunal noted that the majority of active

Ngati Rangitihi appeared to support the KEC mandate. Between that date and July 2005, that situation changed and Ngati Rangitihi determined they would withdraw. Subsequently, the Minister recognised that Ngati Rangitihi had withdrawn from the KEC.[239] As a consequence of the withdrawal, the Wai 1370 Ngati Rangitihi claimants sought assurance from OTS that their claims would be withdrawn from settlement (Wai 872, Wai 7, and Wai 411).[240] Ngati Rangitihi wrote to the Minister on 19 July 2005, seeking to enter into immediate negotiations over the settlement of Ngati Rangitihi claims.[241] OTS formally responded to that letter in July and August, as we discuss below.

After the Minister had formally recognised their withdrawal,[242] OTS advised informally that Ngati Rangitihi claims were not subject to the settlement, with one exception.[243] In email correspondence, Ngati Rangitihi were advised that as Te Ariki was shared with Tuhourangi it would be partially settled through the KEC process. This, they were told, was 'important for the Crown to ensure comprehensibility in settling all historical claims of Tuhourangi and other groups'.[244] OTS advised that, 'for the avoidance of doubt, the Crown will not be settling those aspects of the claim that relate to Ngati Rangitihi'.[245] The boundaries of the KEC's 'area of interest' were amended to reflect the withdrawal of Ngati Rangitihi.[246]

Ngati Rangitihi, thereafter, received two formal letters dated 26 and 28 July 2005 from OTS, asking them to indicate their negotiation intentions and to provide information on Ngati Rangitihi interests within the KEC area of interest.[247] The first of these letters, dated 26 July, signaled that OTS had been giving consideration to the Tribunal's second mandate report. Ngati Rangitihi were told that one of the Tribunal's recommendations was that 'the Crown take steps to ensure that the overlapping claims of iwi and hapu such as Ngati Rangitihi are properly safeguarded'.[248]

OTS explained that it was seeking information from Ngati Rangitihi so that it could determine what additional steps might be prudent or necessary to ensure that Ngati Rangitihi interests were not prejudiced by the progress in negotiations made with the KEC. OTS sought an update regarding the future progress of their claims.[249] This seems to have been the standard letter sent to all claimants, bar Ngati Makino, who were considered different and requiring 'separate consideration'.

The letter to Ngati Rangitihi also advised that the KEC negotiations remained a priority.[250] OTS concluded by noting that, though Ngati Rangitihi had written to the Minister with a proposal regarding negotiations, that proposal did not 'align with some of the Crown's key settlement policies as articulated above'.[251] The second letter from OTS, dated 28 July, provided a summary of OTS's preliminary understanding of Ngati Rangitihi's interests and sought confirmation.[252] The Wai 7 claim (in respect of the Te Ariki site) was not listed in the summary, but Te Ariki was included in the sites of significance section of the table.[253]

To the first letter, Ngati Rangitihi responded through their counsel on 12 August 2005 that they wished to enter into negotiations as soon as possible.[254] In the same letter the claimants indicated that they believed Ngati Rangitihi to be a sufficiently large natural grouping for the purposes of negotiations with the Crown. They suggested that the parties need not wait for the Waitangi Tribunal process to conclude and a report to be finalised before commencing preparations for negotiations.[255]

On 12 August 2005, Ngati Rangitihi replied through counsel to the second letter. They indicated that they would need more time to prepare information on their interests, as this exercise was akin to preparing a customary usage/manawhenua report for Tribunal purposes.[256] They continued to point out the research funding difficulties they were experiencing, and they stated that OTS should be well aware of Ngati Rangitihi's interests given their previous discussions.[257] They noted that they were in the process of preparing closing submissions for the central North Island inquiry and that it was not possible to provide the information in the timeframe.[258] They were concerned that they had not heard from the KEC and that the KEC had made no attempt to meet with them.[259] Counsel pointed out that it

seemed to be premature to reach an agreement in principle before receiving information from overlapping claimants and consulting them on those interests.[260] He also noted that agreements in principle tended to contain significant allocations of specific sites to the negotiating group. Ngati Rangitihi failed to see how this could be done 'without creating significant potential prejudice unless there had been extensive prior consultation on potential redress sites as well as broader items'.[261] They were of the view that consultation should occur before the agreement in principle.[262]

Ngati Rangitihi, through counsel, followed this up a week later, on 19 August 2005, with an Official Information Act request for information on the draft agreement in principle and any information given by the KEC on their interests in the area.[263] Ngati Rangitihi noted that their core area of interest overlaps with that of the KEC.[264] They therefore sought all official information relating to the proposed agreement in principle, including drafts of the agreement in principle, correspondence from the KEC and OTS relating to the agreement in principle, and information received by OTS regarding the interests claimed by iwi represented by the KEC and Ngati Rangitihi.[265]

Ngati Rangitihi responded by the 26 August 2005 deadline and provided information on their interests as best as they could.[266] They indicated that the summary of their interests appended to OTS's letter of 28 July was incomplete.[267] They identified interests in nine blocks and expressed concern that these blocks overlapped with the KEC area of interest.[268] These blocks included the Ruawahia and Rotomahana–Parekarangi blocks.

Phase II consultation – post-AIP: The agreement in principle was signed on 5 September 2005, less than a fortnight after the 26 August 2005 deadline. The director of OTS wrote to counsel for the Ngati Rangitihi claimants on 7 September 2005.[269] In that letter, he noted their response to the letter dated 26 July 2005 regarding Ngati Rangitihi's wish to enter into direct negotiations for a comprehensive settlement of their claims as soon as possible. They were thanked for providing information regarding their future negotiation intentions and told that this information was being forwarded to the KEC for comment. In relation to their 'strong view' that the consultation with overlapping claimants be completed before the agreement in principle, the director pointed out that an agreement in principle:

- merely set out broad components of the settlement package;
- was non-binding;
- did not create legal relations; and
- was subject to the resolution of overlapping claims to the satisfaction of the Crown.[270]

The director then advised that the Crown and KEC had signed the agreement in principle on 5 September 2005 and that Ngati Rangitihi would be consulted further, when they would have the opportunity to comment on items of specific redress. They were further advised that a key issue for the Crown was prioritisation of negotiations and that 'the Crown is more likely to accord priority to claimants groups who work collectively'. To date, the director noted, Ngati Rangitihi had chosen not to work with others.[271] OTS advised that priority, however, was to be deferred and considered by the Minister after the general election, which was subsequently held in September 2005.[272]

Letters were then written to Ngati Rangitihi claimants on 14 September 2005. The letters from OTS outlined the provisions of the agreement in principle as they affected Ngati Rangitihi and invited their comment by 4 November 2005.[273] Ngati Rangitihi were advised that the information they had provided prior to the agreement in principle had been used to 'assist the Crown to develop, in its negotiations with the KEC, redress that took into account the interests identified by overlapping groups'.[274] These letters listed KEC affiliates by four regions and explained how claimants could get a copy of the agreement in principle from OTS's website.

The letters also stated that a signed copy of the agreement in principle would be posted in two weeks. Again, Ngati Rangitihi were assured that the agreement in

principle merely set out broad components of the settlement package, was non-binding, did not create legal relations, and was subject to the resolution of overlapping claims to the satisfaction of the Crown. It was explained that the Crown 'must satisfy itself that all overlapping claims had been addressed', and that the:

> Crown wishes to ensure that settlement with the iwi/hapu represented by the KEC did not prejudice the Crown's ability to provide appropriate redress to neighbouring claimant groups and thereby achieve a fair settlement.[275]

In this letter, OTS also notified claimants of the proposals relating to Te Ariki, and they were invited to provide initial views on the proposed redress. They were also asked to comment on the remainder of the redress package. They were told that OTS was seeking further information on what interests Ngati Rangitihi have relating to other specific sites.[276] All this information had to be submitted by 4 November 2005. Ngati Rangitihi were then advised that they should talk to the KEC to discuss their respective interests, 'as it is the Crown's strong preference that overlapping claims issues are resolved through agreement between claimant groups directly'.[277]

The claimants did not receive a response from OTS regarding their official information request until 20 September 2005, over a month after the request had been lodged and outside the 20 working day limit imposed by section 15 of the Official Information Act.[278] In its response, OTS claimed that much of the information sought remained confidential to the negotiating parties and could not be released. OTS claimed that the request had been too broadly framed and asked Ngati Rangitihi to refine their questions. In subsequent correspondence Ngati Rangitihi asked to have mana whenua information concerning the interests of the KEC released.[279] They noted that to require Ngati Rangitihi to respond to the agreement in principle without access to the position put forward by the KEC was, in their view, a breach of natural justice.[280] They were advised that OTS would not release this kind of information. Ngati Rangitihi referred this decision to the Ombudsman, on the grounds that lack of access to the information sought interfered with their ability to provide the information required. After referring the matter to the Ombudsman, Ngati Rangitihi refined their request for documentation, seeking to have access to mana whenua information about areas where they had overlapping interests.[281] They continued to assert that in order to protect their interests they needed to make informed comment, and in order to do so they needed to know what interests the KEC was asserting.

On 14 October 2005, OTS responded to an aspect of the request.[282] OTS noted that the Crown had made an offer in October 1999 to settle the Wai 7 claim, and advised that the offer was ratified by Ngati Rangitihi but not ratified by Tuhourangi.[283] OTS also noted that the negotiations over Te Ariki broke off in 2000. OTS claimed it could not provide a copy of the agreement (the Tuturu agreement which recorded the return of the site to the original owners) because no such document existed.[284] OTS finally released the documents it did hold concerning the 1990 Te Ariki negotiations and the draft deed of settlement concerning Te Ariki, on 31 October 2005.[285] As a result of the delay in dealing with the Official Information Act request and in sending out the agreement in principle, OTS gave Ngati Rangitihi an extension until 14 November 2005 to comment on the agreement in principle.[286] OTS then clarified the overlapping claims process during phase II in a manner that had not been done previously:

> First I wish to clarify that the purpose of the current consultation with your clients is to seek information on the nature of Ngati Rangitihi interest in specific sites, resources or areas over which settlement redress has been offered to the iwi/hapu of the Kaihautu Executive Council. This is to assist the Crown make informed decisions about:
>
> - The appropriateness of the settlement redress offered in its negotiations with the KEC; and
> - Preserving the capability to provide appropriate settlement redress to Ngati Rangitihi in the future.

> Whilst I can appreciate why you would wish to consider, and possibly contest, the nature of the KEC iwi/hapu interests in overlapped areas, this is not what the Crown is seeking through this phase of consultation. In this regard, the Crown considers that it has supplied adequate information on the location and nature of the redress contained with the Agreement in Principle to assist your clients in providing an informed response.[287]

There is a suggestion that this phase of consultation is nothing more than an information gathering exercise. Counsel for Ngati Rangitihi, in a letter dated 3 November 2005, was quick to point out that the wording also suggests that there would be a later phase where Ngati Rangitihi would be able to consider, and possibly contest, the nature of the KEC interests in the overlapping area.[288] Further information requested by Ngati Rangitihi pursuant to their Official Information Act requests was still to be released at this stage.[289]

On 10 November 2005, and as a result of the Official Information Act intervention by the Ombudsman, OTS provided a summary of the information that it held concerning mana whenua issues relating to this site. OTS noted that most of its information came from the central North Island inquiry, including statements of claim and research reports, many of them hundreds of pages in length.[290] OTS noted in particular the 'Nga Mana o te Whenua o Te Arawa' report, which it said contained detailed information on the customary interests of all Te Arawa groups in each of the four regions used by the KEC.[291] OTS then noted that it did not hold a summary document of all the available research (or other information) about each of the specific sites they held for negotiating claims.[292] However, to answer the specific Official Information Act request regarding the interests of the KEC that were taken into account by the Crown in developing redress included in the agreement in principle, OTS did provide a summary of the nature of the interests of the KEC affiliates.[293] The table provided listed the KEC interest as: 'Wahi tapu. Many Tuhourangi people resided in this area at the time Mt Tarawera erupted and is now considered an urupa.'[294] OTS also enclosed a copy of the transcript of the 'telling their stories hui' and copies of written presentations, on the basis that Ngati Rangitihi had participated in these hui.[295]

Ngati Rangitihi responded on 28 November 2005, with a lengthy submission that covered procedural flaws in the consultation process, traditional and customary information, timing and availability of information, and their site-specific concerns.[296] OTS replied on 6 December 2005 and 20 December 2005, saying it needed more time to consider the information acquired.[297] There was thereafter a lull in communication for a period of six full months.

During this same period, on 11 November 2005, OTS received a letter from other Ngati Rangitihi (Wai 1375) claimants, represented at that time by Mr Bunge, and Mr Kahukiwa noted that they would be making a response to the agreement in principle.[298] It seems that these Ngati Rangitihi claimants made that response on 16 November 2005.[299] OTS wrote to these Ngati Rangitihi claimants in December 2005, stating that a detailed response to their submissions would be provided in 2006.[300]

Phase III consultation (between the Minister's provisional and final decisions): Ngati Rangitihi (Wai 1370) wrote to OTS in June 2006, asking for a response to their submission of 28 November 2005.[301] On 22 June 2006, OTS wrote apologising for not responding.[302] They emphasised the non-exclusive nature of the proposed redress but undertook to consult further in respect of concerns raised about the Te Ariki site. They emphasised that the proposal was 'merely presented as a proposal for exploration' and that the offer of redress remained subject to consultation with Ngati Rangitihi. OTS expressed a desire to meet with Ngati Rangitihi to discuss the proposed redress once the detail of the proposal had been completed.[303]

On 22 June 2006, OTS also wrote to the Ngati Rangitihi (Wai 1375) claimants.[304] In this letter, OTS refuted the notion that in Ngati Rangitihi's submission the agreement

in principle could potentially extinguish Ngati Rangitihi interests. OTS claimed that the express purpose of the ensuing consultation process was to gather the views of affected third parties, such as the Wai 1375 claimants, so that their interests could be taken into account in determining the content of the final settlement package.[305] OTS recalled that one of the conditions of the agreement in principle was that the Crown be satisfied that the interests of overlapping claimants were safeguarded.[306] In relation to the Te Ariki site, the proposal was still being developed, but OTS would consult again on the proposal once it was ready. OTS noted the desire of the Wai 1375 claimants to meet, based on the previous submission made at the end of 2005.

On 10 July 2006, OTS briefed the Minister in respect of four contested sites, including Te Ariki.[307] Officials noted that the proposals for four cultural redress sites were ready and that OTS was in a position to undertake further consultation with overlapping claimants.[308] The Te Ariki site was referred to as one of four sites that were 'fundamental to determining the acceptability of the settlement package to the citizens of Rotorua, the affiliate Te Arawa iwi/hapu represented by KEC, and overlapping groups'.[309]

OTS here described Te Ariki as 45 hectares of land located within the Lake Tarawera reserve and noted that it 'has supreme significance and ancestral history for Tuhourangi and Ngati Rangitihi'.[310] It referred to the acquisition of the land by the Crown, and the 1999 agreement with the Wai 7 claimants that was not ratified by Tuhourangi. OTS noted that 'The Crown therefore agreed in this settlement with the Te Arawa KEC (in respect of Tuhourangi's interests) to deliver on the previous offer made in relation to Te Ariki.'[311]

Officials noted that Ngati Rangitihi objected to the 50 per cent apportionment.[312] OTS considered that the basis for that objection was that, in Ngati Rangitihi's opinion, 'the history of this site is one of traditional ownership by Ngati Rangitihi, recognition of Ngati Rangitihi's ownership in the Native Land Court, and unfair Crown acquisition'.

Officials simply noted that the Crown had previously acknowledged the shared interest of both parties in the Wai 7 negotiations. The proposed redress sought to 'give effect to the Crown's acknowledgement of these interests and to reflect the substance of the Crown's settlement offer in 1999'.[313]

The proposal was subject to consultation with the Ngati Rangitihi claimants. We note at this point that, unlike in the Whakarewarewa valley example, OTS did not spell out what the Native Land Court awards for this block were. So the Minister was not informed of the fact that majority share of the land was owned by Ngati Rangitihi when it was taken under the public works legislation.

The details of the proposed Te Ariki Trust were also spelled out, including the provision that if the Crown had not settled with Ngati Rangitihi within 15 years, the KEC could apply to have the land partitioned.[314] The trust was to have three trustees appointed by the Minister of Maori Affairs (in consultation with the Minister of Conservation), one of whom would be a Department of Conservation representative.[315] The Treaty Negotiations Minister was to appoint the initial trustees.[316] It should be noted that a minor change was made between the agreement in principle and the deed of settlement. The trust deed was altered to provide that the Minister may appoint one of the trustees from Ngati Rangitihi.[317]

OTS also advised the Minister that, if he agreed with the proposals outlined, it would:

- write to overlapping Te Arawa groups advising them of the details of the proposed cultural redress and invite them to comment by the end of July;
- seek to meet with each overlapping group; and
- report back to the Minister with recommendations for a final Crown position on these matters.

That report would incorporate the responses of the overlapping claimants and any modifications to the proposed redress.[318]

The Minister approved the recommendation, on the basis of advice that OTS considered the redress proposals 'adequately safeguard the interests of Ngati Rangitihi'.[319]

He noted that OTS would report back to him regarding any modifications to the proposals after consultation. The provisional decisions were released to both Ngati Rangitihi groups on 14 July 2006, with comments sought by 3 August 2006.[320] OTS and the KEC were to meet with Ngati Rangitihi within that period.

The meeting took place on 28 July 2006. The records of the meeting produced by OTS and the Ngati Rangitihi Wai 1370 claimants differ. There was discussion on Te Ariki and the decision to set aside the Native Land Court award and vest the land in equal undivided shares.[321] What is clear is that the Wai 1370 claimants were unhappy about the decision and tried to explore other options with the Crown. The KEC representative, Mr Te Whare, stated that the only additional information they had relied on, other than that gleaned through phase II, was korero of the elders on marae and at hui.[322] Henare Pryor of Ngati Rangitihi was present at the meeting, and seems to have been happy about the split shares proposal over the Te Ariki site.[323] Mr Raureti, who attended in support with Mr Pryor, advised that when he was growing up all the people of Tuhourangi and Ngati Rangitihi were one people.[324]

At a private meeting held after the meeting with the KEC, OTS was approached again about Ngati Rangitihi (Wai 1370) entering into their own negotiations. In relation to the statutory acknowledgements in the deed, the claimants suggested that until a settlement had been achieved, some form of recognition of their interests along the lines suggested in the *Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* would be appropriate.[325] That report suggested the Crown notify all relevant local authorities of the status of Ngati Rangitihi as tangata whenua in and around the Matata area.[326] OTS advised it would look at this suggestion.[327]

All Ngati Rangitihi claimants responded with their formal submission on 3 August 2006. The claimants represented by Mr Kahukiwa and Mr Bunge essentially supported the views of Mr Pryor expressed at the meeting held on 28 July.[328] In relation to the Te Ariki site, these claimants accepted in principle the establishment of a trust (Te Ariki Trust) to hold and manage the 50 per cent share in the lands earmarked for Ngati Rangitihi.[329] They did, however, have concerns regarding the 'apparent reluctance' of OTS to allow them any input into the development of the management deed, even though Ngati Rangitihi would be bound by it in the future.[330] They were also concerned about the appointment process for founding trustees.[331]

On the same date, the Ngati Rangitihi (Wai 1370) claimants wrote to OTS pointing out that they had not had sufficient time to fully consider the proposed management deed or trustee appointment process.[332] They officially recorded their objection to a process that completed the management deed for Te Ariki without consultation or effective input into the process by Ngati Rangitihi.[333] They repeated their concerns regarding Te Ariki (traditional ownership, recognition of their ownership by the Native Land Court, and acquisition by unfair means). They argued there was a statutory duty to obtain a section 40 clearance before making Te Ariki available to Maori for settlement purposes.[334] They maintained that the Crown had agreed at the 28 July meeting to provide a copy of the section 40 clearance report, but had not done so. They repeated their concerns regarding the lack of consultation over the joint Te Ariki proposal, especially as they would be bound by the arrangements made over the site. They had just received a copy of the drafting instructions for the management deed and had not had time to consider the proposed joint management arrangements. They had had no part in discussion prior to drafting instructions.[335]

The Minister made final decisions on cultural redress on 4 August 2006.[336] As we know, no changes were made to the initial proposals. Claimants were notified of the decision in a joint letter dated 7 August 2006.[337] The Minister thanked the Wai 1375 claimants for expressing their support for the settlement. He acknowledged the Wai 1370 claimants' continuing concerns regarding Te Ariki.[338] He

agreed that Native Land Court awards should not be taken as absolute evidence of customary interests. He explained that because such awards cannot always be said to reflect real interests accurately, a 50:50 split between Tuhourangi and Ngati Rangitihi on the proposed Te Ariki Trust was decided.[339] The Minister noted the concerns of both the Wai 1370 and Wai 1375 claimants regarding the drafting of the management deed and deed of trust for the Te Ariki Trust. The Crown did not feel the need to involve Ngati Rangitihi further as the details were to be determined with the KEC. In relation to possible future negotiations, the Minister advised all Ngati Rangitihi that:

> I am aware of the desire of Ngati Rangitihi to enter into negotiations for the settlement of their claims as soon as possible. You will also be aware that the crown has limitations in this regard, and this was known at the time Ngati Rangitihi chose to withdraw their mandate from the priority negotiations with the Kaihautu Executive Council. The Wai 996 claimants ask that the Crown not use the large natural groupings policy to punish smaller groups. It is not the intention of the Crown to punish groups with this policy. The Crown has to order its resources and gives priority in its own resource allocation to negotiations that reduce, rather than increase, the likely number of future settlements. The large natural grouping policy allows both claimants and the Crown to coordinate resources better in reaching settlement, which can be a long and costly process. Thank you for your constructive engagement on these matters.[340]

The deed of settlement was subsequently initialled and all Ngati Rangitihi claimants were advised by letter on 14 August 2006.[341] However, this was not the end of the matter. Further consultation occurred after the Minister's final decision and the announcement that the negotiations had concluded with the initialled deed of settlement. On 15 August 2006, Ngati Rangitihi asked for a copy of the 1991 deed concerning the Te Ariki site.[342] A week later, on 22 August, the OTS sought to meet with Ngati Rangitihi and the KEC to discuss the draft Te Ariki Trust deed and the management deed.[343] Comments in written form were sought on the draft by 15 September 2006. The Ngati Rangitihi (Wai 1370) claimants were told that there was no section 40 clearance report on the Te Ariki site because the land had not been declared surplus. OTS advised that as the land was to be vested under settlement legislation (through which the land's reserve status would be revoked and its would revert to Crown land prior to vesting), the Public Works Act procedures would not apply.[344] Ngati Rangitihi made a further urgent request on 6 September 2006 under the Official Information Act in relation to the 1991 Te Ariki negotiations.[345]

Ngati Rangitihi (Wai 1370) wrote to the Minister again on 6 September 2006, outlining their concerns about the overall adequacy of consultation relating to the KEC negotiations, the proposed Te Ariki redress, and various other specific concerns.[346] They noted that, although their 3 August 2006 submission had raised significant new issues, the Minister's decision had been made a day later. They recorded that they had arranged a meeting with the Crown to take place on 7 September 2006 to further discuss matters relating to the KEC deed. Ngati Rangitihi had requested documents that showed which parts of the Te Ariki site were considered to be subject to the Public Works Act 'offer back' provision and which parts were not, and why. Most importantly, they outlined for the Minister that they had been seeking to obtain the release of an agreement in principle signed in 1991 (the Tuturu agreement) from OTS since mid-2005, and that they had been told by OTS that 'no such document existed'. They had now located the document within their own archives and wanted to record that Ngati Rangitihi thought the information significant, warranting a renewed consideration of the Te Ariki proposal.[347] They, of course, expressed concern that OTS had withheld the document.

A meeting between Ngati Rangitihi, OTS, and the KEC took place on 7 September 2006.[348] By this stage, the

original named claimants for the Wai 1370 claim were present. They expressed disappointment regarding the proposed transfer of the Te Ariki site and wanted the Crown to implement instead the 1991 agreement that would see the return of Ngati Rangitihi lands to the original owners.[349]

On 8 September 2006, OTS finally released a copy of the Tuturu agreement from 1991. OTS had it all along, despite its claim that 'no such document existed'. OTS noted that it was undated, but it records that it was signed in October 1991. OTS also released further documents that it had withheld, to place the 1991 agreement in principle in the context of the development of negotiations over a period of time. These included a draft agreement in 1994 (which was never signed) and terms of negotiation in 1998 for the Wai 7 claim. OTS also summarised the history of negotiations over the site from 1981 through to the present day. We present that summary in table 4.

There was further correspondence over the request to OTS, and the Minister responded to the Ngati Rangitihi submission but had not changed his views. The deed of settlement was signed on 30 September 2006. On 18 October, OTS responded to a further Official Information Act request by noting that Ngati Rangitihi had failed to narrow down the scope of their request.[350] OTS reiterated that no section 40 clearance report had been prepared because the land had not been declared surplus. They nevertheless enclosed a report about the site dated December 2005.

Tribunal findings on the nature of consultation with Ngati Rangitihi

By the end of phase I of the consultation, Ngati Rangitihi:

- wanted to negotiate the settlement of their claims independent from any other group;
- were told in July and September that this suggestion did not seem to align with the Crown's national settlement policies, but that the issue of prioritisation would be considered after the election, thus leaving the possibility hanging;
- had advised OTS of their strong view that the agreement in principle should not be signed before consultation with overlapping groups had been completed so as to avoid 'significant potential prejudice', but did not receive a response to this point until after the agreement in principle was signed;
- were asked to provide information regarding their interests within the KEC area of interest subject to negotiations;
- gave information that they had interests in two blocks, Ruawahia and Rotomahana–Parekarangi;
- were told in relation to Te Ariki that 'for the avoidance of doubt, the Crown will not be settling those aspects of the claim that relate to Ngati Rangitihi'; and
- had to use the Official Information Act to obtain further information.

Here is what we know had happened by the end of phase II of the consultation:

- OTS rejected any notion that the consultation process should be completed before the agreement in principle was signed, and duly went ahead and signed it.
- OTS told all overlapping Ngati Rangitihi claimants that the agreement in principle was merely setting out broad components of the settlement package, was non-binding, did not create legal relations, and was subject to the resolution of overlapping claims to the satisfaction of the Crown.
- OTS told claimants that it wanted information from overlapping claimants to ensure it did not prejudice the Crown's ability to provide appropriate redress to neighbouring claimant groups and thereby achieve a fair settlement.
- OTS in fact carried out no consultation in phase II. Rather, it was still just seeking information.
- To identify the KEC affiliates' interests in the overlapping areas, and in relation to specific sites including Te Ariki, OTS relied on the 'Nga Mana o te Whenua o Te Arawa' report and the central North Island record of inquiry. The latter was never intended to be a full scale, in-depth mana whenua inquiry, but was

Date	Te Ariki negotiations
1982	Wai 7 Te Ariki lands claim registered (Ngati Rangitihi and Tuhourangi).
1982	Negotiations begin between the Department of Lands and Survey and the claimants, after they object to a proposed commercial guiding operation across the Te Ariki isthmus.
1984	Lands and Survey offer to give Te Ariki back to the claimants. The offer is rejected because the return is subject to a public access way.
1991	Cabinet agrees to a draft AIP for settling the Wai 7 claim. In October 1991, two documents are signed – one between the Crown and Ngati Rangitihi, and the other between the Crown and Tuhourangi.
1991–94	Discussions take place about the mechanisms for transferring the land.
1994	Cabinet agrees a draft final agreement for settling the Wai 7 claim which differs in some respects from the AIP.
1995	Tuhourangi ask the Crown to reconsider several aspects.
1996	Cabinet agrees to amend the 1994 settlement offer and approve a new negotiating brief for the Crown, which is subject to mandating issues being resolved.
1998	Cabinet recognises Leith Comer's mandate to represent Ngati Rangitihi, and in July 1998 recognises Te Ariki Lands Trust's mandate to represent Tuhourangi.
1998	Terms of negotiation are signed between the claimants and the Crown.
1999	After further negotiations, the Crown offers a settlement proposal which is ratified by Ngati Rangitihi but not ratified by Tuhourangi. Minutes of the Ngati Rangitihi hui are released in October 1999 to the Wai 996 claimants (AP 58).

Table 4: Summary of the Te Ariki negotiations between the Crown and Ngati Rangitihi, 1982–99

designed to address generic issues of concern to all claimants.

- All the Ngati Rangitihi claimants were concerned about the inclusion of the Te Ariki site.

By the end of phase III of the consultation, this is what we know had happened:

- Once the information on cultural sites was gathered, by the end of November 2005, OTS spent the next six months in negotiations with the KEC to develop the instruments for the proposal to transfer cultural redress.
- On 10 July 2006, the Minister agreed that during phase III OTS would merely write, meet, report, and incorporate into a report to him the final proposals for transfer and any recommended modifications to those proposals as a result of the consultation round.[351]
- Ngati Rangitihi continued to be ready and willing to negotiate.
- Some Ngati Rangitihi claimants did not object to the KEC proposal for the Te Ariki vesting, while others did.
- All the Ngati Rangitihi claimants were concerned that they would not have proper input into the

development of the Te Ariki Trust deed and management deed, or the decisions made regarding the appointment of trustees.

- OTS was reluctant to allow them to participate, preferring to manage the process in secret with the KEC.
- OTS did not release relevant documents subject to Ngati Rangitihi requests made in October 2005 concerning the 1991 Tuturu agreement.
- The Wai 1375 original claimants eventually instructed the legal representatives for Wai 1370, so all named claimants from Ngati Rangitihi were represented before this Tribunal arguing that the site should be vested in accordance with the 1991 Tuturu agreement.

In addition to this summary of the consultation process, which contained many of the same flaws identified in relation to Ngati Whakaue, we consider some additional concerns:

- The first is that, in October 2005, OTS denied the existence of the 1991 Tuturu agreement. It failed to disclose this document in response to the Official Information Act requests filed by Ngati Rangitihi. The fact that the existence of the 1991 agreement seemed only to come to light at the eleventh hour gives rise to concern. Either OTS deliberately withheld it or it did not adequately inform itself of the prior history when developing the redress and, instead, based its assessment of relative interests on the 1999 agreement. Indeed, from the evidence filed during the course of our inquiry, it seems that officials did not inform their Minister of the existence of the 1991 agreement. They did not mention it at all when they advised him before he made his provisional decisions in July 2006.[352]
- A further question arises, regarding the information that OTS used to determine that there was no need for a section 40 clearance report. If the existence of the prior offer, accepted and signed by kaumatua of both Ngati Rangitihi and Tuhourangi, and the Minister, had been known to OTS, would it have deemed it appropriate to obtain a section 40 clearance, given the possibility that descendants of the original Ngati Rangitihi owners might be disadvantaged by the settlement? We cannot know the answer to this question, but we note that Ngati Rangitihi drew attention to the existence of this deed when they made their submissions in the final phase of consultation. This was new evidence, but it was not taken into account in the final round of decision-making.

Tribunal analysis on the impact of the proposal for vesting Te Ariki on Ngati Rangitihi

In December 2005, after an exhaustive search, and as part of its historical investigation of the Te Ariki site, OTS could find no evidence that compensation was ever paid for the compulsory acquisition of part of the site.[353] In this section, we consider whether the proposed settlement legislation will extinguish any rights or interests of the claimants or the descendants of Ngati Rangitihi owners named in the Native Land Court awards or both.

Customary rights: As we described above, the land was taken under the Public Works Act 1905 for the purposes of internal communication between Lakes Rotomahana and Tarawera. It was then vested in the Tourist and Health Resorts Department in 1908, and managed under the Tourist and Health Resorts Act 1908. In 1916, it was permanently reserved under section 236 of the Land Act 1892 and revested under the Tourist and Health Resorts Act 1908. [354] In addition, the land was included within a larger wildlife refuge in 1964 and became subject to the Wildlife Act 1953. Finally, it was classified as a scenic reserve subject to the Reserves Act 1977, in 1981.[355]

We note that certain rights of Maori were preserved when the land was gazetted as a wildlife refuge in 1964.[356] We also note that certain rights were preserved in the Reserves Act.[357] Section 46 of that Act provides that the Minister may from time to time grant to Maori rights in relation to a reserve. These amount to the statutory recognition of the customary right to take birds not otherwise

protected under other legislation, and the right to bury Maori on ancestral burial grounds, where the land, immediately before reservation or taking, was Maori-owned land. Therefore, under the Reserves Act, certain customary rights could continue with the Minister's consent in favour of the claimants, and they may lose these potential rights after the KEC settlement.

Extant property rights: The claimants argue that there is a section 40 obligation under the Public Works Act 1981. The Crown argues that section 42A enables the Crown to bypass section 40. Section 40 of the Public Works Act 1981 provides that, where any land held under the Public Works Act, or any other Act for any public work, is not required for that or for any other public work or exchange under section 105 of the Act, the Crown shall offer to sell the land to the person from whom it was acquired or their successor at current market value. Section 41 provides further that, where land was, immediately before the taking, Maori-owned land, the Crown shall offer back the land as set out in section 40 or apply to the Maori Land Court for an order under section 134 of the Te Ture Whenua Act 1993.

Section 42A of the Public Works Act 1981 refers to the case where an Act of Parliament returns to Maori ownership any land that, before being returned, was held for a public work, which would have in the normal course of events entitled the former owners to an offer under section 40 or section 41 of the Act. Any former owner may, in such cases, apply to the Land Valuation Tribunal for a solatium payment as compensation for the loss of opportunity to purchase the land. No such payment can exceed $20,000. As we understand it, these provisions were inserted during the passage of the Waikato Raupatu Settlement Bill in the 1990s. During the second and third reading of the Waikato Raupatu Settlement Bill, an amendment was inserted as a result of concerns raised with the select committee. The chair of the Justice and Law Reform Committee, Alec Neill, told the House:

> I am pleased that the Minister in charge of Treaty of Waitangi Negotiations has seen fit to bring in a supplementary order paper to ensure that the claims of those farming people in the Waikato are to some degree preserved, with payment of compensation at some time in the future.[358]

Judith Tizard, a member of that committee, added that the purpose was to ensure compensation was paid where land was considered for Treaty settlements. She noted:

> The member for Timaru moved an amendment in the House to ensure that compensation would be paid to the Pakeha landowners who had their land taken to build power-stations and coalmines when either those projects do not go ahead, or at the end of the process where the land may normally have been offered back to those people.[359]

In the third reading, Jim Sutton, referring to the Public Works Act amendments, stated:

> This amendment, which is to the Public Works Act, will have general application in future settlements. It will, I believe, cause the Crown to be more careful of the impact of such settlements on third parties. It should reduce the backlash against the settlement process itself.[360]

The rule would appear to be that there is an obligation to offer the land back to its original owners to purchase (at market value or at a lesser price if the departmental head or the local authority considers it reasonable). The Waikato Raupatu Settlement Act 1995 included the above amendment to the Public Works Act 1981. Three principles suggest themselves:

- The offer back is obligatory unless the obligation is waived for settlement purposes.
- The waiver, if invoked, seeks to compensate for the lost opportunity through financial redress.
- The offer back applies to the former owners.

There are two other points worth mentioning. The offer back is an option to purchase. Although the section 42A amendment does not limit its application to Pakeha

landowners, it seems clear from the parliamentary debates that the amendment contemplated adverse impact on Pakeha former landowners whose lands had been taken for public works, as opposed to overlapping claimants to whom the Native Land Court had awarded a majority of interests. Be that as it may, it does appear to us that section 42A is not limited in its application, and that some discretion (where land is offered for settlement purposes) is allowed to the Crown. Even if this is not a extant property right, it is certainly an extant interest that the descendants of the original owners may have.

The Crown, by promoting the settlement legislation proposed in this case, does not seek to offer the land back for purchase by the former owners. It seeks to revoke the reservation, and vest the fee simple in a Trust at nil consideration. The Crown argues that the site in question is not surplus to requirements. The site is held and managed as part of the Lake Tarawera scenic reserve. If it were not offered for settlement purposes, the land would continue to be held and administered as part of the scenic reserve: therefore, the Public Works Act provisions do not apply. Claimants asked why it was available to be offered in a settlement if it had not been declared surplus. Although this is a reasonable question, we accept the Crown's argument that the site in question is not 'surplus to requirements' in the usual sense. But the fact that the land is not 'surplus' does not, in our view, absolve the Crown from considering whether any residual property right exists for the descendants of those named as owners by the Native Land Court, as we now explain.

The Te Ariki site has been put on the table for negotiation. As part of the Lake Tarawera scenic reserve, the Te Ariki site is subject to the Reserves Act 1977. In the usual course of events, where a reservation is to be revoked over all or part of a reserve, section 24 of the Reserves Act will apply. This provides for public notification of a proposed revocation. Section 25 deals with the effect of a revocation of a reservation. The land reverts to the status of Crown land under the Land Act 1948 and can be disposed of under the provisions of that Act (although there are some exceptions named). Section 25(3) provides that, where revoked reserved land had been Maori-owned land prior to reservation, and had been gifted by Maori, the land is to be offered back to the descendants of owners as found by the Native Land Court.[361]

It is our view that there is a consistency of thinking expressed in the Public Works Act 1981 and the Reserves Act 1977. Where land has been taken, there is an obligation to offer it back when the Crown no longer needs it for a public work. Where land was gifted for reserve purposes and the reservation is revoked, there is an obligation to offer back. We note that the land in this case was taken and not gifted, and that the proposed settlement legislation will legislate away the obligation under section 25 of the Reserves Act.[362] But this is not the real problem at the centre of the claimants' concerns.

The problem for the claimants who appear before us is not that the Crown is seeking to modify the 'offer back' obligation by vesting the land at nil consideration (instead of offering the land for sale to the descendants of the original owners at market value). It is the fact that the vesting will see the proportion awarded in recognition of Tuhourangi interests increase by one-sixth, and the Ngati Rangitihi share decrease accordingly by one-sixth. It is also a fact that the wider hapu community of Ngati Rangitihi will benefit, rather than the descendants of the original owners as defined by the Native Land Court.

The Crown points out that the principle of revesting land in the descendants of the original landowners amounts to the perpetuation of the system of land individualisation it imposed on Maori through the creation of the Native Land Court and its associated title system. The Crown contended that vesting the site in a larger community of owners was more Treaty compliant. We acknowledge that Native Land Court processes and decisions are often (and for good reason) challenged by claimants before the Tribunal in

historical inquiries. However, both the Public Works Act 1981 and the Reserves Act 1977 specify that, where land is to be offered back, it is to be offered to the owners, or section 42A should apply. The Crown has not amended this legislation, and it is not enough to assert that what is being done is consistent with the Treaty if there has been no sufficient Treaty assessment of any alternative. To do that, one would expect to see evidence that the descendants of the original owners were consulted. No such evidence has been produced by the Crown.

The Tuturu agreement and Public Works Act: This brings us to the next question. If the Crown legislates so that any extant rights (held under section 40 of the Public Works Act 1981 and section 25 of the Reserves Act 1977) are extinguished, has the Crown made a Treaty-compliant judgement by proposing the vesting of the site in different proportions than the Native Land Court award? We do not think that OTS can say that it has made a judgement that is consistent with the Treaty. To do so, it should have discussed the matter with the descendants of the original Ngati Rangitihi owners, and it should have treated with the claimants in an open and transparent manner.

We do not think that OTS can argue that the fact that the 1999 deed superseded the 1991 Tuturu agreement means that this is the preferred model for settling the claims in 2007. In our view, the strongest argument for the Crown to support the decision to vest Te Ariki in this way turns on the fact that Ngati Rangitihi did accept and ratify the 1999 deed, which did seek to return the land effectively in equal shares, and we now turn to a discussion of that.

We note that Ngati Rangitihi put documents before us attempting to demonstrate that there was not unanimous support for the position taken by their negotiator on this question in 1999. None of it is sufficient to warrant making a finding of this sort, and it detracts from the otherwise worthy aspects of their claims. We do know that there is some evidence that the original Ngati Rangitihi Wai 7 claimants do not seem to have known about the 1999 agreement, despite the fact that the agreement purported to settle their claim. We did not, in the course of this inquiry, seek to unravel the mandate issues that lie below this state of affairs. We were left in no doubt that the Wai 7 Ngati Rangitihi claimants, the Wai 524 named claimants, and the Wai 996 claimants do not support the return of the lands in the manner set out in the KEC deed of settlement. However, we also know that there are some very influential Ngati Rangitihi who do support the proposal.

Trust issues: The Crown will establish the Te Ariki Trust to hold the undivided 50 per cent share in the site that has been earmarked for future settlement with Ngati Rangitihi. The Treaty Negotiations Minister will appoint trustees.[363] The management deed sets out the provisions for management of the property by the governance entity and the Te Ariki Trust. We do not know anything about the arrangement for the trustees and the handover situation after any settlement with Ngati Rangitihi. We have seen the management deed however, which provides for the Te Ariki Trust and the governance entity to manage the Te Ariki site. It is not clear to us from that document whether Ngati Rangitihi will be bound by the management deed after settlement, but it is clear to us that Ngati Rangitihi may have no significant say in how the site is managed. It will be recalled that once the reservation is revoked the Te Ariki site will become private land. Our first comment relates to access to the Te Ariki site. Both parties (the Te Ariki Trust and the governance entity) will manage both parts of the Te Ariki site together.[364] The deed is silent on the position of Ngati Rangitihi in the interim.

An easement under the Walkways Act will preserve access rights to all members of the public. We have not seen the easement area defined but assume this will preserve access to the existing route between the two lakes. Ngati Rangitihi will still have access, whether they are represented in management or not, but this reduces their

relationship with this important site to nothing more than that of any other member of the public.

We also note the concern of Ngati Rangitihi that the management deed provides the power to partition the land (or sell the land), and that this right can be exercised upon the completion of a future settlement with Ngati Rangitihi or 15 years after the Te Ariki site is vested in the governance entity and the Te Ariki Trust.[365] We believe they have the right to be concerned, given that the Crown has made no commitment to negotiate with them and has all but advised them it was their own fault for withdrawing from the KEC mandate.

Tribunal finding with regard to Te Ariki

The central issue before us in the case of Ngati Rangitihi is whether the Crown, in settling the historical claim of the KEC affiliates, has retained sufficient capacity to provide adequate and appropriate redress in the future settlement of Ngati Rangitihi's claims to this site. In particular, has OTS 'safeguarded' their interests? In answering this question, we note that the vesting of the Te Ariki site in Tuhourangi and Ngati Rangitihi as tenants in common in undivided shares is a non-exclusive form of redress. There can be no doubt that the Crown did attempt to provide redress through this site that recognised the interests of both Tuhourangi and Ngati Rangitihi. We, too, recognise both shared interests. Nothing we say below is a reflection on the status of Tuhourangi and their obvious and undoubted relationship with the Te Ariki site. Rather, our findings concern OTS and its actions in relation to the Crown's Treaty partners, Ngati Rangitihi and Tuhourangi.

In that respect, we find that OTS has acted in a manner inconsistent with the principles of the Treaty with respect to Ngati Rangitihi through its actions and omissions summarised below:

- The consultation process was token at best. OTS knew that this form of redress would present Ngati Rangitihi with a fait accompli concerning this site. After all, OTS had already determined that the site would be returned to the KEC before phase I commenced. All aspects of the consultation phases were, thereafter, merely about improving on a model that had been predetermined. In addition, Ngati Rangitihi were told that the information gathering exercise in phase II was not about giving them the opportunity to challenge or contest the proposal. That was followed with advice that the purpose of phase III was only about 'safeguarding' their interests.
- No evidence was put before us to show that OTS consulted with the former Ngati Rangitihi owners before deciding to include it as part of the negotiation with the KEC.
- OTS's process lacked transparency and accountability. Ngati Rangitihi had great difficulty obtaining from OTS, under the Official Information Act, the information that was being used to ascertain the relative merits of Ngati Rangitihi interests vis-à-vis Tuhourangi. They needed this information to present their submissions during the overlapping claims process. This resulted in delays at critical times during the consultation phases. Much of that information was directly relevant to the Te Ariki site negotiations of the 1990s. Some of that critical information was withheld in circumstances that can only be described as unfortunate, given how central the information was to consultation with Ngati Rangitihi.
- All the information that OTS sought from Ngati Rangitihi during phases I, II, and III was overweighted in favour of gauging the risk for the Crown if the Te Ariki site was included, with only limited or no discussion on how the transfer safeguarded the major interest of Ngati Rangitihi. We come to this finding because we know the Te Ariki site was one of four cultural redress sites critical to the KEC negotiations. The KEC settlement was, in turn, critical to achieving the Crown's national settlement targets. Briefings to the Minister suggest that they were inextricably linked.
- OTS knew that this is a significant site for Tuhourangi

and Ngati Rangitihi. But despite this knowledge and the Native Land Court award, the future vesting of Te Ariki reflects nothing more than the dominance of the KEC position at the negotiation table. We are not commenting here on the question of proportionate customary interests in the Te Ariki site, rather we are saying that OTS could not have been in a position to assess that. Irrespective of whether OTS is correct or incorrect in vesting the Te Ariki site in half (undivided) shares as opposed to one-third and two-thirds, none of the material the Crown has listed in the evidence before us provides a definitive answer on that point.

- There is no evidence that OTS advised its Minister of the alternative proposal for vesting of Te Ariki based on the formula reached in 1991. OTS knew, or ought to have known, about this 1991 agreement in principle, but it never properly advised its Minister about it. Whether the proposal would have been ultimately rejected or not is not the point. What is more important is that OTS should have advised the Minister of it and let him fairly and impartially assess all the options without favour. Only then could the Crown make a Treaty-consistent decision to continue or modify its proposals for transfer. The process used to glean information from Ngati Rangitihi demonstrates that it did not do this.
- We also have concerns regarding Ngati Rangitihi's access to the site prior to any future settlement, and the risk of partition or sale of half the site after 15 years if their claims remain unsettled.
- We note that the Crown has amended the trust deed to give the Minister discretion to appoint one of the trustees from Ngati Rangitihi.

We find that the actions of OTS in relation to the Te Ariki site breached the duty to consult in accordance with Treaty standards, the duty of active protection, the principle of equity and equality including the right to have Ngati Rangitihi property rights respected, and the duty of the Crown to treat all Maori fairly and impartially and in accordance with its fiduciary obligations to all Maori.

We find that all of Ngati Rangitihi will be prejudiced in their own future negotiations because they will have lost the opportunity to negotiate for the return of the Te Ariki site on terms other than those agreed to by the KEC. As we have no evidence before us indicating that OTS consulted with the descendants of the former Ngati Rangitihi owners before deciding to include it as part of the negotiation with the KEC, they are likely to be seriously prejudiced by this settlement.

If one were to stand back from the detail and ask whether this is fair, the answer upon any reasonable assessment must be no. In effect, OTS has identified Maori land to pay for a part of the settlement that it wants to achieve with the KEC whatever the cost or damage to tribal relationships. It is not losing anything for this gesture. Nor are the people of Rotorua or New Zealand. On the other hand, Ngati Rangitihi who are the descendants of the Ngati Rangitihi landowners are losing the potential to have their birthright returned to them.

The irony is that Ngati Rangitihi would be better off if the site were left under its current status, because at least the claimants have certain defined customary rights of birding and burial recognised under the regime preserved by the Reserves Act 1977. That may not be the case after the KEC settlement. Furthermore, as it reads at the moment, Ngati Rangitihi will have no meaningful role in the management of the site other than through their one possible representative on the Te Ariki Trust.

Finally, we conclude with a comment regarding the role of OTS. The process used for Te Ariki demonstrates that OTS is causing unnecessary distress and delay during critical milestone periods while dealing with overlapping claimants. We believe these approaches to be at odds with the role that OTS should play as keeper of the Treaty settlement process and as the body charged with upholding the honour of the Crown.

Proposed redress over Ruawahia Maunga and Tarawera River

Under the deed of settlement, the Crown will provide two items of non-exclusive redress, which are contested by Ngati Rangitihi claimants. The first involves a whenua rahui over part of the Lake Tarawera scenic reserve (formerly part of the Ruawahia 3 block).[366] The second involves a statutory acknowledgement of the associations of the affiliate Te Arawa iwi/hapu with part of the Tarawera River.[367]

The claimants' case

Ruawahia Maunga: Ngati Rangitihi objected for a number of reasons to the fact that the Crown would declare a whenua rahui for the benefit of the KEC affiliate iwi/hapu over this site. Before discussing those reasons, counsel pointed out that the agreement in principle contained no reference to a whenua rahui over Ruawahia.[368] The return of the Ruawahia block is part of the Wai 1134 claim bought on behalf of two of the claimants before us. Counsel for Ngati Rangitihi contended that there are five reserves in Maori ownership on Ruawahia 3, all under the control of the Department of Conservation, who administer the block. She also asserted that as the reserves were surrounded by Department of Conservation land, access to the sites is restricted, even for the owners. Counsel submitted that a whenua rahui creates what amounts to exclusive interests for the affiliate Te Arawa iwi/hapu, despite the assurances of the Crown to the contrary.[369]

Counsel for Ngati Rangitihi pointed out again the flawed nature of the consultation process adopted by OTS, noting that the agreement in principle envisaged that an overlay classification would apply to the Ruawahia 3 block on transfer to the post governance settlement entity. This was another consultation flaw, as the deed of settlement proposes a whenua rahui over that site.[370] In this respect there has been a major change without advice to the claimants.

The Crown refers to the whenua rahui as a non-exclusive instrument, but in this case it will give exclusive rights to the affiliate Te Arawa iwi/hapu with regard to a number of benefits including dealing with any koiwi or taonga that are found on the Ruawahia site. Ngati Rangitihi say that this is offensive to them, because it gives rights to another group over their wahi tapu.[371]

The next purpose of the whenua rahui is to put others on notice that the KEC affiliates have rights in this area, whilst failing to recognise that Ngati Rangitihi have exclusive rights in the Ruawahia 3 block. Therefore, counsel contended, any Government agency or private company who considers the deed to inform themselves of who has an interest in the Ruawahia block would be left with the impression that it is only the KEC affiliates.[372]

Counsel submitted that, just as with the Te Ariki site, the Crown has not provided an analysis of why they have deemed it appropriate to offer cultural redress over a site which Ngati Rangitihi claim is their tupuna maunga, previously recognised by Native Land Court awards in their favour.[373] The only evidence that the Crown could point to was that provided by Ms Fisher of OTS, who stated that the 'whenua rahui was offered in recognition of Tuhourangi's traditional association with Tarawera as a tupuna maunga'.[374]

As with the Te Ariki redress, Ngati Rangitihi had not seen, and the Crown did not provide, an analysis of why the Crown has deemed it appropriate to offer cultural redress 'over a site which Ngati Rangitihi claim is their tupuna maunga'.

Part Tarawera River: In respect of the proposed non-exclusive statutory acknowledgement over part of the Tarawera River, Ngati Rangitihi say they consider themselves to be the kaitiaki of part of the river over which the KEC will have a non-exclusive statutory acknowledgement. Counsel explained her understanding of a non-exclusive statutory acknowledgement and noted that such an instrument gives the impression that the KEC affiliates will be the correct entity to consult with regarding the Tarawera River. Ngati Rangitihi object to the fact that the Crown will

confer a statutory acknowledgement of association to the affiliate Te Arawa iwi/hapu over their part of the Tarawera River. Ngati Rangitihi have had experience with these statutory instruments, which have created the impression for consent authorities of exclusive interests in favour of those who are the holders of them.[375]

The Crown's case

Ruawahia Maunga: Crown counsel stated that the overlay classification of whenua rahui would acknowledge the affiliate Te Arawa iwi/hapu's customary values in relation to the area and provide for their input into management of that portion of the reserve.[376]

Although whenua rahui are normally an exclusive form of redress, the Crown has offered the redress as a non-exclusive form in order to recognise 'overlapping interests'.[377] The Crown acknowledges the traditional associations of both Tuhourangi and Ngati Rangitihi.[378]

Part Tarawera River: The Crown recognises that there are a number of wahi tapu sites along the Tarawera River and that the river provided mahinga kai and an important travel route for certain groups within the affiliate Te Arawa iwi/hapu. It understands Ngati Rangitihi claim an exclusive interest in that part of the river that passes through the Ruawahia block (which was awarded to Ngati Rangitihi by the Native Land Court). The Crown's view is that the redress is non-exclusive and can be offered to Ngati Rangitihi in the future.[379]

Tribunal analysis on the Ruawahia and Tarawera River redress

As we have noted above, Ruawahia is the central peak of Mount Tarawera. It is iconic in stature and in legend. Ngati Rangitihi say it is the place where Rangitihi, their eponymous ancestor, is interred. The Ruawahia block takes its name from this peak. Ngati Rangitihi were awarded this block by the Native Land Court in 1887. What was to become Ruawahia 3 was partitioned in favour of the Crown in 1907 by the Native Land Court and there are, the claimants allege, Treaty issues concerning the Crown's acquisition of the block.[380] The pattern of such purchases is soon to be reported on by the central North Island Tribunal.

Ruawahia 3 (part of the Lake Tarawera scenic reserve) is to have a whenua rahui, described as a non-exclusive redress instrument, placed upon it. The whenua rahui envisaged in this case offers a real and substantial benefit to the KEC affiliates during the period that there is no Ngati Rangitihi settlement. The purpose of this instrument is to require the New Zealand Conservation Authority and relevant conservation boards to have particular regard to the KEC's values and protection principles. The Crown and the governance entity have to agree and publish 'protection principles' that are directed at the Minister of Conservation. These principles are an attempt to avoid harm to the KEC affiliates in relation to a whenua rahui area, and to avoid diminishing their values in relation to the whenua rahui. There are a number of other benefits that flow from a whenua rahui, such as a provision that:

> Any koiwi (human remains) or other taonga found or uncovered by the Department of Conservation will be left untouched and the Governance Entity informed as soon as possible to enable the Affiliate Te Arawa Iwi/Hapu to deal with the koiwi or taonga in accordance with their tikanga, subject to procedures required by law.[381]

It is correct that the Crown can provide for Ngati Rangitihi interests for future settlement negotiations over the area covered by the acknowledgement. However, we do have some concerns about how Ngati Rangitihi will be able to participate effectively in decisions made that affect the Ruawahia 3 block in the interim, given that they were the owners of the parent Ruawahia block. In addition, Ngati Rangitihi will not be notified in the manner described above about taonga and koiwi (ancestral bones) that are found within the reserve on their part of the original Ruawahia block. That is a very sad result. While we do not say that such a form of redress should not have been

included, we do say that by its inclusion in the deed without some provision being made for Ngati Rangitihi, they are likely to suffer some form of prejudice. We mean here all of Ngati Rangitihi.

The same imbalance exists, the claimants say, in relation to the Tarawera River. The claimants have been very active before consent authorities. They claim that other holders of non-exclusive statutory recognition instruments have received some advantage over them at Matata. This was a particular concern of the Tuwharetoa ki Kawerau Tribunal, and so it recommended that the Crown notify all relevant local authorities that they should recognise Ngati Rangitihi as tangata whenua there.[382] We canvassed the question of what a non-exclusive statutory instrument was when we considered geothermal resources at the beginning of this chapter. The Crown has made it clear throughout that an interest, in the sense of having almost any interest however small, is sufficient to be included in an item of non-exclusive redress. We pondered that, given the nature of the iconic sites we have heard evidence on.

Tribunal findings on the Ruawahia and Tarawera River redress

Ruawahia: The whenua rahui redress is non-exclusive and leaves the Crown the capacity to meet its future settlement with Ngati Rangitihi by providing similar redress. But at the same time it does confer some significant benefits and therefore may result in prejudice for Ngati Rangitihi.

We believe there to be a very easy solution to this problem. A non-exclusive statutory acknowledgement similar to that provided for affiliate Te Arawa iwi/hapu in the settlement should be enacted to include all the descendants for Ngati Rangitihi iwi. That would be consistent with the cultural and spiritual values associated with this area and the mountain. For the mountain Tarawera–Ruawahia is as important to Ngati Rangitihi and Tuhourangi as Mount Tongariro is to Ngati Tuwharetoa.

While we do not say that such a form of redress should not have been included in the KEC negotiations, we do say that by its inclusion in the deed without some provision being made for Ngati Rangitihi, Ngati Rangitihi are likely to suffer some form of prejudice. We mean here all of Ngati Rangitihi, not just the claimants before us. So as was said in the *Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report*, we think that the Minister of Conservation should work with both groups. We recommend that in terms of Ruawahia, the Crown should provide exactly the same form of non-exclusive redress to Ngati Rangitihi upon the introduction of the legislation giving effect to the KEC deed.

Part Tarawera River: It is understandable that iwi/hapu who claim to be kaitiaki or who claim they have dominant, principal, or major associations with a resource, as Ngati Rangitihi do in relation to the Tarawera River, may be offended by the Crown's recognition of different iwi. However, we cannot say that the decision in this case with respect to the Tarawera River was unreasonable in the circumstances, such that it amounted to an action inconsistent with the principles of the Treaty of Waitangi. That is because there is evidence that Ngati Rangitihi and Tuhourangi do have shared interests here.

We do, however, share some concerns with Ngati Rangitihi given their experience with statutory acknowledgements. For as long as Ngati Rangitihi's interests are not recognised in a like manner, they will not have adequate recognition of their interests. Instead, they are being marginalised while decisions affecting their principal kainga, wahi tapu, geothermal resources, maunga, and waterways are being made by others. That is unacceptable in our view and the Crown should find some way of dealing with this. A non-exclusive statutory acknowledgement similar to that provided for affiliate Te Arawa iwi/hapu in the settlement should be enacted to include all the descendants for Ngati Rangitihi iwi.

Proposed Renaming of Whakapoungakau

The legislation giving effect to the deed of settlement provides for the existing place name Whakapoungakau to be altered to the place name Rangitoto Peak. A new place name, Whakapoungakau Range, will be assigned.[383]

The claimants' case

In opening submissions, counsel gave an overview of the tribal landscape of Ngati Rangiteaorere. She cited the reference to Whakapoungakau in Don Stafford's *Landmarks of Te Arawa* and described Rangitoto as the highest point on the range.[384] Ngati Rangiteaorere want this name change proposal withdrawn. Ngati Rangiteaorere object to the fact that they were not consulted on the proposed name change and that the renaming severs their association with Whakapoungakau.

We asked counsel whether the mere fact of a name change would mean that Rangiteaorere would lose its mana. She did not accept the proposition in those terms, but stated that the name Whakapoungakau was identified with Rangiteaorere and that, therefore, any change was dismissive of their mana. It was about their history and was therefore important for the tribe's identity.

In closing submissions, counsel referred to the consultation carried out by the Crown with the KEC before Rangiteaorere withdrew from the KEC. She described the consultation as a 'flawed excuse'. She challenged the Crown to show where the claim is that challenges the Whakapoungakau name.

The case of the Crown

The Crown's position was simply that Ngati Rangiteaorere were represented in the KEC negotiations and therefore had an opportunity to pass their comments on regarding the proposed name change.[385] The Crown also pointed out that it had modified the proposed redress as it affected Ngati Rangiteaorere after the Minister recognised the withdrawal of Ngati Rangiteaorere from the KEC in early August 2006. The Crown agreed to modify the boundaries of the 50-hectare Rangitoto area to ensure there was appropriate access to part of the summit at Rangitoto Peak for Ngati Rangiteaorere.[386]

The Crown's witness, Ms Fisher, explained that the proposal was for the renaming of Whakapoungakau as Rangitoto Peak and assigning the place name Whakapoungakau to the range.[387]

Tribunal analysis on the renaming of Whakapoungakau

Consultation

In July 2005, when OTS was writing to identify overlapping claimants, Ngati Rangiteaorere were considered to be included within the mandate of the KEC. No pre-agreement in principle letter was therefore sent to Ngati Rangiteaorere. The agreement in principle, signed on 5 September 2005, included provision for one place name change:

> The Crown and the KEC will discuss, for inclusion in the Deed of Settlement, changing the name of Whakapoungakau peak within the Whakapoungakau range to Rangitoto in accordance with the functions and practices of the New Zealand Geographic Board Nga Pou Taunaha o Aotearoa.[388]

On 14 September 2005, letters were sent to overlapping claimants but not to Ngati Rangiteaorere. Nevertheless, counsel did provide comment on the agreement in principle on 9 December 2005. Neither the Crown nor Ngati Rangiteaorere filed a copy of that letter. The Crown filed its response, which simply acknowledged the 9 December letter and said that the Crown would review the responses received from overlapping claimants and discus the issues raised with the KEC.[389]

Meanwhile, a lengthy facilitation exercise was under way between September 2005 and June 2006, which would finally end on 2 August 2006 with the Crown's recognition of Ngati Rangiteaorere's withdrawal of its mandate for the KEC.[390]

In closing submissions, the Crown filed a copy of their request to the New Zealand Geographic Board for consideration of a change of place name. This letter, dated 20 March 2006, noted that the KEC had requested the name change and that there had been no objections received through the process of overlapping claims consultation.[391] This request was filed ahead of final decisions on overlapping claims.

OTS briefed the Minister on 6 April 2006 on the outcome of the consultation round with 'overlapping claimants'.[392] There was no mention in this report of the submission from counsel for Ngati Rangiteaorere. Similarly in OTS reports to the Minister on 11 July 2006 and 4 August 2006, there is no mention of any submissions by Ngati Rangiteaorere. Nor were any filed, with the exception of the letter written by counsel for Ngati Rangiteaorere in December 2005.

On 7 August 2006, the Minister notified Ngati Rangiteaorere of his decision to recognise their withdrawal from the KEC based on the hui held in June 2006.[393]

Adequacy of Crown response to withdrawal by Ngati Rangiteaorere

What did the Crown do after it recognised the withdrawal of Ngati Rangiteaorere in August 2006? OTS noted that the quantum for the KEC settlement did not require adjustment as it calculated that the number of people affected by the withdrawal was around 400. It modified the cultural redress by reducing the amount of land to be transferred to the KEC around the summit of the maunga.[394] This demonstrates that some effort was made to re-examine the proposed redress in light of the withdrawal of mandate by Ngati Rangiteaorere, although the Crown made no special effort to treat Ngati Rangiteaorere as an overlapping claimant. This variation is meaningless in tikanga terms if the Maori affected have not been consulted directly and participated fully. Mountains, rivers, and streams are not substitutable, or are not similar, to Maori. This is a fundamental aspect of Maori society and identity and the loss of relationships with these taonga can cause extreme emotional distress. Such concerns can be avoided if OTS does the right thing and brings everyone together to discuss these issues.

The Crown argued that consultation had occurred with Ngati Rangiteaorere on the proposed name change because it was involved in the KEC negotiations prior to Crown recognition of its withdrawal in August 2006. We ask the question, did the Ngati Rangiteaorere representative on the KEC hold a mandate from that iwi? We answer this in part by pointing to the Crown's recognition that the mandate was not reliable and note that this was finally recognised by the Crown in August 2006. We also note that the Crown had a duty to consult those Ngati Rangiteaorere outside the KEC at the time of the consultation, once the withdrawal had occurred.

We have also asked, does the involvement of the KEC mandated representatives constitute consultation with the iwi/hapu? The evidence of Pirihira Fenwick was that Ngati Rangiteaorere had not been included in the decision-making to change the name Whakapoungakau to Rangitoto Peak.[395] We note further that despite Ngati Rangiteaorere becoming an overlapping claimant in this process, there was no opportunity for consultation because the Crown made final decisions simultaneously on the recognition of their withdrawal from the KEC and the resolution of the overlapping claims process. Because OTS had already commenced the name change process, this appears to have been a further reason for the Crown not seeking to consult with Ngati Rangiteaorere as an overlapping claimant.

We note that any decision to change a place name is made by the geographic board. The process for altering a place name involves public consultation, with a final decision to be made by the Minister for Land Information where there are objections to the proposal. Settlement legislation provides an exception to the usual statutory process. In such cases, the settlement legislation itself makes a place name official. The only public consultation that is carried out is through the reading of the Bill. The geographic

board notes that 'place names that come through Treaty settlement redress are considered to be of high cultural, historical, and spiritual significance to Maori'.[396] The settlement legislation will remove any right for any member of the public to be consulted. Essentially, this means that the Crown provided no opportunity for Ngati Rangiteaorere to be consulted on the proposed name change, either as an overlapping claimant through the settlement process, or as an ordinary member of the public through the ordinary process for changing place names.

Tribunal finding on the renaming of Whakapoungakau

Counsel for Ngati Rangiteaorere acknowledged that the peak was known as Rangitoto. She stressed repeatedly the importance of the name Whakapoungakau to Ngati Rangiteaorere and the critical importance of it being retained in their landscape. It is iconic in the hearts and minds of Ngati Rangiteaorere.

We find that the Crown breached the Treaty by not consulting fully and in a timely manner with Ngati Rangiteaorere after their withdrawal from the KEC. We do not understand the specific detail of the proposed name change, but we do know that maunga fall into the category of sites that OTS should not use as settlement redress without full and Treaty-consistent consultation and participation by all tribes with an interest. It would have been helpful to all concerned if the Crown had set out its understanding of the current name of both the range and the peak, and the proposal as it affects the status quo. As the matter stands at present, our understanding is that Ngati Rangiteaorere regard both the peak and the range as their maunga tupuna Whakapoungakau.

Therefore, because of the great significance of the name Whakapoungakau to Ngati Rangiteaorere, and their fear for the loss of the name in officially renaming the peak as Rangitoto peak, the Crown should ensure that the future of the name and its association with Ngati Rangiteaorere are secured by its retention in respect of both the peak and the range. We are uncertain as to whether the name Whakapoungakau Range is recognised by the geographic board. If it is not, we recommend that the Crown take the matter up with the board as a matter of priority. It should not have to await settlement of Ngati Rangiteaorere's residual claims.

Concluding Comments

In chapter 3, we drew together the common threads of OTS's overlapping claims policy and its implementation in the context of the Te Arawa Waka. We did so based on the experience of Ngati Whakaue, Ngati Rangitihi, and Ngati Rangiteaorere. In chapter 5, we will consider the claim of Ngati Makino. We provided a summary of our findings and recommendations in relation to overlapping claims in chapter 3. For now, we make the following observations.

The Crown sought to provide several forms of inclusive redress instruments in its settlement with the KEC. This was, for OTS, innovative. But the introduction of such innovations will only work if all Maori affected appreciate the benefits of them.

Take, for example, the vesting of the Te Ariki site in the post-settlement governance entity as tenants in common in undivided shares with Ngati Rangitihi. The problem is that Ngati Rangitihi hold the predominant legal (as opposed to customary) interest in terms of the site and shares in the land.[397] That was an issue that needed to be worked through beyond the overlapping claims process. Contrast that to the fact that no 'similar' arrangement was offered to deal with the undoubted shared interests of Ngati Wahiao and Ngati Whakaue. We were advised by OTS that these instruments were an advance on those used in previous settlements, and that they had been tailored for overlapping claims and Treaty compliance. It has sought to extend the range of redress instruments to enable better outcomes when settling claims. But care must be taken to ensure that new forms of redress do not create new problems. In the

case of the Whakarewarewa, Te Ariki, and Ruawahia overlapping sites, the offers start from a point that unilaterally overturns the findings of the Native Land Court. We stress here that it is not so much the overturning of the findings of the Native Land Court that is a problem, as the unilateral way in which it has been carried out. To be frank, there is no logic to the way such new innovations are being applied. In all the above examples, the interests of those in negotiations have been elevated.

In terms of the other forms of redress, there is no doubt in our minds that the recipients of non-exclusive redress receive a benefit or advantage. Whether prejudice arises as a result of the Crown (or others in authority) subsequently acting to advantage the KEC affiliates at the expense of, or to the detriment of, let alone the exclusion of, the remaining half of Te Arawa remains to be seen. The grant of non-exclusive cultural redress imposes, in our view, a clear obligation on the Crown to actively protect those of Te Arawa whom it has exposed to a new risk by its settlement with the KEC affiliates. If the Crown does not accept and discharge that duty, the use of non-exclusive cultural redress will quickly fall into disrepute and join the list of Crown actions which have founded long-lasting grievances over the last 167 years.

That duty to protect from this new risk will be best discharged by the Crown moving to engage sooner, rather than later, with the excluded iwi and hapu towards the settlement of their Treaty claims. While we cannot prevent future breaches of the Treaty, we cannot be required to be indifferent, and we must be open to respond positively and in a timely way to new kinds of breaches of the Treaty as they arise.

Notes

1. Waitangi Tribunal, 'Statement of Issues for the Te Arawa Settlement Urgency (Wai 1353)', 15 January 2007 (paper 1.4.7), issue 2.3
2. *Deed of Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu* (Wellington: OTS, 2006) (doc B26), cl 6.3.2(e)v
3. Ibid, cl 8.7
4. Ibid
5. Counsel for Ngati Whakaue, submissions concerning geothermal issues, 5 March 2007 (paper 3.2.3), para 86
6. Ibid, paras 80–82
7. Ibid, para 85
8. Ibid, para 93
9. The Tribunal notes its understanding that the proposed GSA would not require the holder to ever have had title to particular areas of land (or even to have past recognition of traditional or customary ownership) included within the area of the GSA.
10. Counsel for Ngati Tuwharetoa, closing submissions, 26 March 2007 (paper 3.3.31), para 75
11. Counsel for Ngati Rangitihi, closing submissions, 23 March 2007 (paper 3.3.24), paras 11.14–11.20
12. Ibid, para 11.20
13. Idib, para 2
14. Pirihira Fenwick, brief of evidence, 23 March 2007 (doc A105)
15. Counsel for Ngati Rangitihi, closing submissions, 23 March 2007 (paper 3.3.24), para 5; Waitangi Tribunal, *The Ngati Rangiteaorere Claim Report 1990* (Wellington: Brooker and Friend Ltd, 1990), sec 4.5, app 5
16. Counsel for Ngati Whakaue, opening submissions, 26 January 2007 (paper 3.3.5), para 11
17. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 71
18. Crown counsel, submissions concerning geothermal issues, 6 March 2007 (paper 3.2.9), para 12
19. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 68
20. Ibid, para 68
21. Crown counsel, submissions concerning geothermal issues, 6 March 2007 (paper 3.2.9), paras 13–14
22. See OTS to Ngati Manawa, 29 June 2005 (doc A32(a)(BD4)); OTS to Ngati Rangitihi, 28 July 2005 (doc A32(a)(BD5))
23. OTS to Pukeroa Oruawhata Trust, 28 July 2005 (doc A32(a)(BD34)), app 2
24. OTS to Ngati Whakaue, 14 September 2005 (doc A32(a)(BD37)); OTS to Ngati Rangitihi, 14 September 2005 (doc A32(a)(BD12)); Crown counsel, memorandum responding to Tribunal's 8 June 2007 memorandum, 11 June 2007 (doc A32(c))(4))
25. OTS to counsel for Ngati Rangitihi, 14 September 2005 (doc A16(a)(AP47)), app 1
26. OTS to Ngati Rangitihi, 31 October 2005 (doc A32(a)(BD15)). Again, we note that we have not seen every single letter sent to all claimants. We presume that the delay in sending the AIP to Ngati Rangitihi applied equally to the other overlapping claimants.
27. Counsel for Ngati Rangitihi to OTS, 28 November 2005 (doc A32(a)(BD19)), p 19
28. Counsel for Ngati Whakaue to OTS, 25 November 2005 (doc A32(a)(BD43))

29. OTS to Ngati Whakaue, 14 July 2006 (doc A32(BD55)); OTS to Ngati Rangitihi, 14 July 2006 (doc A16(a)(AP74))
30. OTS to counsel for Ngati Rangitihi, 22 June 2006 (doc A32(a)(BD21))
31. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning provisional decisions on overlapping claims, 11 July 2006 (doc A43(1)), p 17
32. Ibid, app 3, table 2
33. Ibid
34. Robyn Fisher, response to Tribunal question, 1 March 2007
35. Crown counsel, submissions concerning geothermal issues, 6 March 2007 (paper 3.2.9), para 15
36. Ibid, para 15
37. Ibid, para 12
38. Robyn Fisher, response to Tribunal question, 1 March 2007
39. Resource Management Act 1991, s 274(1)(c)
40. 'Crown Settlement Offer to Ngāi Tahu', *Maori Law Review*, November 1997, pp 6–7
41. Te Runanga o Ngai Tahu, 'A Guideline for Filming within the Rohe of Ngai Tahu', undated (http://www.filmsouth/index.cfm/permits, downloaded 1 September 2007)
42. *Deed of Settlement between the Crown and the Pouakani People* (Wellington: OTS, undated) (http://nz01.terabyte.co.nz/ots/LiveArticle.asp?ArtID=531094361, downloaded 1 September 2007)
43. Pouakani Claims Settlement Act 2000, s 36
44. *Deed of Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu* (Wellington: OTS, 2006) (doc B26), sch 3, pt 1
45. Crown counsel, submissions concerning geothermal issues, 6 March 2007 (paper 3.2.9), para 11
46. For example, the announcement by the chief executive of Contact Energy of intentions to build two new geothermal power stations in the Taupo region totalling up to 260 megawatts: media release, 23 February 2007 (http://www.contactenergy.co.nz/web/pdf/financial/2007_hy_media_release.pdf, downloaded 1 September 2007). See also the announcement by the chief executive of the State-owned enterprise Mighty River Power that geothermal generation could ultimately develop to 1200 megawatts, sufficient to power 1.2 million homes: media release, 29 November 2006 (http://www.mightyriverpower.co.nz/news/latestnews/Detail.aspx?ID=833, downloaded 1 September 2007).
47. Malcolm Short, cross-examination by Crown counsel, 27 February 2007
48. Crown counsel, submissions concerning geothermal issues, 6 March 2007 (paper 3.2.9), para 12
49. 'Deed of Trust Relating to Te Pumautanga o Te Arawa Trust', 1 December 2006 (doc A80), cl 7.4, sch 7
50. Counsel for Ngati Rangitihi, closing submissions, 23 March 2007 (paper 3.3.24), para 11.1
51. Waitangi Tribunal, 'Statement of Issues for the Te Arawa Settlement Urgency (Wai 1353)', 15 January 2007 (paper 1.4.7), issue 2.3
52. Had the Crown succeeded in settling with the Te Arawa Waka as a whole, as was its initial aim, it would presumably have found a way of achieving this.
53. Waitangi Tribunal, 'Statement of Issues for the Te Arawa Settlement Urgency (Wai 1353)', 15 January 2007 (paper 1.4.7), issue 2.3
54. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32), para 137
55. Ibid, para 135
56. Ibid, para 140
57. Ibid, para 142
58. Hamuera Mitchell, brief of evidence, December 2006 (doc A24), p 4
59. Ben Hona, brief of evidence, 30 November 2006 (doc A26), p 2
60. Hamuera Mitchell, brief of evidence, December 2006 (doc A24), p 2
61. Ibid, p 2
62. Counsel for Ngati Whakaue, opening submissions, 26 January 2007 (paper 3.3.5), para 13.2
63. Ibid, para 50
64. Counsel for Ngati Tamakari, opening submissions, 25 January 2007 (paper 3.3.1), para 58
65. Counsel for Ngati Whakaue, opening submissions, 26 January 2007 (paper 3.3.5), paras 43–47
66. Ibid, para 13.1
67. Ibid, para 12
68. Ibid, para 17
69. Counsel for Ngati Tamakari, opening submissions, 25 January 2007 (paper 3.3.1), paras 30.1–30.9
70. Counsel for Ngati Whakaue, opening submissions, 26 January 2007 (paper 3.3.5), paras 14–15
71. Andrew Te Amo, brief of evidence, December 2006 (doc A23), para 15.3
72. Counsel for Ngati Tamakari, opening submissions, 25 January 2007 (paper 3.3.1), para 56
73. Ibid, para 61
74. Crown counsel, memorandum responding to Tribunal memorandum, 8 March 2007 (paper 3.2.16(c)), para 8.1
75. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 64
76. Ibid
77. Crown counsel referred to OTS and Ministry of Tourism, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations and Minister of Tourism concerning KEC negotiations in relation to Whakarewarewa geothermal valley, 12 August 2005 (doc A43(15))
78. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 66
79. Ibid, para 67
80. OTS and Ministry of Tourism, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations and Minister of Tourism concerning

KEC negotiations in relation to Whakarewarewa geothermal valley, 12 August 2005 (doc A43(15)), paras 20, 23

81. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 72

82. OTS and Ministry of Tourism, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations and Minister of Tourism concerning KEC negotiations in relation to Whakarewarewa geothermal valley, 12 August 2005 (doc A43(15))

83. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32), para 140

84. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 73

85. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32), para 145

86. OTS, internal memorandum concerning proposal for transfer of cultural redress sites, 21 June 2005 (doc A43(13)); OTS and Ministry of Tourism, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations and Minister of Tourism concerning KEC negotiations in relation to Whakarewarewa geothermal valley, 12 August 2005 (doc A43(15))

87. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed policy response to Tribunal's *Te Arawa Mandate Report: Te Wahanga Tuarua*, 12 July 2005 (doc A32(a)(BD3)), paras 16, 31(6)

88. Crown counsel, memorandum responding to Tribunal's 8 June 2007 memorandum, 11 June 2005 (doc A32(c)(9))

89. OTS to Pukeroa Oruawhata Trust, 28 July 2005 (doc A32(a)(BD34))

90. Ibid

91. Ibid

92. OTS and Ministry of Tourism, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations and Minister of Tourism concerning KEC negotiations in relation to Whakarewarewa geothermal valley, 12 August 2005 (doc A43(15))

93. Ibid, para 6

94. Ibid, para 17

95. Ibid, para 18

96. Ibid, para 19

97. Ibid, para 20

98. Counsel for Ngati Whakaue, response to OTS request for information, 17 August 2005 (doc A32(a)(BD35))

99. Ibid, para 7

100. Ibid, p 2

101. Ibid, p 3

102. OTS to counsel for Ngati Whakaue, 2 September 2005 (doc A32(a)(BD36))

103. OTS to Ngati Whakaue, 14 September 2005 (docs A32(a)(BD37), (BD38)

104. Kahui Legal to OTS, 7 October 2005 (doc A32(a)(BD39)); Te Kotahitanga o Ngati Whakaue to OTS, 14 October 2005 (doc A32(a)(BD40)); Pukeroa Oruawhata Trust to OTS, 14 October 2005 (doc A32(a)(BD41))

105. Te Kotahitanga o Ngati Whakaue to OTS, 14 October 2005, p 2

106. Pukeroa Oruawhata Trust to OTS, 14 October 2005, pp 2–3

107. OTS to Ngati Whakaue, 4 November 2005 (doc A32(a)(BD42)), p 2

108. Counsel for Ngati Whakaue (Wai 553) to OTS, 25 November 2005 (doc A32(a)(BD43))

109. Counsel for Ngati Whakaue (Wai 1204) to OTS, 25 November 2005 (doc A32(a)(BD44))

110. OTS to Pukeroa Oruawhata Trust, 15 December 2005 (doc A32(a)(BD45)), p 2

111. Counsel for Ngati Whakaue (Wai 1204) to OTS, 25 November 2005, para 23

112. Pukeroa Oruawhata Trust to OTS, 14 October 2005 (doc A32(a)(BD41))

113. OTS to counsel for Ngati Whakaue, 20 December 2005 (doc A32(a)(BD46))

114. Te Kotahitanga o Ngati Whakaue to KEC, 27 January 2006 (doc A32(a)(BD49))

115. OTS to counsel for Ngati Whakaue (Wai 316), 13 February 2006 (doc A32(a)(BD50))

116. Counsel for Ngati Whakaue (Wai 316) to OTS, 15 February 2006 (doc A32(a)(BD51))

117. Minister in Charge of Treaty of Waitangi Negotiations to counsel for Ngati Whakaue (Wai 1204), 21 February 2006 (doc A32(a)(BD52))

118. OTS to counsel for Ngati Whakaue (Wai 316), 8 March 2006 (doc A32(a)(BD53)); OTS to counsel for Ngati Whakaue (Wai 1204), 31 March 2006 (doc A32(a)(BD54))

119. OTS to counsel for Ngati Whakaue (Wai 1204), 31 March 2006 (doc A32(a)(BD54))

120. In essence, the Crown comes to a general view of the extent of a claimant group's area of interest and the nature of its customary interest based on historical sources, evidence, and reports filed in Waitangi Tribunal hearings, and on advice from the Crown Law Office. Negotiations then begin with the claimant group, which will present information to the Crown on its interests in particular sites and resources. The Crown in turn identifies its interest in the sites and resources. Both sets of information become the basis for negotiation.

121. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 6 April 2006 (doc A32(a)(BD61)), pp 47–57

122. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed cultural redress for KEC, 10 July 2006 (doc A32(a)(BD65))

123. OTS noted that this reserve was subject to the 1999 Ngati Whakaue gifted lands policy and that Cabinet agreed that it should be offered to Ngati Whakaue at no cost should it become surplus to Crown requirements (CAB(99)M30/19).

124. OTS, briefing paper for Minister in Charge of Treaty of Waitangi

Negotiations concerning proposed cultural redress for KEC, 10 July 2006 (doc A32(a)(BD65)), para 21

125. OTS to Ngati Whakaue, 14 July 2006 (doc A32(a)(BD55)), p 6

126. See OTS to counsel for Ngati Whakaue, 25 July 2006 (doc A32(a)(BD57)), where OTS refers to an email it received from John Kahukiwa dated 20 July 2006.

127. OTS to counsel for Ngati Whakaue, 25 July 2006 (doc A32(a)(BD57))

128. Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O'Malley, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', 2 vols, report commissioned by CFRT, 2005 (docs A107, A108); Don Stafford, *Landmarks of Te Arawa*, 2 vols (Rotorua: Reed Books, 1994–96); Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from c1769 to c1945* (Wellington: Victoria University Press, 1998); Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993); Ngati Whakaue deed of agreement, September 1993; Duncan Moore and Judi Boyd, 'The Alienation of Whakarewarewa', report commissioned by the Waitangi Tribunal, 1995 (Wai 153 ROI, doc C2)

129. Ngati Whakaue to OTS, 26 July 2006 (doc A32(a)(BD58))

130. Ngati Whakaue to OTS, 3 August 2006 (doc A32(a)(BD59))

131. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning final decisions on overlapping claims, 4 August 2006 (doc A43(2))

132. Minister in Charge of Treaty of Waitangi Negotiations to Ngati Whakaue, 7 August 2006 (doc A32(a)(BD60))

133. OTS to Ngati Whakaue, 31 August 2006 (doc A32(a)(BD61)); OTS, internal memorandum with background information to meeting with Ngati Whakaue, 28 September 2006 (doc A32(a)(BD62))

134. Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), ch 11

135. OTS to Ngati Whakaue, 4 November 2005 (doc A24(9))

136. Ibid

137. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32), para 138

138. Ibid

139. OTS, internal memorandum concerning information used in relation to Whakarewarewa overlapping claims, 15 August 2006 (doc A43(11))

140. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32), para 139

141. OTS to Ngati Whakaue, 31 August 2006 (doc A32(a)(BD61)), para 26; see also Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O'Malley, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', 2 vols, report commissioned by CFRT, 2005 (docs A107, A108)

142. Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O'Malley, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', 2 vols, report commissioned by CFRT, 2005 (docs A107, A108), vol 2, ch 9

143. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), p 14

144. Ibid, pp 14–15

145. Ben Hona, brief of evidence, p 3

146. Ibid

147. The issue of vesting the Whakarewarewa thermal springs reserve in the KEC governance entity, as opposed to Ngati Wahiao, was not a subject of this inquiry.

148. OTS to Ngati Whakaue, 31 August 2006 (doc A32(a)(BD61)), para 26

149. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 6 April 2006 (doc A32(a)(BD7))

150. Ibid, app 3, p 10

151. Andrew Te Amo, brief of evidence, December 2006 (doc A23), para 10

152. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed cultural redress for KEC, 10 July 2006 (doc A32(a)(BD65)), para 5

153. Ibid, para 26

154. Ibid, para 27

155. OTS to Ngati Whakaue, 4 November 2005 (doc A24(9))

156. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed cultural redress for KEC, 10 July 2006 (doc A32(a)(BD65)), paras 16, 17

157. OTS and Ministry of Tourism, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations and Minister of Tourism concerning KEC negotiations in relation to Whakarewarewa geothermal valley, 12 August 2005 (doc A43(15)), para 20

158. Ibid, para 19

159. Ibid, para 20

160. Waitangi Tribunal, *Tamaki Makaurau Settlement Report* (Wellington: Legislation Direct, 2007), p 11

161. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 73

162. Andrew Te Amo, brief of evidence, December 2006 (doc A23), para 14

163. Ibid, para 15.2

164. Ibid

165. Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O'Malley, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', 2 vols, report commissioned by CFRT, 2005 (docs A107, A108), vol 1, pp 38–39

166. Ibid, p 38

167. Ibid

168. Ibid, chs 5–8

169. Ibid, pp 404, 426

170. Angela Ballara, 'Tribal Landscape Overview, c1800–c1900 in the Taupo, Rotorua, Kaingaroa and National Park Inquiry Districts', overview report commissioned by CFRT, 2004 (doc A48), p 83 (cited in Ngati Rangitihi, submission in response to AIP, 28 November 2005 (doc A32(a)(BD19)))
171. Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O'Malley, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', 2 vols, report commissioned by CFRT, 2005 (docs A107, A108), vol 1, p 404
172. Ibid, pp 404–407
173. Ibid, pp 411–413, 424–425
174. Ibid, p 415
175. Ibid, ch 7
176. Ibid, p 405
177. Ibid
178. Ibid, pp 404–406
179. Ibid, pp 411–413, 424–425
180. Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), pp 285–286; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), pp 121–125
181. Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 329
182. Te Ariki Lands Trust to OTS, 14 April 1998 (doc A16(a)(AP14))
183. P Waka, 'Historic Places in the Vicinity of the Isthmus Joining Lakes Tarawera and Rotomahana' (doc A16(a)(AP5)), p 62
184. Te Ariki Lands Trust to OTS, 14 April 1998 (doc A16(a)(AP14)); draft final agreement between Minister in Charge of Treaty of Waitangi Negotiations and Te Ariki Lands Trust, 1999 (doc A16(a)(AP18)), p 2
185. Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O'Malley, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', 2 vols, report commissioned by CFRT, 2005 (docs A107, A108), vol 1, p 427
186. OTS, 'Historical Investigation of Te Ariki Site', 16 December 2005 (doc A16(a)(AP48)), p 2; see also Nikki Dalziell, 'Te Ariki Lands Trust Claim', report commissioned by Treaty of Waitangi Policy Unit, December 1990 (doc A16(a)(AP5)), p 30; Treaty of Waitangi Policy Unit, internal memorandum concerning McHugh's Te Ariki lands report, 2 May 1991 (doc A16(a)(AP6))
187. Nikki Dalziell, 'Te Ariki Lands Trust Claim', report commissioned by Treaty of Waitangi Policy Unit, December 1990 (doc A16(a)(AP5)); see also Te Ariki Lands Trust to OTS, 14 April 1998 (doc A16(a)(AP14)); draft final agreement between Minister in Charge of Treaty of Waitangi Negotiations and Te Ariki Lands Trust, 1999, p 1; counsel for Ngati Rangitihi, closing submissions, 23 March 2007 (paper 3.3.24), p 33
188. Treaty of Waitangi Policy Unit, internal memorandum concerning McHugh's Te Ariki lands report, 2 May 1991 (doc A16(a)(AP6))
189. Nikki Dalziell, 'Te Ariki Lands Trust Claim', report commissioned by Treaty of Waitangi Policy Unit, December 1990 (doc A16(a)(AP5)); Treaty of Waitangi Policy Unit, internal memorandum concerning McHugh's Te Ariki lands report, 2 May 1991 (doc A16(a)(AP6)); OTS, internal memorandum concerning Te Ariki Lands Trust claim, 13 January 1997 (doc A16(a)(AP13)), para 13
190. Nikki Dalziell, 'Te Ariki Lands Trust Claim', report commissioned by Treaty of Waitangi Policy Unit, December 1990 (doc A16(a)(AP5)); OTS, internal memorandum concerning Te Ariki Lands Trust claim, 13 January 1997 (doc A16(a)(AP13))
191. OTS, internal memorandum concerning Te Ariki Lands Trust claim, 13 January 1997 (doc A16(a)(AP13)), p 6
192. Ibid, p 7
193. Nikki Dalziell, 'Te Ariki Lands Trust Claim', report commissioned by Treaty of Waitangi Policy Unit, December 1990 (doc A16(a)(AP5)), p 31; see also Treaty of Waitangi Policy Unit, internal memorandum concerning McHugh's Te Ariki lands report, 2 May 1991 (doc A16(a)(AP6))
194. Nikki Dalziell, 'Te Ariki Lands Trust Claim', report commissioned by Treaty of Waitangi Policy Unit, December 1990 (doc A16(a)(AP5)), pp 39–40
195. Ibid, p 3; OTS, 'Historical Investigation of Te Ariki Site', 16 December 2005 (doc A16(a)(AP48))
196. *Deed of Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu* (Wellington: OTS, 2006), cls 10.1.53, 10.1.54
197. Ibid, cl 10.1.55
198. Ibid, cl 10.1.57
199. Ibid, cls 10.1.58–10.1.62
200. Ibid, cl 10.11
201. Ibid, cl 10.12
202. Counsel for Ngati Rangitihi, opening submissions, 26 January 2007 (paper 3.3.3), para 8.6
203. This is an approximation of the original Native Land Court awards. For the precise details, see counsel for Ngati Rangitihi, closing submissions, 23 March 2007 (paper 3.3.24), paras 9.6–9.10.
204. Ibid, para 9.17
205. Ibid, para 9.18
206. Ibid
207. Counsel for Ngati Rangitihi, opening submissions, as presented orally
208. OTS, *Ka Tika a Muri, Ka Tika a Mua: He Tohutohu Whakamarama i nga Whakataunga Kereme e Pa Ana ki te Tiriti o Waitangi me nga 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: OTS [2002]), p 98
209. Counsel for Ngati Rangitihi, closing submissions, 23 March 2007 (paper 3.3.24), paras 9.38–9.51
210. This is a reference to Nikki Dalziell, 'Te Ariki Lands Trust Claim', report commissioned by Treaty of Waitangi Policy Unit, December 1990 (doc A16(a)(AP5)).
211. Counsel for Ngati Rangitihi, closing submissions, 23 March 2007 (paper 3.3.24), paras 15.18–15.19

212. Ibid, para 9.2.5
213. Ibid, para 9.2.6
214. Ibid
215. Ibid
216. Ibid
217. Ibid
218. Ibid, para 9.3.3
219. Counsel for Ngati Rangitihi, opening submissions, 26 January 2007, para 7.15
220. Ibid
221. Ibid, para 7.16
222. Ibid, para 7.18
223. Ibid, paras 7.19–7.20
224. Ibid
225. Ibid, para 7.21
226. Crown counsel, memorandum responding to Tribunal memorandum, 8 March 2007 (paper 3.2.16(c)), paras 3.1, 7.2
227. Ibid, para 7.4
228. Ibid, paras 7.5–7.6
229. Ibid, paras 7.11–7.12
230. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 76
231. Ibid, para 77
232. Ibid, para 78
233. Ibid, para 80
234. Ibid, para 81
235. Ibid, para 82; see also OTS, table of affiliate Te Arawa iwi and hapu redress changes, AIP to DOS, undated (doc A32(a)(BD7a))
236. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 75
237. Counsel for Ngati Rangitihi to OTS, 26 August 2005 (doc A32(a)(BD10)), p 2
238. Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p 99
239. OTS to Ngati Rangitihi, 28 July 2005 (doc A16(a)(AP39)), p 1
240. David Potter, forwarded email to and response from OTS, 26 July 2005 (doc A16(a)(AP37))
241. OTS to counsel for Ngati Rangitihi, 7 September 2005 (doc A32(a)(BD11)), p 1
242. OTS to Ngati Rangitihi, 26 July 2005 (doc A16(a)(AP38))
243. David Potter, forwarded email to and response from OTS, 26 July 2005 (doc A16(a)(AP37))
244. Ibid
245. Ibid
246. Compare maps in OTS to Ngati Manawa, 29 June 2005 (doc A32(a)(BD4)), app 1; OTS to Ngati Rangitihi, 28 July 2005 (doc A16(a)(AP39)), app 1
247. OTS to Ngati Rangitihi, 26 July 2005 (doc A16(a)(AP37)); OTS to Ngati Rangitihi, 28 July 2005 (doc A16(a)(AP39))
248. OTS to Ngati Rangitihi, 26 July 2005 (doc A16(a)(AP37)), p 1
249. Ibid
250. Ibid, p 2
251. Ibid, p 3
252. OTS to Ngati Rangitihi, 28 July 2005 (doc A16(a)(AP39))
253. Ibid, p 2 of table
254. Counsel for Ngati Rangitihi to OTS, 12 August 2005 (doc A16(a)(AP41)), p 1
255. Ibid, p 2
256. Ibid, p 3
257. Ibid
258. Ibid
259. Ibid
260. Ibid
261. Ibid
262. Ibid
263. Counsel for Ngati Rangitihi to OTS, 19 August 2005 (doc A16(a)(AP42))
264. Ibid
265. Ibid
266. Counsel for Ngati Rangitihi to OTS, 26 August 2005 (doc A16(a)(AP43))
267. Ibid
268. Ibid
269. OTS to counsel for Ngati Rangitihi, 7 September 2005 (doc A32(a)(BD11))
270. Ibid, p 2
271. Ibid
272. Ibid
273. OTS to Ngati Rangitihi, 14 September 2005 (doc A32(a)(BD12))
274. Ibid, p 1
275. Ibid, p 2
276. Ibid, pp 2–3
277. Ibid, p 3
278. OTS to counsel for Ngati Rangitihi, 20 September 2005 (doc A16(b)(AP49))
279. Counsel for Ngati Rangitihi to OTS, 5 October 2005 (doc A32(a)(BD13)), p 3
280. Ibid, pp 3–4
281. Counsel for Ngati Rangitihi to OTS, 14 October 2005 (doc A16(a)(AP55))
282. OTS to counsel for Ngati Rangitihi, 14 October 2005 (doc A16(a)(AP54))
283. Ibid
284. Ibid
285. OTS to Ngati Rangitihi, 31 October 2005 (doc A16(a)(AP58))
286. Ibid, p 2
287. Ibid, p 3

288. Counsel for Ngati Rangitihi to OTS, 3 November 2005 (doc A16(a) (AP61))
289. Ibid
290. OTS to counsel for Ngati Rangitihi, 10 November 2005 (doc A16(a) (AP62)) p 2
291. Ibid
292. Ibid
293. Ibid
294. Ibid
295. Ibid, p 3
296. Counsel for Ngati Rangitihi to OTS, 28 November 2005 (doc A32(a)(BD19))
297. OTS to counsel for Ngati Rangitihi, 6 December 2005 (doc A16(a) (AP68)); OTS to counsel for Ngati Rangitihi, 20 December 2005 (doc A16(a)(AP69))
298. Counsel for Ngati Rangitihi (Wai 524) to OTS, 11 November 2005 (doc 32(a)(BD17))
299. OTS to counsel for Ngati Rangitihi (Wai 524), 22 June 2006 (doc A32(a)(BD22)), p 1
300. Ibid
301. Counsel for Ngati Rangitihi to OTS, 21 June 2006 (doc A16(a) (AP72))
302. OTS to counsel for Ngati Rangitihi, 22 June 2006 (doc A16(c) (AP73)), p 1
303. Ibid, p 7
304. OTS to counsel for Ngati Rangitihi (Wai 524), 22 June 2006 (doc A32(a)(BD22)), p 1
305. Ibid, p 1
306. Ibid, p 2
307. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed cultural redress for KEC, 10 July 2006 (doc A32(a)(BD65))
308. Ibid
309. Ibid, para 11
310. Ibid, para 39
311. Ibid, para 41
312. Ibid, para 43
313. Ibid, para 44
314. Ibid, para 46
315. Ibid, para 45
316. Ibid
317. See table attached to OTS to Minister in Charge of Treaty of Waitangi Negotiations, 6 April 2006 (doc A32(a)(BD7)). The date of this change appears to be April 2006.
318. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed cultural redress for KEC, 10 July 2006 (doc A32(a)(BD65)), para 55
319. Ibid, para 61.1.3
320. OTS to counsel for Ngati Rangitihi, 14 July 2006 (doc A16(c)(AP74)); emails between OTS and counsel for Ngati Rangitihi seeking to arrange meeting with KEC, July 2006 (doc A32(a)(BD24))
321. Ngati Rangitihi, notes of meeting with OTS and KEC, 20 July 2006 (doc A16(a)(AP75)); OTS, internal file note of meeting with Ngati Rangitihi and KEC, 31 July 2006 (doc A32(a)(BD25))
322. OTS, internal file note of meeting with Ngati Rangitihi and KEC, 31 July 2006 (doc A32(a)(BD25))
323. Ibid
324. Ngati Rangitihi, notes of meeting with OTS and KEC, 20 July 2006 (doc A16(a)(AP75))
325. Waitangi Tribunal, *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wellington: Legislation Direct, 2003), p 78
326. Ibid
327. OTS, internal file note of meeting with Ngati Rangitihi and KEC, 31 July 2006 (doc A32(a)(BD25)), p 3
328. Counsel for Ngati Rangitihi to OTS, 3 August 2006 (doc A32(a) (BD26)
329. Ibid
330. Ibid
331. Ibid
332. Ngati Rangitihi, further submission concerning AIP, 3 August 2006 (doc A16(a)(AP76))
333. Ibid, para 7.10
334. Ibid, paras 7.7–7.8
335. Ibid
336. Minister in Charge of Treaty of Waitangi Negotiations to counsel for Ngati Rangitihi, 7 August 2006 (doc A16(a)(AP77); OTS to claimant counsel, 7 August 2006 (doc A32(a)(BD27))
337. Ibid
338. Ibid
339. Ibid
340. Ibid
341. OTS to counsel for Ngati Rangitihi, 14 August 2006 (doc A16(a) (AP80))
342. The Official Information Act request is referred to in OTS to counsel for Ngati Rangitihi, 8 September 2006 (doc A16(a)(AP90)).
343. OTS to counsel for Ngati Rangitihi (Wai 524), 22 August 2006 (doc A32(a)(BD28)); OTS to counsel for Ngati Rangitihi (Wai 996), 22 August 2006 (doc A32(a)(BD29))
344. OTS to counsel for Ngati Rangitihi (Wai 996), 22 August 2006 (doc A32(a)(BD29))
345. Counsel for Ngati Rangitihi to OTS, Land Information New Zealand, and Department of Conservation, 6 September 2006 (doc A16(a) (AP86))
346. Counsel for Ngati Rangitihi to OTS and Minister in Charge of Treaty of Waitangi Negotiations, 6 September 2006 (doc A16(a)(AP85))
347. Ibid, paras 5.1–5.4
348. Counsel for Ngati Rangitihi, minutes of meeting with OTS, 7 September 2006 (doc A16(a)(AP88))

349. Ibid
350. OTS to counsel for Ngati Rangitihi, 18 October 2006 (doc A16(a) (AP98))
351. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed cultural redress for KEC, 10 July 2006 (doc A32(a)(BD65)), para 55
352. Ibid
353. OTS, internal memorandum concerning Te Ariki Lands Trust claim, 13 January 1997 (doc A16(a)(AP13)); OTS, 'Historical Investigation of Te Ariki Site', 16 December 2005 (doc A16(a)(AP48)). The latter document is OTS plan 13.
354. Counsel for Ngati Rangitihi to OTS, 28 November 2005 (doc A32(a) (BD19)); Nikki Dalziell, 'Te Ariki Lands Trust Claim', report commissioned by Treaty of Waitangi Policy Unit, December 1990 (doc A16(a)(AP5))
355. Nikki Dalziell, 'Te Ariki Lands Trust Claim', report commissioned by Treaty of Waitangi Policy Unit, December 1990 (doc A16(a)(AP5)), apps 16–18
356. Rights were specified in section 27 of the Native Land Amendment and Native Claims Adjustment Act 1922.
357. These rights were preserved from predecessor legislation (the Reserves and Domains Acts of 1952 and 1928), the origins of which can be traced to section 7(1) of the Scenery Preservation Amendment Act 1910.
358. Alec Neill, 19 October 1995, NZPD, 1995, vol 551, p 9931
359. Judith Tizard, 19 October 1995, NZPD, 1995, vol 551, p 9933
360. Jim Sutton, 19 October 1995, NZPD, 1995, vol 551, p 9937
361. Reserves Act 1977, ss 24–25
362. In this regard, we note that clause 10.31.6 of the deed of settlement states that sections 24 and 25 of the Reserves Act 1977 do not apply to any revocations under the settlement legislation or the reserve status of a cultural redress property.
363. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32), paras 93–94
364. *Deed of Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu* (Wellington: OTS, 2006), sch 2, pt 3, management deed, cl 13.1
365. Ibid, sch 2, pt 3, management deed, cl 9
366. Ibid, cl 6(g:ii)
367. Ibid, cl 6(e:ii:bb)
368. Counsel for Ngati Rangitihi, closing submissions, 23 March 2007 (paper 3.3.24), para 10.14
369. Ibid, p 43
370. *Deed of Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu* (Wellington: OTS, 2006), cl 6(g:ii)
371. Counsel for Ngati Rangitihi, closing submissions, 23 March 2007 (paper 3.3.24), p 43
372. Ibid, p 44
373. Ibid, p 46
374. Ibid, pp 45–46
375. Ibid, pp 47–48
376. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32), para 95
377. Ibid, para 96
378. Ibid, para 97
379. Ibid, paras 99–101
380. Counsel for Ngati Rangitihi, closing submissions, 23 March 2007 (paper 3.3.24), p 42
381. *Deed of Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu* (Wellington: OTS, 2006), sch 3, pt 5, cl 5.1.8
382. Waitangi Tribunal, *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wellington: Legislation Direct, 2003), p 78
383. *Deed of Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu* (Wellington: OTS, 2006), cl 11.23
384. Don Stafford, *Landmarks of Te Arawa*, 2 vols (Rotorua: Reed Books, 1994–96), pp 147–148; see also counsel for Ngati Rangiteaorere, opening submissions, 1 February 2007 (paper 3.3.10), p aras 3–8
385. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 84
386. Ibid, para 87
387. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32), para 205
388. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 6 April 2006 (doc A32(a)(BD6)), para 48
389. OTS to counsel for Ngati Rangiteaorere, 21 December 2005 (doc A32(a)(BD102))
390. OTS to counsel for Ngati Rangiteaorere, 4 September 2006 (doc A32(a)(BD82))
391. OTS to New Zealand Geographic Board, 20 March 2006 (paper 3.3.32(a))
392. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 6 April 2006 (doc A32(a)(BD7))
393. Pirihira Fenwick, brief of evidence, 8 December 2006 (doc A28(2))
394. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 87
395. Pirihira Fenwick, brief of evidence, 8 December 2006 (doc A28(2))
396. New Zealand Geographic Board, 'Place Name Decisions', 19 April 2002 (http://www.linz.govt.nz/core/placenames/placenamedecisions/aboutdecisions, downloaded 1 September 2007)
397. From the documents before us, it seems that the tenancy in common proposal had been considered and rejected before the return of Ngati Wahiao to the KEC mandate. We cannot, therefore, be certain that the 50 per cent share not transferred to KEC would have been allocated to Ngati Whakaue exclusively.

CHAPTER 5

NGATI MAKINO

Introduction

In chapter 4, we considered how claimants from those tribes within the Te Arawa Waka who stood outside the KEC mandate experienced the implementation by OTS of its overlapping claims process. In this chapter we consider the particular experience of Ngati Makino during this process. We do so because Ngati Makino occupy an unusual position among the overlapping claimants. We regard their position as unique, as they are the only claimants with a deed of mandate recognised by the Crown since 1998 (five years before the Crown recognised the mandate of the KEC). They also have agreed terms of negotiation. This means that well before the Tribunal's mandate inquiries in 2004 and 2005, they had reached the first two milestones on the path to settling their claims. Unlike the other claimants who appeared before us, Ngati Makino were in the position of being ready to commence negotiations before or at the same time as the KEC.

At the time of our hearing, OTS was not in settlement negotiations with Ngati Makino (or any cluster around Ngati Makino). According to OTS's work programme, Ngati Makino are not listed as a group engaged in settlement negotiations with the Crown. They are, however, still listed as a group whose mandate is recognised by the Crown and that has agreed terms of negotiation with the Crown.[1]

Background

Ngati Makino appeared before the Te Arawa mandate inquiries of 2004 and 2005. Their claims related to the lack of progress with their negotiations, in contrast to the commencement of negotiations with the Te Arawa groups under the mandate of the KEC. The Tribunal found, in 2004, that the Crown had both a 'moral and a Treaty obligation to negotiate with Ngati Makino separately and contemporaneously with the rest of Te Arawa'.[2] If Ngati Makino agreed, it was suggested that Waitaha (and perhaps Tapuika) be invited to join in their negotiations. The Tribunal also suggested that the Crown accord priority to negotiations with Waitaha.

The Crown considered the Te Arawa mandate Tribunal's suggestion, and informed these three groups that a potential negotiation with them could not be accorded the same priority as the negotiation being conducted with the KEC.[3] Ngati Makino put their case once more to the Tribunal regarding the adequacy of the Crown's response. The *Te Arawa Mandate: Te Wahanga Tuarua Report* of March 2005 found that the Crown had acted in a manner inconsistent with the principles of partnership and of equal treatment in respect of Ngati Makino (and Waitaha).[4] It considered that the lengthy delay in negotiating with Ngati Makino and the refusal to sequence their negotiations concurrently with those of the KEC would likely prejudice Ngati Makino.[5] The Tribunal recommended:

> that the Crown should now commence negotiations with Ngati Makino. Ngati Makino having agreed, these negotiations should also include Waitaha. Tapuika could perhaps be joined to those negotiations as well, if the Crown and tribes together accept that that would be a natural grouping. However Ngati Makino and Waitaha should not have to wait for Tapuika if the latter do not wish to participate.[6]

The letter of transmittal to the Minister of Maori Affairs and the Treaty Negotiations Minister summarised the Te Arawa mandate Tribunal's finding and recommendation as follows:

> We have found that the Crown has acted in a manner inconsistent with the principles of the Treaty in relation to Ngati Makino and Waitaha. We therefore recommend that the Crown should now commence negotiations with Ngati Makino. Ngati Makino having agreed, these negotiations should also include Waitaha.

In the two years that have passed since the 2005 report, there have been two sets of developments affecting Ngati Makino in relation to settling their claims. One is the Crown's response to the 2005 Tribunal recommendation that the Crown commence negotiations. The other is the nature of their participation as overlapping claimants in the settlement of the KEC's claims. But first, for those unfamiliar with this iwi, we introduce Ngati Makino.

Ngati Makino the iwi

Ngati Makino say they resided at Otamarakau on the Bay of Plenty coast, moving between there and the Rotorua Lakes, particularly Rotoehu and Rotoiti, where they also lived at Matawhaura. Therefore, it is not possible to talk about Ngati Makino in the Maori realm without linking them to these places. They also have interconnecting descent lines underscoring their relationships with Waikato, Waitaha, Te Arawa, Ngati Pikiao, and Ngati Awa. Although they exercise a high degree of autonomy, they are for most purposes aligned with various tribes of the Te Arawa Waka. Like all the claimants before us, they have core overlapping, intersecting, and interwoven claims within the KEC area of interest.

Ngati Makino were represented before us by Te Ariki Morehu, who commenced with one of the tribal pepeha of his people: 'ko Matawhaura te maunga, ko Ngati Makino te iwi. (Matawhaura is the mountain, Ngati Makino is the tribe.)' People familiar with Maori custom will know that his reference to an iconic feature of the landscape is a statement of identity: it says where he is from and whom he represents. The mountain Matawhaura is thus central to explaining the identity and associations of Ngati Makino with their lands.

Evidence given by Mr Awhimate referred to the central place of Matawhaura in the waiata and whakatauki of Ngati Makino.[7] Morris Meha told us that Ngati Makino were an iwi, not a hapu.[8] He pointed out urupa sites at Matawhaura and he, too, cited whakatauki. He concluded that the summit of Matawhaura was Ngati Makino's, but that under the KEC deed of settlement it would now be returned to Ngati Pikiao.

Matawhaura and Otari Pa

Matawhaura is now a contested cultural redress site, as is Otari Pa. Under the KEC deed of settlement, the Crown acknowledges the significance of these two sites to Ngati Pikiao. It also acknowledges that Ngati Makino have interests. It proposes to transfer these sites in fee simple to a 'Pikiao' entity for the benefit of all groups (who descend from Pikiao). The vesting of these sites in this 'Pikiao' entity is to be delayed until Makino settle their claims with the Crown, or 15 years from the date that the KEC deed of settlement becomes conditional, whichever comes first.[9] In the meantime, an overlay classification in favour of the KEC affiliates will be placed over Matawhaura, and a non-exclusive statutory acknowledgement will be given in relation to Otari Pa.

Overarching issues for determination by the Tribunal

As we noted in chapter 4, we posed, prior to hearing, a number of questions in relation to the claims brought before us. Owing to the nature of the evidence we subsequently heard, we have reduced the issues to the following in terms of Ngati Makino:

- Has the Crown, in settling the historical claims of the KEC affiliates, retained sufficient capacity to provide adequate and appropriate redress to Ngati Makino in the future with respect to Matawhaura and Otari Pa?[10]
- In particular, has the Crown 'safeguarded' the interests of Ngati Makino with respect to each of the contested items of redress?

We note that, to determine this issue, a detailed examination of the chronology of the events as they unfolded for Ngati Makino is needed. We have attached that chronology to this report as appendix II. We prefer here to move immediately into our analysis of events.

Questions for determination by the Tribunal

In order to address the overarching issues, we consider that there are a number of specific questions arising from the evidence and submissions on the claims of Ngati Makino that need to be answered. In doing so, we have adopted a phase I, II, and III analysis similar to that used in chapters 3 and 4. Here, we set out the key questions we address in each phase:

- *Phase I:* Was the Minister fully informed before deciding not to require OTS to commence negotiations with Ngati Makino with immediate effect? Were the Crown's reasons for not implementing the Tribunal's recommendation reasonable in the circumstances?
- *Phase II:* Given that the Crown did not implement the Tribunal's recommendation, what impact did that have on the way Ngati Makino engaged with the overlapping claims process?
- *Phase III:* How did the Crown safeguard Ngati Makino's interests in the final round of decisions on redress?

We turn now to analyse and discuss each of these questions, making findings on each question. We conclude with an assessment of what the evidence demonstrates, and make certain recommendations accordingly.

The Minister's Decision in Response to the Second Te Arawa Mandate Report

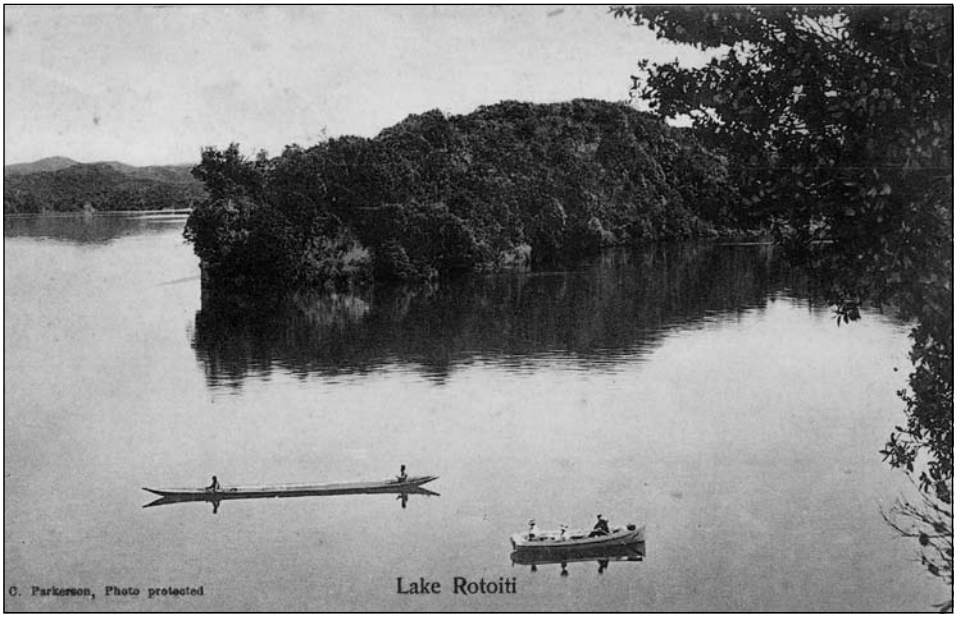
The case for Ngati Makino

Counsel for Ngati Makino submitted that the Crown had ignored the Tribunal's recommendation for the Crown to negotiate separately with Ngati Makino and accord them priority. Despite the fact that there had been several findings from the Waitangi Tribunal, the Crown de-prioritised negotiations.[11] Counsel did not accept the Crown's reasoning for de-prioritisation:

> The Crown [to justify their de-prioritisation] has made statements which suggest that Ngati Makino has been unwilling to engage to progress the settlement of their claims. These statements are absolutely incorrect.[12]

Counsel also submitted to us that OTS had filtered its advice to the Minister to the extent that he was not fully informed. Counsel alleged, as one example, that the OTS briefing dated 30 March 2005 contained an incorrect summary of the Tribunal's findings. She submitted that the Crown had abused its decision-making power by failing to take account of Tribunal recommendations and suggestions. The lack of information given to the Minister, in her submission, created gaps in the chain of reasoning. Such procedural improprieties, she said, struck at the principle of natural justice.[13]

Ngati Makino take issue with the Crown's reasons for failing to implement the Tribunal's recommendation. These reasons included the possibility that honouring the promises to Ngati Makino would destabilise the mandate held



'Lake Rotoiti', C Parkerson, postcard, circa 1905–14

by the KEC.[14] Counsel also took issue with certain aspects of the Crown's settlement policy, in particular large natural groupings, the division of assets into cultural and commercial redress, and the differing treatment accorded to each of these types of redress. Counsel told us that despite the Tribunal's 2005 recommendation (and the fact that Ngati Makino and Waitaha were willing to negotiate on shared interests) the Crown was attempting to force Ngati Makino into a larger grouping by refusing to engage with them unless they worked with Tapuika.[15]

In closing submissions, counsel referred us to the Court of Appeal decision in the *Radio Frequency* case, which stated that Maori were entitled to hold one of three types of expectation of the Crown, where it decides to depart from its obligations under the Treaty. These three types of expectation were:

- a procedural benefit (a right to consultation, should the Crown consider departing from its obligations under the Treaty);
- both a procedural and a substantive benefit (the right to expect the Crown to be appropriately informed and to weigh carefully Treaty principles); or
- a substantive benefit (that the Crown would honour its Treaty obligations).[16]

Counsel for Ngati Makino submitted that none of these expectations were met, and that:

- 'The Crown has failed to honour its Treaty obligations with respect to Ngati Makino and Waitaha who have not been consulted with.'
- 'The Crown has failed to inform itself prior to decision-making.'
- 'OTS has convoluted the decision-making process to such an extent that it is unclear as to who is actually making the decisions, and on what basis these decisions are being made.'
- 'OTS has filtered the information that has been passed to such an extent, that Tribunal recommendations seem to have been withheld from his purview.'[17]

The case for the Crown

The Crown contended that it is for the Treaty Negotiations Minister to set the negotiation priorities and settlement targets for OTS. While the Crown made no specific written submissions on its response to the Te Arawa mandate Tribunal's recommendation and submissions on prioritising negotiations with Te Arawa iwi and hapu not part of the KEC mandate, the issues were canvassed orally during the presentation of legal submissions. In response to questions from the Tribunal and claimant counsel, Crown counsel and the witness for OTS contended that the Crown had safeguarded the interests of all the claimants by preserving its capacity to provide a fair settlement for them at some stage in the future.

The supporting papers to OTS witness Robyn Fisher's brief of evidence, and those filed as supplementary papers, do provide relevant evidence on this question and we refer to that material in our analysis.[18]

Tribunal analysis of phase 1 – the Minister's decision

We begin by noting that the March 2005 briefing paper from OTS to the Treaty Negotiations Minister did not accurately convey the Tribunal's recommendation that negotiations with Ngati Makino should 'now commence'.[19] So the Minister was not fully apprised of the need to commence negotiations simultaneously and direct OTS accordingly, or, alternatively, to reject the recommendation.

Nor did OTS signal to the Minister the important implications for Ngati Makino if he chose not to negotiate with them. These implications included:

- that they would not be in negotiations with the Crown at the same time as the Crown was conducting its negotiations with the KEC;
- that they would not be able to negotiate redress as the KEC negotiations outpaced them; and
- that significant sites, which both KEC affiliate iwi/hapu and Ngati Makino have interests in, would be offered to the KEC (eg, Matawhaura and Otari Pa).

The implication for the Crown was the risk of acting in a manner inconsistent with the principles of the Treaty of Waitangi, but again the Minister was not briefed. OTS did warn of several negative potential impacts for OTS itself if the Tribunal's recommendation and suggestions were adopted, including:

- impacts on the human resource and financial resources of OTS;
- impacts for the KEC mandate; and
- potential impacts and risks for the success of other settlement negotiations beyond Te Arawa.[20]

Once the Minister approved this course of action, any acknowledgement or urgency fell away almost immediately. April and May passed before OTS conducted an in-house review of its overlapping claims process for roll out in Te Arawa.[21] The review did not address the unique circumstances of Ngati Makino at all. The position might have been saved at this point, however, as OTS flagged its intention to report 'shortly' on a suggested policy response to the second report of the Te Arawa mandate Tribunal. Had it done so, further delays might have been minimised. But it did not. Ngati Makino, in the meantime, gave up waiting and initiated contact with OTS on 24 June 2005, making it clear that they were ready and willing to negotiate.[22]

On 12 July 2005, three and a half months after the Tribunal released its report, OTS finally made recommendations to the Minister on a policy response.[23] It suggested that the Minister defer any response until further information had been obtained from Ngati Makino. No timeframe was given for reporting back to the Minister on whether he should commence negotiations. On the very same day, OTS briefed the Minister on the cultural redress package that could form the Crown's offer of redress to the KEC.[24]

Thus, on the one hand, OTS was advising the Minister on 12 July 2005 to act in a manner that would result in detriment for Ngati Makino by authorising deferral, while, on the other hand, it was advising the Minister to agree to a redress package that it had prepared for the KEC negotiations. The briefing on the mandate Tribunal's second

report again neglected to mention the urgency of the situation, and therefore did not signal to the Minister that the longer the delay, the slimmer Ngati Makino's prospects of negotiating in parallel with the KEC became.

In accepting OTS's recommendation of 12 July 2005 (in response to the Tribunal's report), the Minister was effectively rejecting the Tribunal's recommendation, because the steps that OTS suggested amounted to further delay.[25] And, as we have already noted from the previous ministerial briefing in March, the Minister was never given to understand that the Tribunal's recommendation included timing the negotiations with Ngati Makino simultaneously with those being conducted with the KEC. The Minister was advised, instead, that it was an issue of prioritising resources, and that in this context it was more important to give priority to:

- resourcing the negotiations with the KEC in order to conclude a settlement without undue delay;
- ensuring OTS resources were not stretched beyond capacity;
- preventing further destabilisation of the KEC mandate; and
- avoiding any precedent that might serve to undermine the Crown's large natural groupings policy.[26]

OTS had already lost three and a half months of valuable time for commencing negotiations with Ngati Makino, and now it was seeking deferral again. On the same day that OTS recommended this course of action, the Minister approved the proposed cultural redress offer to the KEC.[27] Neither of the briefing papers that were presented to the Minister warned of the impact on Ngati Makino, and the Minister therefore never considered that issue.

We note here three further important implications for Ngati Makino:

- Ngati Makino lost the opportunity to enter into negotiation over sites that were possibly the subject of claims by Ngati Pikiao in the KEC. In this context, we find it surprising that OTS would advise its Minister in some detail on the difficulty in separating out the interests of Ngati Pikiao and Ngati Makino in certain cultural sites, and yet fail to alert him to the implications for Ngati Makino's negotiations if Ngati Pikiao settled ahead of Ngati Makino. The basis for this position was a report that OTS had commissioned in May 2001. This report was never made available to the two mandate Tribunals, where OTS's treatment of Ngati Makino was an issue for determination. It has never been tested in evidential terms. Now, four years and two Tribunal inquiries later, it was being used against Ngati Makino.
- There is a continuing burden and cost for Ngati Makino in maintaining their mandate while they wait for negotiations to commence. OTS is aware of the cost for Maori communities of maintaining mandate over a considerable period of time, both in terms of loss of kaumatua, knowledge, and expertise, and in terms of resources needed to keep communication flowing to members of iwi and hapu.
- Ngati Makino would soon be asked to participate in the overlapping claims process, in order to assist the Crown to discharge its duty of safeguarding Ngati Makino's interests. If Ngati Makino were not advised promptly that the Minister had effectively (if unknowingly) rejected the Tribunal's recommendation, there was little chance that Ngati Makino would appreciate the significance of being full participants in the overlapping claims process. Their hopes and expectations were quite otherwise.

On our analysis, then, the Minister was not fully informed when he effectively decided to reject the Tri bunal's recommendation. We turn now to examine the evidence, to determine whether the decision was expressly and directly communicated to Ngati Makino leaving no room for ambiguity.

OTS asked Ngati Makino on 26 July 2005 about their negotiation intentions in the standard letter sent to all the Te Arawa iwi and hapu outside the KEC mandate.[28] That letter used several key phrases that are worth highlighting.

OTS advised that the Ngati Makino situation was 'different' and required 'separate consideration'. The Minister was 'willing' to give 'early consideration to resuming negotiations'. OTS sought to ensure that the interests of Ngati Makino were 'advanced'. These phrases pointed to progress down the settlement negotiations path. But the letter also contained a different message. The phrasing around ensuring the interests of Ngati Makino were 'properly safeguarded' belonged to the vocabulary associated with the overlapping claims process, had Ngati Makino but known it.

At least three important messages for Ngati Makino were absent from this letter. The letter failed to state unequivocally that there would be no separate negotiations with Ngati Makino beginning in immediate terms so as to run concurrently with the KEC negotiations. The second missing message was that the Minister had deferred considering whether to commence negotiations with Ngati Makino, and that he would consider his response only after OTS had sought further information from Ngati Makino about their negotiation intentions. The third missing message was the Crown's strong preference for a negotiation with Ngati Makino as part of a collective group involving both Waitaha and Tapuika.

The letter also failed to reconcile the conflicting signals being given. On the one hand, Ngati Makino were being told that early consideration could be given to a resumption of negotiations (subject to Crown policy preferences as listed in the letter). But on the other hand, they were being told that they would soon be asked to provide information on interests they might have in areas subject to negotiations with the KEC (the overlapping claims process).

There is a further contradiction inherent in the letter. OTS acknowledged that 'the Ngati Makino situation is different to the tribes of the Te Arawa Waka not affiliated to the KEC and requires separate consideration'.

A further crucial failure in communication was OTS's failure to spell out the necessity for Ngati Makino to consider themselves as an overlapping claimant and participate in the forthcoming consultation process. Because the letter did not rule out the possibility of separate negotiations, we find it hard to see how Ngati Makino could have appreciated the significance of the two paragraphs which flagged an intention to seek further information about their interests in the context of the overlapping claims process.

Ngati Makino claimants were sent letters just two days later asking them to identify their overlapping interests.[29] This letter was not sent to the Ngati Makino negotiator, who, as we shall see, continued to field correspondence in relation to the prospect of settlement negotiations.

Tribunal findings on phase 1 – the Minister's decision

We find that the Minister effectively rejected the recommendation in the Tribunal's *Te Arawa Mandate: Te Wahanga Tuarua* report relating to Ngati Makino. He did so as a consequence of accepting the advice of OTS to defer a decision in March 2005, and again in July 2005, until OTS had obtained further information from Ngati Makino. While it is true that Tribunal recommendations are not binding, and that the Crown always has the option of rejecting them, such action is a very serious step. There should have been, at the least, an assessment of alternatives in Treaty terms and a reflection on whether the Crown might still be able to meet its obligations to Ngati Makino. Any suggestion that the modified overlapping claims process could safeguard their interests during any period of deferral misses the point that there were no reasonable circumstances between March and July 2005 that could justify deferral. The Crown still had time to meet its national settlement targets and its commitments to the KEC. Furthermore, the resumption of negotiations with Ngati Makino between March and July 2005 would have enabled OTS to address its concerns regarding Ngati Pikiao and Ngati Makino. The only negative impact might have been the stretching of OTS's resources, a matter that was within the Crown's own power to rectify.

We further find that while the Minister approved the

proposed policy response, he did so without full knowledge that he was effectively rejecting the Tribunal's recommendation. No other alternative interpretation is possible. We do not think that, between March and July 2005, the Government's imperative to meet its national settlement targets with regard to the KEC blinded the Minister to the need to exercise the Crown's Treaty and fiduciary obligations to Ngati Makino. In the absence of clear evidence, we prefer the view that he was poorly advised.

We ask ourselves whether the impacts and effects of the Minister's decision were clearly communicated to him and to Ngati Makino, and we conclude that they were not. On our reading of this information, OTS did not adequately inform its Minister of the full import of the mandate Tribunal's recommendation with respect to Ngati Makino, and the consequences of not following that recommendation. As a result of the approach taken by OTS, from July 2005 the window of opportunity for negotiations with Ngati Makino to run in parallel with the KEC negotiations was gone because the Crown and KEC were already exchanging offers and counter-offers.

We consider the actions and omissions of OTS to be inconsistent with the principles of the Treaty of Waitangi, particularly the principles of partnership, good faith, and the guarantee to respect Ngati Makino's rangatiratanga. These principles are fully explained in appendix I to this report. We further find that the Crown's corresponding duties (listed below and fully explained in chapter 2) were clearly not adhered to. Acting on behalf of the Crown, OTS failed to discharge the following duties:

- By not determining the impact of its decision on Ngati Makino, whilst elevating its own priorities, the Crown failed in its duty to act honourably and with the utmost good faith.
- By failing to fully disclose the Crown's effective rejection of the mandate Tribunal's recommendation, the Crown failed in its duty to act honourably and with the utmost good faith.
- Because the Crown's judgement was based on its own national settlement priorities and its commitments to the KEC, without an adequate assessment of the commitments it had previously made to Ngati Makino when it recognised Ngati Makino's deed of mandate and terms of negotiations, it failed to act fairly and impartially.
- The Crown failed to consult on matters of importance. In this regard, we ask what could be more important for Ngati Makino at this stage than fair and full disclosure by the Crown of its response to the mandate Tribunal's recommendation, so that Ngati Makino could then assess its own position.

Having made these findings, we turn now to consider whether this initial breach of Treaty principles was so serious that there was real prejudice caused at this stage. In other words, we ask whether what was done afterward mitigates against any need for us to make recommendations.

Impact on Ngati Makino's Engagement with the Overlapping Claims Process

In this section, we examine the impact on Ngati Makino's engagement with the overlapping claims process as a result of the Crown's decision to not implement the Tribunal's recommendation (phase II) and its failure to communicate that decision. Before we do, we remind the reader that in this period, two sets of circumstance were running in parallel. First, there remained the possibility of an early resumption of negotiations with Ngati Makino. Secondly, the overlapping claims consultation process began.

The case of Ngati Makino

The case of Ngati Makino can be summarised as an allegation that they were under the impression that they were about to enter into negotiations with OTS and that they were therefore not required to participate as an overlapping claimant in the KEC settlement process.[30] Their case

rests on the exchanges between OTS and Ngati Makino in this period, which, they say, indicate clearly that that Ngati Makino was willing to engage with the Crown. Ngati Makino say that they were not told that separate and priority negotiations were not on the table for them. Ngati Makino contend that the best way for them to protect their interests, vis-à-vis those of the KEC, was to conduct negotiations with the Crown without delay.[31]

The Crown's case

The Crown's case can be summarised as two arguments. The first is that Ngati Makino were well informed of the Minister's decision not to implement the Tribunal's full recommendation.[32] The second is that, despite the exchange of correspondence, Ngati Makino failed to respond as an overlapping claimant and did not discharge their duty as a Treaty partner to engage reasonably with the Crown on matters of mutual importance.[33]

Tribunal analysis of phase II – impact on Ngati Makino's engagement in the overlapping claims process

In our findings in relation to phase I, we noted that the decision on resuming negotiations with Ngati Makino was deferred until OTS had received and considered Ngati Makino's response to the letter of 26 July 2005. We now examine Ngati Makino's response, and the Minister's decision on the alternative pathway for Ngati Makino (seeking further information before considering an early resumption of negotiations). We note that alarm bells had rung for the principal Ngati Makino negotiator, who correctly identified that, despite the talk of early negotiations, there was no commitment given to commencing negotiation.[34]

Rather, Ngati Makino were being asked to supply information on their interests, which they had previously supplied, in order for the Crown to complete negotiations with the KEC ahead of them. Nevertheless, on 5 August 2005, Ngati Makino's principal negotiator supplied answers to the series of questions on their readiness to negotiate.[35] Again, it was stated that Ngati Makino were ready and willing to proceed with negotiations.

From the papers put before us we can only conclude that the question of early resumption of Ngati Makino's negotiations was not put before the Minister, or if it was, that he deferred yet again. So the Crown's response to the Tribunal's recommendation became a deferral of the matter for an indefinite period of time. This raises direct implications for the manner in which Ngati Makino's participation as an overlapping claimant would evolve.

In these circumstances, the OTS letter of 24 August 2005 becomes highly significant because there is still no clarity for Ngati Makino regarding possible negotiations.[36] We can deduce from the letter that OTS was still not advising that it had ruled out early commencement of negotiations, although they signaled some problems with the approach outlined by Ngati Makino. They were nevertheless willing to discuss the matter further and suggested a meeting either with Ngati Makino alone, or Ngati Makino together with Waitaha. There was no mention of Tapuika. At this point, although separate negotiations were still being posited as a possibility, there was no commitment to sequence negotiations with those of the KEC. Furthermore, Ngati Makino learned for the first time that renewing their mandate was an issue for the Crown. This was a measure that, if followed, would have resulted in a further delay placing them well behind the KEC in terms of readiness for negotiation. At this stage, we note, Ngati Makino had been asked by the Crown to reconfirm their mandate no fewer than three times and were being asked to do so again. There is no indication that the Crown would not negotiate, subject to certain conditions being met.

But then, and inexplicably, all activity ceases. Nothing further happened with regard to communication over separate negotiations with Ngati Makino until February 2006. This brings us to the next exchange of emails and

correspondence between Ngati Makino and OTS officials from February 2006, leading to a proposal by OTS to meet on 24 March 2006 (Ross Phillipson from OTS and Ngati Makino's negotiator) and again on 28 March 2006 (Mr Phillipson, the claims committee, kaumatua, and the Ngati Makino principal negotiator). It seems from these exchanges that Mr Phillipson had become aware that Ngati Makino thought that OTS had recognised the findings and recommendation of the mandate Tribunal's second report. He was careful to bring this to the attention of OTS staff:

> There are a few matters in the letter we may need to respond to firmly. (Note also I have not, as he writes, stated the Crown 'recognise' the recent Tribunals findings in respect of the Makino negotiations (I said the Crown was 'mindful' of them)).[37]

Once more, the communication trail goes cold. No documents were put before us that would show whether the meetings proposed for late March 2006 occurred, or whether Mr Phillipson (or any OTS official) 'firmly' corrected (or otherwise) the impression of the principal negotiator for Ngati Makino that the Crown had recognised the Tribunal's finding in respect of separate negotiations.

The April 2006 briefing paper from OTS to the Minister on overlapping claims matters made no mention of negotiations with Ngati Makino.[38] The fact that Ngati Makino failed to respond to the consultation round on the agreement in principle was also not mentioned in this paper. It is as if they had ceased to exist.

Tribunal finding on phase II – impact on Ngati Makino's engagement in the overlapping claims process

We know that Ngati Makino claimants were sent letters as overlapping claimants (the pre-AIP consultation letter, dated 28 July 2005 and a post-AIP consultation letter, dated 19 September 2005).[39] We also know that Ngati Makino had an expectation that they would enter into negotiations, and nothing appears to have corrected their impression by the close of phase II (early July 2006).[40] This point was reinforced at our hearing during Ms Sykes's cross-examination of Ms Fisher.[41]

In the absence of evidence to the contrary, we must find that Ngati Makino were never informed, during this critical period for the overlapping claims consultation process, that separate negotiations would not occur, much less in sufficient time to enable them to safeguard their interests as far as the KEC settlement package was concerned. We also note that, although OTS gave the impression that it wished to recommence negotiations with Ngati Makino (in tandem with Waitaha), in reality it was merely exploring their state of readiness and never intended to negotiate with Ngati Makino on any other terms but its own.

During the hearing, we put it to Crown counsel that Ngati Makino could not have understood that the Crown had ruled out any chance of a settlement with Ngati Makino alone. Mr Andrew told us that it was made very clear to Ngati Makino that the Crown was not prepared to negotiate with Ngati Makino solely and contemporaneously with the KEC negotiations.[42] Yet the documents provided by the Crown and Ngati Makino, which we reviewed in the previous section, suggested to us that the door remained open. We note that the terms of negotiation for Ngati Makino have not been revoked.[43] All conditions remained in place to signal that negotiations were still a possibility. It was understandable, in our view, that Ngati Makino assumed that the Crown was willing to begin negotiations.

We must conclude, on the evidence concerning phase II, that there was no sufficient clarification given to Ngati Makino of the Crown's position on their status. Ngati Makino signaled their willingness to negotiate before the overlapping claims process began. They were willing to proceed in tandem with Waitaha on shared issues. Ngati Makino did not respond to the Crown's consultation letters as an overlapping claimant, on the basis that they wished to conduct negotiations in respect of their claim. The chief

negotiator for the Crown recognised this was their impression.[44] On balance, the weight of evidence supports Ngati Makino's belief that they were in a process of preparing for negotiation rather than in a consultation process as an overlapping claimant.

We must also find that it was the Crown that had a duty to ensure that it had fully ascertained and appreciated the nature and extent of the impact of its overlapping claims policy on Ngati Makino. That is part of its responsibility as the kawanatanga partner in the relationship it shares with Maori. As such, it has duties during the negotiation process, including its duty to act in accordance with the principles of the Treaty and duties akin to fiduciary duties. But ultimately, in our view, it was the conflicting signals sent to Ngati Makino about the Crown's negotiation intentions, and the Crown's failure to fully disclose its own position regarding them, that acted as a barrier to Ngati Makino's full and proper participation as an overlapping claimant in the consultation process.

Safeguarding Ngati Makino's Interests prior to Settlement with the KEC

We now examine how the Crown safeguarded Ngati Makino's interests in the final phase of consultation. This requires an examination of the evidence associated with the final phase of OTS's consultation round with Ngati Makino as an overlapping claimant. We note that, at the end of this process, the deed of settlement reflected an arrangement to recognise the interests of Ngati Makino in two sites.

The case of Ngati Makino

The position of Ngati Makino is that, from July 2006 until the signing of the deed of settlement in September 2006, they tried to respond to the Crown's consultation round as an overlapping claimant. They contend they sought, however, to have the Crown's negotiation intentions explained to them before they did so. Ngati Makino allege they were denied the opportunity to meet with the Minister on the basis of OTS misrepresentation of their response.[45]

Referring to the KEC agreement in principle, where it provided that the vesting of Matawhaura and Otari Pa in the Pikiao entity was subject to consultation with Ngati Makino, counsel argued that the Crown had dispensed with this condition.[46] Where the Crown had argued that there had been no engagement by Ngati Makino, counsel pointed out that the Crown's witness had revealed, under cross-examination:

> that the bottle-neck was largely as a result of Crown failure to respond to correspondence expeditiously. As a result, there was inadequate time to engage with Ngati Makino so it didn't happen.[47]

In terms of the actual proposal to transfer, Ngati Makino took issue with the proposal that would see the Crown:

> ostensibly shifting its fiduciary responsibilities with respect to Matawhaura and Otari Pa into the proposed Pikiao entity which is now to hold these taonga on trust for Ngati Makino.[48]

The case for Ngati Makino is that 'the Crown has not turned its mind to ensuring the protection of Ngati Makino taonga as it divests itself of [its] obligations'.[49] Counsel submitted that this was evident in cross-examination of Ms Fisher, who characterised the arrangements for these sites as 'novel' and admitted that the OTS document '20 Questions on Post Settlement Governance Entities' did not relate to this novel circumstance.

The Crown's case

The Crown submitted that Ngati Makino did not engage meaningfully in the consultation process.[50] In opening

submissions, the Crown referred to the proposed vesting as an inclusive arrangement. The Crown was trying to protect the interests of Ngati Makino where Ngati Makino acknowledged a close relationship with Ngati Pikiao.

The Crown contended that Ngati Makino's lack of engagement made it very difficult for the Crown to deal with these sites, noting that the lack of engagement appeared to be 'based on Ngai Makino's desire to pursue their settlement with the Crown'.[51]

The Crown argued that the duty of good faith required both partners to engage meaningfully. The Crown had received no constructive feedback from Ngati Makino.[52] The agreement in principle had specified that vesting was subject to consultation with Ngati Makino. The Crown tried a number of times to consult before it finalised the redress.[53]

The Crown regarded the interests of Ngati Makino and Ngati Pikiao as common interests, protected by the Pikiao entity. This was an inclusive instrument. The Crown contended that it had taken steps to preserve Ngati Makino's interests despite their lack of engagement.[54]

Tribunal analysis on phase III – safeguarding the interests of Ngati Makino

Prospects for settlement negotiations

It seems that Ngati Makino's 'impression' or expectation of early negotiations remained intact at least until July 2006, when OTS was entering into the final phase of the overlapping claims process. We now consider why they continued to hold that view and whether OTS did anything to dispel this understanding.

Three aspects of the 10 July 2006 briefing to the Minister leading to his provisional decision are relevant here:[55]

- OTS made no mention of what to do about negotiations with Ngati Makino. Rather, at this point OTS officials were telling their Minister that Ngati Makino was a hapu of Ngati Pikiao and that they shared the same interests.[56] But we know that the customary evidence demonstrates that, while there are strong kinship bonds between these two iwi, they are definitely separate and distinct. We also know that there is no explanation of how OTS assessed Ngati Makino's interests, relative to the KEC, in Matawhaura and Otari Pa.
- The Minister was advised that Ngati Makino had failed to engage in the consultation process as an overlapping claimant.[57]
- The Minister was also advised that further consultation with Ngati Makino was the next step before approving the redress in respect of two sites, which OTS had identified as of interest to Ngati Makino. Consultation would include a letter and an invitation to meet with OTS.

On 11 July 2006, OTS put a further paper to the Minister seeking approval for provisional decisions on overlapping claims. This was a detailed paper setting out the results of the consultation round and the recommended changes to the redress.[58] There was not a single reference in this paper to Ngati Makino.

At this point, we observe that the Minister had still received no follow-up recommendation from OTS concerning:

- separate and priority negotiations with Ngati Makino;
- the impact on Ngati Makino of failing to make a final decision on this point; and
- the impact on Ngati Makino of not informing them in an unambiguous and timely manner of the impact of not engaging in consultations.

The next critical exchange of correspondence occurs with Ngati Makino in the context of the overlapping claims process (ie, consultation on the Minister's provisional decisions). As we saw in chapter 3, this was to mark the end of the consultation process. In our assessment of the evidence, we have found that it is the Crown that must

bear the responsibility for communication failures thus far. In our assessment of the exchange that follows, we will ask whether the response by Ngati Makino to the overlapping claims issues was reasonable and responsible in the circumstances.

We begin with the letter of 14 July 2006, which informed Ngati Makino of the Minister's provisional decisions on cultural redress.[59] This letter was framed almost entirely around the status of Ngati Makino as an overlapping claimant. Nevertheless, the 14 July 2006 letter (unlike the briefing papers to the Minister of 10 and 11 July 2006) continued to refer to the question of separate negotiations with Ngati Makino.

As appendix II to our report demonstrates, the exchanges from July to August 2006 marked a frenetic period of communication between OTS and counsel for Ngati Makino. It is characterised by the two parties apparently communicating at cross purposes, and a hardening of attitude on both sides at a time when the overlapping claims decisions were really in their final hour. The opportunity to meet never occurred. We had two versions put to us as to the reasons why. The Crown's understanding was that Ngati Makino was not prepared to meet on the Crown's terms.[60] Ngati Makino told us that OTS had not accurately represented its position on the proposed meeting. Ngati Makino sought an extension of the 3 August 2006 deadline in order to respond fully.[61] None was given, and the decision to decline was not even communicated to Ngati Makino. Consequently, Ngati Makino made no submissions on the provisional decisions.

For Ngati Makino, the KEC settlement had reached a critical phase. The consultation process for overlapping claims was over. They now had no formal means of influencing decisions about redress that affected their interests. Between the Minister's sign off on 7 August 2006 and the initialing of the deed on 8 August 2006, there was simply no opportunity to engage with Ngati Makino. In point of fact, even if the proposed meeting had taken place in late July 2006 (as planned) we cannot conceive that there remained much opportunity for substantive change to occur. As Crown counsel told us, the consultation phase over the provisional decisions had been the final phase. The substantive decisions were now in place.

Although there was no opportunity for change after the deed of settlement was initialled on 8 August 2006, an exchange of views took place between Ngati Makino, OTS, and the Treaty Negotiations Minister that is important to record. We observe the relationship between Ngati Makino and the Crown deteriorating, and see for the first time the Crown's actual response to the mandate Tribunal's recommendation being revealed to Ngati Makino, some 16 months after the second mandate report was completed.

It was only on 14 September 2006 that OTS set out clearly and for the first time its policy response to the Tribunal's recommendation.[62] OTS informed Ngati Makino that it would not even meet with them to discuss settlement matters other than in the context of a joint negotiation involving Waitaha and Tapuika. Here, for the first time, OTS set out its bottom line, which differed from its previous stance. This bottom line was confirmed on 11 October 2006, when the Minister refused to meet with Ngati Makino without both Waitaha and Tapuika present.

Safeguarding Ngati Makino's interests in Matawhaura and Otari Pa

We have discussed, in the introduction to this chapter, how the two contested sites are to be transferred. They will be transferred to a Pikiao entity for the benefit of all groups that descend from the ancestor Pikiao. Ngati Makino will not have these sites vested in them, and there is no guarantee that the new entity will have Ngati Makino representation on it. In the meantime, all available benefits from the sites are to be conferred on the KEC affiliates. We find it difficult to understand, from a methodological point of view, how OTS arrived at this result. Ngati Makino had a legitimate expectation that they would not be affected by

the KEC negotiations, given their unique status and the fact that they were told this by OTS at the commencement of the KEC negotiation process. Certain interests of Ngati Makino are now subsumed within a settlement they have taken no part in, and in accordance with an overlapping claims process which they had not seen as applying to them because of poor communication on the part of OTS.[63] In addition, OTS briefing papers to the Minister show that he was not fully appraised of Ngati Makino's unique situation vis-à-vis the KEC negotiations. They reveal that he could not have been adequately informed on the nature and extent of Ngati Makino's interests within the KEC area of interest before he made his decisions in April and July 2006.

In summary we cannot see how OTS 'safeguarded' Ngati Makino's interests, and we believe that the actions of OTS have resulted in serious prejudice to Ngati Makino.

Tribunal findings on phase III – safeguarding the interests of Ngati Makino

We find that OTS did not 'safeguard' Ngati Makino's interests during phase III. We think the evidence in the briefing papers to the Minister during this phase demonstrates that OTS has not acted fairly and impartially towards Ngati Makino. Further, it has breached Ngati Makino's legitimate expectation that the Crown would negotiate with them.

We also find that Ngati Makino's position vis-à-vis its own settlement negotiations was demonstrably disadvantaged by the Crown's prioritisation of the KEC's settlement negotiations. It was aggravated by the failure of OTS to engage Ngati Makino in the overlapping claims process. At all relevant times, OTS did not adequately brief the Minister so that he understood that this was a major omission.

We note again the lack of tikanga expertise within OTS. We say this with respect, but it must be obvious that there is no one available to OTS staff from whom they can draw independent advice. There are kaumatua, who have a ceremonial role, but what we are talking about is a role of policy audit and tikanga advice. Here again, OTS staff were dealing with sites of importance, iconic in nature. They knew, or should have known, given their reliance on the 'Nga Mana o te Whenua o Te Arawa Customary Tenure Report' and other central North Island research reports, that the sites would be contested. By using these sites, they knew that amicable tribal relations would be affected. They have encouraged tribal division.

We also share concerns that the deed of settlement may facilitate the construction of a new Te Arawa tribal landscape, subsuming all who stood outside it (unless they achieve their own settlements in reasonable time).[64] Ngati Makino witness Mr Awhimate underscored this point, noting that the deed of settlement extended Ngati Pikiao's rights into Ngati Makino's rohe. He feared that, as a result, Ngati Makino would lose their identity, and he felt that consequently their mana was belittled.[65] In hearings, counsel for Ngati Makino submitted that OTS was confused about the identity of Ngati Makino, and that this confusion was reflected in the deed of settlement provisions as they relate to Ngati Makino. We agree. On the one hand, the settlement deed declares it will not settle the Treaty claims of Ngati Makino (cl 1.11). But for the purposes of dealing with Matawhaura and Otari Pa, Ngati Makino are defined in clause 10.32 as individuals who are 'descended from Pikiao', and any future redress in these sites has been predetermined. It is part of Ngati Makino identity that they have close ties to a number of different kin groups – among them Ngati Awa, Waitaha, and Ngati Pikiao. Obliging them to give priority to any one of these links merely for the convenience of the Crown is an attack on their rangatiratanga.

We are left with grave concerns that OTS has not understood the status of Ngati Makino in relation to Ngati Pikiao. The flawed understanding of OTS officials may raise serious implications for Ngati Makino's future, especially in relation to how Ngati Makino regard themselves and how others regard them. We make these findings as a result of

the attitude of OTS towards overlapping claimants generally, but especially in light of its failure to fully disclose its intentions in terms of negotiating with Ngati Makino. We also note how, over time, as the pressure for settlement built, OTS hardened its position against Ngati Makino, as reflected in its refusal to meet with Ngati Makino to discuss negotiations unless they were prepared to join with both Waitaha and Tapuika.

We ask ourselves whether the response by Ngati Makino to the overlapping claims process was reasonable, fair, and Treaty consistent. Could Ngati Makino have done more to meet with OTS on OTS's own terms in the final consultation round? In our view, Ngati Makino could only have grasped the full import of the overlapping claims process when it became crystal clear that there were to be no separate negotiations with them unless they were willing to wait for Waitaha and Tapuika, and then only if the parties chose to work together for settlement negotiations as a 'large natural grouping'. In the ordinary course of events, we might lean towards the Crown's view that Ngati Makino had the opportunity to put its case as an overlapping claimant, and that its failure to do so rests with Ngati Makino alone. We do not regard this as an ordinary course of events. Ngati Makino have been mandated since 1998. They have signed terms of negotiation with the Crown. Two mandate reports have advised the Crown to commence those negotiations (and the 2004 report asked that they be carried out contemporaneously with the KEC negotiations).

Seen against this long history of failed policy and progress, and the Crown's delay in communicating clearly its bottom line, Ngati Makino's response is understandable. For this reason, we do not accept that Ngati Makino made informed choices about its participation as an overlapping claimant. The evidence shows that the Crown only revealed its final position on Ngati Makino's prospects for settlement negotiations after the deed of settlement had been signed.

Tribunal Conclusions

In answer to the overarching issue posed for this chapter, namely whether the Crown, in settling the historical claims of KEC affiliates, has retained sufficient capacity to provide adequate and appropriate redress to Ngati Makino in the future with respect to Matawhaura and Otari Pa, we must say no, it has not. The Crown has not made such an assessment. Nor has OTS 'safeguarded' the interests of Ngati Makino with respect to each of the contested items of redress.

We find that OTS has acted in a manner inconsistent with the principles of the Treaty and its duties to uphold the honour of the Crown, act in good faith, treat Ngati Makino fairly and impartially, consult, and uphold its fiduciary obligations.

OTS has failed to take any meaningful steps to remedy the breach found in the case of Ngati Makino by the Te Arawa mandate Tribunal. It has never adequately presented the case for Ngati Makino to the Treaty Negotiations Minister. Therefore, he cannot have been adequately informed of the unique position of Ngati Makino in July 2005, when he endorsed the approach of OTS to Ngati Makino, and in July 2006, when he signed off on the cultural redress for the KEC.

Equally, we consider that Ngati Makino were not adequately informed of the intentions of OTS in respect of separate and immediate negotiations for Ngati Makino. OTS's recommendation to the Minister in respect of Ngati Makino and subsequent correspondence with Ngati Makino were marked by a certain amount of ambiguity and obfuscation, which we have had to unpick to answer the simple question of whether OTS has safeguarded their interests. We are clear now that OTS has not.

We also find that the Crown has not remedied the breach identified by the Te Arawa mandate Tribunal, and has further compounded the breach by steamrolling towards the completion of the KEC settlement without ensuring the

minimum safeguards of Ngati Makino's interests as an overlapping claimant.

This has led to significant prejudice, given the contest over the cultural redress offered as part of the KEC settlement. We made our recommendations on how to deal with Ngati Makino in chapter 3, and they are reproduced in chapter 7.

Notes

1. OTS, *Four Monthly Report: July–October 2006* (Wellington: OTS, 2006) (doc A98), pp 5–7
2. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 6
3. Ibid, p 96
4. Ibid, p 97
5. Ibid, p 98
6. Ibid
7. Awhimate Awhimate, oral evidence, November 2006 (doc A33)
8. Morris Meha, brief of evidence, 1 December 2006 (doc A17), paras 6–7
9. *Deed of Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu* (Wellington: OTS, 2006) (doc B26), cls 10.31–10.36
10. Waitangi Tribunal, 'Statement of Issues for the Te Arawa Settlement Urgency (Wai 1353)', 15 January 2007 (claim 1.4.7), issue 2.3
11. Counsel referred to the memorandum following the seventh hearing from the Wai 46 presiding officer in 1995 and the 1997 eastern Bay of Plenty report.
12. Counsel for Ngati Makino, opening submissions, 30 January 2007 (paper 3.3.8), para 8.3
13. Counsel for Ngati Makino, oral opening submissions, 28 February 2007
14. Ibid
15. Counsel for Ngati Makino, opening submissions, 30 January 2007 (paper 3.3.8), paras 21–22
16. Counsel for Ngati Makino and Waitaha, closing submissions, 26 March 2007 (paper 3.3.27), para 2.13; *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 184 (CA)
17. Counsel for Ngati Makino and Waitaha, closing submissions, 26 March 2007 (paper 3.3.27), paras 2.14–2.15
18. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32); Robyn Fisher, document bank supporting brief of evidence, various dates (doc A32(a))
19. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 30 March 2004 (doc A90(7)). Note that the year on the letter (2004) is incorrect.
20. Ibid, para 14
21. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed policy response to Tribunal's *Te Arawa Mandate Report: Te Wahanga Tuarua*, 12 July 2005 (doc A32(a) (BD3))
22. OTS to Ngati Makino, 5 July 2005 (doc A32(a)(BD66))
23. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed policy response to Tribunal's *Te Arawa Mandate Report: Te Wahanga Tuarua*, 12 July 2005 (doc A32(a) (BD3)), para 29
24. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed cultural redress package for KEC, 12 July 2005 (doc A43(6))
25. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed policy response to Tribunal's *Te Arawa Mandate Report: Te Wahanga Tuarua*, 12 July 2005 (doc A32(a) (BD3)), para 29
26. Ibid, para 19
27. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed cultural redress package for KEC, 12 July 2005 (doc A43(6)); OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed policy response to Tribunal's *Te Arawa Mandate Report: Te Wahanga Tuarua*, 12 July 2005 (doc A32(a)(BD3))
28. OTS to Ngati Makino, 26 July 2005 (doc A33(f))
29. OTS to Ngati Makino (Wai 334), 28 July 2005 (doc A32(c)(1)); OTS to Ngati Makino (Wai 459), 28 July 2005 (doc A32(c)(2)); OTS to Waitaha and Ngati Makino (Wai 1053), 28 July 2005 (doc A32(c)(3))
30. Counsel for Ngati Makino and Waitaha, closing submissions, 26 March 2007 (paper 3.3.27), paras 4.1–4.25
31. OTS to Ngati Makino, 5 July 2005 (doc A32(a)(BD66)); Ngati Makino to OTS, 5 August 2005 (doc A32(a)(BD67))
32. Exchange between Crown counsel and presiding officer during cross-examination of Robyn Fisher by counsel for Ngati Makino, 29 February 2007
33. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), paras 88–89, 91
34. Ngati Makino to OTS, 5 August 2005 (doc A32(a)(BD67))
35. Ibid
36. Ngati Makino to OTS, 24 August 2005 (doc A32(a)(BD68))
37. Ross Phillipson to OTS (internal email), 19 March 2006 (doc A32(a) (BD72))

38. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 6 April 2006 (doc A32(a)(BD7))
39. Neither of these critical letters was filed by Ngati Makino or the Crown.
40. OTS to Ngati Makino, 5 July 2005 (doc A32(a)(BD66)); Ngati Makino to OTS, 24 August 2005 (doc A32(a)(BD68)); Ross Phillipson to Neville Nepia (email), 10 March 2006 (doc A32(a)(BD71))
41. Robyn Fisher, cross-examination by counsel for Ngati Makino, 29 February 2007
42. Presiding officer, questions to Crown counsel during cross-examination of Robyn Fisher
43. Presiding officer, questions during cross-examination of Robyn Fisher by counsel for Ngati Makino
44. Ross Phillipson to OTS (internal email), 19 March 2006 (doc A32(a)(BD72))
45. Counsel for Ngati Makino and Waitaha, closing submissions, 26 March 2007 (paper 3.3.27), paras 4.1–4.25
46. Ibid, para 4.6
47. Ibid, para 4.9
48. Ibid, para 4.12
49. Ibid, para 4.18
50. Crown counsel, closing submissions, paras 88–89, 91
51. Ibid, para 88
52. Ibid, para 89
53. Ibid, para 90
54. Ibid, para 91
55. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed cultural redress, 10 July 2006 (doc A32(a)(BD65))
56. Ibid, paras 34–35
57. Ibid, para 4
58. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning provisional decisions on overlapping claims, 11 July 2006 (doc A43(1))
59. OTS to Ngati Makino, 14 July 2006 (doc A32(a)(BD73))
60. OTS to Ngati Makino, 31 July 2006 (doc A32(a)(BD75))
61. Counsel for Ngati Makino to Philip Cleaver (email), 1 August 2006 (doc A32(a)(BD74)); counsel for Ngati Makino to OTS, 2 August 2006 (doc A33(h))
62. OTS to counsel for Ngati Makino, 14 September 2006 (doc A32(a)(BD79))
63. Counsel for Ngati Makino, opening submissions, 30 January 2007 (paper 3.3.8), para 7
64. Ibid, para 41
65. Awhimate Awhimate, oral evidence

CHAPTER 6

OUTSTANDING MANDATE ISSUES

Introduction

There are several claimants from the Te Arawa Waka whose claims, without their consent, have been swept into the KEC affiliate iwi/hapu settlement. Claimants from four Te Arawa iwi/hapu presented claims relating to mandate issues. These claims essentially concern the manner in which the Crown has responded to the suggestions made by the Waitangi Tribunal in its second Te Arawa mandate report, *Te Arawa Mandate: Te Wahanga Tuarua Report*. In particular, these claims deal with the suggestion that OTS should ensure that the KEC amend its trust deed to provide the opportunity for hapu to withdraw their mandate.

The Wai 1297 and Wai 1311 claimants of Ngati Whaoa objected to the way in which they had been represented on the KEC. Since 2003, Ngati Whaoa had been represented jointly (or 'coupled') with Ngati Tahu as a single entity. The claimants argued that the Crown failed to recognise the decision made by Ngati Whaoa at a January 2005 hui-a-hapu to withdraw from the KEC.[1] They were also concerned about the KEC deed of trust. Similarly, the Wai 1350 claimants of Ngati Tahu, who were not involved in either of the two Tribunal hearings on mandating issues, also argued that Ngati Tahu had never been given the opportunity to uncouple from Ngati Whaoa for mandating and settlement purposes. They maintained that Ngati Tahu is not part of Te Arawa.[2] Both the Ngati Whaoa and Ngati Tahu claimants argued the Crown had failed to follow the suggestion set out in the Tribunal's second mandate report, that the Crown should ensure that the KEC provided the means by which coupled hapu may be uncoupled, should they wish.[3]

The Wai 1310 claimants of Ngati Rangiunuora objected to their representation on the KEC as a subgroup of the wider Ngati Pikiao roopu. They argued that as a hapu they had never agreed to mandate the KEC, and further that the procedural rules contained in the KEC's deed of trust provided no means by which they could vote as a hapu to withdraw from the KEC.[4] The Wai 1349 claimants of Ngati Tamakari also objected to their representation on the KEC as a subgroup of the wider Ngati Pikiao roopu, and to the absence of any provision in the KEC deed of trust for the hapu to vote to withdraw from the KEC.[5] The Ngati Rangiunuora and Ngati Tamakari claimants argued that the Crown had failed to follow the recommendations of the mandate Tribunal's second report that the Crown should ensure that the KEC develop a process by which hapu could withdraw or affirm their support for the KEC mandate.[6]

As we noted above, before we can consider the specific claims before us we review the Crown's policy response to the Tribunal's second Te Arawa mandate report. We discuss whether this response was Treaty compliant. This is followed by a consideration of whether OTS should have continued to monitor the KEC mandate in a manner consistent with that Tribunal's advice and the principles of the Treaty of Waitangi.

The mandate claimants

We begin by introducing the groups that presented claims to us on mandate issues. We do so, because an appreciation of the identity of our claimants is fundamental to understanding the underlying issues we address in this chapter.

Ngati Whaoa trace their descent from the ancestor Whaoa. Their traditional rohe includes the area around the Paeroa Range and Waiotapu, along with the Kaingaroa area and surroundings.[7] They are a Te Arawa hapu, who appear in the Native Land Court records with interests in blocks in the Paeroa and Kaingaroa areas. The central North Island Tribunal will be reporting soon on generic issues concerning whether many claimants of the central North Island, including Ngati Whaoa, lost land in the nineteenth century through the native land laws, targeted Crown purchasing policies, and land sales.[8]

Witnesses who appeared before us stressed the separateness of Ngati Whaoa and Ngati Tahu. Peter Staite told us that the separation was acknowledged and accepted by both Ngati Whaoa and Ngati Tahu. He explained the separate lines of descent:

> Ngati Tahu land occupation within the centre span of the Arawa Waka, mai i Maketu ki Tongariro maunga is established by marriage of Hinewai of Mataatua Waka to Whaoa's son Te Aho O Te Rangi, the mana whenua line. These lines were quoted by Ngati Tahu speakers in early hearings. Ngati Whaoa maintained continuous occupation and mana whenua to 1840.
>
> Ngati Te Rama and Ngati Mataarae occupied the southern regions and often referred to as Ngati Tahu from their mother (Whakarongotaua) grandmother Hinewai. But she and they were more Ngati Whaoa through both her grandfathers, being sons of Whaoa.[9]

Ngati Whaoa are associated with the Kaingaroa 1, Kaingaroa 2, Paeroa East, and Rotomahana Parekarangi blocks, although they were not awarded interests in all four blocks.[10] As the report 'Nga Mana o te Whenua o Te Arawa Customary Tenure Report' points out, they were acting autonomously during these hearings. Within their sphere of influence they have associations with many natural resources including Waiotapu, Te Kopia, Ohaaki, and Orakei Korako.

We then turn to Ngati Tahu. We note the differing traditions of the origins of the ancestor Tahu.[11] In one tradition, Tahu is associated with the Horouta Waka; in another the Te Arawa Waka. They have kin links with Ngati Tuwharetoa, Ngati Manawa, and Tainui.[12] Joseph Reihana outlined, for the Tribunal's benefit, the rohe and sites of significance to Ngati Tahu.[13] During the nineteenth century, Ngati Tahu and Ngati Whaoa competed for interests in land around the southern parts of the Rotomahana Parekarangi and Paeroa areas.[14] They are associated with the following blocks: Kaingaroa 1, Kaingaroa 2, Paeroa East, and Rotomahana Parekarangi.[15]

Ngati Tahu have separate lines of descent, and while there is evidence of a 'strong degree of intermarriage' between descendants of Whaoa and Tahu,[16] there is also evidence of a high degree of intermarriage between Whaoa and Tuhourangi, and between Ngati Tahu, Ngati Tuwharetoa, and Ngati Raukawa.

A central concern for these claimants is the extent to which the Crown relies on the following argument: Ngati Tahu and Ngati Whaoa are jointly listed as a roopu in the KEC deed of trust. Any decision for separate representation must be made by the joint entity, which voted to mandate the KEC in 2003. The claimants in this inquiry are individuals who seek to operate in isolation from the roopu entity.[17]

We turn now to two hapu (associated with Ngati Pikiao), who appeared before us. Angela Ballara, whose evidence informed the Crown's negotiations with the KEC, referred to the numerous hapu associated with Ngati Pikiao.[18] One of these is Ngati Tamakari. This is a hapu that was traditionally based around Lake Rotoiti and extending to Maketu.[19] We understand that the ancestor Tamakari was the son of Pikiao 1.[20] The Wai 1349 claimants descend from this tupuna. We were told that hapu with traditional ties in

the Lake Rotoiti area are now referred to as Ngati Pikiao.[21] However, Ngati Tamakari were operating as a distinct customary group before the Native Land Court and its representative before us asserts itself as a separate traditional hapu with associations to other hapu in the area. We understand that David Whata-Wickliffe also gave extensive evidence on the identity of Ngati Tamakari before the central North Island Tribunal.[22] The claimants dispute the Crown's claims that Ngati Tamakari are part of Ngati Pikiao and are therefore represented by Ngati Pikiao on the KEC.

Ngati Rangiunuora is a further hapu associated with Ngati Pikiao, who object to the Crown's claim that they are part of Ngati Pikiao and therefore also represented on the KEC. Their witness, Colleen Skerritt-White, also gave evidence before the central North Island Tribunal of their origins and identity.[23] We understand that Ngati Rangiunuora were traditionally associated with the areas around Rotoiti, Rotoma, Okataina, and Rotoehu.[24] One of their principal marae is located on the southern shore of Lake Rotoiti.

A central concern for these claimants is the extent to which the Crown relies on the following argument: Ngati Tamakari and Ngati Rangiunuora are hapu of Ngati Pikiao. Ngati Pikiao is one of the roopu listed in the KEC deed of trust. Hapu of Ngati Pikiao cannot stand apart from the roopu. Any decision on withdrawal is a matter for Ngati Pikiao to resolve. The claimants in this inquiry are in any case individuals who seek to operate in isolation from the roopu entity.[25]

Recommendations of the Te Arawa mandate Tribunal regarding provisions for the uncoupling and withdrawal of hapu from the KEC

Issues regarding the coupling of Ngati Whaoa and Ngati Tahu, and the inclusion of Ngati Rangiunuora and Ngati Tamakari in the KEC were heard by the Te Arawa mandate Tribunal in January 2005, and were the subject of specific recommendations in that Tribunal's second report, released in March 2005.

Before that Tribunal, the claimants from Ngati Whaoa disputed the outcome of the July 2003 mandating hui which elected joint representatives of Ngati Whaoa and Ngati Tahu on to the KEC. They wished to uncouple themselves from Ngati Tahu and make their own decision with respect to their inclusion in the KEC deed of mandate.[26] The position of OTS was that the views of the Ngati Whaoa claimants did not represent the majority of their hapu, but instead were simply the views of the claimants as individuals. With respect to Ngati Whaoa, the Tribunal reiterated its August 2004 suggestion that a preliminary hui of Kaihautu members be held to discuss matters of uncoupling and representation on the kaihautu and KEC. It noted that this had not taken place. It advised that:

- when the KEC reviewed its accountability rules, it develop a rule by which hapu could withdraw from its mandate; and
- the Crown 'should ensure that provision is made for coupled hapu to be uncoupled, should they wish'.[27]

The mandate Tribunal also heard from claimants from a number of hapu, including Ngati Te Rangiunuora and Ngati Tamakari, who objected to their inclusion in the KEC as subgroups under the umbrella of Ngati Pikiao. These hapu argued that they had never had the opportunity to meet independently or collectively to assent to their inclusion in the KEC deed of mandate.[28] The Crown responded by arguing, first, that the claimants opposing the inclusion of their hapu in the KEC mandate did not truly represent their hapu, but were expressing their own views as individuals. The Crown's view was that Ngati Pikiao as a whole had endorsed the KEC mandate, and, essentially, that the inclusion or exclusion of certain of its hapu was an internal matter, which could properly be resolved only by Ngati Pikiao itself.

Once again, the Tribunal reiterated its August 2004 suggestion that a preliminary hui of KEC members be held to discuss matters of uncoupling and representation on the main Kaihautu body and on its executive council, but then noted that this had not taken place.[29] The Tribunal had

concerns that the Crown may have acted in breach of the Treaty principle of equity and equal treatment. However, it did not make a conclusive finding on the matter because the situation was saved at the time, as the KEC had yet to revise its deed of trust.[30] The Tribunal found that when the KEC did so, it needed to address issues of accountability (between KEC representatives and the hapu they represented), and develop a process by which hapu could vote to withdraw from the mandate. The Tribunal stated firmly that, in order to avoid future Treaty breach, the Crown:

> should ensure that there is provision made for hapu such as these [that is, those hapu who objected to their representation as subgroups of Ngati Pikiao] to withdraw or affirm their support for the executive council's mandate.[31]

Background

Introduction and issue

This section contains a chronology of the key events relevant to the issues before us. We first chart the development of the Crown's response to the Tribunal's suggestions. Secondly, we chart monitoring by OTS of the KEC mandate as it concerns the claimants before us, and thirdly we summarise the review of the KEC's trust deed. Finally, we deal with attempts by the claimants to have their claims withdrawn from the KEC mandate.

This section has been divided in this way to make it easier for the reader to follow the four separate but interwoven sequences which are relevant to our inquiry:

- the Crown's policy response to the Waitangi Tribunal's suggestions;
- OTS's monitoring of the KEC mandate;
- the review of the trust deed; and
- ongoing attempts to reclaim Treaty claims from the KEC mandate.

Policy response to the second Te Arawa mandate report

On 30 March 2005, the day that the second Te Arawa mandate report was released, officials from OTS reported to the Treaty Negotiations Minister with their preliminary comment on the recommendations.[32] A more detailed report followed three months later.[33] Neither report mentioned the Tribunal's recommendations in respect of providing for the uncoupling and withdrawal of hapu from the KEC. In particular, there was no mention of the requirement for OTS to ensure that the KEC contain provisions in its deed of trust that would allow hapu such as the mandate claimants to withdraw or affirm their support.

There was no briefing and therefore no Crown response. After this date, there was only a series of autonomous actions from OTS. Therefore, this section is very short.

Claimant counsel Michael Sharp argued that this constituted a major breach of administrative law, and that the logical consequence of this was that the Crown must go back to the beginning of the process again.[34] The Crown responded that the Treaty Negotiations Minister was generally made aware of the mandate issues and the proposed response by OTS to the second Te Arawa mandate report.[35] We have seen no evidence on this point at all.

OTS monitoring of the KEC mandate

OTS did not brief its Minister on the Tribunal's specific advice and suggestions concerning the mandate claimants before us. What it did do, in June 2005, was provide advice to the Treaty Negotiations Minister on mandate developments relating to Ngati Whaoa. This advice was needed to respond to a set of directions from this Tribunal concerning Ngati Whaoa's application for urgency relating to the Te Arawa lakes settlement. Those proceedings, while 'overlapping' in terms of the resources involved, were unrelated to the KEC's negotiations. At the Ngati Whaoa hui, however, there was support for the Ngati Whaoa claimants to continue with their claims before the central North Island Tribunal. As this hui of Ngati Whaoa was never considered

'Rainbow Mountain (Maungaka[ka]ramea)', R G Marsh, postcard, circa 1910–14

in the second report of the mandate Tribunal, any OTS briefing on it would have had nothing to do with the Tribunal's reports.[36]

In this briefing on 23 June 2005, OTS updated the Minister on the general state of the KEC mandate involving the tribes of Te Arawa who were considered at various stages to be overlapping claimants, rather than claimants subsumed under the mandate of the KEC.[37] The position of Ngati Whaoa, however, was addressed. OTS advised the Minister not to recognise the results of the Ngati Whaoa hui held in January 2005. It also recommended that he recognise the withdrawal of Ngati Rangitihi from the KEC mandate. OTS provided background information for the Minister, which included a discussion of the Tribunal's two Te Arawa mandate inquiries. In respect of the Tribunal's advice and suggestions from the second Te Arawa mandate report, OTS stated only:

> The Tribunal has found that the Kaihautu Executive Council and the Crown responded adequately to the recommendations in respect of the reconfirmation of the Kaihautu Executive Council's mandate made by the Tribunal in August 2004 and that officials consider that these favourable findings provide a basis for continuing negotiations with the Kaihautu Executive Council.[38]

A further oblique reference was made to the Tribunal's second report:

> The instability of the Kaihautu Executive Council's mandate in relation to certain iwi/hapu has caused some uncertainty over the past six months and continues to divert considerable resources from the negotiations. There are many contributing factors to this situation, including the coincidence of CNI Tribunal hearings running in parallel and the Tribunal's suggestions in the April 2005 mandate report that the Crown

> ought to accord priority to separate negotiations with non-KEC Te Arawa groups.[39]

OTS intended to report again on the status of the mandate in the following few months, particularly in respect of Ngati Whaoa, Ngati Rangiteaorere, and Ngati Wahiao. There was no direct reference to what the mandate Tribunal had said about the situation of Ngati Whaoa.

On 22 July 2005, OTS briefed the Minister again and recommended that he recognise that Ngati Wahiao had rejoined the KEC mandate. OTS also noted that two recent Ngati Rangiteaorere hui showed divided support for the KEC, but on balance it considered that there was insufficient basis for the Crown to recognise their withdrawal.[40] OTS referred to changes made to the KEC trust deed, linking these to the Tribunal's recommendation:

> the amendments to the trust deed were adopted on 28 June 2005 following a comprehensive review arising out of suggestions made by the Waitangi Tribunal in its *Te Arawa Mandate Report*.[41]

We discuss whether this was in fact correct in the following section. We note here that there was no change to the trust deed in the manner advised by the mandate Tribunal.

On 12 July 2005, and as we know from our discussion in chapter 3, the Minister approved a policy response to the Tribunal's second mandate report on overlapping claims.[42] The Tribunal's advice and suggestions on mandating issues were again not mentioned in OTS advice to its Minister.

OTS reported on mandate issues to its Minister on 9 August 2005, in the context of fresh applications made to the Waitangi Tribunal concerning mandate issues.[43] As the Crown did not file this report, we are unable to say whether OTS reported the Tribunal's recommendations regarding changes to the trust deed.

On 8 December 2005, OTS briefed its Minister regarding the applications for urgency affecting Ngati Rangiteaorere, Ngati Wahiao, Ngati Whaoa, and Ngati Rangiunuora. Mandate issues are referred to in the following manner:

> In both previous Te Arawa mandate inquiries, the Waitangi Tribunal suggested that Ngati Tahu/Ngati Whaoa be provided with an opportunity to reconsider their 'coupling'. While the Crown and KEC followed the Tribunal's previous suggestions for a reconfirmation process, the question of 'uncoupling' Ngati Tahu/Ngati Whaoa was not specifically addressed.[45]

The remainder of this paragraph was excised on the grounds of legal privilege, so we do not know if the Minister was briefed on the second aspect of the Tribunal's advice that the trust deed be amended. As we know from chapter 1, after these applications were filed there followed a period of time when attempts were made by the Tribunal to obtain further information and to facilitate mediation for Ngati Rangiteaorere issues. What is important to note is that it took the filing of further Tribunal proceedings before OTS fully briefed its Minister on the recommendations made in the Tribunal's second Te Arawa mandate report.

This is the extent, then, of papers put before us which show the Crown's response to the Tribunal's concerns about remaining mandate issues. We can conclude that:

- the Minister was not informed of the Tribunal's concerns and suggestions regarding mandate; and
- he therefore neither accepted nor rejected the Tribunal's suggestion.

It can be inferred, however, that on 22 July 2005 the Minister was wrongly advised that the amendments made to the KEC trust deed had been made following a review arising from the Tribunal's second mandate report. Thus, the matter of the fullness of the advice received by the Treaty Negotiations Minister was at issue at our hearing. This issue became apparent only as a result of the cross-examination of OTS witness Ms Fisher.

In closing submissions, claimants pointed out that OTS did not point out to its Minister that it had failed to brief him on the mandate Tribunal's advice that the Crown should ensure that KEC included certain provisions relating to uncoupling and withdrawal in its trust deed. Neither

did it advise that, in failing to meet the suggestion of the Te Arawa mandate Tribunal concerning the amendment to the KEC deed of trust, the Crown might be acting in a manner inconsistent with the Treaty of Waitangi.[46]

We conclude this section by noting that we found no evidence in the letters filed in the inquiry that OTS communicated with the mandate claimants before us to formally advise that the advice of the mandate Tribunal with respect to each one of them was not going to be followed.

In summary, we know that by the end of 2005 there was:

- no formal Crown response to the Tribunal's second report in respect of mandating concerns;
- no OTS briefing giving formal advice to the Minister on the content of the mandate Tribunal's second report; and
- no formal notification to mandate claimants that OTS had rejected the Tribunal's suggestion.

The extent of the failure became apparent only at the hearing held in February and March 2007.

KEC deed of trust

We turn now to consider what actually happened to the KEC deed of trust. In the absence of a formal Crown response to the Tribunal's second mandate report, we must now consider what action OTS took. OTS witness Ms Fisher told us that the KEC and OTS had discussed the mandate suggestions at several meetings, and OTS had encouraged the KEC to clarify withdrawal procedures in its trust deed:

> The Crown was consulted on the proposed amendments to the KEC's Trust Deed following the Tribunal's second Mandate Report. The Tribunal's recommendations were discussed at several meetings between KEC and the Crown. The Crown encouraged KEC to clarify provisions relating to the withdrawal of groups from the mandate.[47]

She agreed that the revised trust deed did not follow the recommendations of the Tribunal, and explained the Crown's position as follows:

> The Crown's view was that the provisions as suggested by the Tribunal were not necessary and that it would be inappropriate for the Crown to 'require' that the provisions be included.[48]

We note from handwritten meeting notes produced by OTS that it had raised the matter of including procedures for the withdrawal of iwi/hapu in the KEC deed of trust at meetings with the KEC between February and April 2005.[49] The review itself had been under way prior to the second mandate report.

On 28 February 2005, the deed of trust was discussed at a KEC/OTS negotiation meeting.[50] The KEC representative was recorded in the notes as follows: 'Removal – use Schedule 2 procedures for withdrawal of iwi/hapu.'

On 16 March 2005, the chief negotiator for OTS, Ross Phillipson, referred to a framework for reviewing the trust deed that required comment from Te Puni Kokiri and the Crown Law Office. Five areas had emerged from the review, one of which was:

> How hapu can withdraw (who and how)
> - Benefit of clear process in deed for withdraw inc who/how
> - Suggest collective agreement of 'grp'
> - Information to KEC, KEC to Crown
>
> Crown determination[51]

In the ensuing discussion, the chief negotiator was recorded as saying: 'having a withdrawal process in place safeguards against small hapu acting independently.'[52]

On 17 March 2005, OTS set out its expectations for the KEC regarding enhancements to the trust deed provisions for the withdrawal of roopu from the KEC. OTS stated:

> To enable greater transparency, we consider there may be benefit in identifying certain minimum standards in the trust

> Deed that are expected to be met in order for the Kaihautu Executive Council (and ultimately the Crown) to recognise the withdrawal of a particular iwi/hapu. In this regard, you may also wish to consider whether it is appropriate to stipulate who is 'entitled' to withdraw, for example, whether subgroupings of the identified Te Arawa Roopu . . . can or cannot disaggregate from their Roopu or, at a minimum, must gain support of all other hapu/iwi in their Te Arawa Roopu to disaggregate.[53]

This letter was handed over to KEC representatives at an OTS–KEC negotiations meeting on 17 March 2005.[54] In the discussion recorded in the handwritten notes, clarification was sought and given as to the interest by the Waitangi Tribunal in this aspect of the trust deed. We quote that exchange in full:

> **RTW.** at DOT hui last night asked for example of where WT would raise these issues. Could see why Direct negs requires DOT but ≠ in WT process, so why WT interested.
> **RP.** From WT pt of view relates to contemporary actions ie, Urgent Inquiry processes
> **RP.** Will be interested if you adopt suggestions
> **RTW.** Next doc goes out nxt wk & will consider
> **RP.** did advise re being sure Kaihautu sure of their status re recomm to KEC, ie, being sure they understand KEC is the decision maker
> **RTW.** KEC have fiduciary responsibilities → should be ultimate d/makers.
> Will add plan matters to doc. To be sure K members understand process.[55]

The handwritten notes of the 31 March meeting record the following exchange:

> **RP.** What happened about process for withdrawal
> **RTW.** No real interest other than to leave to KEC to draft.[56]

There is a further reference to the withdrawal process at the meeting held on 7 April 2005, where the following exchange is recorded:

> **RP.** Can you emphasise matter relating to withdraw
> **RTW.** Yes.[57]

This is the extent of primary evidence put before us in terms of the Crown's response to the suggestion by the Tribunal that it ensure the KEC amend the trust deed to provide for decoupling and hapu withdrawal.

In Ms Fisher's brief of evidence and Crown submissions, it was argued that OTS encouraged the KEC to follow Tribunal recommendations, but that it drew the line at insisting – ultimately it was seen as the KEC's call. So here we have the first acknowledgement that OTS literally absolved itself of the matter.

In June 2005, the KEC's consolidated deed of trust was issued. Clause 17 of the deed set out the rules by which groups could withdraw from the KEC:

> **17. Withdrawal from Nga Kaihautu o Te Arawa**
> **17.1** Withdrawal must be voted on at a general meeting
> A Te Arawa Roopu that wishes to withdraw from Nga Kaihautu o Te Arawa must hold a general meeting in accordance with Schedule 8, at which it must be resolved by the members of that Te Arawa Roopu present at that general meeting to withdraw from Nga Kaihautu o Te Arawa.
> **17.2** Effect of resolution at general meeting to withdraw from Nga Kaihautu o Te Arawa
> If it is resolved at a general meeting held pursuant to subclause 17.1 that a Te Arawa Roopu withdraw from Nga Kaihautu o Te Arawa, the trust deed will be deemed to have been amended in accordance clause 18 [giving the executive council the power to amend the trust deed] so as to remove all references to that Te Arawa Roopu.[58]

Schedule 8 of the deed established rules for any general meeting held under subclause 17.1. The rules cover notification, general procedure, voting, and minute taking. The schedule requires that before a general meeting is notified, a majority of the Kaihautu members for that roopu must confirm in writing that they support the holding of

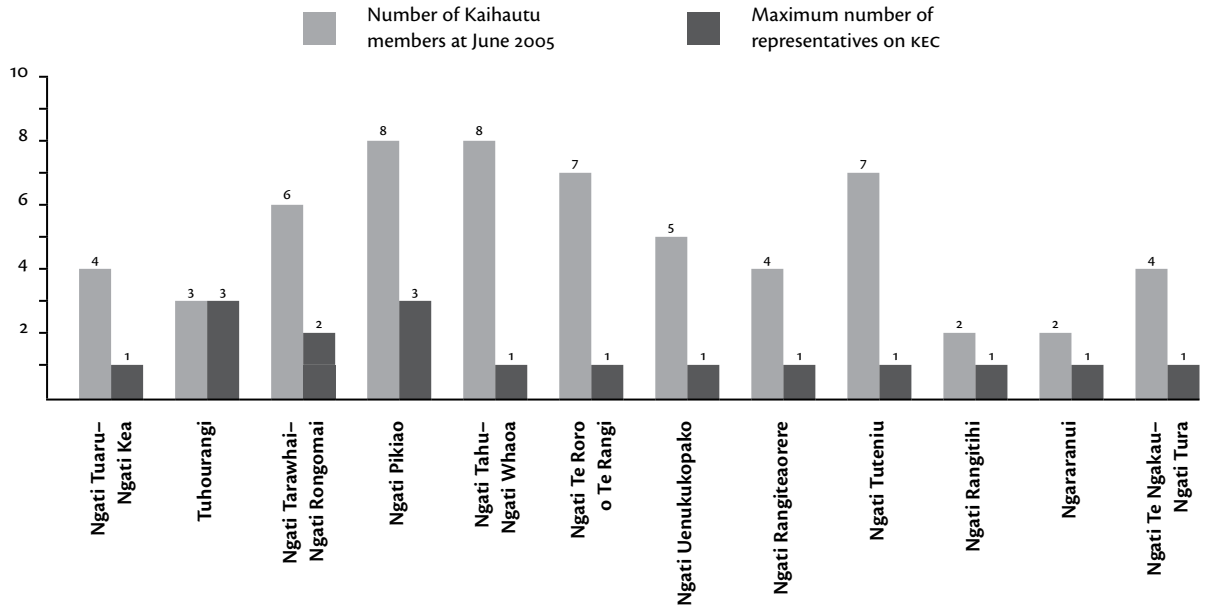


Table 5: Te Arawa roopu in the June 2005 KEC deed of trust

a general meeting for the withdrawal of their roopu from the KEC.[59]

The term 'roopu' is used in the deed to describe each of the Te Arawa iwi/hapu represented on the Kaihautu. The 12 roopu listed in the trust deed are set out in table 5.

We note that developments subsequent to June 2005 mean that this roopu list no longer accurately reflects which Te Arawa iwi/hapu are represented on the KEC. Ngati Wahiao has rejoined and is coupled with Tuhourangi in the list of affiliated Te Arawa iwi/hapu included in the September 2006 deed of settlement. On the other hand, both Ngati Rangitihi and Ngati Rangiteaorere have withdrawn, and are therefore not included in the deed of settlement.[60]

The change was reported to a hui of Kaihautu members on 28 June 2005.[61] We received no evidence of any letters sent to the affected claimant groups to inform them of the implications of the change to the trust deed, as far as their claims were concerned. In that respect, claimants who appeared were directly affected by the two processes occurring in parallel from June 2005 to November 2005:

- negotiation of the settlement package, 21 July 2005 to 5 September 2005; and
- central North Island inquiry participation, until November 2005.

In summary:

- Before the second Te Arawa mandate report was released, the KEC was reviewing its trust deed in consultation with OTS officials.
- Prior to the release of the report, OTS asked the KEC to consider providing minimum standards for

withdrawal, including the question of who was entitled to withdraw.

- OTS's comments record that it was worried about the withdrawal of small hapu.
- The Crown did not push the KEC to change the trust deed to provide for affirmation/withdrawal at the hapu level.
- The trust deed was amended to provide a means for roopu to affirm or withdraw their support for the KEC mandate.
- These changes meant that Ngati Tamakari and Ngati Rangiunuora continued to be locked into the Ngati Pikiao roopu, and Ngati Whaoa and Ngati Tahu could achieve separation only if a majority of the joint entity (Ngati Whaoa–Ngati Tahu) agreed to hold a hui, and the majority of those voting elected to withdraw. Given the demography of Ngati Tahu–Ngati Whaoa, it would be unlikely that such a hui could lead to a transparent result by reflecting the concerns of Ngati Whaoa who do not identify as Ngati Tahu.
- The claimants who appeared before us were not advised of the impact of the revised trust deed provisions on the status of their claims before the central North Island Tribunal, or of the impact of the proposed deed of settlement on their ability to settle their claims once the Tribunal had reported.

Attempts to withdraw from the KEC mandate

How did this impact on the claimants who appeared before us? In this section, we describe OTS's exchanges with each of the four groups following the release of the second Te Arawa mandate report.

Ngati Whaoa

On 22 January 2005, prior to the release of the Tribunal's report, Ngati Whaoa held a hui-a-hapu to establish an administrative body and a representative body for the hapu. Approximately 50 people attended the hui, and votes were taken not only to establish Te Runanga o Ngati Whaoa, but also to uncouple from Ngati Tahu and withdraw support for the KEC.[62]

On 25 July 2005, the Treaty Negotiations Minister advised Ngati Whaoa that he did not recognise the outcome of the January 2005 hui, as a number of basic notification and procedural requirements had not been met.[63] He stated that any hui held to withdraw the KEC mandate must conform to the same standards as that required to give the mandate in the first place.

On 14 and 15 November 2005, OTS sent letters to all claimants affected by the agreement in principle.

OTS filed a copy of the letter sent to the chairman of the Te Runanga o Ngati Tahu–Ngati Whaoa claims committee.[64] This letter attributed a number of claims to the representation of the Runanga o Ngati Tahu–Ngati Whaoa (Wai 57, Wai 217, Wai 288, Wai 839, and Wai 840), and drew attention to the fact that the agreement in principle listed two categories of Wai number: those which would be wholly settled by the deed of settlement, and those which would partly settled by the deed of settlement.

A Tribunal direction on 5 December 2005 directed the Crown to respond to a claim by Michael Rika, who had sought an urgent hearing. OTS advised its Minister that representation through the joint Ngati Tahu–Ngati Whaoa entity had been consistently opposed by Mr Rika and other individuals.[65] The issues surrounding the Ngati Whaoa mandate were described as complex, 'as they involve a subset within a group seeking to remove itself from a larger grouping'.[66] The key issue for the Crown was to 'ensure it balances the rights of groups of individuals to make their own decisions' against the policy objectives of negotiating and settling with 'large natural groupings'. The Minister was informed that two Tribunal inquiries had suggested that Ngati Tahu–Ngati Whaoa be given the means to reconsider their 'coupling', but that they had not addressed this issue. While OTS stood by its decision of July 2005

not to recognise the withdrawal of Ngati Whaoa based on the January 2005 hui, it acknowledged there was division within Ngati Whaoa and that this should be addressed. It therefore suggested that a joint hui be held to decide whether the two should remain as a single grouping with opportunity for each group to vote. The rationale for this approach was explained in some detail, along with a discussion of the risks:

> Suggesting a hui to consider 'uncoupling' is not without policy risk as it may suggest to smaller groupings of the iwi/hapu comprising KEC that fragmentation of the broader collective is possible. A key factor here, however, is that this has been a long-standing claim within Ngati Tahu/Ngati Whaoa. The Crown is less likely to adopt such an approach in respect of a claim that has not been brought to the Crown's attention early in the negotiation process. On balance, we consider that the circumstances surrounding Ngati Tahu/Ngati Whaoa justify the examination and discussion of these issues by the group and to confirm whether there is support for 'uncoupling'. We also consider that such a hui should address mandate issues, that is, if they either decide to remain a single grouping or to be separated, there then should be a vote on mandating KEC.[67]

The letter to the chairperson of Te Runanga o Ngati Whaoa restated the Crown's position in respect of the January 2005 hui. It drew attention to the revised trust deed and stated that, following a suggestion of the Tribunal, 'the trust deed now sets out a clear process for you that are to be held to consider withdrawal from the KEC membership'. In this regard, the proper approach for Te Runanga o Ngati Whaoa was to utilise the trust deed provisions:

> As Ngati Tahu/Ngati Whaoa are jointly represented on the KEC, I understand that a joint hui would be required to consider issues of mandate for one or both groups. In addition, under the trust Deed the holding of such a hui requires that the agreement of the Kaihautu representatives for the relevant iwi/hapu.
>
> I encourage you to discuss your concerns with the Ngati Tahu/Ngati Whaoa representatives on the KEC.[68]

An exchange of correspondence between the Crown and the Ngati Whaoa claimants followed this letter. Ngati Whaoa advertised a meeting for 19 March 2006, in the afternoon. The Ngati Tahu–Ngati Whaoa responded with a meeting to be held on the same day. Both hui went ahead, against the advice of OTS officials, who pointed out that the two hui would cancel each other out.[69]

The first hui was called by Te Runanga o Ngati Tahu–Ngati Whaoa.[70] A resolution to reconfirm the mandate was carried by 119 votes to four. Twenty-four people attended the second hui, which voted unanimously to withdraw from the KEC mandate.[71] The hui organisers reported a further 51 postal votes, and a number of expressions of support for the withdrawal.

OTS reviewed the procedures of both meetings and concluded that significant weight could not be given to either hui in light of the circumstances. In OTS's view, the KEC retained the mandate to represent Ngati Tahu–Ngati Whaoa:

> On balance, officials recommend that you reconfirm that the Kaihautu executive Council continues to hold a mandate to represent Ngati Tahu–Ngati Whaoa given the resolutions of past hui, the significant numbers attending the first hui and the procedural shortfalls, particularly in respect of the second hui.[72]

The Minister's decision was communicated to both Ngati Whaoa claimants on 26 July 2006.[73]

Although further correspondence was exchanged between OTS and the Ngati Whaoa claimants, the status quo remained intact. The deed of settlement was initialled on 8 August 2006 and finally signed on 30 September 2006. In summary:

- The Crown considered that the January 2005 hui did not meet the procedural requirements and therefore would not recognise the separate status of Ngati Whaoa.
- The Crown did not recognise that the March 2006 hui met procedural requirements.
- The status quo remains.

Ngati Tahu

The Crown regards Ngati Tahu as jointly represented by the roopu Ngati Tahu–Ngati Whaoa. In December 2004, counsel for Wai 803 (Rawinia Reihana, Nga Uri o Ngati Tahu) became aware from evidence in the central North Island inquiry that the Wai 803 claim had been included in the terms of negotiation signed between the Crown and the KEC.[74] He wrote to the KEC seeking to have the Wai 803 claim withdrawn from the KEC documentation on the basis that the KEC did not have the mandate to negotiate a settlement on behalf of the Wai 803 claimants. He copied this correspondence to OTS and the central North Island Tribunal.[75]

In May 2005, counsel for the Wai 288 claim similarly wrote to the KEC, asking that the Wai 288 claim be withdrawn from the KEC documentation on the grounds that the KEC did not hold the mandate to settle these claims on behalf of the claimants.[76]

On 18 July 2005, counsel for Wai 803 wrote to OTS confirming that a map sent to them (outlining the KEC's area of interest) included lands that were the subject of claims made by Wai 803.[77] Counsel pointed out that the KEC was cross-claiming against blocks that were subject to the Wai 803 claim; that the Wai 803 claimants did not support the KEC; and that the Wai 803 claimants did not agree to any settlement with the KEC that included the lands of Ngati Tahu. They sought to meet with OTS if these blocks were the subject of further discussion.

On 11 October 2005, counsel for Wai 288 and Wai 803 wrote again to OTS, noting that an agreement in principle had been signed.[78] He sought a reply to the 18 July 2005 letter and reiterated that the Ngati Tahu claimants did not support the KEC. They sought to enter their own negotiation process with the Crown.

OTS replied to the July and October 2005 letters on 17 November 2005, enclosing a copy of the agreement in principle.[79] The letter referred to the Wai 288 claim only. It explained that the Wai 288 claim related wholly to one of the iwi/hapu represented by the KEC, and therefore that the Crown recognised that entity had the mandate to negotiate the settlement of the Wai 288 claim. The Tribunal's second mandate report was cited in support of the policy to settle claims regardless of whether the claimants agreed with their inclusion or not:

> The Crown's policy is to negotiate and settle with mandated claimant groups, not to negotiate on the basis of individual register Wai claims. Thus, where the views of registered claimants (be they individuals or whanau) conflict with the views of their hapu, or where there is little evidence of support for a claimant from their hapu, we believe that the Crown is right to consider that the view of the hapu provided at a duly convened hui should take precedence.

The letter then explained the next steps towards achieving settlement. The Wai 288 claimants were encouraged to register their interest with the KEC in order to receive regular communication on the progress towards settlement.

Ngati Tahu filed a statement of claim on 8 December 2005 in response to receiving notification that their claims (Wai 288 and Wai 803) would be settled by the deed of settlement.[80]

On 3 June 2006, a hui was held to mandate Ngati Tahu, but the results were not conveyed to OTS. The Crown received an objection in August 2006 from Tony Reihana (Ngati Tahu) after it had notified the Wai 288 and Wai 803 claimants that the deed had been initialled.[82]

In summary:

- Counsel for Wai 288 and Wai 803 had asked the Crown and the KEC to withdraw their claims from the KEC's terms of negotiation and agreement in principle

in December 2004, May 2005, July 2005, and October 2005.
- OTS informed these claimants in November 2005 that withdrawal of their claims from the deed of settlement was not possible for policy reasons.
- The Wai 299 and Wai 803 claimants held a mandating hui in June 2006, but did not communicate the results to OTS.
- The status quo remains.

Ngati Tamakari

Ngati Tamakari had participated in the Te Arawa mandate inquiries in 2004 and 2005. OTS notified Ngati Tamakari claimants on 8 November 2005 that the agreement in principle had been signed, and that their claims would be settled by the deed negotiated between the KEC and Crown.[83]

On 15 August 2006, Ngati Tamakari were informed that the deed of settlement had been initialled.[84] Counsel sought an explanation for the inclusion of Ngati Tamakari in the KEC mandate.[85] OTS informed counsel that Ngati Pikiao had mandated the KEC, and continued to support that mandate.[86]

In evidence given before this Tribunal, Ms Fisher acknowledged that the Crown did not see any need for the KEC to provide for withdrawal from the KEC mandate at the hapu level.[87] The Crown's position was that such issues were not a matter for the Crown to determine:

> The mandate has been obtained at the level of Ngati Pikiao. Issues such as whether individual hapu should have the ability to confirm or withdraw mandate are, in the Crown's view, internal to Ngati Pikiao. The Crown did not consider it appropriate to force such a process upon Ngati Pikiao (or other roopu).

In summary:
- OTS informed these claimants in November 2005 that the agreement in principle had been signed and that their claims would be settled as part of the KEC negotiation.
- OTS informed these claimants in August 2006 that the deed of settlement had been initialled and that their claims would be settled.
- Counsel for Ngati Tamakari sought an explanation. The reason given was that Ngati Pikiao had supported the mandate and Ngati Tamakari were a subgroup of Ngati Pikiao.
- The status quo remains.

Ngati Rangiunuora

On 26 August 2005, counsel for Ngati Rangiunuora filed a memorandum in the central North Island inquiry requesting urgency on mandate matters.[88] This was followed up with a statement of claim which alleged that Ngati Rangiunuora had never been invited to become members of the KEC, or be represented by the KEC, and that Ngati Rangiunuora had never become members or been represented by the KEC.[89] Ngati Rangiunuora also sought assurances from the Crown Law Office that the Crown had not recognised the KEC as holding the mandate to negotiate the settlement of Ngati Rangiunuora's claims, and that the agreement in principle did not affect their claims.[90]

In their reply of 14 September 2005, the Crown Law Office confirmed that Ngati Rangiunuora was considered to have mandated the KEC, and that their claims would be settled by the KEC on their behalf.[91] The basis for this was the Crown's understanding of the status of Ngati Rangiunuora as a subgroup of Ngati Pikiao:

> The Crown understands that Ngati Te Rangiunuora (also known as Ngati Rangiunuora) is a sub-group of Ngati Pikiao. Ngati Pikiao mandated Nga Kaihautu, and elected representatives to Nga Kaihautu, at a hui on 15 July 2003 at Tapuaeharuru Marae.
>
> Ngati Rangiunuora are listed among other sub-groups of Ngati Pikiao in the public notice seeking comments on the Kaihautu Executive Council Deed of Mandate that was publicised in December 2003/January 2004. Ngati Pikiao Kaihautu members voted to support the Reconfirmation

> Proposals reconfirming the mandate for Nga Kaihautu at a hui for the Coast Region held on 2 October 2004. Ngati Rangiunuora are listed among other sub-groups of Ngati Pikiao in the Terms of Negotiation between Nga Kaihautu and the Crown. Lastly, I note that Ngati Pikiao Kaihautu Executive Council representatives signed the Agreement in Principle on 5 September 2005.

Ngati Rangiunuora filed a memorandum to the Tribunal on 26 September 2006 in support of their application for urgency.[92] This set out details of the claimants' mandate, given on 25 November 2004, to bring the claims on behalf of Ngati Rangiunuora. This mandate was reaffirmed on 26 August 2005.

In summary:

- Counsel sought urgency on mandate matters in August 2005.
- Counsel sought assurances that the agreement in principle would not settle their claims.
- The Crown Law Office explained in September 2005 that Ngati Rangiunuora was considered to have mandated the KEC on the basis that it was a subgroup of Ngati Pikiao.
- The status quo remains.

Remaining issues

In this section, we consider the specific claims of the claimants before us. In the statement of issues, we posed several questions in relation to claims brought before us on outstanding mandate issues, namely:

> Have any interests of the claimants been included in the KEC deed of Settlement and if so was the process by which these claimants' interests were included consistent with the principles of the Treaty of Waitangi? This depends on:
>
> (a) whether the Crown ensured or assured itself that adequate provision had been made for claimant hapu/iwi to withdraw or affirm their support for the KEC Executive Council prior to signing the KEC deed of Settlement as suggested by the Waitangi Tribunal in its *Te Arawa Mandate Report: Te Wahanga Tuarua* (2005)? The focus here is on:
>
> - To what extent, if at all, the Crown adequately assessed the withdrawal provisions in the KEC amended trust deed to ensure that they were consistent with the principles of the Treaty of Waitangi prior to signing the KEC deed of settlement;
> - To what extent, if at all, the Crown relied on these provisions, prior to signing the KEC deed of settlement to assess the mandate of the claimants or the KEC Executive Council to finally settle the claims of these hapu/iwi, and was that reliance consistent with the principles of the Treaty of Waitangi. In particular:
>   - Did the Crown adequately scrutinise and monitor the mandate of the NKORA Executive Council with regard to Ngati Tamakari and Ngati Te Rangiunuora?
>   - Were the actions taken by the Crown adequate in relation to the suggestion in the Tribunal's *Te Arawa Mandate Report: Te Wahanga Tuarua* suggestion that provision be made for the possible de-coupling of Ngati Whaoa and Ngati Tahu?
>   - Did the Crown adequately scrutinise the mandate held by the Ngati Whaoa–Ngati Tahu representatives on KEC to settle the claims of Ngati Whaoa?

As can be seen from our review above, there have been serious consequences, as all four claimant groups have had their interests included in the KEC deed of settlement. We turn now to consider how the Crown assured itself that the interests of the claimants would be actively protected by inclusion in the deed of settlement. We also consider whether the claimants who appeared before us are likely to be prejudiced by the settlement of their claims.

The Claimants' Case

Ngati Whaoa

Wai 1297 (Michael Rika)

Counsel for Wai 1297 claimants, Mr Taylor, opened his submissions by noting that the claim was initially filed in response to the Crown's refusal to recognise the resolution of Ngati Whaoa's 22 January 2005 hui to withdraw from the KEC mandate. Counsel argued that the recommendations of the second Te Arawa mandate report should be read as requiring that the Crown ensure that Ngati Whaoa (and the other hapu mentioned) 'properly determine their position by actively undertaking an appropriate hui where the issue of mandate is addressed'.[93] In other words, the Crown needed to properly determine Ngati Whaoa's support or otherwise for the KEC mandate, rather than assume the 'status quo' to be that the hapu is included in the KEC mandate.

On receiving 'indicative evidence' that Ngati Whaoa wished to withdraw from the KEC, in the form of the voting results from the 22 January 2005 hui-a-hapu, the Crown responded by simply rejecting the decision of that hui on procedural grounds, and recognising the KEC deed of trust. Counsel argued that the roopu withdrawal rules in the KEC trust deed failed to address Ngati Whaoa's fundamental concern, because they did not allow the hapu to speak for itself and make its own decisions. Instead, requirement that a majority of members support the holding of a meeting to resolve to withdraw placed a significant barrier to Ngati Whaoa's ability to use the process. The KEC members representing the joint Ngati Tahu–Ngati Whaoa roopu were all staunch supporters of the KEC, he argued, and even if a general meeting was held, the Ngati Whaoa vote would be 'swamped' by the Ngati Tahu vote.[94]

Counsel also argued that OTS had endorsed the inadequate trust deed provisions because it had 'persisted with the inclusion of the withdrawal provisions in the form that they ultimately sat in the deed, in spite of the Report's recommendations'.[95] He argued that the calling of the 19 March 2006 morning hui demonstrated the 'lack of good will' on the part of the Ngati Tahu–Ngati Whaoa KEC members towards his clients. The results of the 19 March hui were, he submitted, indicative only of the breakdown in relationships among the people of Ngati Whaoa. By failing to give Ngati Whaoa the opportunity to confirm whether or not they supported the KEC mandate, counsel argued that the Crown had failed both to address the hapu's concerns and to follow the Tribunal's March 2005 recommendations.

Counsel contrasted the Crown's treatment of Ngati Whaoa with its treatment of Ngati Rangiteaorere, for whom the Crown agreed to facilitate a final mandating hui which eventually lead to that hapu's withdrawal. He also reiterated the claimants' rationale for objecting to the Crown's suggestion that Ngati Whaoa could only withdraw from the KEC mandate by resolution of a joint Ngati Tahu–Ngati Whaoa hui. He argued that historical evidence before the central North Island Tribunal demonstrated that the two hapu were distinct peoples and that each hapu could speak for itself according to Te Arawa tikanga. Furthermore, other Te Arawa hapu, such as Ngati Tuteniu and Wahiao, had removed themselves from the KEC mandate without the consent of the hapu with which they were jointly represented.[96] Counsel asked that the Tribunal recommend Ngati Whaoa be removed from the KEC mandate, and that the Crown facilitate a process where Ngati Whaoa alone could decide whether or not they wish to mandate the KEC.[97]

Wai 1311 (Peter Staite)

Counsel for Wai 1311, Mr Sharp, began his submissions by commenting on the Crown's response to the Tribunal's January 2005 recommendations. He submitted that the Crown had failed to ensure that the KEC amend its trust deed rules to give effect to those recommendations. In particular, he argued that the requirement in the trust deed that the withdrawal of any roopu must be initiated by a meeting called by a majority of the members of the relevant roopu failed to meet the requirements set out by the Tribunal. He submitted that the Crown should have

insisted that the KEC structure contained provision for any member of Ngati Whaoa to initiate a process by which the hapu could withdraw its support for the KEC.[98]

He rejected the view of OTS officials that it would have been inappropriate for the Crown to stipulate that the KEC implement uncoupling and withdrawal provisions as recommended by the Tribunal before negotiations could continue. He argued that to have done so would have been no different to stipulating any number of other minimum requirements to be met by groups in negotiations.[99]

Instead, in the view of counsel, Crown 'encouragement' to clarify the withdrawal provisions in the deed of trust at these meetings amounted to suggestions that hapu only be allowed to withdraw with the consent of the overall roopu.[100] Further, he argued that OTS had made the decision not to follow the Tribunal's January 2005 recommendations with respect to hapu withdrawal and uncoupling without the authority of the Treaty Negotiations Minister.[101]

Counsel argued that claimants had invested substantial time and resources into prosecuting their claims before the Te Arawa mandate Tribunal. Having received favourable recommendations from the Tribunal, claimants had a legitimate expectation that Cabinet, or at minimum the responsible Minister, would have made a fully informed decision whether to follow the recommendations. If, after due consideration, the Crown decided to depart from the Tribunal's recommendations, it should then consult with claimants, explaining its reasoning, before making a final decision.[102]

In the submission of counsel, there was no basis in administrative law for OTS to have assumed the authority for dealing with the Tribunal's recommendations without reference to the Minister. OTS had therefore acted in breach of the Crown's Treaty obligation of active protection of Maori interests, and decisions made by OTS should be deemed to be invalid.[103]

Counsel then dealt with the ongoing monitoring of the KEC mandate by the Crown. He argued that the Crown had done nothing to investigate or analyse claimants' concerns regarding their representation on the KEC. He noted that the suggestion of the claimant, Peter Staite, that the Crown hold a hui for Ngati Whaoa alone, which would vote on support for the KEC mandate, had been declined by the Crown. Lastly, he outlined the outcomes of a number of hui which, he submitted, clearly demonstrated that Ngati Whaoa objected to being included in the KEC settlement. Counsel accepted that the matter of Ngati Whaoa support for the KEC mandate had not yet been put to the vote at a formally convened hui. Nevertheless, he argued that the results of two well-attended (albeit procedurally inadequate) hui on 22 January and 12 February 2005 showed a clear preference among attendees to remain outside the KEC mandate. With respect to the two hui held on 19 March 2005, Counsel submitted that they were not supported by Te Runanga o Ngati Whaoa, or by the hapu in general. Instead, he argued that they reflected the fact that Te Runanga o Ngati Whaoa–Ngati Tahu, which called the morning hui, was dominated by Ngati Tahu and sought to derail attempts by Ngati Whaoa to independently express their will.[104]

Counsel asked the Tribunal to recommend that the Crown ensure that a properly convened hui of Ngati Whaoa alone be held to vote on coupling and mandate, before the KEC settlement proceeds.[105]

Ngati Tahu (Wai 1350)

The Wai 1350 claimants objected to the inclusion of the Wai 288 (Kaingaroa forest) and Wai 803 (Ohaaki geothermal lands and taonga) claims in the KEC settlement. Counsel for the claimants, Mr Te Nahu, submitted that the Wai 288 and Wai 803 claimants had never agreed to be part of the KEC settlement process, or to have their claims extinguished by the settlement. Ngati Tahu is not a hapu of Te Arawa, counsel submitted, and Ngati Tahu and Ngati Whaoa are 'two quite unique and distinct iwi' despite their shared whakapapa.[106] The claimants object to the coupling

of Ngati Tahu and Ngati Whaoa within the KEC structure. They consider that the Crown has not followed the Te Arawa mandate Tribunal's recommendations in respect of the need for a hapu vote on uncoupling. At a hui on 3 June 2006, members of Ngati Tahu attending voted to pursue the Wai 288 and Wai 803 claims through the Waitangi Tribunal.[107]

Counsel noted that the matter of uncoupling was never addressed at the 19 March 2006 hui, and that Ngati Tahu were not able to vote in their own right on the matter of support for the KEC mandate at that hui. There were a number of other procedural flaws, he submitted, including that the chair and secretary had conflicts of interest, that the independent observer left before voting took place, and that the votes have subsequently been destroyed. The running of the hui, combined with officials' failure to fully report on the Tribunal's January 2005 recommendations on uncoupling and hapu withdrawal to the Treaty Negotiations Minister, demonstrated, according to counsel, that the Crown considered that the recommendations were 'unimportant and undeserving of the Minster's consideration.'[108]

Counsel sought recommendations from the Tribunal that the Crown cease to negotiate the Wai 288 and Wai 803 claims with the KEC, that Ngati Tahu be withdrawn from the KEC mandate as they are not an iwi of Te Arawa.[109]

Ngati Tamakari (Wai 1349)

Counsel for Wai 1349 claimants, Michael Sharp, opened his submissions by describing the origins of the representation of Ngati Pikiao hapu on the KEC. David Whata-Wickliffe, Ngati Tamakari claimant for Wai 1349, was not present at the 2003 hui at which Nga Kaihautu o Ngati Pikiao was established. Rather, that organisation was formed by representatives of other Ngati Pikiao hapu, including Ngati Hinekura, Ngati Rongomai, Ngati Rangiunuora, Ngati Tutaki a Koti, and Ngati Tutaki a Hane.[128] Counsel submitted that the individual hapu represented under the umbrella of Ngati Pikiao, including Ngati Tamakari, had never had the chance to hold hui-a-hapu to decide whether they supported the KEC mandate. If the KEC settlement proceeds, he submitted, it would effect Ngati Tamakari interests in the Wai 1032 (Tahunaroa, Waitahanui, and Whakarewa blocks) claim.

Counsel argued that the provisions contained in section 17 of the KEC deed of trust failed to comply with the Te Arawa mandate Tribunal's January 2005 recommendations in respect of Ngati Tamakari and other Ngati Pikiao hapu. The trust deed rules did not address the concerns of groups that disputed the right of the KEC to negotiate their claims, because the support of a majority of roopu kaihautu members was required before any meeting to vote on mandate withdrawal could be held. Counsel submitted that the Crown should have insisted that the KEC structure allow any member of Ngati Tamakari to initiate a process whereby the hapu could vote to withdraw its support for the mandate.[129]

The Crown had never, it was submitted, taken adequate steps to investigate and analyse the claimant's concerns over Ngati Tamakari's inclusion in the KEC mandate. This was despite efforts by David Whata-Wickliffe to have the Crown support the convening of a hui-a-hapu of Ngati Tamakari to vote on mandate.[130] Counsel asked the Tribunal to recommend that the Crown put a process in place to ascertain properly the support within Ngati Tamakari for the KEC mandate.[131]

In closing submissions, counsel argued that the Crown had consistently taken the view that groups could only withdraw through the roopu group.[132]

Ngati Rangiunuora (Wai 1310)

Counsel for Wai 1310 claimants, Kathy Ertel, submitted that the Crown's position that issues of Ngati Pikiao hapu seeking to withdraw from the KEC mandate are matters internal to Ngati Pikiao, left her clients in an impossible position. There was no forum in which they could have

their views regarding their support for the KEC mandate heard. The Crown had done nothing, she submitted, to actively monitor the mandate of Ngati Pikiao, or to review the Ngati Rangiunuora claimants' objection to being subsumed within Ngati Pikiao. The Crown had failed to implement the Te Arawa mandate Tribunal's recommendations that the Crown ensure that individual Ngati Pikiao hapu had the opportunity to demonstrate their support or otherwise for the KEC mandate. She noted that no hui had been held to assess Ngati Rangiunuora support for the KEC mandate.[133]

Counsel submitted that, because the Treaty Negotiations Minister was never advised in writing of the Te Arawa mandate Tribunal's recommendations in relation to her clients, it followed that OTS officials had failed in their duty to provide Ministers with concise, considered advice including the key recommendations required to make ministerial decisions. Thus, she argued, when OTS officials stated in evidence that the Crown reached the decision that it was not necessary or appropriate for it to require the KEC to include provisions implementing the Tribunal's January 2005 recommendations in its trust deed, they were referring not to the decisions made by the Treaty Negotiations Minister, but to their own decisions. She asked the Tribunal to recommend that the settlement not progress any further, and that there be a 'cooling off' period to allow Te Arawa to take stock and design an inclusive process to discuss settlement issues.[135]

The Crown's Case

With regard to Ngati Whaoa and Ngati Tahu

In closing submissions, the Crown addressed the question of whether the Treaty Negotiations Minister had been briefed about the mandate Tribunal's recommendation. It noted that the 30 March 2005 briefing to the Minister had not referred directly to this issue, but nor had the letter of transmittal which was appended to the briefing.[111] The Crown's position in respect of the subsequent failure to brief the Minister was that the Minister was nevertheless aware and supportive of the approach taken by officials:

> The Crown acknowledges that there is no evidence before the Tribunal that indicates that the Minister was explicitly or directly briefed on the two recommendations that are the subject of this inquiry. Officials have acknowledged that in hindsight it may have been prudent for completeness sake to have explicitly set out the officials' assessment of the Tribunal's recommendations in a report to the Minister. This would have ensured that there was a clear record of that position and the factors that were taken into account at that time. The absence of such a record is, in the words of Ms Fisher, regrettable.[112]

Furthermore, the Crown argued that OTS has the authority to make decisions and take actions in the name of the Crown.[113] Crown counsel urged the Tribunal to consider their view that the absence of an explicit briefing does not of itself constitute a Treaty breach, or prejudice to the claimants.[114] Nor, in the Crown's view, can it be argued that the failure to require the withdrawal and uncoupling provisions means that a breach has occurred. The Crown asked us to examine its reasons for not requiring any change to the withdrawal provisions. In the Crown's view, the primary issue is, therefore, whether the Crown has adequately monitored the KEC mandate, particularly in respect of claimants that appeared before us.[115]

The Tribunal's role, in the Crown's view, is not to determine whether the Crown should have recognised attempts to withdraw mandate. It is limited to considering the Crown's policy and how that was applied.[116]

The Crown argued that the decision not to require an uncoupling provision was reasonable, as any decision on uncoupling needed to be 'inclusive'.[117] It said that, because Ngati Whaoa and Ngati Tahu had decided on joint representation at a joint hui, any decision to 'uncouple' should be made at a joint hui.

The Crown pointed to division amongst Ngati Whaoa and argued that neither of the two claimant groups spoke for all of Ngati Whaoa.[118]

The claimants' view of the 22 January 2005 hui was disputed by the Crown. Counsel said the Minister had considered that the public notice of the hui did not convey its primary purpose. There was also no independent verification of what had occurred at the hui. The Crown also pointed out that the chairman of Te Runanga o Ngati Whaoa had informed the Minister that the 22 January 2005 was not a mandating hui and had nothing to do with the KEC mandate or negotiations between the KEC and the Crown.[119] The Crown also pointed to conflicting evidence about the voting conducted at the hui.

The Crown also pointed to its willingness to respond to the Tribunal's direction in December 2005 to find a way forward. They had encouraged the groups to hold a joint hui, and suggested separate voting. This had not occurred. Instead, Ngati Whaoa had run one hui, and the joint entity had run another hui. The 24 people attending the Ngati Whaoa hui had voted unanimously to withdraw from the KEC. There had been some postal votes obtained after the hui, but these were not accepted by the Crown. At the joint entity hui, 119 people voted to remain with the KEC. Of the 127 people present, all affiliated with Ngati Tahu, and 120 affiliated with Ngati Whaoa. The Minister could not recognise the resolution of either hui and therefore concluded that the mandate was retained by the KEC.[123]

The Crown maintained that it was unaware that Ngati Tahu had concerns about mandate issues until it filed a memorandum on 21 December 2005. Counsel maintained that this is a claimant-based claim, rather than a hapu-based claim.[125] In this sense, counsel argued the claimants' case falls outside the Crown's policy framework. The relevant policy is that it is not necessary to obtain the agreement of individual claimants to mandate. This policy, the Crown argued, has been accepted by the Te Arawa mandate Tribunal. It was also pointed out that the June 2006 hui minutes were not sent to the Crown and that the 13 to 15 people who attended that hui cannot be compared to the level of support at the joint hui.[126]

The Crown's view of the identity of Ngati Tahu is that they are listed as a Te Arawa group within other deeds, and that the Ngati Tahu people within the Ngati Tahu–Ngati Whaoa entity support the KEC's mandate.[127]

With regard to Ngati Tamakari and Ngati Rangiunuora

The Crown argued that it had encouraged the KEC in March 2005 to consider whether to provide clear processes for withdrawal at the level of roopu or hapu.[136] The KEC had chosen to provide a withdrawal process at the roopu level. To have required that hapu have the right to withdraw, in the Crown's submission, was not reasonable given the inconsistency with the large natural groupings policy:

> The Crown remains of the view that to require individual hapu to have the right to withdraw by simple vote is inconsistent with the large natural group policy. Such an approach would undermine the collective nature of settlement negotiations. It would result in fragmentation within the large natural group and have significant implications for the Crown's settlement policies.[137]

Further, the Crown cited support from the Waitangi Tribunal for the large natural groupings policy. In that respect, Crown counsel argued, to have required the KEC to allow hapu to withdraw from the mandate would have been inconsistent with previous Tribunal support for that policy.[138] It also argued that this would have been unworkable and had 'significant implications' for the national Treaty settlement process. Counsel concluded: 'It would lead to a piecemeal, fragmented and delayed settlement process.'[139]

Crown counsel challenged Mr Sharp's assertion that the Crown had consistently insisted that withdrawal could only occur at the roopu level. He referred to the Crown's

recognition of the withdrawal of Ngati Wahiao at the time it was part of the Tuhourangi/Ngati Wahiao roopu.[141]

The Crown considered that Ngati Tamakari and Ngati Rangiunuora had mandated the KEC through Ngati Pikiao. Even if they had the ability to withdraw support from the KEC independent of Ngati Pikiao, the Crown's view was that there was insufficient evidence that both groups have support to withdraw at the hapu level.[142]

In regard to Ngati Tamakari, the Crown's view was that the claimants had attempted to persuade Ngati Pikiao to recognise separate status for Ngati Tamakari and had been unsuccessful. The Crown also relied on the absence of any hui to reconsider the representation of Ngati Pikiao or Ngati Tamakari on the KEC.[143]

The Crown's view on Ngati Rangiunuora was similar. Ngati Rangiunuora had not provided any evidence to establish a mandate to bring the claim forward. There was no evidence, in the Crown's view, of hui or hapu support for the claim that Ngati Rangiunuora wished to stand outside the KEC mandate or outside the umbrella of Ngati Pikiao.[144]

Tribunal Analysis and Findings

Introduction

As we stated above, in this section we consider whether the process of including the interests of the mandate claimants in the deed of settlement was consistent with the principles of the Treaty of Waitangi. We must also consider how the claimants who appeared before us are likely to be prejudiced by the deed of settlement between the Crown and the KEC.

Our analysis focuses on four areas:

- procedural issues relating to officials' advice to Ministers;
- the Crown's response to substantive issues in the Tribunal report;
- substantive mandate issues – uncoupling and withdrawal; and
- large natural groupings.

We then set out our findings and recommendations.

Tribunal analysis and findings on procedural issues relating to OTS failure to advise the Minister

The evidence of OTS witness Ms Fisher and opening submissions by the Crown did little to reveal the Crown's process of decision making as it related to implementing the Tribunal's suggestions on withdrawal mechanisms. It was only during the course of extensive cross-examination at the hearing that this oversight or omission emerged.

Both the witness and Crown counsel appeared to recognise the seriousness of this omission on the day it was first revealed to the parties (27 February). There was an admission that there were no further documents and that there was no explicit recommendation to the Minister to accept or reject the Tribunal's findings. On subsequent days, Ms Fisher appeared to shift ground slightly by referring to the Minister being regularly informed from other sources and oral briefings. In written answers to questions after the hearing, Heather Baggott of OTS implied that ministerial signoff was not necessary:

> With regard to the Tribunal's comment at p 100–101 of *Te Arawa Mandate Report: Te Wahanga Tuarua* (2005), officials made a judgement call that taking account of the circumstances and the other key recommendations contained in that report, it was not a priority matter to bring to the Minister's attention at that time. The relevant considerations were that
>
> 8.1 the issue of withdrawal and 'decoupling', particularly in respect of Ngati Tahu/Ngati Whaoa, had been previously considered by MOTOWN [the Treaty Negotiations Minister];
>
> 8.2 the Crown had already approved the KEC's three stage process for review of their trust deed, which included

> proposals relating to the withdrawal of affiliates for their council members to decide upon, and that process was well-advanced; and
>
> 8.3 the Crown makes its own assessment of hui seeking to withdraw mandate separate to any assessment that the mandated body might make.
>
> Officials acknowledge that in hindsight it may have been prudent, for completeness sake, to have explicitly set out officials' assessment of that Tribunal comment in a report to the Minister. This would have ensured there was a clear record of that position and the key factors that were taken into account at that time.[145]

Crown counsel echoed this view in closing submissions, noting that Ms Fisher had regretted the absence of any clear record.[146]

It appears to us that the failure of OTS officials to advise the Treaty Negotiations Minister of the Te Arawa mandate Tribunal's mandate recommendations (as opposed to overlapping claims and Ngati Makino recommendations) was a significant oversight. However, OTS's explanation that it was a 'judgement call' not to burden the Treaty Negotiations Minister with too much advice is interesting, and on an uncharitable view smacks of after-the-fact justification. At best, it suggests to us that outstanding mandate issues (in respect of these groups) were not considered a high priority by early 2005. At worst, it suggests to us that OTS was seriously concerned that support for the KEC mandate might haemorrhage if individual hapu were finally given the opportunity to affirm or withdraw their support for the roopu with which their interests were said to be represented.

We must also note that the Treaty Negotiations Minister himself says he was informed verbally. He told Parliament:

> Whilst that specific item was not referred directly to my attention, nonetheless in a broader sense it was covered by numerous briefings. In fact, on a number of occasions during the course of that negotiation I referred to both the inclusion and withdrawal of hapu/iwi from the process. So it had no material effect at all.[147]

However, this statement was made in 2007 and after our hearing, so it comes far too late for it to be given any weight. We turn now to consider the Crown's response to criticism that the Minister should have been briefed.

Crown response to substantive issues in the Tribunal report

In closing submissions, the Crown invited us to consider its reasons for not inserting certain provisions in the KEC deed of trust.[148] These reasons were:

- The KEC is not under the Crown's control.
- Mandate issues are a problem about individuals.
- The Tribunal's suggestion was inconsistent with the large natural groupings policy.

The suggestions in the mandate Tribunal's second report relating to Ngati Whaoa, Ngati Tamakari, and Ngati Rangiunuora were very important. OTS must have recognised this – the context of the recommendations was that it was a 'last chance' for the Crown to avoid breach by letting hapu decide. The word 'hapu' in the report makes it completely clear that the Tribunal was referring to groups such as Ngati Whaoa, Ngati Tamakari, and Ngati Rangiunuora. This was clearly recognised by OTS, which acknowledged that it chose not to insist that the KEC adopt the 'exact' provisions recommended by the Tribunal.

While it is true that OTS did not reject the Tribunal's suggestions outright, we must examine its subsequent actions. The timing of the release of the second mandate report appears to be an issue here. We know that before the Tribunal had reported, the KEC was reviewing its trust deed and had been encouraged by OTS to clarify withdrawal procedures. The line taken by OTS before the release of the report was to encourage the KEC to consider the level at which iwi/hapu could opt out of the KEC mandate.

In evidence put before us, we saw that even before the report's release, the chief negotiator for OTS sold the benefits of having a withdrawal process in place as a 'safeguard against small hapu acting independently'. We saw no evidence that the chief negotiator changed his mind after the release of the report, or that the report's suggestions were subsequently discussed with the KEC with a view to modifying their proposed change.

This sits somewhat at odds with Ms Fisher's evidence of the Crown's role after the release of the second mandate report. In her view, OTS could only make the KEC aware of the Tribunal's suggestions and encourage them to consider the suggestions. The question is, how much pressure should OTS have brought to bear on the KEC? We accept the submissions of Mr Sharp when he says that it would not have been unusual for the Crown to insist that the KEC meet minimum requirements before negotiations could proceed, especially given that these requirements had the weight of a Tribunal suggestion behind them. We consider that it would have been entirely appropriate to insist that the concerns of Ngati Whaoa and two Ngati Pikiao hapu were addressed to the standards outlined in the Tribunal's report.

But all this is by the by, as we now know that OTS thought that the changes suggested by the Tribunal were unnecessary and inappropriate. It is clear to us that the Crown had a predetermined view of the status of the claimants when measured against the 'large natural groupings' policy test. We can only ask ourselves how OTS could possibly have brought pressure to bear on the KEC to implement a Tribunal suggestion, when they themselves considered the suggestion unnecessary and inappropriate. We do not, therefore, accept the Crown's submission that part of the reason for not implementing the Tribunal's suggestion was that the KEC was not under its control.

Substantive mandate issues – an issue about individuals?

Although the Ngati Whaoa claimants objected to being coupled with Ngati Tahu, and Ngati Tahu with Ngati Whaoa, and the Ngati Rangiunuora and Ngati Tamakari claimants objected to being subsumed within Ngati Pikiao, we consider that their issues are fundamentally the same. The root concern of these groups has always been that they objected to, and never endorsed, the way in which they were represented on the KEC. Additionally, the claimants argue that they do not want their hapu claims to be included in Crown's settlement with the KEC.

In our view, the key point to be made is that this is a two-stage process. The first issue is that of representation at the iwi/hapu level. The second concerns the mandating of the KEC. We therefore cannot see how a hapu's support for the KEC could be assessed while the matter of representation was left unresolved. As Mr Taylor has argued, the trust deed rules simply allow for smaller coupled hapu to be 'swamped' by the will of a larger coupled hapu, where the larger hapu supports the KEC. In our view, any hapu listed by the KEC in the deed of trust should have had the opportunity to affirm or withdraw their support – whether or not that hapu is coupled or listed as a subgroup of an umbrella roopu. We note that the claimants disputed the origins (going back to 2003) of the Ngati Whaoa–Ngati Tahu coupling, and of the Ngati Pikiao umbrella structure.

We also note that the structure of hapu/roopu representation on the KEC has been somewhat fluid over the last four years. The 2003 mandating hui was challenged, and significant flaws were found in the process that warranted a reconfirmation process. The reconfirmation process, in turn, had certain weaknesses. In this timeframe, Ngati Wahiao decoupled from Tuhourangi to withdraw from the KEC mandate, Ngati Rangiteaorere and Ngati Rangitihi withdrew from the mandate, and Ngati Wahiao recoupled with Tuhourangi and rejoined the KEC mandate.

From allegedly murky beginnings, the initial structure has now locked in groups, possibly against their will, and at the least against the will of the claimants before us in this inquiry. We note that most of the claimants we heard on mandate issues in March 2007 had raised the same concerns at earlier Tribunal hearings (all bar Ngati Tahu).

Their concerns are not new to the Crown. It may be late in the day to be addressing mandate issues, but these have been on the table consistently for some years.

We also make the point that the settlement will be far more robust if each hapu has voted on their support for the KEC. Such a vote would provide clarity on the status of these claimant groups. OTS has sometimes characterised certain claimants as 'disaffected individuals'. By putting such matters to the vote at a hui-a-hapu, the level of support from within the hapu enjoyed by the claimants could finally be accurately assessed. We cannot see what the Crown or KEC would have to lose by allowing such hui-a-hapu to proceed. On the contrary, they would allow a more robust and transparent settlement.

As we noted in chapter 2, if the Crown, in the form of OTS, is to work with Maori communities in a way that allows for those communities to exercise their tino rangatiratanga, the Crown must be able to identify and understand Maori customs and cultural preferences. This requires that OTS has a sound understanding of, respect for, and engagement with tikanga. Knowing the tikanga of the iwi and hapu affected by a settlement negotiation, or at least making sure that independent (as opposed to partial) advice is received on that tikanga, enables the Crown to engage more effectively with those iwi and hapu whom it must meet to talk through matters that are often contentious and emotionally charged. An understanding of this tikanga context enables the Crown to reach the 'right' decisions in tikanga terms, and the right decision for sustainable Treaty settlements. This is an important aspect of the Crown and Maori relationship and ought to be reflected appropriately in the design of Treaty settlement policy and its processes.

The promotion of hui or mediation and the time needed for consensus decision-making are all mechanisms that can be used to finally determine and put to bed issues of mandate. Such issues are usually easily solved by the iwi or hapu themselves, given time and space. In accordance with tikanga, Maori accept such decisions, even though they may not like them. The opportunity to put their case, to have their issues heard, and providing for Maori consensus decision-making to take its course could easily have happened in the Te Arawa setting in early 2005. We do not consider it would have been unfair to the KEC to have allowed opportunities for this. The mechanism for allowing this was through OTS's review of the KEC deed of trust, as the mandate Tribunal pointed out in both its reports. By making it a requirement that the KEC do so, OTS would have demonstrated a good faith attempt to bring all parties to the point where the settlement package was acceptable to all. All claimant interests would then be fully identified and discussed in accordance with tikanga Maori, rather than behind closed doors, with one party enjoying the privilege of setting the terms and conditions of engagement on cultural redress to which the balance of Te Arawa had to respond.

Allowing claimants from Ngati Whaoa, Ngati Tamakari, and Ngati Rangiunuora their 'day in court' by putting their opposition to the KEC mandate to the vote at a hui-a-hapu would achieve a transparency in terms of levels of support within the hapu for the KEC. To do so would also reveal the level of support that those claimants enjoy within their own hapu. If, as the Crown implies, they are in fact individuals who do not enjoy their hapu support, this will come out at such a vote. Of course, voting and meeting procedures must meet standards of notification and procedural fairness. By allowing claimants the vote they desire, the robustness of the KEC mandate will be enhanced. It is not a forgone conclusion that these hapu will vote to withdraw. At present, no one really knows how the numbers within each hapu stack up. Hapu will not necessarily vote to withdraw.

When we consider why OTS and, after litigation, the Minister have done nothing further to demand this accountability from the KEC, we can only identify that it is because they themselves have their own goals to meet; namely, the maintenance of the Crown's large natural groupings policy.

Large natural groupings

We reject the relevance of the Crown's large natural groupings policy to the claimants' situation. Their claims are rooted in concerns about the original mandate process that have never been rectified despite two Tribunal reports. Robust and transparent mandating is the critical factor here, and that process should not be compromised by the Crown's large natural groupings policy. In any case, we reiterate our view that by allowing claimants the vote they desire, the robustness of the KEC mandate will be enhanced. We also point out that hapu will not necessarily vote to leave.

Adequacy of Crown's monitoring of mandate

This leads us to consider whether, in our view, the Crown has adequately monitored the mandate of the KEC in respect of the claimants who appeared before us. We note that the Crown defined four requirements in the context of its role in mandate maintenance:

- assessing relevant hui to ensure they meet the minimum guidelines;
- being informed of support for groups seeking to withdraw a mandate;
- being informed of any opposition to the proposed withdrawal of mandate; and
- taking matters into account when reaching decisions about mandate.[149]

This is the framework applied to each of the claimants who appeared before us. It resulted in a Crown response to the concerns identified by the Te Arawa mandate Tribunal as follows:

- no action regarding Ngati Tamakari;
- no action regarding Ngati Rangiunuora;
- no action regarding Ngati Tahu;
- encouragement to Ngati Whaoa to hold a joint hui with Ngati Tahu, and upholding of the status quo at least partly on the basis of the rival hui; and
- facilitation for Ngati Rangiteaorere.

We asked ourselves whether the framework took account of the history of the KEC's mandate, and the fragile nature of that mandate as at March 2005 when the Tribunal released its second mandate report. It appears to us that this framework failed to recognise the special circumstances which apply in the Te Arawa case. That said, we are aware that the Crown engaged more actively with Ngati Rangiteaorere. The facilitation resulted in a decision to recognise their withdrawal from the KEC. OTS offered no explanation as to why this was not attempted in the case of Ngati Whaoa, other than on the basis of cost.

Was this framework Treaty compliant? We would say that OTS has failed to recognise that by March 2005, and after two Tribunal reports, it needed to do far more for Te Arawa claimants who were locked into the KEC mandate as a result of poor mandating processes than simply take a watching role and limit its entire active function to one of assessing the outcome of hui against the KEC's deed of trust. We repeat our view that had the KEC trust deed been amended as suggested by the Te Arawa mandate Tribunal, the Crown would have been in a position to continue to recognise the KEC's mandate on a sounder basis.

Tribunal findings on all mandate claims

We find that the Treaty Negotiations Minister made no response to the *Te Arawa Mandate Report: Te Wahanga Tuarua*, and is not in a position to be able to assess whether the subsequent actions of OTS were Treaty compliant. Nor can the Minister say that he was able to monitor the KEC mandate as it related to the claimants before us in a manner consistent with that Tribunal's advice and the principles of the Treaty of Waitangi. The issue of whether the Crown responded in a Treaty-consistent manner was clearly important to ensuring the interests of the claimants before us were dealt with fairly and impartially. The Crown owes fiduciary duties to all Maori, not just those in negotiations. But OTS did not brief its Minister on the advice

and suggestions of the mandate Tribunal concerning the claimants before us, with the exception of Ngati Tahu, who were not part of that process.

What is clear is that the Minister, at all relevant times, was never fully appraised of the special circumstances of each of these claimant groups so that he could adequately ascertain whether any additional action was needed to discharge the Crown's obligations and duties to all Maori. This was an omission, in our view, and as such was inconsistent with the principles of the Treaty of Waitangi.

OTS, therefore, acted in a manner inconsistent with the Treaty of Waitangi when it unilaterally decided that it would not require the KEC to amend its trust deed. It acted in a manner inconsistent with the principles of partnership, and equity and equal treatment. In doing so, it did not discharge the Crown's duties to act honourably and with utmost good faith, to act fairly and impartially, to actively protect the claimants' interests, to consult, and to avoid errors in process, the misapplication of tikanga Maori and irrationality.

The Te Arawa mandate Tribunal set out in some detail the Treaty principles it considered relevant to the issues before it. We adopt those principles as relevant to the mandate issues before this Tribunal (see app I). We also find, on all fronts, that the Crown has breached all the duties we listed in chapter 2. Consequently, we do not think it necessary to assess any of the claimants' mandate for bringing their claims, for, as the Crown has acknowledged, the main issues before this Tribunal concern its own actions.

We also find that the Crown has acted in breach of the Treaty principles of partnership, and equity and equal treatment by failing to ensure that the hapu of Te Arawa were given the opportunity to vote on their representation on the KEC. Once passed, the settlement legislation will extinguish the claims that these mandate claimants brought before the central North Island Tribunal in good faith and at considerable cost. That the claimants' interests have not been appropriately weighed to ensure they are safeguarded by the KEC settlement is enough to establish significant prejudice. The prejudice to the claimants who appeared before us is threefold:

- Unless the central North Island Tribunal reports before the Crown introduces the settlement legislation, they will lose the opportunity to have their claims reported on.
- Once the settlement legislation has passed, they will lose the opportunity to negotiate to settle their claims.
- The rifts between these groups and related groups within the Kaihautu have deepened over the past two years, rather than reduced, as a result of the Crown's omissions.

We must ask ourselves whether this prejudice is offset by any potential benefits from the KEC settlement. Here we must consider whether the governance entity will provide for involvement by these groups, and whether these groups will be eligible to register to receive any benefits they may be entitled to receive from the settlement. We can only say that on the basis of the evidence put before us, we cannot know how these groups will fare as potential beneficiaries of the KEC settlement. We have no confidence, given their treatment in the past, that they can expect more.

Notes

1. Counsel for Ngati Whaoa, closing submissions, 23 March 2007 (paper 3.3.26), para 6
2. Counsel for Ngati Tahu, closing submissions, 26 March 2007 (paper 3.3.30), para 2.3
3. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), pp 100–101
4. Counsel for Ngati Rangiunuora, further submissions, 22 February 2007 (paper 3.3.22), pp 3–4
5. Counsel for Ngati Tamakari, opening submissions, 25 January 2007 (paper 3.3.1), p 5–6
6. Waitangi Tribunal, *Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 101
7. Counsel for Ngati Whaoa, opening submissions, 25 January 2007 (paper 3.3.2), para 6; Merata Kawharu, Ralph Johnson, Verity Smith,

Robert Wiri, David Armstrong, and Vincent O'Malley, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', 2 vols, report commissioned by CFRT, 2005 (docs A107, A108), vol 1, pp 279, 281

8. The central North Island Tribunal has since released its report.

9. Peter Staite, brief of evidence, 7 November 2006 (doc A5), paras 7–9

10. Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O'Malley, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', 2 vols, report commissioned by CFRT, 2005 (docs A107, A108), vol 1, pp 316–317, 336, 364–366, 385–389

11. Ibid, pp 274–277

12. Ibid

13. Joseph Reihana, brief of evidence, 7 November 2006 (doc A3), pp 4–9

14. Angela Ballara, 'Tribal Landscape Overview, c1800–c1900 in the Taupo, Rotorua, Kaingaroa and National Park Inquiry Districts', overview report commissioned by CFRT, 2004 (doc A48), p 30

15. Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O'Malley, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', 2 vols, report commissioned by CFRT, 2005 (docs A107, A108), vol 1, pp 317, 324–326, 368, 390–392

16. Ibid, pp 281–282

17. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), paras 34.5, 34.8, 34.9, 34.11, 34.12

18. Angela Ballara, 'Tribal Landscape Overview, c1800–c1900 in the Taupo, Rotorua, Kaingaroa and National Park Inquiry Districts', overview report commissioned by CFRT, 2004 (doc A48), p 185

19. Counsel for Ngati Tamakari, opening submissions, 25 January 2007 (paper 3.3.1), paras 5–6

20. Don Stafford, *Te Arawa: A History of the Te Arawa People* (Wellington: Reed Books, 2004), p 82

21. Counsel for Ngati Rangitihi, opening submissions, 26 January 2007 (paper 3.3.3), paras 5–6

22. David Whata-Wickliffe is not related to the presiding officer of this inquiry.

23. Colleen Skerrett-White, brief of evidence, 18 September 2006 (doc A11), paras 1–4

24. Colleen Skerrett-White, brief of evidence, 7 February 2005 (Wai 1200 ROI, doc B10), p 5; Don Stafford, *Te Arawa: A History of the Te Arawa People* (Wellington: Reed Books, 2004), pp 95–96, 160

25. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), paras 25, 34.6

26. Waitangi Tribunal, *Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), pp 55–56

27. Ibid, p 101

28. Ibid, pp 49–53

29. Ibid, p 100

30. Ibid

31. Ibid, pp 100–101

32. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 30 March 2005 (doc A90(7)). Note that the year on the letter (2004) is incorrect.

33. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 23 June 2005 (doc A90(6))

34. Counsel for Ngati Whaoa and Ngati Tamakari, closing submissions, 26 March 2007 (paper 3.3.28), para 5

35. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 20

36. The hui had been held after the Tribunal's hearing in January 2005 but before the release of its report in March 2005.

37. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 23 June 2005 (doc A90(6))

38. Ibid, para 13

39. Ibid, para 55

40. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 22 July 2005 (doc A90(3))

41. Ibid, para 6(c)

42. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 12 July 2005 (doc A90(4))

43. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 8 December 2005 (doc A31(a)(BD14)), para 2 (refers to 9 August 2005 report)

45. Ibid, para 21

46. Counsel for Ngati Whaoa and Ngati Tamakari, closing submissions, 26 March 2007 (paper 3.3.28), para 5

47. Robyn Fisher, brief of evidence, 22 December 2006 (doc A31), para 8

48. Ibid, para 9

49. OTS, handwritten notes of meetings between OTS and KEC to discuss trust deed, February–April 2005 (doc A90(a)(1))

50. Ibid, p 1

51. Ibid, p 3

52. Ibid, p 4

53. OTS to KEC, 17 March 2006 (doc A31(c))

54. OTS, handwritten notes of meetings between OTS and KEC to discuss trust deed, February–April 2005 (doc A90(a)(1)), p 7

55. Ibid, pp 7–8

56. Ibid

57. Ibid, p 9

58. KEC, 'Consolidated Deed of Trust', June 2005 (doc A75), cl 17

59. Ibid, sch 8

60. *Deed of Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu* (Wellington: OTS, 2006) (doc B26), cls 1.5–1.7

61. KEC, 'Milestone Report: Mandate Maintenance Report for the Period Ended 30th June 2005', July 2005 (doc A91), pp 23–31

62. Counsel for Ngati Whaoa, opening submissions, 25 January 2007 (paper 3.3.2), p 8

63. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 23 June 2005 (doc A90(6)); Minister in Charge of Treaty of Waitangi Negotiations to Ngati Whaoa, 25 July 2005 (doc A31(a)(BD9))
64. OTS to Ngati Tahu–Ngati Whaoa, 14 November 2005 (doc A31(a)(BD12))
65. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 8 December 2005, para 17
66. Ibid, para 20
67. Ibid, para 24
68. Minister in Charge of Treaty of Waitangi Negotiations to Ngati Whaoa, 12 December 2005 (doc A31(a)(BD15))
69. Robyn Fisher, brief of evidence, 22 December 2006 (doc A31), paras 42–43, 56
70. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 7 July 2006 (doc A31(a)(BD36)), para 31
71. Robyn Fisher, brief of evidence, 22 December 2006 (doc A31), para 51
72. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 23 June 2005 (doc A31(a)(BD6), paras 26–34
73. Robyn Fisher, brief of evidence, 22 December 2006 (doc A31), para 58
74. Counsel for Ngati Tahu to KEC, 14 December 2004 (doc A3(a))
75. Ibid
76. Counsel for Ngati Tahu to KEC, 19 May 2005 (doc A3(a))
77. Counsel for Ngati Tahu to OTS, 18 July 2005 (doc A3(a))
78. Counsel for Ngati Tahu to OTS, 11 October 2005 (doc A3(a))
79. OTS to counsel for Ngati Tahu, 17 November 2005 (doc A31(a)(BD50))
80. Robyn Fisher, brief of evidence, 22 December 2006 (doc A31), para 80
82. Ibid, paras 82, 83
83. Ibid, para 69
84. OTS to Ngati Tamakari, 15 August 2006 (doc A31(a)(BD42))
85. Counsel for Ngati Tamakari to OTS, 8 September 2006 (doc A31(a)(BD43))
86. OTS to counsel for Ngati Tamakari, 18 September 2006 (doc A31(a)(BD44))
87. Robyn Fisher, brief of evidence, 22 December 2006 (doc A31), para 72
88. Counsel for Ngati Rangiunuora, application for urgency, 26 August 2005 (doc A31(a)(BD45))
89. Colleen Skerret-White, statement of claim, 5 September 2005 (doc A31(a)(BD46))
90. Robyn Fisher, brief of evidence, 22 December 2006 (doc A31), para 75
91. Crown Law Office to counsel for Ngati Rangiunuora, 14 September 2005 (doc A31(a)(BD47))
92. Counsel for Ngati Rangiunuora, memorandum responding to Tribunal memorandum, 26 September 2006 (doc A31(a)(BD48))
93. Counsel for Ngati Whaoa, closing submissions, 23 March 2007 (paper 3.3.26), p 4
94. Ibid, p 5–6
95. Ibid, p 5
96. Ibid, pp 10–11
97. Ibid, p 14
98. Counsel for Ngati Whaoa, opening submissions, 25 January 2007 (paper 3.3.2), pp 5–6
99. Counsel for Ngati Whaoa and Ngati Tamakari, closing submissions, 26 March 2007 (paper 3.3.28), p 21
100. Ibid, p 8
101. Ibid, p 2
102. Ibid, pp 13–14
103. Ibid, pp 7–9
104. Counsel for Ngati Whaoa, opening submissions, 25 January 2007 (paper 3.3.2), pp 7–8
105. Ibid, p 11
106. Counsel for Ngati Tahu, opening submissions, 26 January 2007 (paper 3.3.18), p 5
107. Ibid, p 11
108. Counsel for Ngati Tahu, closing submissions, 26 March 2007 (paper 3.3.30), p 4
109. Counsel for Ngati Tahu, opening submissions, 26 January 2007 (paper 3.3.18), p 14
128. Counsel for Ngati Tamakari, opening submissions, 25 January 2007 (paper 3.3.1), p 3
129. Ibid, p 6
130. David Whata-Wickliffe, brief of evidence, 7 November 2006 (doc A7), paras 6–7, 15
131. Counsel for Ngati Tamakari, opening submissions, 25 January 2007 (paper 3.3.1), p 9
132. Counsel for Ngati Whaoa and Ngati Tamakari, closing submissions, 26 March 2007 (paper 3.3.28), para 72
133. Counsel for Ngati Rangiunuora, opening submissions, 2 February 2007 (paper 3.3.12), paras 11–19
135. Counsel for Ngati Rangiunuora, closing submissions, 23 March 2007 (paper 3.3.25), paras 3–5, 10–11
111. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), paras 15, 16
112. Ibid, para 18
114. Ibid, paras 19, 21
115. Ibid, para 10
116. Ibid
117. Crown counsel, submissions concerning mandate issues, 15 February 2007 (paper 3.3.13), para 54
118. Ibid, para 59
119. Ibid, paras 60–61
123. Ibid, paras 65, 67–69
125. Ibid, paras 73, 75

126. Crown counsel, submissions concerning mandate issues, 15 February 2007 (paper 3.3.13), paras 76–77
127. Ibid, para 78
136. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 24
137. Ibid, para 25
138. Ibid, para 26
139. Ibid, para 29
141. Ibid, para 30
142. Ibid, para 35.6
143. Crown counsel, submissions concerning mandate issues, 15 February 2007 (paper 3.3.13), paras 81–82
144. Ibid, paras 84–85
145. Crown counsel, responses to written questions from the Tribunal, undated (paper 3.3.23), paras 8–9
146. Crown counsel, closing submissions, 3 April 2007 (paper 3.3.32), para 19
147. Ibid, para 20
148. Crown counsel, submissions concerning mandate issues, 15 February 2007 (paper 3.3.13), para 8
149. Ibid, para 38

CHAPTER 7

RECOMMENDATIONS

In this report, we have found that the Crown, through the actions of OTS, has acted in more ways than one in a manner inconsistent with the principles of the Treaty of Waitangi with respect to all the claims before us. In exercising its undoubted kawanatanga, the Crown has crossed over and usurped the rangatiratanga of iwi and hapu thereby committing grave breaches of the Treaty. In particular, during the implementation of the Crown's policies in Te Arawa, OTS failed to act as an honest broker in the negotiation process. OTS failed to discharge its Treaty and fiduciary duties to all Maori, including its duty of active protection where the Crown is obligated to protect Maori taonga, including tikanga and the customary processes that flow from this. In our view, OTS did not act honourably and with the utmost good faith.

Te Arawa is now in a state of turmoil as a result. Hapu are in contest with other hapu and the preservation of tribal relations has been adversely affected. We are left fearing for the customary future of the Te Arawa Waka as a result. OTS is the interface between Maori and the Crown charged with the responsibility of upholding the honour of the Crown. Now because of their practices, the claimants face real and serious prejudice.

Urgent inquiries before the Tribunal have a place but must not become a normal step on the way to settlement legislation. The Crown must get its policies and practices better tuned to achieving fair and sustainable settlements. Focusing on the goal of restoring the relationships established by the Treaty is what is required. The principles of the Treaty are not complicated. They need to be embraced rather than compromised by inadequate processes inappropriately applied.

There is no real way of addressing the situation fully without the Crown reprioritising its work programme for OTS and commencing the negotiation process with all those tribes that stand outside KEC and by commencing now to negotiate with Ngati Makino. In the interim, and to prevent any significant and irreversible prejudice, we make the following recommendations:

Crown Audit

We recommend that the Minister of Maori Affairs commissions annual audits of OTS to ensure that its management and policy operations are aligned with the Crown's obligations under the Treaty of Waitangi. It should review the approach OTS takes to the development of policy advice, paying particular attention to its approach to tikanga.

Geothermal Statutory Acknowledgement

The deed of settlement provides for a non-exclusive statutory acknowledgement in favour of KEC to the Rotorua regional geothermal system; namely, all 12 geothermal fields of the Rotorua region. We recommend that this

statutory acknowledgement should apply to all of the peoples of the Te Arawa Waka.

Cultural Redress Contested by Ngati Whakaue

In terms of the Whakarewarewa thermal valley sites, we recommend that the Crown find some process to reengage with Ngati Wahiao and Ngati Whakaue to discuss an appropriate division of responsibility and ownership in relation to this site. We do not make any recommendation concerning Moerangi.

Cultural Redress Contested by Ngati Rangitihi

In terms of the Ruawahia Mount–Lake Tarawera scenic reserve, the Crown should provide exactly the same form of non-exclusive redress to Ngati Rangitihi upon the introduction of the legislation giving effect to the KEC deed.

In terms of the Tarawera River, the Crown should provide for a non-exclusive statutory acknowledgement of Ngati Rangitihi's associations with the river upon the introduction of the legislation giving effect to the KEC deed.

In terms of Te Ariki, the Crown should find some process to reengage with Ngati Rangitihi and Tuhourangi to discuss an appropriate division of responsibility and ownership in relation to this site.

Cultural Redress Contested by Ngati Rangiteaorere

In relation to Whakapoungakau, we concur with the claimants that the Crown should reconsider with Ngati Rangiteaorere this aspect of the settlement to ensure Whakapoungakau and the name Rangitoto remain in place for this maunga and range.

Separate Negotiation with Ngati Makino

We recommend again that the Crown discharge its long overdue responsibility to commence negotiations with Ngati Makino immediately.

Cultural Redress Contested by Ngati Makino

In relation to Matawhaura and Otari Pa, we recommend that the Crown should find some process to reengage with the Ngati Makino and Ngati Pikiao to discuss an appropriate division of responsibility and ownership in relation to these sites. The whenua rahui and statutory acknowledgements proposed for these sites should be extended to Ngati Makino upon the introduction of the legislation giving effect to the KEC deed.

Mandate Claimants

With respect to the mandate claimants, the prejudice to those who appeared before us is threefold:

- The introduction of settlement legislation before the central North Island Tribunal has reported is likely to pre-empt the Tribunal's ability to report at all on their claims.
- Once the settlement legislation has passed, they lose the opportunity to negotiate about their claims, because the legislation will be deemed to have settled them.
- The rifts between these groups and related groups within KEC have deepened rather than reduced over the past two years as a result of the Crown's omissions.

We have no confidence that given their treatment in the past they can expect more. We recommend that before the legislation giving effect to the KEC deed of settlement is introduced, the Crown facilitate hui a hapu for Ngati Whaoa, Ngati Tamakari and Ngati Rangiunuora to enable

the issue of whether or not they support the KEC mandate to be put to bed once and for all. The Crown should meet the costs of such hui and independent facilitators of the claimants' choice should be used. For Ngati Tahu claimants before us, the Crown should facilitate and pay for mediation between them and representatives of Ngati Tahu on Te Pumautanga o Te Arawa, the post-governance settlement entity. The purpose would be to ensure that they have the opportunity to explore what benefits they are entitled to under the settlement and reach a memorandum of understanding as to what those benefits might be.

Dated at Wellington this 15th day of June 2007

Judge Caren Leslie Fox, presiding officer

Peter Philip Brown, member

Honourable Douglas Lorimer Kidd DCNZM, member

Tuahine Northover MNZM, member

THE SEAL OF THE WAITANGI TRIBUNAL

APPENDIX I

EXTRACT FROM THE SECOND TE ARAWA MANDATE REPORT

The following text is from pages 71 to 75 of the Waitangi Tribunal's *Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005).

The Principle of Reciprocity

The Maori cession of kawanatanga to the Crown was made in exchange for the Crown's recognition of tino rangatiratanga. In the words of the Mohaka ki Ahuriri Tribunal, the 'Crown's exercise of kawanatanga ("sovereignty" in the English text) has to be constrained by respect for Maori rangatiratanga'. The Crown's right to govern, which must include the right to make decisions regarding public expenditure, the resourcing of Treaty settlements, and setting criteria for determining priorities for negotiations, is not an absolute right. The right to govern was in exchange for the protection of the 'rangatiratanga' of hapu over all their lands, villages, and taonga. Therefore, the Crown must provide for hapu and iwi to exercise their tino rangatiratanga in the settlement of their claims. It follows that the Crown must also consider its Treaty obligation to a particular group or groups, if their circumstances warrant an alternative approach to the Government negotiation policy, processes, and targets for the settlement of claims.

To attain true reciprocity, there must be consultation and negotiation in practice as well as in name, and flexibility in the application of policies where shown to be strictly necessary. Such reciprocity is the key to durable Treaty settlements. We think that the aspirations of the Te Arawa tribes, and their preferred mode of exercising their tino rangatiratanga in the settlement process, emerged clearly during the reconfirmation process and other hui, and at our January hearing. The Crown now knows whether most Te Arawa wish to negotiate their claims through the kaihautu. Reciprocity requires a careful, fair, and practical response from the Crown. This is the context for our findings later with regard to Ngati Makino, Waitaha, Tapuika, the Ngati Whakaue cluster, and other claimants outside the executive council's mandate.

The Principle of Partnership

The principle of partnership carries with it an obligation for each Treaty partner to act towards the other with the utmost good faith. Fundamentally, the principle of partnership is about the post-1840 relationships between Maori and the Crown, based on the reciprocal obligations of each partner to the other. The Muriwhenua fishing Tribunal described the Treaty's ongoing role in mediating future relationships between the Crown and Maori in these terms:

> It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle,

fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.[1]

Similarly, the Motunui–Waitara Tribunal found that:

> The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.
>
> We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles.[2]

Thus, we consider that the principle of partnership envisages that, far from ending relationships, a Treaty settlement will lay the foundation of an ongoing mutually beneficial partnership. The Crown risks significantly curtailing its ability to forge such a renewed partnership with some Te Arawa, if they are left too far behind in the settlement process. We address this important point below.

We note here that the obligations of partnership are not one-sided, and nor should negotiation and settlement processes be decided unilaterally. Both Treaty partners should make reasonable decisions during the settlement process. In order to ensure that their future relationship is mutually beneficial, the Crown should not pursue its nationwide Treaty settlement targets at the expense of some of its Treaty partners. Where the particular circumstances of a group or groups warrant a more flexible approach, the Crown must be prepared to apply its policies in a flexible, practical, and natural manner. We accept that the Crown has financial and other practical constraints. In our assessment of the claims below, we suggest a practical way forward for the Crown, to assist it in meeting its partnership obligations.

The Principle of Active Protection

The principle of active protection arises from reciprocity and partnership. The Crown's obligation to protect Maori rights under the Treaty was discussed by the president of the Court of Appeal in 1987:

> The Treaty signified a partnership between Pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith. The relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. The duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.[3]

We have had particular regard to this principle in determining whether the reconfirmation process met our August 2004 suggestions. Our findings on the reconfirmation process, and the Crown's monitoring and acceptance of it, are set out below. Here, we note the Crown's obligation to actively protect the just rights and tino rangatiratanga of all Te Arawa.

The Principles of Equity and Equal Treatment

The principles of equity and equal treatment were neatly summarised by the Foreshore and Seabed Tribunal:

> The principle of equity is that the protections of citizenship apply equally to Maori and non-Maori. Sometimes expressed as the principle of equal treatment, it requires the Crown to treat Maori and non-Maori fairly and equally, and to treat Maori tribes fairly vis-à-vis each other.[4]

This principle places an obligation on the Crown to act fairly and impartially towards Maori by ensuring it treats Maori hapu/iwi fairly vis-à-vis each other. This logically extends to not allowing one iwi an unfair advantage over another. Under this principle, in seeking to negotiate a comprehensive settlement of all the historical claims of Te Arawa, the Crown must deal fairly with all claimant groups within Te Arawa, and not allow one group an unfair advantage over another. This does not mean treating all groups exactly the same, where they have different populations, interests, leadership structures, and preferences. Tino rangatiratanga must be respected. What it does mean is that the Crown must treat each group fairly vis-à-vis the others, and in doing so, it must do all in its power not to create (or exacerbate) divisions and damage relationships.

In practical terms, this principle consists of two duties: the duty to act fairly and impartially towards Maori and the duty to preserve amicable tribal relations. Both of these duties have been discussed in Tribunal reports. In relation to the first, the duty of the Crown to act fairly and impartially towards Maori, the Maori Development Corporation Tribunal stated:

> There is, in our view, a duty arising from the Treaty that the Crown act fairly and impartially towards Maori. This Treaty principle derives from the large concession made by Maori in 1840 of the gift of governance to the Crown, in return for which it is reasonable to assume that Maori would receive good governance and laws and policies that would be beneficial to them all. The guarantee of rangatiratanga then, with which the Crown responded, was a guarantee to all of the iwi, not to a selected number. Implicit in this is a guarantee that the Crown would not, by its actions, allow one iwi an unfair advantage over another.
>
> . . . The onus of fairness and impartiality was thus created. Transported to modern times, the principle remains the same but is now to be applied in different circumstances. A critical feature of today's circumstances, however, is the continuing vitality of Maori tribal organisation and identification. From our own knowledge and experience we are able to confirm to the Crown a fact of which it is no doubt already aware: tribal rivalry remains healthy and dynamic.
>
> The Court of Appeal has characterised the Crown's Treaty relationship to Maori as that of a fiduciary thereby setting a very high standard of performance for its Treaty obligations (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641). It is fundamental that a fiduciary must act fairly as between beneficiaries rather than allowing one of the group to be favoured.[5]

In the context of this inquiry, we consider that to fulfil its duty to act fairly and impartially towards Maori, the Crown must not prefer to negotiate and settle with one group of Te Arawa over another. It must act fairly and impartially towards all groups in Te Arawa.

The second duty – the duty of the Crown to preserve amicable tribal relations – is closely related to the first. Should it fail in the first duty, the Crown will run the risk of entrenching or worsening extant tensions and divisions between groups within Te Arawa. The Crown's duty to preserve amicable tribal relations is discussed in the *Ngati Awa Settlement Cross-Claims Report*:

> We think that the Crown should be pro-active in doing all that it can to ensure that the cost of arriving at settlements is not a deterioration of inter-tribal relations. The Crown must also be careful not to exacerbate the situations where there are fragile relationships within tribes.
>
> Inevitably, officials become focused on getting a deal [in seeking to settle cross-claims]. But they must not become blinkered to the collateral damage that getting a deal can cause. A deal at all costs might well not be the kind of deal that will effect the long-term reconciliation of Crown and Maori that the settlements seek to achieve.
>
> . . . The simple point is that where the process of working towards settlement causes fall-out 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 the absolute minimum.
>
> We do not underestimate the difficulty of this task. But neither do we underestimate the potential for harm to Crown–Maori relations if this area of risk is not carefully and positively managed.[6]

While the comments of the Ngati Awa settlement cross-claims Tribunal relate mainly to the cross-claims of different iwi, rather than different overlapping groups within an iwi, we consider that their analysis of the Crown's duty remains relevant to our present inquiry.

Notes

1. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 192
2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 52
3. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA)
4. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p 133
5. Waitangi Tribunal, *Maori Development Corporation Report* (Wellington: Brooker's Ltd, 1993), pp 31–32
6. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), pp 87–88

EVENTS INVOLVING NGATI MAKINO

On pages 204 to 207, we set out a matrix showing the events that occurred in the period March 2005 to October 2006 leading to the filing of the fresh claims by Ngati Makino. We also summarise, in narrative form, the key events that form the platform of our analysis.

The matrix covers three different areas: the first relating to ministerial decisions; the second to dual-track activity relating both to negotiations and to the overlapping claims process; and the third to the 'safeguarding' of Ngati Makino's interests. For each area of focus we lay out a chronology of events, showing (on the left) which events relate to the possibility of negotiations between the Crown and Ngati Makino and (on the right) those associated with interaction over the overlapping claims process. Within each chronology, we show a breakdown according to the phases identified in the body of the report.

First Focus Area: Ministerial Decisions

On 30 March 2005, OTS gave an interim briefing to the Treaty Negotiations Minister on the contents of the Te Arawa mandate Tribunal's second report. In that report, the Tribunal told the Minister that in relation to Ngati Makino, it had found:

> The Crown has breached the Treaty principles of partnership and equal treatment in not affording priority to separate negotiations with Ngati Makino. The Tribunal recommends that the Crown commence negotiations with Ngati Makino. The Tribunal also suggests that priority should be given to negotiations with Waitaha and a cluster around Ngati Whakaue.[1]

In its analysis of the Tribunal's recommendation, OTS commented:

> The Tribunal's finding that by refusing to conduct negotiations with Ngati Makino, the Crown has breached the Treaty has potentially raised significant issues for the Crown. In particular, the Tribunal does not appear to have engaged with a number of the significant policy and resourcing issues that OTS consider would arise from concurrent priority negotiations with those groups.
>
> The Crown has always been committed to progressing the claims of Ngati Makino, but the preference is for Ngati Makino to work with other groups that they have a relationship with. In particular, in November 2004 the Crown wrote to Ngati Makino and Waitaha expressing a willingness to enter into negotiations with a collective also comprising Tapuika, who they have a close relationship with.
>
> . . . . .
>
> The Tribunal's suggestion for according priority status to Ngati Makino, Waitaha and a cluster around Ngati Whakaue raises a number of significant implications in respect of Crown strategy, policy and resourcing. According priority to these groups will inevitably mean decreasing the priority of other non Te Arawa negotiations, and in real terms would involve

Ministerial decisions

Phase 1

Date	Settlement negotiations with Ngati Makino	Overlapping claims process
30 March 2005	OTS provides preliminary briefing to Treaty Negotiations Minister on Waitangi Tribunal recommendations.	
21 June 2005		OTS proposes to transfer Matawhaura and Otari Pa in tenancy in common.
June 2005		OTS conducts an in-house review of overlapping claims policy and process.
23 June 2005	OTS briefs Minister again on Tribunal recommendations.	
12 July 2005	OTS seeks approval for Minister to defer consideration of early resumption of negotiations with Ngati Makino until further information obtained.	OTS seeks approval for the modified overlapping claims process.
12 July 2005	OTS seeks approval from Minister for cultural redress offer to KEC.	
17 July 2005	Minister decides that particular consideration needs to be given to Ngati Makino. Minister seeks further information and signals that early consideration could be given to resumption of negotiations.	
26 July 2005	OTS asks Ngati Makino about their negotiation intentions and readiness. It acknowledges that Ngati Makino are different and require separate consideration and says Minister is 'willing to give early consideration to a resumption of negotiations'.	
24 June 2005	Ngati Makino tell OTS it is ready to negotiate.	
5 July 2005	OTS provides interim reply: is still waiting for Minister's decision in regard to Tribunal's recommendation.	In same letter, OTS signals that it will soon write to ask for (updated) information on Ngati Makino interests.

Phase II	26 July 2005	OTS asks Ngati Makino about their negotiation intentions and readiness. It acknowledges that Ngati Makino are different and require separate consideration and says Minister is 'willing to give early consideration to a resumption of negotiations'.	Dual-track activity
	28 July 2005		OTS seeks (updated) information on Te Arawa overlapping claimants' interests in areas contained within KEC area of interest, with 14 August 2005 deadline.
	5 August 2005	Ngati Makino reply to 5 July and 26 July letters from OTS. Responding to questions about their negotiation intentions, they repeat that they are willing and ready to proceed.	In same letter, Ngati Makino point out they have already provided information in context of Tribunal inquiries.
	24 August 2005	OTS replies to Ngati Makino's 5 August 2005 letter, stating it is willing to meet to discuss further Ngati Makino's proposed strategy, although it has some difficulties with it. OTS wants to discuss process for reconfirming mandate and timeframes for negotiation.	In the same letter, OTS refers to its 5 July letter, asking for Ngati Makino to identify any interests in KEC area of interest and reply of 5 August. It notes Ngati Makino are willing to disclose further information only at negotiation table. It states that Crown and KEC aiming for AIP by late August or early September.
	14 September 2005		OTS writes to overlapping claimants advising of AIP and inviting submissions by 3 November 2005.
	16 February 2006	OTS trys to phone Ngati Makino about pre-negotiation discussions.	OTS also wants to discuss overlapping claims issues.
	10 March 2006	Ross Phillipson for OTS has phone discussion with Ngati Makino.	In same call, Ross Phillipson discusses overlapping claims issues.
	10 March 2006	Ross Phillipson asks to meet regarding intentions towards Waitaha and Tapuika.	Ross Phillipson asks to discuss overlapping claims issues.
	19 March 2006	Ngati Makino tell OTS they want to restart negotiations immediately and they understand Crown has recognised Tribunal's findings.	In same letter, Ngati Makino propose that Crown mediate over competing interests in assets marked for transfer to KEC.
	19 March 2006	Ross Phillipson updates OTS on communications with Ngati Makino. Says OTS needs to correct its impression of Crown's response, as Crown was 'mindful' only of Tribunal's recommendation. Suggests meeting.	

continued over page

	Date	Settlement negotiations with Ngati Makino	Overlapping claims process	
Phase II	6 April 2006		OTS briefs Minister on progress of consultation and resolution of contested redress. There is no mention of Ngati Makino.	Dual-track
	10 July 2006		OTS briefs Minister on major cultural redress sites, noting there has been no response from Ngati Makino. Minister agrees that OTS will consult further and meet with affected groups.	
	14 July 2006		OTS informs Ngati Makino of provisional decisions in respect of two sites and notes that Ngati Makino's claims were excluded from deed of settlement. OTS also notes that Crown has had no response from Ngati Makino and invites response by 3 August 2006.	
	19 July 2006		OTS suggests to counsel for Ngati Makino that OTS, Ngati Makino, and KEC meet to discuss redress in two contested sites.	
	19 July 2006		Counsel for Ngati Makino tells OTS she has not received its 14 July letter.	
	20 July 2006	Counsel for Ngati Makino reports to OTS she has been unable to contact Lillian Anderson to discuss negotiation design process.	Counsel for Ngati Makino asks OTS for 14 July letter and asks that all correspondence be copied to counsel.	
	20 July 2006		OTS emails copy of 14 July letter.	
	31 July 2006		OTS write to Ngati Makino, referring to failure to hold joint OTS–KEC–Ngati Makino meeting. (Failure due to Ngati Makino wanting to meet separately, before an overlapping claims meeting, to discuss negotiations.)	
	1 August 2006		Counsel for Ngati Makino emails OTS to dispute reason for failure.	

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Phase III

2 August 2006	Counsel for Ngati Makino writes to OTS, disputing reason for failure. Counsel had understood OTS was unavailable for negotiation meeting and had asked to defer meetings until all could attend. Counsel refers to subsequent phone conversation with director of OTS and asks that 3 August deadline be rescinded to allow for proper consultation.
4 August 2006	OTS seeks Minister's approval for overlapping claims decisions.
7 August 2006	Minister informs Ngati Makino of his decisions concerning two redress sites. Minister notes no response to 14 July 2006 letter.
8 August 2006	AIP with KEC initialled
9 August 2006	Counsel for Ngati Makino writes to Minister concerning 7 August letter, disputing Minister's assertion that Ngati Makino failed to engage. Counsel alleges predetermination.
14 August 2006	OTS replies to counsel for Ngati Makino, informing her of initialling of AIP and pointing out the Crown wished to consult but Ngati Makino neither responded nor identified overlapping interests.
16 August 2006	Counsel for Ngati Makino writes to OTS, disputing 'no response' assertion. She asserts that KEC had no mandate to represent overlapped interests, criticises process, and asks to meet with Minister.
14 September 2006	OTS replies to Ngati Makino's letters of 2 and 16 August. It does not accept assertions in 2 August letter and reminds counsel Ngati Makino has been on notice since 14 July 2006. OTS says it is not appropriate to meet to discuss negotiations unless it is joint meeting with Waitaha and Tapuika.
30 September 2006	KEC deed of settlement signed.
11 October 2006	Minister replies to Ngati Makino's 9 August 2006 letter. Minister does not consider it appropriate to meet to discuss settlement negotiations without Waitaha and Tapuika present.

> over 25 percent of the Office of Treaty Settlement negotiations resources being devoted exclusively to Te Arawa claims. It could also provide a real incentive for some groups currently represented by the Kaihautu Executive Council to also seek separate negotiations. We will examine these findings in detail and report further on these matters.[2]

The Minister received these recommendations and agreed, on 1 April 2005, that OTS should:

> report [to the Minister] shortly with officials' advice on any implications arising from the Report, and in particular on those aspects of the Report that:
>
> - suggest according priority status to Ngati Makino, Ngati Waitaha and Ngati Whakaue; and
> - address overlapping claims.[3]

On 21 June 2005, OTS consulted with three departments (the Department of Conservation, Land Information New Zealand, and the Crown Law Office) on a proposal to transfer certain cultural redress sites in tenancy in common, where there was a known overlapping interest. Two of these sites were the Matawhaura Maunga (located within Lake Rotoiti scenic reserve) and Otari Pa (located within Rotoehu West Crown forestry lands).[4] Under this proposal, the Crown would transfer 50 per cent of the undivided shares in the land to the governance entity. It would retain the remaining 50 per cent until such time as the Crown settled with Ngati Makino, at which point Ngati Makino would replace the Crown as the tenant in common. Officials pointed out certain advantages to this co-ownership mechanism: the land would not require a partition survey, and co-owners would share responsibilities and liabilities. The two groups with an interest in each of the two sites were recorded as Ngati Pikiao and Ngati Makino – the latter described as 'a hapu of Ngati Pikiao (non KEC)'.

On 24 June 2005, Ngati Makino's principal negotiator, Neville Nepia, reminded OTS of the Tribunal's recommendation and signalled that Ngati Makino were ready to negotiate.[5] He also pointed out that valuable time had passed since the Tribunal's report:

> Regrettably too it seems that notwithstanding clear directions from the Waitangi Tribunal that the Crown is in breach of the Treaty of Waitangi in its failure to progress matters with Ngati Makino, you have not attempted to rectify these matters with any sense of urgency and it is Ngati Makino once more that presents itself as a willing party to bring these matters to a finality.

On 5 July 2005, OTS sent an interim reply, noting that it was waiting for the Minister's decision on the Crown's response to the Tribunal's findings. In this letter, OTS explained the overlapping claims policy in some detail and said that it would write soon seeking updated information on Ngati Makino's interests, although it was acknowledged that Ngati Makino had already provided information during the earlier negotiations:

> We acknowledge that you have already provided information on Ngati Makino's interests during the course of our earlier negotiations. We will therefore be seeking updated information from you on the areas in which Ngati Makino exercised customary interests, and in any sites or resources of significance to Ngati Makino that are within the area of interest identified by the Te Arawa iwi and hapu in negotiations.[6]

On 12 July 2005, OTS presented the Minister with its recommendations for the cultural redress aspects of the Crown's offer to the KEC.[7] On that date, officials also presented a set of recommendations to their Minister in response to the Tribunal's second mandate report.[8] In relation to Ngati Makino, officials advocated an approach that neither openly accepted nor rejected the Tribunal's recommendation. Instead, they couched their analysis and recommendation on the basis of a need to give 'particular consideration' to the priority status of Ngati Makino. Their suggested policy response to the Tribunal's finding and

recommendation was to seek further information from Ngati Makino, alerting them to the possibility of resuming negotiations, and then to assess their priority status once further information came to hand:

> Officials consider that the Tribunal finding that the Crown has breached the Treaty by not continuing negotiations with Ngati Makino requires particular consideration to be given on their priority status. Progress on the rest of Ngati Pikiao's claims through the Kaihautu Executive Council collective gives an opportunity to review the complexities that originally held up the Ngati Makino claims. Officials therefore propose to write to Ngati Makino to signal that early consideration could be given to resumption of negotiations and to seek clarification of their current negotiation intentions, including the possibility of joint negotiations with Waitaha and Tapuika. Ngati Makino's response could then be considered by you in the context of your next assessment of OTS priorities.[9]

The OTS officials pointed out that the Crown had recognised the mandate of the Ngati Makino Heritage Trust in April 1998 and had signed terms of negotiation in October 1998.[10] They reviewed the history of the subsequent negotiations, which had included an attempt to identify the interests of Ngati Makino and develop a settlement offer. They said OTS had found it difficult to distinguish Ngati Makino and Ngati Pikiao for the purposes of settlement, and therefore had commissioned further research in May 2001. In the view of OTS, this report had confirmed their cautious approach to progressing negotiations with Ngati Makino independently of Ngati Pikiao. Consequently, the Minister had notified Ngati Makino in late 2003 'that separate negotiations with Ngati Makino would be discontinued'. He had encouraged Ngati Makino to 'reconfirm its mandate in line with the wider Te Arawa mandating process that the Kaihautu Executive Council was then undertaking'.[11] OTS noted that Ngati Makino had not joined the Kaihautu and had 'consistently argued for the resumption of their negotiations'.[12]

OTS then set out its recommendations for Ngati Makino, noting that Ngati Makino had a recognised mandate and terms of negotiations, and that negotiations had been advancing.[13] They therefore proposed:

> that OTS write to Ngati Makino and, in a similar way as is proposed for other overlapping Te Arawa groups, request clarification on their negotiation intentions, especially in light of the Tribunal process. The letter should, however, acknowledge the particular situation regarding Ngati Makino, signal that early consideration could be given to resumption of negotiations and signal the preference that negotiations occur collectively with Waitaha and Tapuika. This matter could then be considered by you in the context of your assessment of OTS priorities.[14]

On 17 July 2005, the Minister agreed that particular consideration needed to be given to Ngati Makino, and that OTS officials should write to Ngati Makino, requesting clarification on their current negotiation intentions and signalling that early consideration could be given to the resumption of negotiations.[15]

The next significant step was the promised letter to Ngati Makino to advise them of the 'Crown's initial response [to the Tribunal's report] and to seek their views on a number of matters'.[16] This letter was sent to Ngati Makino's principal negotiator on 26 July 2005, and copied to their counsel. OTS summarised the recommendations of both Te Arawa mandate reports in respect of negotiations with Ngati Makino. Its summary of the 2005 findings included the important point that the Tribunal had recommended that the Crown should commence negotiations with Ngati Makino:

> The Tribunal found that prejudice is likely to result from the long delay in negotiating with Ngati Makino, combined with the present refusal to consider concurrent negotiations. The Tribunal recommended that the Crown should now recommence negotiations with Ngati Makino.[17]

The next section of the letter was headed 'Your views on the future progress of Ngati Makino historical claims'. It stated:

> In order to assist the Crown's consideration of these recommendations I would appreciate an update from you on the following matters:
>
> - How soon would you wish to recommence direct negotiations with the Crown?
> - If you wish to recommence direct negotiations with the Crown are you prepared to withdraw from the Stage 1 Tribunal CNI Inquiry? Do you wish to await completion of Stage 1 of the CNI Inquiry, including publication of the Tribunal report, before seeking to resume negotiations?
> - Would Ngati Makino be agreeable to having Waitaha and Tapuika join in direct negotiations with the Crown? Is Ngati Makino prepared to wait while Waitaha and Tapuika complete any necessary mandate and pre-negotiation stages?
> - Would Ngati Makino prefer to negotiate directly with the Crown without Waitaha and Tapuika?[18]

The letter provided seven additional matters for Ngati Makino to consider before responding on their state of readiness to negotiate. These seven points contain a mix of information regarding Crown settlement policy, separate negotiations with Ngati Makino, and Ngati Makino's participation in the overlapping claims process. We set them out in full:

- Negotiations with Nga Kaihautu o Te Arawa Executive Council remain a priority for the Crown.
- The Crown strongly prefers to negotiate comprehensive settlements of all the historical (pre-September 1992) Treaty claims of a group at the same time, and prefers to negotiate with large natural groups of iwi and hapu.
- The Crown will not negotiate with groups who are engaged in litigation or proceedings before the Waitangi Tribunal.
- Concurrent negotiations with groups outside the Kaihautu Executive Council would not be possible without stopping negotiations with the Kaihautu Executive Council for a significant period in order to await the readiness of other groups to proceed. This would not be fair to those who have mandated the Executive Council, and who remain committed to the current negotiations process. It is however acknowledged that the Ngati Makino situation is different to other Te Arawa iwi/hapu not affiliated to the Kaihautu Executive Council and requires separate consideration.
- Subject to the general points noted above, the Minister in charge of Treaty of Waitangi Negotiations is willing to give early consideration to a resumption of negotiations with Ngati Makino.
- The Crown and the Kaihautu Executive Council expect to conclude an Agreement in Principle in August or September this year. During this period the Crown would wish to ensure your interests are properly taken into account and safeguarded as the Crown concludes the Kaihautu Executive Council negotiations.
- You will have received a letter several weeks ago advising that the Crown will be seeking information on the interests of Ngati Makino within the areas that are the subject of negotiations with the Kaihautu executive Council. I will be writing to you again shortly to formally invite you to provide such information. That process will enable you to advise of any relevant interests that Ngati Makino have. The Crown's preference is that overlapping claims issues are best resolved by the claimant groups themselves.

The letter concluded:

> I would value your considered response to the issues raised in this letter. This would greatly assist in planning a way ahead that respects the commitment to negotiations made by those who have mandated the Kaihautu Executive Council, and also ensures that the interests of Ngati Makino are properly safeguarded and advanced.[19]

Second Focus Area: Dual-Track Activity Relating to Both Negotiations and the Overlapping Claims Process

Ngati Makino's principal negotiator, Mr Nepia, replied to OTS on 5 August 2005. Although he was responding to the 26 July request for information on negotiation intentions, he appears to have responded to the implicit request made on 5 July 2005 for further information on Ngati Makino's interests.[20]

Mr Nepia stated that he was pleased with 'the Crown's intimation to finally put an end to the hiatus in negotiation that has occurred between itself and Ngati Makino'. He warned, though, that Ngati Makino were nevertheless disappointed by the tenor and content of the Crown's interim response (the 5 July letter), which had sought further information on interests for the Crown to use when discussing competing claims. He stated that Ngati Makino were very concerned that the Crown appeared to be negotiating with other groups prior to Ngati Makino, despite the Tribunal's clear finding on the matter.[21]

Mr Nepia commented on the efforts made by Ngati Makino's claims committee to regularly maintain their mandate, and signaled that they would be willing to convene a hui to update their status and inform their people. He then offered some criticism of OTS for not informing itself of the political climate between Waitaha and Tapuika, which appeared to effectively rule out the idea of Ngati Makino being part of a cluster involving Waitaha and Tapuika. He described the possibility of future joint negotiations with Waitaha as follows:

> We have always indicated the respect and esteem with which we hold our whanaunga from Waitaha, and had the Crown accepted our earlier attempts to enter into joint negotiations, we would have been only too happy to do so. We still believe that a multilateral process of negotiation, if adopted, could see areas of interests which are exclusively Makino settled and returned in the time that it would take Waitaha to complete the pre-negotiation phase. We could then join with them to negotiate interests which are shared. In this way, Makino would not be discussing interests that are shared with our whanaunga in their absence.[22]

If the Crown were unwilling to accept with this strategy, he asked the Crown to proceed with separate negotiations:

> It seems that Ngati Makino now have a window of opportunity that we cannot in all fairness let go of. Ngati Makino are ready to go now. We have waited too long already, we have lost too many in the wait, we look forward to the Crown's immediate attention.[23]

He also advised that Ngati Makino would withdraw from the central North Island inquiry when negotiations commenced, providing that they received assurance from the Crown of the priority status of their negotiations:

> We can intimate that upon the recommencement of negotiations, we would be willing to withdraw from pursuing our cases before the Waitangi Tribunal. We signalled right from the outset of the CNI Inquiry that the only reason for our participation was the Crown's ongoing refusal to negotiate with us.
>
> However, given the Crown's recent treatment of us, we would be seeking a significant display of good faith on the Crown's behalf. In these respects, we signal that at this moment we intend to continue to pursue our claims right up to the day that we come to the table to negotiate our settlement. We need to know that we are a priority before we deprioritise any alternative avenues that remain open to us, We do not wish to prejudice our options only to find ourselves within another negotiation hiatus.[24]

In summary, Ngati Makino were ready and willing to proceed to negotiation.

OTS responded on 24 August 2005.[25] The first matter concerned Ngati Makino's interests in the KEC area of interest. It was noted that Ngati Makino were prepared to

provide further information on the nature and extent of their interests only at the negotiating table. Further comment would be sought from Ngati Makino after the AIP had been signed.

The second matter addressed was the response to the Crown's letter of 26 July 2005 on Ngati Makino's future intentions for negotiation. It was noted that Ngati Makino's proposal did not appear to 'align with the Crown's strong preference for negotiating comprehensive settlements of all of a claimant groups' interests at the same time'.[26] OTS sought further clarification of whether Ngati Makino and Waitaha could form a single negotiating team, and indicated that there was a greater chance of according priority to negotiations if they could join together. In conclusion, OTS took issue with a number of statements made in the 5 August letter, but continued to refer to further discussions about negotiations:

> As I have previously stated, officials are willing to meet with Ngati Makino to discuss our next steps towards recommencing negotiations. I see the key issues to be discussed at that meeting being Ngati Makino's proposal for joint negotiations with Waitaha, the process for reconfirming the Claims Committee's mandate to represent Ngati Makino, and timeframes for negotiations. Officials are also willing to meet with both Ngati Makino and Waitaha together, if you consider that would be appropriate.[27]

The letter was also copied to counsel for Ngati Makino.

The AIP, signed on 5 September 2005, details the proposed management of cultural redress sites.[28] In respect of Matawhaura and Otari Pa, the Crown acknowledged that Ngati Makino had interests in these sites and would provide a future vesting mechanism in recognition of this.[29] The basis for this was that the Crown recognised Ngati Makino as an overlapping Te Arawa group which descended from the ancestor Pikiao. Accordingly, it was proposed that the sites be transferred to an entity to be established for the benefit of all groups that descend from Pikiao.[30] The proposed vesting would not occur until either the settlement of Ngati Makino's claims or 15 years from the date of settlement.[31] In the interim, and upon settlement of the KEC claims, the Crown would provide an (unspecified form of) overlay classification in favour of the KEC over the Matawhaura site.[32] The overlay classification would be non-exclusive. OTS sent a tailored letter to Ngati Makino, as an overlapping claimant, on 14 September 2005, advising of the contents of the AIP and seeking comment.[33]

On 16 February 2006, officials tried to contact the Ngati Makino principal negotiator in order to meet.[34] OTS wished to discuss the issue of overlapping claims: 'pre-negotiation discussions – where they are at', mandate considerations, and Ngati Makino's position on the possibility of joining with Waitaha and Tapuika for negotiation purposes.

The Crown's negotiator for the Kaihautu negotiations spoke with Ngati Makino's principal negotiator on 10 March 2006.[35] He followed up this phone conversation with an email, requesting a meeting within the following week or two to discuss two matters: overlapping claims and Ngati Makino's 'intentions in terms of advancing their own settlement including their position in respect of Waitaha and Tapuika'.

On 19 March 2006, the principal negotiator for Ngati Makino responded to this invitation to meet, making it clear that Ngati Makino saw their position as taking primacy in the Te Arawa claims negotiations.[36] They wished to start negotiations immediately:

> Firstly Ngati Makino view their position within the Te Arawa claims negotiations process as taking one of primacy. You have indicated that the Crown have recognized the Waitangi Tribunal's findings in terms of the Crown breaching the Treaty in its dealings with Ngati Makino with respect to the direct negotiations process.
>
> 1. **Therefore Ngati Makino want to re-start the direct negotiations process immediately with the Crown.**
>
> This would eliminate any future lodging of a claim against the Crown for those breaches as spelled out by the Waitangi Tribunal. Ngati Makino hold the mandate from its

people to do so. We have at the request of the Crown re-mandated ourselves on three separate occasions over a nine-year period. We have done so by holding hui with Ngati Makino specifically for this purpose.

2. **Therefore Ngati Makino see the mandating process as being one already confirmed upon myself and my team and do not see the need for it again.**[37]

OTS briefed the Minister on 10 July 2006 on key cultural redress sites, including Matawhaura and Otari Pa.[38] This paper noted an absence of response from Ngati Makino on any aspect of the settlement package, including the proposal regarding Matawhaura and Otari Pa.[39] OTS was of the view that both Ngati Pikiao and Ngati Makino had interests in these two sites. Ngati Makino was described as a 'hapu of Ngati Pikiao and an overlapping Te Arawa group'.[40]

Officials explained the implications of this relationship, as they saw it, for the overlapping claims process:

> Ngati Pikiao and Ngati Makino have intertwining whakapapa, claim the same area and share some grievances. The close relationship between these groups does mean that the Crown needs to ensure that, with respect to Matawhaura and Otari Pa, it can adequately address the interests of both Ngati Makino and Ngati Pikiao.[41]

OTS concluded its report by stating that, subject to the Minister's approval, they would write to these groups and seek comment by the end of July. Officials would also try to arrange a meeting.[42]

Third Focus Area: 'Safeguarding' Ngati Makino's Interests prior to Settlement with the KEC

OTS wrote to the principal negotiator for Ngati Makino on 14 July 2006, sending a copy of the letter to Rawiri Te Whare of the KEC.[43] The letter was not copied to counsel for Ngati Makino. The stated purpose of this letter was to advise Ngati Makino of the Minister's provisional decision on overlapping claims, the details of the proposed redress in relation to Matawhaura and Otari Pa sites, and the manner in which Ngati Makino's claims would be 'explicitly excluded from the Deed of Settlement for Affiliate Te Arawa Iwi/Hapu'.

OTS said that the Minister's decision in respect of the Matawhaura and Otari pa sites was:

> based on an evaluation of the respective interests of Ngati Makino and the Affiliate Te Arawa Iwi/hapu in each of the sites over which the Crown has offered redress to the Affiliate Te Arawa Iwi/Hapu, and consideration of whether the type of redress being offered – exclusive or non-exclusive – appropriately reflects these interests.
>
> Where Ngati Makino can demonstrate interests in lands offered as exclusive redress, consideration has also been given to the extent to which the Crown will retain other lands to be able to provide suitable redress in a future Treaty settlement with Ngati Makino.[44]

OTS noted that the Crown had received no formal response to its letters to representatives of Ngati Makino. In the absence of any comment, OTS had sought to safeguard the interests of Ngati Makino through the provision of certain references to Ngati Makino in the deed. The letter also made reference to settlement negotiations for Ngati Makino:

> I also wish to take this opportunity to acknowledge our previous communications regarding Ngati Makino's wish to recommence settlement negotiations with the Crown. I understand there has been some recent communication with Lil Anderson of this office on that issue and that positive steps are being made towards re-engagement on the basis of forming a collective with Waitaha and Tapuika.[45]

The letter concluded with an invitation for a formal response in writing by 3 August 2006, and a note that OTS and KEC representatives would be available to meet within the following two weeks. It was firmly stated that

the Minister would make a final decision after considering their response, 'if any'. Two appendices to the letter set out details of the proposed redress, and relevant definitions of Ngati Pikiao and Ngati Makino, which would be included in the deed of settlement.

Officials followed this letter up with an email to counsel for Ngati Makino on 19 July, suggesting a three-way meeting between OTS, Ngati Makino, and KEC representatives to discuss the proposed redress over Matawhaura and Otari Pa.[46] They sought to meet in Rotorua on 27 July.

Counsel for Ngati Makino replied, on 20 July 2006, that she had not received the 14 July letter.[47] Counsel also noted unsuccessful attempts to contact Lillian Anderson from OTS 'regarding the issue of Negotiation design process'. Counsel requested that OTS copy all correspondence to Ngati Makino to three email addresses (of counsel).[48] It was again noted that 'the letter of the 14 July that you refer to does not seem to have reached anyone in our office at this time'.[49]

OTS emailed counsel a copy of the 14 July letter, noting that the hard copy had been sent to the former Ngati Makino negotiator, and that an email copy had been sent to one of the email addresses counsel had referred to.[50] Officials explained that the former negotiator had asked that all future correspondence be sent to the chairperson of the Ngati Makino claims coordination committee and another named person (described as the negotiator for Ngati Makino and chairperson of the Makino Heritage Trust). OTS asked again whether Ngati Makino would like to have a three-way meeting about 'the proposed redress over Matawhaura and Otari pa, as well as any general overlapping concerns'. The OTS official confirmed that counsel should still deal with Lillian Anderson on matters to do with 'any future negotiations involving Ngati Makino'.

Further phone communication took place between counsel and OTS in respect of the proposed meeting, with the result that no meeting took place. There are two versions of the reason for this failure. The first comes from OTS. The director of OTS, it is claimed, wrote to the chairperson of the Ngati Makino claims committee on 31 July, pointing out that the purpose of the proposed meeting had been to discuss overlapping issues as referred to in the letter of 14 July 2006 (the two sites).[51] The meeting was referred to as a joint meeting between OTS, Ngati Makino, and KEC representatives. As a result of discussions between counsel (Jason Pou) and an OTS official (Philip Cleaver), it had also been agreed that OTS would meet separately with Ngati Makino after the meeting 'to discuss the progression of Ngati Makino's settlement negotiation'. OTS set out its understanding of the reasons why neither meeting would now take place:

> I understand that the reasons for this, expressed by Annette Sykes, are that Ngati Makino:
>
> - wanted the meeting to focus on Ngati Makino's settlement negotiations and aspirations, and
> - wish to meet directly with the Minister to discuss these aspirations, prior to then meeting with OTS on overlapping claims issues relating to the proposed KEC settlement.[52]

The director expressed the view that the joint meeting could have benefited all parties, but reminded Ngati Makino that they still had until 3 August 2006 to respond in writing to the provisional decisions. He made reference to separate negotiations and said, 'I have also followed up on recent correspondence between your counsel and Lillian Anderson of this office and can advise a response will be provided shortly'.[53] This letter was copied to the previous principal negotiator, the new principal negotiator, counsel for Ngati Makino, and the KEC representative.

Ngati Makino's understanding was different. Their counsel challenged the director's account, first by email on 1 August 2006 and, secondly, in a separate letter to the director on 2 August 2006. In her emailed response, she claimed that OTS had misread Ngati Makino's intentions and said she would follow up with a letter on those matters.[54]

In her letter, counsel maintained there had been no agreement that the separate meeting on the issue of

separate negotiations would follow the three-way meeting on overlapping claims issues.[55] She advised that:

> Conversations with Mr Cleaver were on the basis that Ngati Makino desired a separate meeting with OTS prior to one with Nga Kaihautu o Te Arawa Executive Council (KEC) to allow for discussion of negotiation strategy possibilities that had been canvassed in correspondence that had been sent to Ms Lillian Anderson (of OTS).[56]

Counsel explained that the dates that OTS required for the negotiation meetings were not convenient for counsel. Counsel (Mr Pou) had suggested deferring both meetings until all parties could attend. Counsel understood the ball had been put back in OTS's court to find such a date. The director had then phoned counsel (Ms Sykes). According to Ms Sykes, both parties had traversed a wide range of issues dealing with the status of Ngati Makino as a mandated body, possible negotiation strategies, the failure of the Crown to make Ngati Makino aware of its response to the Tribunal's mandate report, and representations about Ngati Makino to other groups. She also discussed the possibility of meeting with the Minister, given the confusion around Ngati Makino's issues.

Counsel also explained the rationale for the sequence of meetings. She had thought it 'in the best interests of all parties' for the status of negotiation between Ngati Makino and the Crown to be clarified before the joint meeting. She denied that she had not wanted the three-way meeting. Rather, the issue was about the sequence of meetings:

> Ms Sykes clearly stated that the meeting was desired, however, given the state of affairs that had arisen, she suggested that the meeting be postponed until the issues above could be addressed and appropriate personnel from OTS who seemed to be unavailable could so meet.[57]

Counsel resubmitted her request to meet with the Minister prior to engaging with OTS and the KEC jointly, and asked that the 3 August deadline be rescinded 'to allow for proper and meaningful a-kanohi engagement'.

On 4 August 2006, OTS sent the Minister its recommendations for final decisions on the overlapping claims. This represented the end of the process for overlapping claimants. Ngati Makino were described as an overlapping claimant group which had 'declined to meet to discuss overlapping claim matters'.[58]

OTS commented further on Ngati Makino as follows:

> Ngati Makino is a Te Arawa iwi, with interests within the coastal portion of the KEC area of interest. Ngati Makino has not provided a written response to your provisional decision, and has declined to meet with OTS to discuss the proposed redress over the Matawhaura and Otari pa sites.[59]

The Cabinet paper prepared for the Cabinet committee to sign off the KEC offer (dated 31 July 2006, but presented on 3 August 2006), made only a single reference to Ngati Makino:

> The vestings [of Matawhaura and Otari Pa] will occur either through a future Treaty settlement with Ngati Makino (the only hapu of Ngati Pikiao which chose not to mandate the Te Arawa KEC) or 15 years after this settlement (whichever is the earlier).[60]

On 7 August, the Minister notified his final decision to Ngati Makino, pointing out that Ngati Makino had not responded to the 14 July 2006 letter.[61] In a few lines, the Minister set out his rationale for making no change to his provisional decisions on redress:

> In the absence of a response from you on these issues, I remain of the view that the proposed redress is consistent with the Crown's overlapping claims policy, in particular that:
>
> - the settlement package will not affect the Crown's capacity to offer fair redress to Ngati Makino in a future Treaty settlement; and
> - the settlement package appropriately recognises the strong interests of the Affiliate Te Arawa Iwi/Hapu in these sites and to remove or alter the proposed redress would unreasonably devalue their settlement offer.

> My final decision is, therefore, that overlapping claims have been addressed to the satisfaction of the Crown and the settlement will now be finalised.[62]

Counsel for Ngati Makino wrote to the Minister on 9 August 2006 in response to his notification of final decisions. She disputed the assertion that Ngati Makino had failed to engage. Once more, she summarised events and noted that she had yet to receive a response from OTS to her letter of 2 August 2006. She characterised the information the Minister had received about Ngati Makino's position as a misrepresentation, and raised concerns about the overlapping claims process of consultation and the Crown's dealings with Ngati Makino under their terms of negotiation.

> The Crown's decision to crystallise the settlement of significant Te Arawa claims on the very same day we received [the] letter has left Ngati Makino with the view that matters had been predetermined and the process of engagement which Ngati Makino has long been seeking with the Crown tainted by the fact that the Ngati Makino views would not have been able to have been taken into account in any case given the Crown's actions.
>
> It is difficult to see how the good faith undertakings which form the basis of the Terms of Negotiations between the Crown and Ngati Makino are being honoured in these circumstances and we are instructed to seek clarification as a matter of urgency as to the Crown's intentions with respect to Ngati Makino's negotiations.[63]

On 14 August 2006, the director of OTS wrote to Ms Sykes, as counsel for the (Wai 334) Otamarakau land claim, to inform her that the deed of settlement had been initialled. He pointed out:

> We had identified the Wai 334 claimants as possibly having overlapping claims to the redress offered to the Kaihautu Executive Council, and wished to consult with you in respect of these interests. You did not respond to this letter and provide details of any overlapping interests of the Wai 334 (Ngati Makino) claimants.[64]

On 16 August 2006, Ms Sykes wrote again to the director of OTS on behalf of her Ngati Makino clients, disputing the statement that Ngati Makino had not responded to the question of overlapping interests. She referred to several exchanges of correspondence and emails with OTS staff. She said these exchanges made it clear that her clients did not accept the mandate of the KEC to represent interests that overlapped the interests of Ngati Makino. She also criticised the processes of negotiation and consultation:

> Nor has the process of negotiation between the Crown and Nga Kaihautu, which has effectively excluded Ngati Makino from asserting and maintaining their mana and authority over their lands and taonga, been one that is consistent with the Treaty of Waitangi or recommendations from the Waitangi Tribunal in the Te Arawa mandate claim.[65]

She asked again to meet with the Minister.

On 14 September 2006, the director responded. This letter contained a response to counsel's letters of 2 and 16 August 2006. The director did not accept the assertions in the 2 August letter. In his view, OTS had sought to accommodate Ngati Makino's request for a meeting on their negotiation status by proposing the meeting after the overlapping claims process meeting. He also took issue with the concerns expressed about the 3 August 2006 deadline, reminding counsel that Ngati Makino had been on notice since the 14 July 2006 letter. He concluded:

> In light of this, and officials' willingness to meet with Ngati Makino, I cannot accept your assertion that 'it is difficult to see how OTS' actions towards Ngati Makino can be construed in good faith.'[66]

Rather more attention was directed to the 16 August letter. The director accepted that there had been regular communication over many months. On the issue of the

KEC's interests overlapping with those of Ngati Makino, the director stated:

> I reiterate again that the Crown considers that the Kaihautu Executive Council has the mandate to represent certain iwi/hapu whose interests overlap those of Ngati Makino. The Crown has sought to consult with groups such as Ngati Makino in order to protect their interests in the lands over which groups represented by the Kaihautu Executive Council also have interests and have been offered redress.[67]

He clarified an issue relating to the proposed Pikiao entity for the Matawhaura and Otari Pa vestings, explaining that the proposed legislation contemplated the possibility that Ngati Makino's settlement legislation 'may not be passed within the next 12 years'. As to meeting with the Minister, he wrote that this was not appropriate without representation from Waitaha and Tapuika, and set out the Crown's bottom line:

> As you know it is the Crown's strong preference that Ngati Makino join with Waitaha and Tapuika in settlement negotiation. In earlier correspondence you have suggested a 'multilateral approach' to these negotiations. The Crown would only be willing to discuss such an approach in the context of wider discussions including Waitaha and Tapuika.[68]

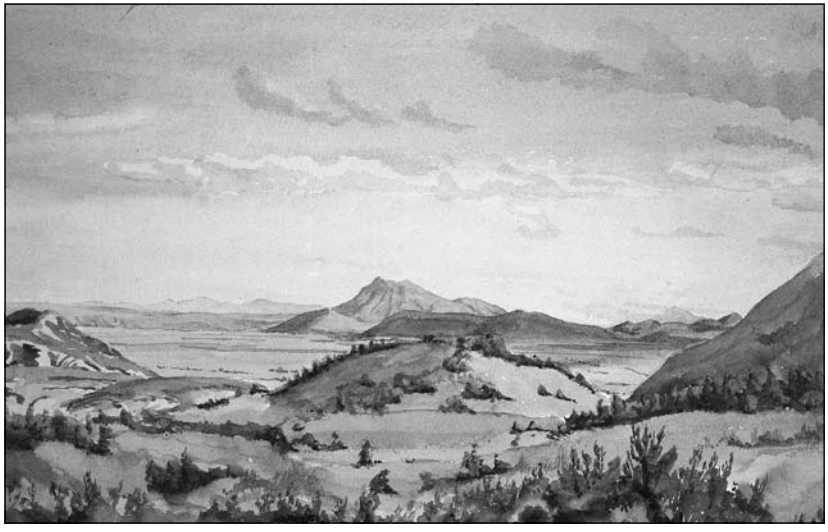
The deed of settlement was signed on 30 September 2006. On 11 October 2006, the Minister finally replied to Ms Sykes's letter of 9 August 2006. He assured her that his decisions on redress were not based on any misunderstanding, and set out his response to the request for a meeting:

> I have considered your requests for clarification of the Crown's intentions with respect to negotiations with Ngati Makino and a meeting to discuss issues concerning Ngati Makino. You will be aware that it is the Crown's strong preference for Ngati Makino to join with Waitaha and Tapuika for settlement negotiations.
>
> I do not consider it would be appropriate to meet with Ngati Makino at this time without representation from Waitaha and Tapuika also. I would be pleased to meet with representatives of Ngati Makino, Waitaha and Tapuika together to discuss the prospect of joint settlement negotiations.[69]

Notes

1. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 30 March 2005 (doc A90(7)), para 8(d). Note that the year on the letter (2004) is incorrect.
2. Ibid, paras 10, 11, 14
3. Ibid, para 18(6)
4. OTS, internal memorandum concerning proposal for transfer of cultural redress sites, tenancy in common, 21 June 2005 (doc A43(13))
5. Ngati Makino to OTS, 24 June 2005 (doc A32(a)(BD66)))
6. OTS to Ngati Makino, 5 July 2005 (doc A32(a)(BD66))
7. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed KEC cultural redress package, 12 July 2005 (doc A43(6))
8. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed policy response to Tribunal's *Te Arawa Mandate Report: Te Wahanga Tuarua*, 12 July 2005 (doc A32(a)(BD3))
9. Ibid, para 5
10. Ibid, paras 22–25
11. Ibid, para 26
12. Ibid, para 27
13. Ibid, para 28
14. Ibid, cover sheet
15. Ibid, para 29
16. OTS to Ngati Makino, 26 July 2005 (doc A33(f))
17. Ibid
18. Ibid
19. Ibid
20. Ngati Makino to OTS, 5 August 2005 (doc A32(a)(BD67))
21. Ibid
22. Ibid
23. Ibid
24. Ibid
25. OTS to Ngati Makino, 24 August 2005 (doc A32(a)(BD68))
26. Ibid
27. Ibid

28. 'Agreement in Principle for the Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu', 5 September 2005 (doc A32(a)(BD6))
29. Ibid, para 31
30. Ibid
31. Ibid, para 32
32. Ibid, para 34
33. OTS to Ngati Makino, 19 September 2005 (docs A32(c)(4), (5))
34. OTS, internal email, 16 February 2006 (doc A32(a)(BD70))
35. OTS to Ngati Makino (email), 10 March 2006 (doc A32(a)(BD71))
36. Ngati Makino to OTS, 19 March 2006 (doc A32(a)(BD72))
37. Ibid
38. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning proposed KEC cultural redress, 10 July 2006 (doc A32(a)(BD65))
39. Ibid, para 4
40. Ibid, para 34
41. Ibid, para 35
42. Ibid, para 55
43. OTS to Ngati Makino, 14 July 2006 (doc A32(a)(BD73))
44. Ibid
45. Ibid. Counsel for Ngati Makino also referred to this communication in an email sent on 20 July 2006 (doc A32(a)(BD74)).
46. OTS to counsel for Ngati Makino (email), 19 July 2006 (doc A32(a)(BD74))
47. Counsel for Ngati Makino to OTS (email), 20 July 2006 (doc A32(a)(BD74))
48. Ibid
49. Ibid
50. OTS to counsel for Ngati Makino (email), 20 July 2006 (doc A32(a)(BD74))
51. OTS to Ngati Makino, 31 July 2006 (doc A32(a)(BD75))
52. Ibid
53. Ibid
54. Counsel for Ngati Makino to OTS, 1 August 2006 (doc A32(a)(BD74))
55. Counsel for Ngati Makino to OTS, 2 August 2006 (doc A33(h))
56. Ibid
57. Ibid
58. OTS, briefing paper for Minister in Charge of Treaty of Waitangi Negotiations concerning final decisions on overlapping claims, 4 August 2006 (doc A43(2)), para 15
59. Ibid, para 25
60. OTS to Minister in Charge of Treaty of Waitangi Negotiations, revised paper to Cabinet policy committee, 31 July 2006 (doc A43(3)), para 32
61. Minister in Charge of Treaty of Waitangi Negotiations to Ngati Makino, 7 August 2006 (doc A33(i))
62. Ibid
63. Counsel for Ngati Makino to Minister in Charge of Treaty of Waitangi Negotiations, 9 August 2006 (doc A32(a)(BD77))
64. OTS to counsel for Ngati Makino, 14 August 2006 (doc A33(k))
65. Counsel for Ngati Makino to OTS, 16 August 2006 (doc A33(k))
66. OTS to counsel for Ngati Makino, 14 September 2006 (doc A32(a)(BD79))
67. Ibid
68. Ibid
69. Minister in Charge of Treaty of Waitangi Negotiations to counsel for Ngati Makino, 11 October 2006 (doc A32(a)(BD80))



THE FINAL REPORT ON THE IMPACTS OF THE CROWN'S TREATY SETTLEMENT POLICIES ON TE ARAWA WAKA AND OTHER TRIBES

Previous page: The Kaingaroa Plains, from near Waiotapu, May 1890, Lister family, Alexander Turnbull Library, Wellington (E-394-f-028-1).

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The Honourable Parekura Horomia
Minister of Maori Affairs

The Right Honourable Helen Clark
Prime Minister

The Honourable Mark Burton
Minister in Charge of Treaty of
Waitangi Negotiations
Parliament Buildings
WELLINGTON

The Waitangi Tribunal
141 The Terrace
WELLINGTON

30 July 2007

E te Pirimia, tēnā koe e te Ariki Kahurangi. E te Minita Māori, te Kāhu Kōrako, tēnā koe e tū nei ki te kei o te Waka Māori. E te Minita nōna te mana whakarite take e pā ana ki te Tiriti ō Waitangi, tēnā koe e whakamoe nei i te wairua ohooho o te iwi Māori.

Tēnei rā te mihi manahau, te mihi matakuikui ki a koutou katoa.

Tēnā hoki koutou i ō tātou tini mate kua rauhingia ki te nohopukutanga o te tangata ki te whareahuru o ngā marae o Tuawhakarere.

This is the fourth report that the Tribunal has issued on claims brought in respect of the Crown's settlement with Nga Kaihautu o Te Arawa.

We have found in this report that aspects of the Crown's processes for dealing with overlapping groups, and aspects of the deed of settlement itself, are inconsistent with the principles of the Treaty of Waitangi.

We have thought carefully about what recommendations to make. Treaty settlements are critical to the future of our country, and we consider that any recommendation to delay or stop a proposed settlement should be made only as a last resort.

Nevertheless, we cannot endorse the settlement in its current form. We have grave concerns for the impact of this settlement on overlapping iwi and on the durability of future central North Island settlements. Future settlements cannot proceed like this. The Crown cannot continue to 'pick favourites' and make decisions on tribal interests in isolation, based on inadequate information. However, we believe that the affiliate iwi and hapu of Te Arawa deserve a settlement.

We therefore recommend that their proposed settlement be delayed, pending the outcome of a forum of central North Island iwi and other affected groups, convened by Te Puni Kokiri. All the claimants to our inquiry, plus the Nga Kaihautu and the Crown Forestry Rental Trust, should participate in this hui.

The aim of the forum would be to negotiate between participants, according to tikanga, high-level guidelines for the allocation of Crown forest lands. Neither the Crown nor the Waitangi Tribunal need be directly involved. The New Zealand Maori Council and the Federation of Maori Authorities should be present to represent the general interests of Maori nationally.

The aim of the forum would be to reach agreement upon:

- principles to guide decision-making over the allocation of central North Island Crown forest lands in Treaty settlements;
- the overall proportionality to apply to the allocation of assets between different iwi; and
- the priority given to particular iwi in respect of Crown forest lands in each geographical area.

Issues of manawhenua may have greatest bearing on the priority given to groups in a specific area. The forum may take a different form, but the critical thing is that these decisions are made by the central North Island iwi themselves, on their own terms, answerable to each other.

We note that this approach would benefit the Crown, insofar as it would no longer be in the unenviable position of determining the allocation of settlement assets between these groups, based on its understanding of their customary interests and of the potential size and shape of future settlements.

Equally, it would give Maori an assurance that the allocation of Crown forest assets had been undertaken fairly, transparently, and according to tikanga. Iwi may, post settlement, consider managing their forest assets collectively, to maximise combined commercial returns and to create opportunities for flexible arrangements in respect of cultural practices and access.

Most importantly, we consider that truly durable Treaty settlements would grow out of such a process. We are not confident that this will be the case if the current Te Arawa deed of settlement is enacted.

Heoi ano

CHAPTER 1

INTRODUCTION

Procedural Background

The process by which the Crown and Nga Kaihautu o Te Arawa Executive Council (KEC) have negotiated the settlement of Te Arawa's historical Treaty claims dates back to 2003. The negotiations have not proceeded smoothly for Te Arawa. In 2004 and 2005, the Waitangi Tribunal issued reports on the process by which the Crown recognised the KEC's mandate to negotiate Te Arawa's claims. During the mandating process, the proportion of Te Arawa represented by the KEC dropped to approximately half, as various groups withdrew their support. Nevertheless, negotiations proceeded. The KEC and Crown signed their agreement in principle in September 2005, and the deed of settlement in September 2006. The Crown will introduce legislation enabling the settlement at some time after 1 August 2007.

In late 2006, however, following the signing of the deed of settlement, new claims were brought to the Tribunal in respect of the proposed settlement. The claimants were, for the most part, the half of Te Arawa who choose to stand outside the KEC mandate and who considered that the settlement would prejudice their interests by transferring to the KEC certain cultural and commercial assets, including Crown forestry licensed (CFL) lands, in which they have interests. In January 2007, before the Tribunal sat to hear these claims, the New Zealand Maori Council and the Federation of Maori Authorities filed proceedings against the Crown in the High Court, alleging that the proposed KEC settlement would breach commitments made by the Crown in 1989 and 1990 in respect of the transfer of CFL lands. After seeking feedback on the matter from parties, the Tribunal decided in early February to adjourn consideration of all matters relating to the Crown forestry assets involved, pending the High Court's ruling on the New Zealand Maori Council and Federation of Maori Authorities litigation.[1] The Tribunal heard claims on cultural redress aspects of the settlement at a hearing held in Rotorua between Monday 26 February and Friday 1 March 2007. Our report on these claims, *Report on the Impact of the Crown's Settlement Policy on Te Arawa Waka* was released on Monday 18 June. (That report is reproduced in this volume.)

Following the 4 May 2007 release of the High Court decision of Judge Gendall, the Tribunal sought submissions from parties on whether to reconvene to hear the forestry issues. Memoranda filed in reply universally supported the reconvening of the Tribunal. The Tribunal sat at Tamatekapua in Rotorua to hear commercial redress claims from Monday 25 to Wednesday 27 June 2007. As a result, this report deals only with issues regarding the

transfer of CFL lands to Te Pumautanga o Te Arawa, the post-settlement governance entity, under the terms of the KEC deed of settlement. It should properly be read in conjunction with our first settlement process report. Because the present report is in many ways an addendum to that report, and because of the pressure of time under which the Tribunal is operating in this inquiry, wherever possible we have sought to refer to that report in order to avoid unnecessarily repeating material. A fuller account of the background to the hearing of central North Island Treaty claims and the KEC mandating issues is set out in our previous Te Arawa mandate reports,[2] and in our first settlement process report.

The pressure of time we referred to above is the result of a clause in the KEC deed of settlement which commits the Crown to introducing enabling legislation to effect the settlement within nine months of the ratification of the post-settlement governance entity.[3] The trust deed of Te Pumautanga o Te Arawa was signed on 1 December 2006. By a memorandum of 19 June 2007, the Crown notified the parties that the Government did not intend to introduce the settlement legislation before 31 July 2007.[4] Thus, because the Tribunal has no jurisdiction in respect of any Bill that has been introduced into the House of Representatives, we were obliged to issue this report on or before 31 July 2007.[5]

The present report comprises five chapters. Chapter 1 introduces the claim and the claimant groups. Chapter 2 provides essential background information to the issues. Chapters 3 and 4 contain our substantive analysis and comment, and chapter 5 sets out our overall findings and recommendations.

Participants in the June 2007 Hearing

Groups with claims on commercial redress issues included most Te Arawa groups that appeared at our February 2007 hearing, along with iwi from outside the Te Arawa confederation and those outside the Te Arawa Waka, who have interests in central North Island CFL lands. We use the broad term 'Te Arawa Waka' in the title of this report to reflect the fact that the groups bringing claims in relation to the proposed KEC settlement were not only the core hapu and iwi of the Te Arawa confederation descended from Tamatekapua, but also their Te Arawa whanaunga, Waitaha and Ngati Makino. The Te Arawa Waka also includes Ngati Tuwharetoa. This description from the Tribunal's 1984 *Report on the Kaituna River Claim* describes the relationships of the tribes of the Te Arawa Waka:

> Te Arawa is a confederation of Maori tribes which are descended from the crew of the Arawa canoe that landed at Maketu many hundreds of years ago. From Maketu the voyagers and their succeeding generations moved inland occupying the central part of the North Island in terms of the tribal saying '. . . Mai Maketu Ki Tongariro . . .' from Maketu in the Bay of Plenty on the sea-coast, to Mt Tongariro near Lake Taupo in the hinterland. Te Arawa comprises the tribes descended from Tuwharetoa living near Lake Taupo, and the tribes claiming descent from Tamatekapua living on the shores of the Rotorua lakes and surrounding districts down to Maketu itself.[6]

In addition to the iwi of the Te Arawa Waka, we heard from Ngati Manawa, Tuhoe, Ngati Haka–Patuheuheu, Ngati Raukawa, and the New Zealand Maori Council.

Generic opening submissions were presented by both Kathy Ertel and Karen Feint on behalf of all claimant groups.[7]

In this report, we frequently use terms such as 'non-KEC Te Arawa groups' and 'non-Te Arawa central North Island iwi'. We do this purely for reasons of economy, in order to avoid excessively long and clumsily constructed sentences. We sincerely regret any offence we may cause by referring to iwi and hapu 'in the negative' in this way.

Te Arawa groups that stand outside the KEC mandate

Ngati Rangitihi (Wai 1370, Wai 1375)

The chairperson of Te Rangatiratanga o Ngati Rangitihi,

Andre Paterson, filed evidence on behalf of Ngati Rangitihi.[8] Richard Boast, Josey Lang, Baden Vertongen, and Laura Carter appeared as counsel.

Ngati Rangiunuora (Wai 1310)
Kathy Ertel and Vicki Milcairns appeared as counsel for Ngati Rangiunuora. No additional evidence was filed in support of the claim for the June 2007 hearing.

Ngati Tamakari (Wai 1349)
David Whata-Wickliffe filed written evidence for Ngati Tamakari.[9] Michael Sharp appeared as counsel.

Te Kotahitanga o Ngati Whakaue (Wai 1204)
Anaru Te Amo presented evidence for Te Kotahitanga o Ngati Whakaue.[10] Hamuera Mitchell and David Stephens filed written evidence.[11] Matanuku Mahuika, John Kahukiwa, Miharo Armstrong, and Rawiri Rangitauira appeared as counsel.

Ngati Karenga (Wai 1398)
William (Boy) Hall filed a written affidavit on behalf of Ngati Karenga.[12] Donna Hall, Martin Taylor, and Leroy Dickson appeared as counsel.

Ngati Rangiteaorere (no specific claim)
Donna Hall and Leroy Dixon appeared as counsel for Ngati Rangiteaorere. No additional evidence was filed in support of the claim for the June 2007 hearing.

Te Arawa groups that dispute KEC representation

Walter Rika of Ngati Whaoa (Wai 1297)
Claimant Walter Rika filed written evidence.[13] Martin Taylor and Richard Charters appeared as counsel.

Peter Staite of Ngati Whaoa (Wai 1311)
Claimant Peter Staite filed written evidence.[14] Michael Sharp appeared as counsel.

Other central North Island iwi

Ngai Moewhare (Wai 1399)
Maanu Paul presented evidence for Ngai Moewhare, a hapu of Ngati Manawa which has withdrawn from Te Runanga o Ngati Manawa.[15] Donna Hall, Martin Taylor, and Leroy Dickson appeared as counsel.

Te Kotahi a Tuhoe Trust (Wai 1225)
Tamati Kruger presented evidence on behalf of Te Kotahi a Tuhoe Trust.[16] Te Kani Williams appeared as counsel.

Ngati Haka–Patuheuheu (Wai 1371)
Te Kani Williams appeared as counsel. No additional evidence was filed in support of the claim for the June 2007 hearing.

Ngati Makino (Wai 1372)
Annette Sykes and Jason Pou appeared as counsel for Ngati Makino. No additional evidence was filed in support of the claim for the June 2007 hearing.

Ngati Tuwharetoa (Wai 1373)
Two affidavits from Ngati Tuwharetoa witnesses in the April 2007 New Zealand Maori Council High Court litigation were filed as evidence in this inquiry: that of Lake Taupo Forest Trust chief executive George Asher; and that of the deputy chairperson of the Tuwharetoa Maori Trust Board, Paranapa Otimi.[17] Lake Taupo Forest Trust forest operations manager Geoffrey Thorp spoke to George Asher's evidence at the hearing.[18] Karen Feint and Kelly Fox appeared as counsel.

Tauhara hapu (Wai 1397)
Peter Clarke filed evidence on behalf of Tauhara hapu of Ngati Tuwharetoa.[19] Donna Hall, Martin Taylor, and Leroy Dickson appeared as counsel.

Te Runanga o Ngati Manawa (no specific claim)
Ngati Manawa pakeke Rano (Bert) Messent filed a written

affidavit on behalf of Te Runanga o Ngati Manawa.[20] Richard Boast and Deborah Edmunds appeared as counsel.

Ngati Raukawa (no specific claim)

Ngati Raukawa Trust Board Treaty claims manager Chris McKenzie presented evidence for Ngati Raukawa.[21] Richard Boast, Josey Lang, and Laura Carter appeared as counsel.

Ngati Tutemohuta (no specific claim)

Ngati Tutemohuta claims manager Lennie Johns filed a written affidavit.[22] Aiden Warren appeared as counsel.

The New Zealand Maori Council (Wai 1395)

Sir Graham Latimer filed a written affidavit, and Maanu Paul presented oral evidence, on behalf of the New Zealand Maori Council.[23] Donna Hall, Martin Taylor, and Leroy Dickson appeared as counsel.

The Crown

Peter Andrew, Damen Ward, and Yvette Cehtel appeared as counsel for the Crown. Sam Davis appeared as Crown kaumatua. OTS director Paul James and Land Information New Zealand Crown property manager Paul Jackson gave evidence for the Crown.[24] The Crown also filed as evidence the affidavit of Crown Forestry Rental Trust chief executive Ben Dalton from the April 2007 New Zealand Maori Council and Federation of Maori Authorities High Court litigation.[25]

Other parties

Ngati Whare are currently in settlement negotiations with the Crown, and did not wish to file a claim against the Crown. However, their counsel, Jamie Ferguson, filed a memorandum noting their opposition to the provision in the deed of settlement by which the Crown will be deemed a confirmed beneficiary of accumulated rentals held by CFRT.[26]

Counsel for Ngati Tahu, Maryanne Crapp, appeared in a watching brief capacity.

Finally, counsel for Te Pumautanga, Willie Te Aho, also attended the hearing and made a brief oral statement at the conclusion.

Venue and Hearing

The Tribunal sat at hearing at Papa-i-ouru (Tamatekapua) Marae in Rotorua from Monday 25 to Wednesday 27 June 2007.

Notes

1. The New Zealand Maori Council and the Federation of Maori Authorities subsequently appealed the High Court decision. The Court of Appeal heard their appeal on 19 June 2007 and delivered its judgment on 2 July 2007. The appeal was dismissed: *New Zealand Maori Council v Attorney-General* unreported, 2 July 2007, Court of Appeal, CA241/07.
2. Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004); Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005)
3. *Deed of Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu* (Wellington: OTS, 2006) (doc B26), sec 4.1
4. Crown counsel, memorandum concerning introduction of settlement legislation, 19 June 2007 (paper 3.1.161)
5. Treaty of Waitangi Act 1975, s 6(6)
6. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wellington: Waitangi Tribunal, 1984), p 7
7. Counsel for Ngati Rangiunuora, generic submissions, 22 June 2007 (paper 3.1.166); counsel for Ngati Tuwharetoa, opening submission on behalf of all claimants, 25 May 2007 (paper 3.3.36)
8. Andre Paterson, brief of evidence, 13 June 2007 (doc B12)
9. David Whata-Wickcliffe, brief of evidence, 21 June 2007 (doc B27)
10. Andrew Te Amo, brief of evidence, 18 June 2007 (doc B19)
11. Hamuera Mitchell, brief of evidence, 13 June 2007 (doc B10); David Stephens, brief of evidence, 18 June 2007 (doc B18)
12. William Hall, brief of evidence, 13 June 2007 (doc B15)
13. Walter Rika, brief of evidence, 13 June 2007 (doc B6)
14. Peter Staite, brief of evidence, 21 June 2007 (doc B28)
15. Maanu Paul, brief of evidence, 13 June 2007 (doc B9)
16. Tamati Kruger, brief of evidence, 8 June 2007 (doc B11)

17. George Asher, brief of evidence, 13 June 2007 (doc B7); Paranapa Otimi, brief of evidence, 13 June 2007 (doc B8)
18. Geoffery Thorp, brief of evidence, 2 July 2007 (doc B36)
19. Peter Clarke, brief of evidence, 13 June 2007 (doc B13)
20. Rano Messent, brief of evidence, 22 June 2007 (doc B29)
21. Chris McKenzie, brief of evidence, 13 June 2007 (doc B16)
22. Lennie Johns, brief of evidence, 13 June 2007 (doc B5)
23. Graham Latimer, brief of evidence, 13 June 2007 (doc B14)
24. Paul James, brief of evidence, 22 March 2007 (doc B21); Paul James, brief of evidence, undated (doc B24); Paul Jackson, brief of evidence, 19 June 2007 (doc B22); Paul Jackson, amended brief of evidence, 27 June 2007 (doc B22(a))
25. Ben Dalton, brief of evidence, 19 April 2007 (doc B23)
26. Counsel for Ngati Whare, memorandum concerning urgency, 22 June 2007 (paper 3.1.168)

CHAPTER 2

BACKGROUND

Before describing the key issues in our inquiry, we must first summarise the relevant factual background to the claims. Given the time constraints, we have sought to do this as briefly as possible. We discuss three key matters by way of context to the rest of the report:

- litigation undertaken by the New Zealand Maori Council and the Federation of Maori Authorities in the late 1980s over the Government's proposed sale of State-owned forestry lands in the central North Island, the settlement of that litigation by way of the Crown forestry agreement 1989, and the statutory measures taken to give effect to that agreement;
- the efforts made by the Crown, before, during, and after the KEC negotiations, to engage with other central North Island claimant groups whose interests coincided or overlapped with those of the KEC ('overlapping claimants'); and
- the commercial redress terms of the KEC deed of settlement, in particular provisions relating to the transfer of CFL lands to the value of the quantum set, and the offer of additional CFL lands under the 'deferred selection' mechanism.

We now describe each of these in turn. These sections are necessarily brief, and meant only to provide a framework for the discussions in the chapters that follow. More detail is provided where necessary in those chapters. Also, a fuller account of the second of these points (albeit with a focus on cultural redress issues) can be found in chapter 3 of our first settlement process report (see pp 54–55). In particular, that report includes a useful table showing the key events in the Crown's negotiations with the KEC, and in its communications with overlapping claimants. We conclude this chapter with a brief summary of the overall findings and recommendations of that report.

Forestry Litigation and the Crown Forestry Agreement 1989

High Court litigation and the July 1989 Crown forestry agreement

In February 1989, the New Zealand Maori Council and the Federation of Maori Authorities filed proceedings in the High Court to prevent the Crown (in the form of the State-owned enterprise Forestcorp) from selling off State-owned forestry assets, arguing that the sales would be inconsistent with Treaty principles and with the Court of Appeal's

Lands case decision of two years earlier. Indeed, the High Court found that matter went:

> to the very heart of the issue raised by the 1987 case . . . whether assets including forest lands could be disposed of through the new State enterprises to interests outside the State enterprises without breach of the principles of the Treaty of Waitangi.[1]

However, no substantive hearing and judgment was necessary, since the Government undertook not to sell the forest assets until its proposals had been further developed, following consultation with the Maori people. The court simply expressed hope that the dispute would 'be resolved in the spirit of partnership and in accordance with the principles of the Treaty'.[2] The New Zealand Maori Council was left to negotiate with the Government, and in July 1989 the matter was settled out of court. The product of that settlement was an agreement between the Crown and the council signed in July 1989, commonly known as the Crown forestry agreement. As we will discuss in later chapters, the commitments made by the Crown in that agreement are central to the claims before us in respect of the proposed KEC settlement.

The four-page agreement proposed a creative solution to the problem. The Crown would be free to sell to private buyers the existing tree crop, and licences to grow and mill trees on the lands, but not the land itself. The Crown would retain for itself the initial proceeds from these sales, but the annual licence rentals would be paid into a trust. The interest from the funds accumulating in the rental trust would then be used to fund Maori claimant groups to prepare, present, and negotiate Treaty claims involving, or possibly involving, Crown forest lands.

Because the freehold title to the lands remained with the Crown, it would be able to use the lands in Treaty settlements as redress for historical breaches. Under the terms of the forestry licences, the Crown retained the right to 'resume' the land. Crown forest lands could be returned to claimant groups following investigation and recommendation by the Waitangi Tribunal. Where the Tribunal so recommended, Crown forest land, along with the Crown's rights and obligations in respect of existing forestry licences, would be transferred to the successful claimants. The claimants would also receive two sums of money. First, compensation for the fact that the land was being returned subject to encumbrances, as calculated using one of several formulae set out in the agreement. Secondly, the claimants would receive from the rental trust all the accumulated rentals associated with lands to be returned to them. Both Maori and the Crown agreed to 'jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations within the shortest possible period'.[3] Where the Tribunal determined that a certain area of Crown forest would not be required for resumption, that land, plus the accumulated rentals associated with it, would return to the Crown. The payment of accumulated rentals was meant to have the effect of backdating the settlement to circa 1990. Following the settlement of all Treaty claims relating to Crown forest lands, any remaining lands and accumulated rentals would pass to the Crown.

Before legislation was passed to enact the agreement, there was one further development. The Crown agreed by deed poll of 17 October 1989 not to register title to Crown forest land until the Waitangi Tribunal had confirmed that the land was no longer liable to be returned to Maori ownership. The deed poll also iterated the parties' expectation that the Tribunal would have heard most of the claims relating to Crown forest land by the middle of 1992.[4]

The Crown Forest Assets Act 1989 and CFRT

The Crown Forestry agreement was given statutory effect by the Crown Forest Assets Act 1989. The Act established a rental trust, called the Crown Forestry Rental Trust (CFRT), allowed the Crown to sell forestry licences to private buyers, and empowered the Waitangi Tribunal to make binding recommendations in respect of the return of CFL land to Maori claimants.[5] The forest licences issued by

the Crown would automatically roll over year by year, until such time as the Waitangi Tribunal made a recommendation in respect of the return of that CFL land. At that point, the land would transfer to the claimants (along with associated compensation), and the licence would terminate over a 35-year period.[6] The Crown was restricted under the Act from selling or otherwise disposing of any CFL land unless the Waitangi Tribunal had made a recommendation (including where the Tribunal recommended that CFL land was no longer liable for resumption and could be transferred to the Crown).[7]

The CFRT was established by a deed of April 1990. The CFRT would comprise six trustees, three appointed by the New Zealand Maori Council and the Federation of Maori Authorities, and three by the Crown. The trust would receive from the Crown and invest all rental moneys from CFL land, and distribute the interest earned 'to assist any claimant in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve or could involve Licensed Land'.[8] Clause 11 of the deed provided for the payment of accumulated rentals to claimants following a Waitangi Tribunal recommendation that CFL land be returned to them. First, the successful claimants would become 'confirmed beneficiaries' of the trust. Then, the confirmed beneficiaries would receive the accumulated rentals held by the trust in respect of the CFL land to be returned. As was noted by various parties in our inquiry, this provision creates a financial incentive to claimant groups to maximise the quantity of CFL land (and therefore the value of the accompanying accumulated rentals) that forms part of their settlement.

Seventeen years after the establishment of CFRT, the value of the accumulated rentals on many CFL blocks is now greater than the value of the land. While this situation may not have been envisaged in 1990, it is important to remember that accumulated rentals are not the 'icing on the cake', but are an integral part of the 1989 regime. The payment of accumulated rentals is intended to restore a situation equivalent to that which would have existed if the claim had been settled in 1989, and the groups had been receiving rentals on their CFL land assets from licensees ever since. Dr Brian Easton made this comment on the payment of accumulated rentals to successful claimant groups:

> It may at first seem unfair that the effective value of the settlement may far exceed the quantum because of the remitting of the accumulated rents on the purchased land. An alternative approach is to think that while the settlement is formally in 2008, say, it has a retrospective element in that the revenue stream from rents on the land is backdated to 1990, when the CFRT began to receive the rents.[9]

Lastly, following the return of the land to Maori ownership, the confirmed beneficiaries were entitled to receive all future rental payments for the duration of the licence. The deed provided that the Crown could become a confirmed beneficiary of the trust, where the Tribunal recommended that an area of CFL land be not liable for return to Maori ownership. In such circumstances, the Crown would receive all accumulated rentals associated with that CFL land, and would be released from its obligation to pay future rentals on that land to the trust.[10]

We should note here that this mechanism has never been used and, in fact, the Waitangi Tribunal has never issued binding recommendations in respect of CFL lands. Instead, the Crown has sought to settle with Maori claimant groups by direct negotiation. In five cases, such settlements have included the transfer of CFL lands to the claimants: the Ngai Tahu, Waikato Raupatu, Te Uri o Hau, Ngati Awa, and Ngati Tuwharetoa (Bay of Plenty) settlements. In these cases, the settlement legislation has included a 'deeming provision' to legislate for the transfer of CFL land to the claimants in the absence of a Waitangi Tribunal recommendation. The Ngati Awa Settlement Act 2005, for example, provides that:

> The Crown must give notice under . . . the Crown Forest Assets Act 1989 in respect of the redress licensed land as if that section applies to the redress licensed land, even though the Waitangi Tribunal has not made a recommendation. . . .
>
> Notice given by the Crown . . . has effect as if the Waitangi Tribunal had made a recommendation . . . for the return of the redress licensed land and that recommendation had become final on the settlement date.[11]

Similar provisions were included in the other Treaty settlements involving the transfer of CFL land.[12] As we will discuss, aspects of the transfer of CFL land in the proposed KEC settlement have no exact precedent.

The Development of the Crown Offer to the KEC and the Terms of the Deed of Settlement

Development of Crown offer to KEC

In this section, we outline the development of the Crown's offer of commercial redress to the KEC during negotiations in 2005 and 2006, in order to provide a framework for our later discussion of Crown engagement with other groups. Appendix I shows the development of the offer to the KEC during the different stages of the negotiation process, as a reference for the discussion which follows.

Formal negotiations between the KEC and the Crown began with the signing of the terms of negotiation on 26 November 2004. The first formal offer of commercial redress was made to the KEC by the Crown on 25 July 2005. The offer listed nine CFL forest blocks, totalling approximately 62,000 hectares, from which the KEC would select parcels for inclusion in the deed of settlement, to the value of the quantum set ($36 million). At this point, officials did not expect that the KEC would take up the entire area of land on offer. Instead, it was in the nature of a 'pool' from which land would be selected. The total value of the CFL lands contained in that pool was approximately five times that of the quantum on offer to the KEC.[13] The KEC had, however, made it clear to officials by this time that their key objectives in negotiations included to maximise their ability to purchase land subject to CFLs from their quantum and therefore receive the associated accumulated rentals, and to enable a geographic spread of assets.[14] The Crown's offer stated that the 'exact configuration of [CFL] land to be transferred will need to be agreed by the parties before a Deed of Settlement is finalised'.[15] In this first offer, the KEC was offered a right of deferred selection (that is, the option to use the accumulated rentals on CFL land acquired under quantum to purchase additional Crown properties *after* the settlement date) on a number of commercial properties, to be exercised within six months of the settlement date. No right of deferred selection was offered over CFL lands, however. Nor was Horohoro State Forest, administered by the Ministry of Agriculture and Forestry (and not subject to a CFL), included on the list of commercial assets in the Crown's first offer.

In their internal advice to the Minister in Charge of Treaty of Waitangi Negotiations on 22 July 2005, immediately prior to the first offer, officials from the Office of Treaty Settlements (OTS) anticipated that the proposed quantum would be below the KEC's expectations. They suggested that the right of deferred selection could be extended to cover CFL lands within the pool later in the negotiating process, if necessary, to achieve 'further negotiation flexibility'. This would allow the KEC to spend the accumulated rentals it received to purchase additional CFL lands within the six-month deferred selection period. Officials identified various benefits for the Crown in extending the right of deferred selection to cover CFL lands: it allowed the Crown to increase the value of the settlement to the KEC without increasing its own costs, and at lower operational costs than would apply if the more frequent right of first refusal mechanism was used.[16]

The KEC responded to the Crown's first offer on 8 August 2005 with its counter-offer. This included a number of

requests. It wanted the right of deferred selection to apply to all CFL lands included in the offer, and to receive the accumulated rentals associated with all CFL lands included in the settlement: both those acquired within the quantum and those acquired through the deferred selection process.[17] In their advice to the Treaty Negotiations Minister, officials recommended that the KEC should be granted a right of deferred selection over CFL lands. However, they advised that the total pool of CFL land on offer should be reduced, to ensure that sufficient land was available for future settlements with central North Island iwi. They also considered that accumulated rentals on CFL lands transferred under the deferred selection mechanism should not be paid to the KEC, because to do so would:

> provide a significant windfall to the Kaihautu Executive Council and raise significant issues of fairness between other groups . . . particularly those who do not have CFL land in their claim area . . .[18]

Following an initial assessment of the interests of non-KEC central North Island iwi (described below), the Crown made its second offer to the KEC on 17 August 2005. At this point, the pool of CFL land on offer more or less took its final form. In line with the advice of officials, the Crown's second offer extended the right of deferred selection to cover CFL lands, but reduced the total pool of land available for selection by approximately 11,000 hectares. As appendix I shows, the quantity of land on offer in the Pukuriri and Reporoa CFL blocks was reduced, and the Headquarters CFL block was completely removed from the offer.[19] At this stage, the negotiating parties had not reached agreement on the land values of the various CFL blocks. We assume that decisions on the reduction in the pool of CFL land were based on estimated land values from Land Information New Zealand.

The agreement in principle was signed on 5 September 2005, and made public on OTS's website shortly afterwards. The pool of CFL land on offer in the agreement in principle was the same as the pool in the Crown's second offer, with one change: the area of the West CFL block in Rotoehu forest included in the agreement in principle was greater than that included in the second offer. We note that the agreement in principle also included in the commercial redress package the Ministry of Agriculture and Forestry-administered 1458-hectare Horohoro State Forest, which was not subject to a CFL. As the value of the quantum was $36 million, the KEC would be able to select as much of the approximately 51,000-hectare pool of CFL land as its $36 million would buy, and then spend the accumulated rentals associated with those CFL lands to purchase additional CFL lands. The agreement in principle made it clear that a six-month right of deferred selection would apply in respect of CFL land within the pool, and that the KEC would not receive the accumulated rentals on the deferred selection lands.[20] It did not mention, however, that the settlement legislation would include provision to deem the Crown a confirmed beneficiary of CFRT funds, in order for it to receive the accumulated rentals on the CFL lands offered under deferred selection.

Following the agreement in principle, the KEC was to select the CFL blocks it would acquire from within the pool. The total amount of land the KEC could acquire would be the maximum area available to it by using the quantum amount, plus the accumulated rentals on those lands acquired with the quantum, plus any other funds available to it from other sources. The first step in the selection process would be to negotiate an agreed valuation for the 51,000 hectares of CFL lands within the pool.

The valuation process began in January 2006, when Land Information New Zealand provided 'material information' relating to the CFL lands to OTS, for disclosure to the KEC. Officials at Land Information New Zealand had earlier divided the CFL blocks described in the agreement in principle into 14 'selection units'. The selection units were required to be 'of sufficient size to enable a meaningful valuation to be obtained' and the boundaries to be 'on practical lines that would not compromise ongoing management for forestry purposes'.[21] Valuers were appointed

by Land Information New Zealand (for the Crown) and the KEC. By late May, valuations for each party had been completed.

However, during late April there was a very important development which dramatically affected the valuation of the CFL land, and in turn the total area available to the KEC. The KEC proposed that a restrictive covenant be placed over the CFL lands, requiring that the land remain in commercial forestry.[22] Such a covenant (known as a Kyoto covenant) would assist the Crown to meet its international climate change commitments (known as Kyoto liabilities) by ensuring that the CFL lands were not deforested and converted to other uses (mainly pastoral farming, and in particular dairying). The Crown accepted the KEC's proposal, which appeared to be broadly consistent with the direction of its climate change policy, and on 2 June 2006 the parties agreed to a variation in the valuation process outlined in the agreement in principle, whereby the CFL lands would be revalued 'as if commercial forestry was the highest and best use for the land'.[23] One effect of such a restriction would be to reduce the value of any land to which it applied.

By June 2006, therefore, it had become apparent to the parties that the KEC would potentially be able to acquire the full pool of approximately 51,000 hectares of CFL land on offer in the agreement in principle: either directly under quantum, or through deferred selection.[24]

By late June, the new valuations were completed. There was a wide divergence in the valuations commissioned by the Crown and by the KEC. Table 1 shows those valuations, the first based on a 'highest and best use' market value, the second assuming that the land use would be restricted to commercial forestry.

The differences in valuation were the result of different interpretations of various factors, including: whether certain units would more profitably be converted to dairy farming; the impact of climate change policies; road access to blocks; potential future income streams from units; and inflation of land values.[25] We note that in June 2006, when these valuations were done, no decisions about climate change policy had yet been made by Cabinet.

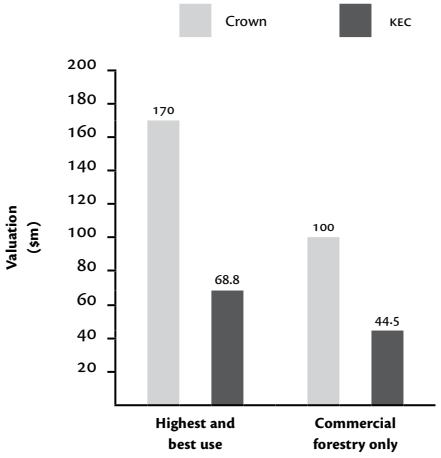


Table 1: Crown and KEC valuations for total pool of CFL land on offer (51,000 ha)

Source: Paul Jackson, brief of evidence, 27 June 2007 (doc B2(b)), pp 8–9

Beginning on 1 June 2006, the OTS and KEC negotiating teams met in Rotorua and Wellington at various times to seek an agreed valuation. This process was completed on 27 June, when the Treaty Negotiations Minister met with the KEC chairman Rawiri Te Whare and they together agreed to a valuation of $85 million for the total 51,000 hectare pool of CFL land, subject to a covenant restricting land use to forestry.[26] At the same meeting, it was agreed that the KEC would acquire the total pool of 14 CFL selection units on offer. The KEC adopted the Crown's proposal for which selection units would be acquired with the quantum amount, and which would be purchased by deferred selection (using the accumulated rentals on the quantum units plus additional funds).[27] A 29 June 2006 letter from Land Information New Zealand Crown property manager Paul Jackson to Te Whare set out which units were to be purchased within the quantum and which were to be

Crown forest licence	Gross area (ha)	Transfer value ($m)	Accumulated CFRT rentals as at April 2008 ($m)
Waimaroke (F1A)	1860	3.491	3.221
Waimaroke (F1C)	4401	5.281	7.418
Waimaroke (F1E)	5523	6.610	9.309
Waimangu (F2)	649	1.234	1.237
Pukuriri (F8)	9600	8.533	10.482
Wairapukao (F5)	2200	5.162	3.879
Horohoro (F7)	1164	1.512	1.218
Rotoehu (F8)	1689	4.177	4.223
Total	27,086	36.000	40.985

Table 2: Settlement licensed land offered to KEC in deed of settlement **Source: document B1(8)**

Crown forest licence	Gross area (ha)	Transfer value ($m)	Accumulated CFRT rentals as at April 2008 ($m)
Waimaroke (F1B)	7615	13.567	12.834
Waimaroke (F1D)	3307	4.188	5.574
Reporoa (F4A)	7071	16.476	12.064
Reporoa (F4B)	2269	5.629	3.870
Reporoa (F4C)	3089	7.675	5.271
Highlands (F6)	530	1.464	0.985
Total	23,881	49.000	40.599

Table 3: Deferred licensed land offered to KEC in deed of settlement **Source: document B1(8)**

purchased under deferred selection, and the value of accumulated rentals associated with each unit.

We reproduce the information from that letter in tables 7 and 8. We note that the alphanumeric descriptors refer to the CFL units, and do not correspond with the legal lot descriptions used in the agreement in principle, deed of settlement, and in our appendix I.

These tables show that eight CFL units with a combined value of $36 million will be transferred to Te Pumautanga (the post-settlement governance entity representing the KEC hapu and iwi, and the body which will receive the settlement assets) under the quantum. These units are called 'settlement licensed land'. The value of the accumulated rentals associated with the 27,086 hectares of settlement licensed land amounts to almost $41 million. This figure approximately represents the cost to the claimants of the delay in settlement since 1990, and therefore the accumulated rentals are paid to Te Pumautanga outside the quantum. The right of deferred selection granted to the KEC allows it to purchase further CFL land from within the pool at market value, using the accumulated rentals and any other funds available to it. At the 27 June 2006 meeting referred to above, the KEC opted to purchase the entire pool of CFL land on offer. The 23,881 hectares of CFL land remaining in the pool to be acquired under the deferred selection mechanism is called 'deferred licensed land'. The value of this land is $49 million, greater by $8 million than the value of accumulated rentals to be received by Te Pumautanga on settlement licensed lands. Thus, Te Pumautanga must cover the difference using other funds. The approximately $40.6 million of accumulated rentals associated with the deferred licensed lands is to be paid not to Te Pumautanga, but to the Crown. Appendix II shows the locations of all CFL lands included in the settlement.

Commercial redress terms of the deed of settlement

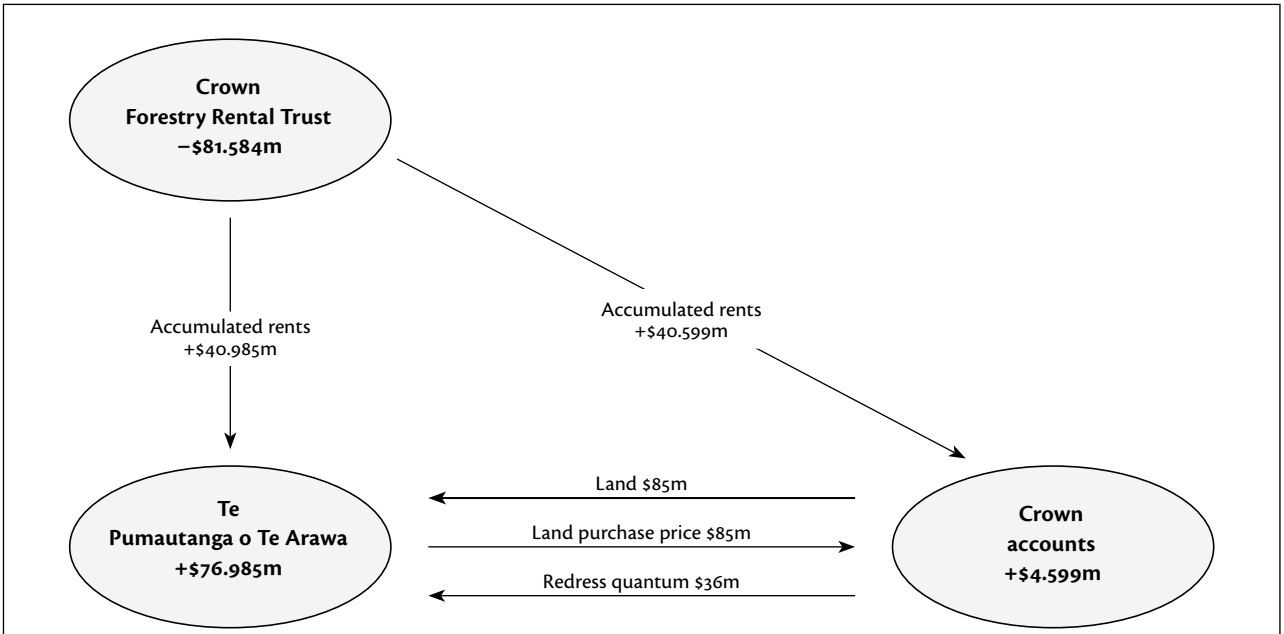
The deed of settlement between the KEC and the Crown was signed on 20 September 2006. The deed includes an historical account and apology, cultural redress terms, and commercial redress terms. Here we are concerned only with the last of these.

The deed notes that the KEC had been offered a six-month right of deferred selection over additional CFL lands outside quantum, and that it had exercised that right by agreeing to purchase all deferred licensed land on offer. The schedules to the deed contain a full description of the 51,000 hectares of CFL lands (including both quantum land and deferred licensed land) selected by the KEC, but do not indicate which units are to be transferred within the quantum and which under deferred selection. The deed stipulates that the settlement legislation will provide that 'in relation to the Deferred Licensed Land . . . with effect from the Actual Deferred Settlement Date, the Crown will be a "Confirmed Beneficiary" under clause 11.2 of the trust deed of the Crown Forestry Rental Trust', allowing it to receive the accumulated rentals associated with the deferred selection lands.[28] The terms of the covenant restricting the land use to commercial forestry are set out at clauses 12.47 to 12.49 of the deed.

The deed also offers a right of deferred selection over other commercial assets:

- a Ministry of Social Development residential dwelling, to be leased by Te Pumautanga back to the Ministry of Social Development;
- five schools (Rotokawa School, Lynmore Primary School, Mokoia Intermediate School/Owhata School, Ngongotaha School, and Horohoro School), to be leased by Te Pumautanga back to the Ministry of Education;
- the 1458-hectare Horohoro State Forest, currently administered by the Ministry of Agriculture and Forestry;
- a 68-hectare former Te Puni Kokiri farm property, currently landbanked by OTS; and
- four geothermal wells in the Ngatamariki field.

We note that two schools (Western Heights High School and Otonga Road School) offered under a buy



Net cash flows to parties to KEC settlement

Source: Dr Brian Easton, 'Commentary on the Agreement between the Crown and Nga Kaihautu o Te Arawa', report commissioned by the Waitangi Tribunal, 2007 (doc B20), p 12

and leaseback scheme in the agreement in principle were removed from the deed of settlement. These non-CFL commercial settlement assets were not the subject of substantive submissions in our June 2007 hearing. We do note, however, that both Ngati Whakaue and Ngati Raukawa claimed customary interests in the Horohoro State Forest, and Ngati Whakaue disputed that any of the groups represented by the KEC had had customary interests there recognised by the Native Land Court.[29]

One other provision in the deed warrants mention. Clauses 11.19 and 11.20 provide for the creation of two public access easements across a Whakarewarewa forest block which is not a part of the KEC settlement package, and which therefore creates no cost or benefit for the KEC. The Crown acknowledged that the easements were included in the deed of settlement as a 'trade off' with the Rotorua District Council, in return for the council's cooperation in facilitating other elements of the settlement.[30] Ngati Whakaue objected to the easements, on the ground that they would reduce the value of the land in that block – land which, they expected, would form a part of their Treaty settlement in the future. (The Parekarangi 4 or Moerangi blocks on which the easements will be located were awarded to Ngati Whakaue in the Native Land Court in 1888.[31]) Both Ngati Whakaue and the Crown filed evidence and submissions on the easements. However, because of the limited time we have had to prepare this report, we have not been able to consider the matter fully. We would simply comment

that, to the extent that the consultation process with Ngati Whakaue over the easements was the same as the general consultation process on overlapping interests, our findings in respect of the latter issue apply equally to the consultation over easements.

The commercial redress terms of the KEC settlement are complex to grasp. Dr Brian Easton helpfully elucidated the situation by preparing a diagram showing the net cash flows resulting from the various transactions associated with the settlement. We reproduce his diagram here as figure 1.

First, Te Pumautanga receives a quantum of $36 million from the Crown as commercial redress for historical Treaty breaches. It nominates to spend all of that quantum on CFL forests. Next, Te Pumautanga receives $40.985 million from CFRT in accumulated rentals on the CFL forests purchased. With the $40.985 million of accumulated rentals, plus approximately $8 million of other funds, Te Pumautanga purchases $49 million worth of additional CFL lands, exercising its right of deferred selection. The accumulated rentals associated with the deferred licensed land, totalling approximately $40.599 million, are paid to the Crown by CFRT. Thus:

- The net financial benefit to Te Pumautanga from the settlement is $76.985 million, which is equal to the value of the quantum ($36 m) plus the value of the associated accumulated rentals ($40.985 m). After spending this sum on CFL lands, plus approximately $8 million from other sources, Te Pumautanga owns $85 million in forest assets following the settlement.
- The net position of CFRT is reduced by $81.584 million following the settlement: that being the sum of the accumulated rentals paid out to Te Pumautanga ($40.985 m) and to the Crown ($40.599 m).
- The net position of the Crown is increased by $4.599 million, that being the difference between the value of the quantum awarded to Te Pumautanga ($36 m), and the value of the accumulated rentals on deferred licensed land paid to the Crown by CFRT ($40.599 m). (The offer of deferred selection CFL lands to Te Pumautanga is fiscally neutral for the Crown because it simply gives Te Pumautanga the option to buy additional lands at market value.) In addition, a $85 million appropriation is required to cover the cost of the forestry covenants: that is, the difference between the Crown's assessment of the market value of the CFL lands, and the agreed price at which the land is transferred to the KEC.

Crown Engagement with Non-KEC Central North Island Groups with Overlapping Interests

Having described the progress of negotiations between the KEC and the Crown, and the terms of the deed of settlement which has eventuated from those negotiations, we now turn to review the process by which the Crown sought to protect the interests of non-KEC groups whose interests overlap those of the KEC. This process was undertaken by the Crown in parallel to the KEC negotiations. We dealt in some detail with the equivalent overlapping claims process in respect of cultural redress issues in our first settlement process report. During our June hearing on commercial redress issues, counsel for the Crown Mr Andrew stressed to us that its consultation processes in respect of commercial redress and cultural redress were one and the same. Therefore, he agreed in principle to the Tribunal applying to the Crown's commercial redress consultation process its findings in respect of the consultation on cultural redress.[32] Nevertheless, because different groups were affected by the commercial redress issues, and for the sake of thoroughness, we review here the key communications and hui between OTS and both non-KEC Te Arawa groups and non-Te Arawa central North Island groups.

The director of OTS, Paul James, described to us the measures taken by the Crown to address overlapping claims issues during the KEC negotiations. In early 2005,

OTS and KEC together identified two categories of groups with interests overlapping those of the KEC. The Crown's two categories were:

- non-KEC Te Arawa groups with overlapping interests: Tapuika, Waitaha, Ngati Rangiwewehi, Ngati Makino, and non-KEC Ngati Whakaue; and
- non-Te Arawa central North Island groups with overlapping interests: Ngati Raukawa, Ngati Tuwharetoa, Ngati Whare, Ngati Manawa, Ngati Haka–Patuheuheu, Ngati Awa, and Ngati Tuwharetoa (Bay of Plenty).

Slightly different processes were followed by the Crown in dealing with groups in each of these categories, but the essence of the approach was the same. Three rounds of form letters were sent out to each overlapping claimant group: the first following the first offer to the KEC but prior to the signing of the agreement in principle ('initial contact'); the second following the signing of the agreement in principle ('substantive consultation'); and the third inviting comment on the provisional decision of the Treaty Negotiations Minister on overlapping claims matters. The key difference in the approach taken to non-KEC Te Arawa groups, versus non-Te Arawa groups, came before the agreement in principle was reached, when overlapping Te Arawa groups were sent two letters instead of one. We discuss this more fully below.

Some of the letters sent out to the two categories of groups described above were filed by the Crown as evidence in our inquiry. However, it is not clear to us whether the Crown filed a comprehensive set of letters. As a result, we are uncertain about the significance of the fact that we did not see letters to all of these groups for each stage. We commented on the Crown's filing of evidence in our earlier report on cultural redress matters.

Phase 1: Communication and assessment of overlapping interests before the agreement in principle

On 29 June 2005, OTS wrote to non-Te Arawa central North Island groups. The letter invited recipients to identify any interests they might have in areas which were the subject of the KEC negotiations, saying:

> Any information you are able to provide will enable the Crown to take these interests into account when considering what redress it can offer to the Te Arawa iwi and hapu represented by the Kaihautu Executive Council.

Recipients of the letter were given a month to reply with some or all of the following information:

- the boundaries of the general area in which the group exercised customary interests;
- the ancestor, iwi, or hapu through which the group identified those interests;
- any specific land block interests within the KEC area of interest and the basis for those interests;
- details of Native Land Court awards of customary land within the group's area of interests;
- any pa or kainga, or other sites of major significance (eg, wahi tapu or mahinga kai);
- any information about the group's use of rivers and other waterways; and
- any other information that might assist the Crown in assessing overlapping interests, including ancestral associations.

Attached to the letter was a 1:500,000 scale map of the KEC area of interest, and a brief summary of the Crown's historical Treaty claims process and overlapping claims policy. The attached maps filed in evidence in our inquiry were poor quality black and white photocopies. The outline of overlapping claims policy indicated that the Crown's information-gathering process on overlapping claims would involve two stages: 'initial contact' made before the signing of the agreement in principle with the KEC; and 'substantive consultation' made after the signing of the agreement in principle. Finally, the letter suggested that groups get in touch with the KEC directly to discuss overlapping interests.[33] We note that the due date for responses, 29 July 2005, was four days after the Crown's initial offer to the KEC.

Also on 29 June, a similar letter was sent to non-KEC Te Arawa groups. This letter informed recipients about the KEC's identified area of interests, and notified them that a second letter would follow shortly inviting them to identify any of their own interests which overlapped with those of groups within the KEC. Attached to the letter was a map showing the KEC area of interest.[34] The follow-up letter was sent out on 28 July 2005, immediately after the Crown's first offer to the KEC. The attached general policy summaries were the same as those included in the 29 June 2005 letter to non-Te Arawa groups, as was the list of the kinds of information sought by the Crown to establish the groups' interests (ie, the list above).

The letter also described the additional steps the Treaty Negotiations Minister had directed officials to take in order to safeguard the interests of non-KEC Te Arawa groups. These additional steps were: the provision directly to the group of a summary of preliminary Crown research on that group's overlapping interests; and the seeking of information from those groups on their future intentions in negotiations. Attached to the letter was a table setting out the Crown's preliminary assessment of each group's interests in the KEC area of interest. The table set out the Crown's understanding of the general area encompassed by the groups' Treaty claims (ie, claims registered with the Waitangi Tribunal), the specific blocks which lay within those areas, and specific sites of significance to the group. These assessments were based on statements of claims for the Tribunal's central North Island inquiry, and on Native Land Court minute book references from 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', a report by Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O'Malley filed for the central North Island inquiry.[35] The letter also suggested that groups get in touch with the KEC directly to discuss overlapping interests. Recipients were asked to provide this information by 17 August, leaving them around six weeks to respond.[36]

The responses of Ngati Whakaue and Ngati Rangitihi to these letters were filed as evidence in our inquiry. Counsel for Ngati Whakaue, John Kahukiwa, replied to OTS on 17 August, directing the office to evidence filed by Ngati Whakaue in support of their claims in the Tribunal's central North Island inquiry for evidence on their customary interests. He noted that the Crown had limited its information gathering to statements of claims and 'Nga Mana o te Whenua o Te Arawa', but that other sources were available to it in the central North Island inquiry, including pleadings, document banks, and testimonial evidence.[37] Counsel for Ngati Rangitihi, Deborah Edmunds, replied to OTS on 12 August, saying:

> To provide you with the information you request would take a considerable amount of time and resources. In fact, it is like preparing a customary usage/mana whenua report for the purposes of Waitangi Tribunal hearings.

Ms Edmunds then noted that her Ngati Rangitihi clients were currently busy preparing submissions for the Tribunal's central North Island inquiry, but would seek to provide the information requested a week after the due date. Finally, she conveyed the 'strong view' of Ngati Rangitihi that:

> any consultation should occur *before* an Agreement in Principle. We note that previous Agreement In Principles contain significant allocations of specific sites to the negotiating group. We fail to see how this can be done without creating significant potential prejudice unless there has been extensive prior consultation on potential redress sites as well as broader issues. [Emphasis in original.][38]

In a 26 August 2005 letter, Ngati Rangitihi described the boundaries of its core rohe and the blocks in which it had interests, and referred officials to its submissions, mana-whenua report, and other evidence in the Tribunal's central North Island and Te Urewera inquiries.[39]

Using the information available to it at the time, the Crown made its preliminary assessment of overlapping interests, and reported this to the Treaty Negotiations

Minister on 15 August 2005, just before the Crown's second offer to the KEC.[40] It was this preliminary assessment which informed the Crown's decision to reduce the size of the pool of CFL land in its second offer to the KEC, from approximately 62,000 hectares to approximately 51,000 hectares. The OTS briefing paper of 15 August set out the rationale behind this. Officials recognised that the extension of the right of deferred selection to include CFL lands would be sought by other central North Island groups in future settlements, and, if granted, would increase the amount of CFL land required for each of these future settlements. Officials advised that the key issue to be addressed in respect of overlapping interests of non-KEC iwi was the sufficiency of CFL land remaining in the Kaingaroa Forest for future settlements with Ngati Manawa, Ngati Rangitihi, and Ngati Tuwharetoa. They considered that relatively large amounts of Kaingaroa CFL land would remain available for settlements with Ngati Manawa and Ngati Rangitihi (though they noted that Ngati Rangitihi's interests were in areas overlapped by Ngati Manawa, and possibly by Ngati Tuwharetoa and Ngati Whare). Officials' key concern was that Ngati Tuwharetoa 'may have threshold interests in the southern part of the Kaingaroa 2 block being offered to the Kaihautu Executive Council and may possibly have less CFL land available to them (relative to the Kaihautu Executive Council collective, Ngati Rangitihi and Ngati Manawa)'. Thus, they recommended the reduction in the pool of CFL land in the Crown's second offer:

> Officials consider it prudent to further safeguard the interests of overlapping claimants groups (in particular, those groups discussed above) and therefore propose that, on the basis of the proposal that the Kaihautu Executive Council have the opportunity to purchase all the CFL land on offer, the following areas be removed from the initial Crown offer of CFL land:
>
> a. a southern part of the Kaingaroa 2 block (approximately half of the area subject to the Pukuriri CFL) to ensure that sufficient CFL land is available for a future settlement with Ngati Tuwharetoa . . . and
> b. parts of the Kaingaroa 1 block (parts of the Headquarters and Reporoa CFL included in the initial offer) due to uncertainties surrounding the threshold interests of iwi/hapu affiliated to the Kaihautu Executive Council in these areas.[41]

Officials then noted that 'further detailed analysis' would be required to ensure that there was no 'major imbalance in the availability of forest land relative to the nature and extent of Treaty breaches, between the Kaihautu Executive Council and other groups with claims', and that this would be undertaken following the signing of the agreement in principle. Lastly, officials advised that, following this further analysis, additional land in the Rotoehu West CFL may be included in the pool on offer, in order to address the KEC's repeated requests that the land available there be increased to better meet the interests of Ngati Pikiao.[42]

As is shown in appendix I, the second offer to the KEC extended the right of deferred selection to cover CFL lands, but reduced the total pool of CFL land available. The pool offered in the agreement in principle was slightly larger than that in the second offer, as additional Rotoehu West CFL land was included, as anticipated.

Phase 2: Communication and assessment of overlapping interests after the agreement in principle

Following the signing of the agreement in principle on 5 September 2005, the Crown embarked on its next round of information gathering in respect of overlapping interests. OTS director Paul James described the two dimensions of this process to us. First, the Crown undertook 'further comprehensive research' on the interests of overlapping groups, drawing in particular on forms of historical and customary evidence other than Native Land Court records.

This research was coupled with 'extensive consultation with the claimants who had overlapping interests'. In the cases of Ngati Manawa and Ngati Whare, the Crown drew upon information provided during direct negotiations.[43]

This 'extensive consultation' with iwi took the form of a further round of letters, sent to non-Te Arawa overlapping groups on 9 September, and to non-KEC Te Arawa groups on 14 September.[44] More than 100 letters were sent out by OTS following the signing of the agreement in principle.[45] The letter directed recipients to the copy of the KEC agreement in principle on OTS's website, and included a summary of the commercial redress provisions, including a map showing the location of the CFL forests included in the pool on offer.

The letters to non-KEC Te Arawa groups also drew the recipients' attention to the inclusion in the offer of particular CFL forests, where the Crown was aware that the recipient group had interests in those forests.

Recipients were invited to comment on the terms of redress offered to the KEC by 4 November 2005, approximately six weeks after the letters were sent out.

A number of responses were included in the Crown evidence filed in our inquiry. Ngati Rangitihi sent a comprehensive submission on the agreement in principle on 28 November 2005.[46] The submission expressed a number of concerns about the process by which the agreement in principle had been developed, many of which were broadly similar to the concerns raised by claimants at our February and June 2007 hearings. In particular, Ngati Rangitihi were concerned that the inclusion of Rotoehu CFL land in the offer to the KEC would leave insufficient land available for their own future settlement. Ngati Whakaue sent in their substantive response to the agreement in principle on 25 November 2005.[47] Their response also raised concerns with the process as whole, and expressed the view that the Crown intended to transfer to Te Pumautanga lands in which Ngati Whakaue had interests. In particular, Ngati Whakaue objected to the inclusion of Whakarewarewa CFL lands in the agreement in principle. Counsel for Ngati Rangiwewehi, Tauhara hapu, Ngati Rangiteaorere, and Ngati Wahiao responded on 9 December 2005.[48] The Ngati Tuwharetoa claims committee's chairperson, Paranapa Otimi, responded on 12 December 2005, noting Ngati Tuwharetoa's interests in a number of CFL blocks on offer to the KEC: Pukuriri, Waimaroke, and Wairapukao.[49]

As a result of this round of research and consultation, a second assessment of overlapping interests was produced. A comparison of OTS's analysis of overlapping interests before and after the agreement in principle shows that a number of adjustments were made as a result of the reassessment after the agreement in principle:

- Ngati Rangitihi: a threshold interest was recognised in Rotomahana Parekarangi, and a threshold interest in Matahina A6 was no longer recognised;
- Ngai Tuhoe and Ngati Haka–Patuheuheu: a threshold interest was recognised in Waiohau B9 and Kaingaroa 1;
- Ngati Tuwharetoa: a threshold interest was recognised in Erua and Waimihia Forests;
- Ngati Whare: a threshold interest was recognised in Heruiwi;
- Ngati Hineuru: a threshold interest was recognised in Kaweka, and a threshold interest in Heruiwi (other than Heruiwi 4) was no longer recognised; and
- Ngati Kahungunu: a threshold interest was recognised in Heruiwi 4 and Gwavas.[50]

Appendix III shows the Crown's final assessment of the interests of overlapping groups in the central North Island CFL blocks which will remain after the KEC settlement. This is the land from which commercial redress in future central North Island Treaty settlements will be provided. We have rearranged the Crown's data so that each forest area is listed only once, with the names of the various overlapping groups with interests in that block alongside. The Crown's original table was arranged according to overlapping groups, and repeated the names of some forest

areas a number of times, next to each group with interests there. We believe our presentation of the same data gives a more accurate representation of the situation as it is on the ground: the interests of many groups overlapping a finite amount of land.

As a result of this reassessment, the Crown concluded that adequate central North Island CFL land would remain following the KEC settlement to accommodate future central North Island settlements. This 'included assessing a number of possible configurations of claimant groups coming together for direct negotiations'.[51] As a result, the Crown concluded that no change to the CFL redress offered to the KEC was necessary, and all units included in the pool of CFL land described in the agreement in principle remained on offer to the KEC.

But by the Crown's own assessment, each of the 51,000 hectares of CFL land on offer to the KEC is overlapped by the interests of one or more non-KEC group.[52] This gives some impression of the complexity of customary interests over these lands. Similarly, the vast majority of the remaining central North Island CFL lands outside the KEC offer are also claimed by more than one group.[53] We note that the threshold interests of some claimant groups in our inquiry did not figure in the Crown's assessment of overlapping interests: Ngati Raukawa, Tapuika, Ngati Rangiteaorere, Ngati Tamakari, Ngati Rangiunuora, and Ngati Whaoa.

Phase 3: Provisional decision of the Minister on overlapping interests

On 14 July 2006, OTS sent out a third round of form letters, advising overlapping groups of the Treaty Negotiations Minister's provisional decision on overlapping claims matters.[54] The letters advised groups that the Crown had been 'careful to ensure that it will retain sufficient CFL lands and other commercial assets within the central North Island region for use in future Treaty settlements with other iwi groups'. It also described the areas of remaining central North Island CFL with which the Crown believed the recipient group could probably demonstrate the strongest customary association, and other CFL lands where the recipient group could demonstrate a threshold interest. Recipients were asked to reply with their comments by 3 August 2006, less than three weeks after the letters were sent out. On 7 August, overlapping groups were informed by letter of the Treaty Negotiations Minister's final decision on overlapping claims matters.

The 14 July letter to Ngati Rangitihi noted that OTS officials were available to meet in the following two weeks to discuss overlapping claims matters. This hui was held in Rotorua on 28 July 2006. Senior KEC representatives attended.[55] A similar offer was extended to Ngati Whakaue. Ngati Whakaue made a substantive response to the Treaty Negotiations Minister's provisional decision on 3 August 2006, but refused to meet with officials if members of the KEC were in attendance. A hui was subsequently arranged and held on 26 September 2006.[56] The deed of settlement was signed on 30 September 2006.

Tribunal's June 2007 Report on Cultural Redress Matters

The Waitangi Tribunal issued its *Report on the Impact of the Crown's Treaty Settlement Policy on Te Arawa Waka* in prepublication format on 15 June 2007. In addition to recommendations concerning sites for specific cultural redress, that report made general findings and recommendations:

- that the Crown had breached the Treaty by failing to act as an honest broker during the KEC negotiation process, and by failing to protect the customary interests of overlapping groups in the cultural redress sites offered to the KEC;
- that the Crown must improve its policies and practices in order to achieve fair and sustainable settlements which restore the Treaty relationship;
- that the Crown must reprioritise the work programme for OTS to commence negotiations with all Te Arawa

hapu and iwi who stand outside the KEC, and with Ngati Makino; and
- that hui should be held to determine whether or not those groups with outstanding mandate issues support the KEC.

Summary

The key points in this chapter were as follows:

- In 1989, the Crown reached an agreement with the New Zealand Maori Council and the Federation of Maori Authorities whereby it would not sell off State-owned forest lands but would keep them for future use in Treaty settlements. The rentals paid to the Crown by the licensees using the CFL blocks are held in a trust. When CFL land is transferred to a successful claimants group in a Treaty settlement, the accumulated rentals associated with that land are paid out of the trust to the claimant group.
- The key milestones in the negotiations between the Crown and the KEC were: the signing of the terms of negotiation in November 2004; the signing of the agreement in principle in September 2005; and the signing of the deed of settlement in September 2006. The proposed settlement will transfer a total of 51,000 hectares to of central North Island CFL land, in 14 CFL blocks, to the KEC. The agreed value of that land, subject to a covenant ensuring that it will stay in forest for 28 years, is $85 million.
- In acquiring this land in its settlement, the KEC will 'spend' its $36 million settlement quantum on eight CFL blocks, then spend the accumulated rentals on those blocks (plus some additional funds) to purchase an additional six CFL blocks. The use of this so-called 'deferred selection' mechanism in Treaty settlements is unusual.
- During the KEC negotiations, the Crown undertook to inform and to protect the interests of central North Island groups with interests that overlap those of the KEC. These groups included core Te Arawa hapu and iwi who stand outside the KEC, and other central North Island iwi, such as Ngai Tuhoe and Ngati Tuwharetoa.

Notes

1. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 152
2. Ibid, p 153
3. Crown forestry agreement 1989, 20 July 1989, cl 6
4. Deed poll, 17 October 1989
5. Crown Forest Assets Act 1989, ss 11, 34, 40; Treaty of Waitangi Act 1975, s 8HB
6. Crown Forest Assets Act 1989, pt 4
7. Ibid, s 35
8. 'Trust Deed for Crown Forestry Rental Trust', April 1990, cl 9
9. Dr Brian Easton, 'Commentary on the Agreement between the Crown and Nga Kaihautu o Te Arawa', report commissioned by the Waitangi Tribunal, 2007 (doc B20), p 6
10. 'Trust Deed for Crown Forestry Rental Trust', April 1990, cl 11
11. Ngati Awa Settlement Act 2005, s 141
12. Ngai Tahu Claims Settlement Act 1998, s 34; Waikato Raupatu Claims Settlement Act 1995, s 26; Te Uri o Hau Claims Settlement Act 2002, s 121; Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, s 123
13. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 15 August 2005 (doc B3(8)), p 5
14. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 22 July 2005 (doc B3(6)), p 3
15. OTS, 'Crown Settlement Offer for the Settlement of the Historical Claims of the Affiliate Te Arawa Hapu', undated (doc B3(15))
16. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 22 July 2005 (doc B3(6)), pp 3–5
17. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 15 August 2005 (doc B3(8)), p 3
18. Ibid, p 6
19. Ibid
20. 'Agreement in Principle for the Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu', 5 September 2005, cl 63
21. Paul Jackson, brief of evidence, 27 June 2007 (doc B22(b)), p 11
22. Ibid, p 7; OTS to Minister in Charge of Treaty of Waitangi Negotiations, 26 June 2006 (doc B3(11)), p 4
23. Paul Jackson, brief of evidence, 27 June 2007 (doc B22(b)), p 7
24. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 26 June 2006 (doc B3(11)), p 4
25. Paul Jackson, brief of evidence, 27 June 2007 (doc B22(b)), p 10

26. An appropriation of $85 million was included in the 2007 Budget to cover the cost of the forestry covenant to the Crown; that is, the difference between $170 million (the Crown's own assessment of the market value of the land at highest and best use) and $85 million (the agreed 'forestry only' value at which the land was actually transferred by the settlement): *Budget 2007: The Estimates of Appropriations for the Government of New Zealand for the Year Ending 30 June 2008*, bk 5, vol 2, 17 May 2007 (doc B35), p 788.
27. Paul Jackson to KEC, 28 June 2006 (doc B1(7))
28. *Deed of Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu* (Wellington: OTS, 2006) (doc B26), cl 12.25
29. Counsel for Ngati Whakaue, closing submissions, 4 July 2007 (paper 3.3.54), pp 2, 9; counsel for Ngati Raukawa, closing submissions, 4 July 2007 (paper 3.3.57), p 2
30. Crown counsel, closing submissions, 6 July 2007 (paper 3.3.59), p 21
31. Counsel for Ngati Whakaue, closing submissions, 9 July 2007 (paper 3.3.62), p 6
32. Crown counsel, oral submissions, 27 June 2007 (recording 4.3.3)
33. OTS to Ngati Manawa, 29 June 2005 (doc B21(a)(11))
34. OTS to Ngati Wahiao, 29 June 2005 (doc B21(a)(12))
35. Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O'Malley, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', 2 vols, report commissioned by CFRT, 2005 (docs A107, A108)
36. OTS to Ngati Rangitihi, 28 July 2005 (doc B21(a)(13))
37. Counsel for Ngati Whakaue to OTS, 17 August 2005 (doc A32(a)(35))
38. Counsel for Ngati Rangitihi to OTS, 12 August 2005 (doc A32(a)(9))
39. Counsel for Ngati Rangitihi to OTS, 26 August 2005 (doc A32(a)(10))
40. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 15 August 2005 (doc B3(8))
41. Ibid, p 7
42. Ibid, pp 7–8
43. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), p 27
44. See, for example, docs A32(a)(12), (37), (84), (94)
45. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32), p 13
46. Counsel for Ngati Rangitihi to OTS, 28 November 2005 (doc A32(a)(19))
47. Counsel for Ngati Whakaue to OTS, 25 November 2005 (doc A32(a)(43))
48. Counsel for Ngati Rangiwewehi, Tauhara hapu, Ngati Rangiteaorere, and Ngati Wahiao to OTS, 9 December 2005 (doc A32(a)(99))
49. Paranapa Otimi to OTS, 12 December 2005 (doc A32(a)(100))
50. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), pp 23–25, 28–29
51. Ibid, pp 29–30
52. Ibid, p 23
53. Ibid, p 29
54. See, for example, OTS to Ngati Rangitihi, 14 July 2006 (doc A32(a)(23)); OTS to Ngati Whakaue, 14 July 2006 (doc A32(a)(55)); OTS to Ngati Makino, 14 July 2006 (doc A32(a)(73)); OTS to Ngati Haka–Patuheuheu, 17 July 2006 (doc A32(a)(88)); OTS to Ngati Tuwharetoa, 17 July 2006 (doc A32(a)(104))
55. OTS to Ngati Rangitihi, 14 July 2006 (doc A32(a)(23)); OTS, notes of meeting with Ngati Rangitihi, 31 July 2006 (doc A32(a)(25))
56. Ngati Whakaue to OTS, 3 August 2006 (doc A32(a)(59)); OTS, background notes to meeting with Ngati Whakaue, 26 September 2006 (doc A32(a)(62))

CHAPTER 3

TERMS OF THE DEED OF SETTLEMENT

Introduction

Broadly, the first set of issues raised by claimants in this inquiry can be expressed in this way: Where the commercial redress provisions in the deed of settlement are inconsistent with the Crown forestry agreement made between Maori and the Crown in 1989, are they nevertheless consistent with Treaty principles?

For the sake of brevity, in this chapter we refer to the July 1989 Crown forestry agreement, and the statutory instruments which gave it effect (the Crown Forest Assets Act 1989 and the April 1990 CFRT deed), collectively as 'the 1989 agreement' or 'the 1989 regime'. The terms of the KEC deed of settlement depart from the 1989 regime in two significant ways. First, CFL lands will be transferred to Te Pumautanga, following the passage of settlement legislation, without a determination and a binding recommendation of resumption by the Waitangi Tribunal. Two categories of CFL lands will be transferred in this way: settlement licensed land (to the value of the quantum) and deferred licensed land (to be purchased at market value by right of deferred selection). Secondly, the deed provides for legislation to be passed which will deem the Crown a confirmed beneficiary of the accumulated rentals associated with the CFL lands transferred under right of deferred selection. That these provisions are inconsistent with the 1989 regime was not at issue: the Crown admitted as much (with the caveat, discussed below, that the 1989 agreement contemplated that the Crown would receive CFRT rentals under certain circumstances) before the Court of Appeal in June 2007.[1] Rather, the key matters raised by claimants for our consideration are:

- whether any departure from the 1989 agreement is per se in breach of the Treaty; and, if not,
- whether the terms of the KEC deed of settlement relating to the deferred selection mechanism and the deeming of the Crown as a confirmed beneficiary of CFRT funds are consistent with the Treaty.

The 1989 Agreement

We do not propose to deal with the first of these issues at any length. At our June 2007 hearing, we heard different views on the nature and status of the 1989 agreement. The claimants argued that the Crown Forestry agreement was a solemn compact. Mr Paul spoke at some length about the New Zealand Maori Council view of the agreement. Ms Ertel and Ms Feint emphasised that the 1989 agreement

was reached in settlement of litigation, and was binding on the parties. Ms Feint submitted:

> In departing from the 1989 Agreement, the Crown has breached its Treaty obligations, which must include a duty to adhere to agreements reached with its Treaty partner and a duty actively to protect the rights of all claimants to Crown forest lands.[2]

Other claimant counsel made submissions along similar lines.

The Crown argued at length that the 1989 agreement was never intended to preclude the direct settlement of Treaty claims, outside the processes it established:

> The 1989 agreements do not create a Treaty obligation on the Crown to only pursue matters before the Tribunal. The Crown must remain open to other means of settling Treaty grievances.[3]

Counsel for the Crown noted that Maori, including some groups in the present inquiry, had consented to the use of these other options, and had themselves sought to pursue them. He argued that the Crown was free to choose between Treaty-compliant options in settling Treaty claims:

> The Crown must not settle with groups in a way that substantially prejudices its ability to provide sufficient redress to other groups. Fair processes must be used. Subject to those caveats, direct negotiation is Treaty-compliant.[4]

The High Court has considered the legal implications of the inclusion in the KEC deed of settlement of provisions which are inconsistent with the 1989 agreement. Justice Gendall, in his High Court decision, declined to make the declaration sought by the New Zealand Maori Council and the Federation of Maori Authorities to strike the commercial redress provisions out of the deed of settlement, on the ground that 'as a matter of Parliamentary Sovereignty, the Courts cannot presume to tell Parliament what it can and cannot do'.[5] Judge Gendall's view that the content of settlement legislation was a matter for Parliament, not the courts, to decide was upheld by the Court of Appeal. In its decision, the Court of Appeal emphasised that the 1989 agreement was a political compact:

> The Settlement Deed in the present case is equally a political compact, with the only material unconditional obligation undertaken by the Crown being the introduction of a Bill for consideration by Parliament. The wisdom of proceeding with the settlement with TPT [Te Pumautanga o Te Arawa] in the face of strong opposition from the appellants, Ngati Makino and others, and in the face of the criticisms expressed by the Tribunal, is like the decision to proceed with the *Sealords* settlement: a political decision to be made in Parliament.[6]

The jurisdiction of the Waitangi Tribunal is far broader than that of the courts. Our statutory task is to determine whether or not the KEC settlement, or any of the elements or processes it contains, is consistent with the principles of the Treaty.

We now turn to examine the specific provisions of the deed of settlement which, the claimants allege, are in breach of the Treaty: the extension of the right of deferred selection to cover CFL lands, and the provision to deem the Crown a confirmed beneficiary of CFRT rentals.

Deferred Selection over CFL Lands

While rights of deferred selection or first refusal to purchase have been used in past settlements, there is no exact precedent for extending a right of deferred selection over CFL lands as has been given to the KEC. The deferred selection provision was included in the deed of settlement after the KEC asked that it be included in its 8 August 2005 counter-offer. However, this request would not have come

as a surprise to the Crown. In a briefing paper to the Treaty Negotiations Minister immediately prior to the Crown's first offer to the KEC, OTS officials explained the benefits (for the KEC and for the Crown) of extending deferred selection to cover CFL lands:

> If the entire quantum is used for licensed Crown forest land, the Kaihautu Executive Council would not normally be able to purchase other commercial assets at the time of settlement using funds in addition to their quantum. The inability to do so could detract from the overall settlement package . . .
>
> To ensure that the Kaihautu Executive Council can still purchase the full range of assets without using quantum would require a 'deferred selection process' (DSP). DSP has not been a common redress instrument in recent settlements, the most comparable past example to what is proposed in this instance being that offered to Ngai Tahu.
>
> The key benefit of a DSP for the Kaihautu Executive Council would be the ability to purchase land subject to a CFL to the full value of the quantum, receive the rentals and then be able to purchase (and leaseback) non-surplus Crown land, and purchase geothermal assets very shortly after Settlement Date.
>
> From a Crown perspective, the DSP has the benefit of enhancing the value of the package with limited cost to the Crown. In addition, a time-limited DSP has lower operational costs and decreases risks associated with overlapping claimants than a Right of First Refusal (RFR). Those operational costs do increase the longer a DSP is in place.[7]

While officials anticipated that the right of deferred selection might need to be extended to cover CFL lands in order to 'enhance the acceptability of the total financial and commercial redress package' to the KEC, it was not put on the table in the Crown's first offer. Instead, following the KEC's request in its counter-offer, the Crown included it in its second offer.

On 15 August 2005, officials estimated that the value of the total pool in the initial offer was five times the value of the quantum.[8] The extension of the right of deferred selection to cover CFL land would enable the KEC to use the entire sum of accumulated rentals on quantum land to purchase additional CFL lands. In practice, it would more than double the total value of land which the KEC could select from the pool on offer.

The claimants in our inquiry objected to the offer of deferred selection over CFL lands for a number of reasons:

- It would create a financial benefit for the Crown, which would receive both the sale price (at market value) on the deferred selection lands, and the accumulated rentals associated with those lands.
- By increasing the quantity of land which the KEC could afford to purchase from the pool on offer, it would increase the risks that insufficient CFL lands would remain for use in future settlements, and that land of significant cultural value to overlapping groups would pass to the KEC.
- Similarly, by increasing the quantity of land available to the KEC, it would exacerbate the KEC's existing 'unfair advantage' of having first choice in the purchase of CFL settlement lands. (This was often expressed by claimants in terms of the Crown seeking to deal with claimant groups that were 'first up, best dressed'.)

We have little to say about the offer of deferred selection over CFL lands in and of itself. The claimants objected primarily to the *effects* of the offer: that is, the increase in the amount of land available to the KEC, and the corresponding reduction in CFL land remaining for future settlements with other iwi. We deal with these matters in chapter 4. We make our findings in respect of the first bullet point in the next section, dealing with the provision deeming the Crown to be a confirmed beneficiary. The substance of the other objections concerns the robustness of the Crown's processes for assessing the customary interests of overlapping groups, and for assessing the sufficiency of remaining

CFL lands for future settlements in the central North Island. We discuss each of those processes in the next chapter.

We have no objection in principle to any mechanism which allows the Crown to offer a more generous settlement to claimants, provided always that the interests of groups outside the negotiations are protected. We would add that at the point that deferred selection over CFL lands was included in the offer to the KEC, the Crown must have known that the area of land which the KEC would be able to acquire would more than double, given the value of the accumulated rentals. Thus, the duty of the Crown to actively protect the interests of all groups with overlapping interests was increased, particularly as every hectare of CFL land in the pool was subject to overlapping claims. The highest standard of consultation with overlapping groups would be required, to communicate the complexity of the deal on offer, and to allow the groups to ensure that their interests were not prejudiced in the process.

Deeming of the Crown as Confirmed Beneficiary

One of the most contentious issues for the claimants in this inquiry was the provision in the deed of settlement for the Crown to become a confirmed beneficiary of the accumulated rentals associated with deferred licensed lands. On the face of it, this appears to run counter to the fundamental purpose of the 1989 agreement, which provided for the transfer of the lands to claimant groups as redress for Crown Treaty breaches. However, as the Crown noted, the 1989 agreement does in fact contemplate the Crown receiving CFRT rentals and CFL lands in certain circumstances. According to the Crown Forestry agreement:

> If the Waitangi Tribunal recommends that land is no longer subject to resumption, the Crown's ownership and related rights are confirmed. . . .
>
> Whenever the Tribunal recommends that land is no longer subject to resumption, the accumulated capital in the Rental Trust relevant to that piece of land will be paid to the Crown. . . .
>
> Any monies remaining over from this account [CFRT funds] after all claims over forest lands have been settled will be refunded to the Crown.[9]

It is self-evident that none of these circumstances applies in the current situation. The essence of the Crown case seems to be this: by its own calculations, sufficient CFL lands will remain in the central North Island following the KEC settlement to accommodate future settlements with all other central North Island iwi. Thus, the accumulated rentals on deferred selection lands it will receive under the KEC settlement are in effect an 'advance payment' on rental moneys the Crown will (by its calculations) be entitled to at some point in the future, following the completion of all central North Island Treaty settlements. The Crown referred to itself as the 'residual beneficiary' of accumulated rentals and surplus CFL lands.

Development and communication of confirmed beneficiary proposal

On 9 September 2004, the Deputy Prime Minister and Minister of Finance, the Honourable Dr Michael Cullen, and the then Treaty Negotiations Minister, the Honourable Margaret Wilson, discussed a proposal, upon the completion of all central North Island Treaty settlements, to hold all remaining central North Island CFL lands and associated accumulated rentals in a trust established for the purpose of Maori economic development. They proposed that central North Island iwi would be given a right of first refusal over remaining central North Island CFL lands, to be purchased at market value. Central North Island iwi would not, however, receive the accumulated rentals associated with any land they purchased in this way. Instead, those

accumulated rentals, plus some or all of the remaining CFL land not purchased in this way by iwi, would be placed in the proposed Maori economic development trust.

While, as we discuss in the next section, the idea of the Maori economic development trust may have dropped off the radar, the other part of Dr Cullen's proposal persisted: during KEC negotiations the Crown proceeded on the basis that the accumulated rentals on deferred selection land would not go to the KEC. In our reading of the available evidence of internal Crown documents, it kept to itself the idea that it would become the beneficiary of those rents, right up until the time that that aspect of the settlement machinery became public. Officials' advice to the Treaty Negotiations Minister at the time of the first offer to the KEC was quite straightforward on the point. OTS's briefing paper of 22 July 2005 noted that further negotiation flexibility could be achieved through:

> extending the properties covered by the deferred selection to include specified parcels of land subject to CFLs (*where any accumulated rentals associated with the land would be returned to the Crown*). [Emphasis added.][10]

In its public communications – for example, letters to overlapping claimant groups, and in the agreement in principle itself – this detail was omitted from explanations of the proposed settlement. From the time of the second offer to the KEC, it was made clear to all parties that the KEC (or, more correctly, Te Pumautanga) would not receive the accumulated rentals on deferred selection lands. What was never mentioned, so far as we can see, was that the Crown would receive those rentals instead.

Of particular concern is that OTS did not mention this aspect of the settlement in its 20 December 2005 letter to CFRT. This was despite the fact that the letter was prepared in response to a specific request from CFRT for 'written clarification of the deferred selection process with regard to licensed Crown forest land . . . and the associated accumulated rentals' to be included in the KEC settlement.[11] We note that evidence of CFRT chief executive Ben Dalton confirms that the CFRT trustees and management became aware only:

> some time after the publication of the draft deed of settlement that the terms of settlement include the Crown being treated as a 'Confirmed Beneficiary' in relation to any Crown forestry rental proceeds associated with any Crown forest license land to be acquired . . . under the deferred selection process . . .[12]

Meanwhile, internal ministerial advice continued to indicate a clear expectation that the accumulated rentals would pass to the Crown. A 26 July 2006 Treasury briefing paper to the Minister for State Owned Enterprises made reference to the 'additional CFRT rentals that the Crown will forgo' as a result of the effect of the proposed forestry covenant on land values.[13] So far as we can, tell the proposal for the Crown to receive the accumulated rentals first became public in September 2006 when the deed of settlement was signed. The New Zealand Maori Council and the Federation of Maori Authorities initiated court proceedings in January 2007.

Tribunal finding

The rentals on CFL land have accumulated in CFRT funds since 1990 for the specific purpose of providing redress for the Crown's historical breaches of the principles of the Treaty. The Crown was a party to the agreement which established the trust for that purpose. In our view, for the Crown to include this provision in the deed of settlement is inconsistent with the Treaty. To make matters worse, the Crown failed to communicate this proposal to the other parties to that agreement (the New Zealand Maori Council and the Federation of Maori Authorities), to CFRT itself, to the claimant groups that might otherwise have received benefits from those rentals, and indeed to the general public.

Maori economic development trust proposal

At our June 2007 hearing, the Crown insisted that it had not planned to receive the rentals for itself. Rather, it argued that the accumulated rentals were always to have been paid into a Maori economic development trust, along the lines proposed by Dr Cullen and Margaret Wilson in September 2004. We now turn to discuss that proposal.

Dr Cullen's 9 September 2004 letter described above proposed that the accumulated rentals on CFL lands offered under deferred selection would not pass to the claimant group, but would instead be placed into a specially created Maori economic development trust. The purpose of the trust would be to fund Maori development on a national basis, rather than solely for the benefit of central North Island iwi. On 20 September 2004, Dr Cullen wrote to Ms Wilson to outline the proposal in a letter.[14] Her response was brief and non-committal.[15] Critically, in our view, there is no evidence of any further policy development of the idea, or consultation over it, either by Cabinet or by officials. This is despite the fact that Dr Cullen's letter specifically remarks that the proposal would require separate consultation with Maori in general, and central North Island Maori in particular. The absence of evidence suggests to us that the Maori development trust proposal may have become a dead letter.

This was a very important proposal, one which, if it were to be pursued, would have required major policy development and intensive consultation with stakeholders, including the New Zealand Maori Council, the Federation of Maori Authorities, Te Puni Kokiri, CFRT, Treasury, and all Maori. We have seen no evidence that this occurred. Nor have we seen evidence that this 2004 proposal was in the minds of officials or Cabinet during the KEC negotiations. Dr Cullen's initial, high-level sketch remains the fullest expression of the Maori economic development trust proposal.

In closing submissions, counsel for the Crown referred to the proposal in this way:

> to avoid any misapprehension by Maori, and as an indication of the Crown's good faith, the Government wishes to discuss with Maori placing the accumulated rentals and the purchase price of the deferred licensed land in a trust for the social and economic development of Maori.[16]

We are not convinced by the Crown's arguments that it always intended to place the accumulated rentals in trust, as proposed by Dr Cullen some years ago. There is simply no evidence before us to show that the Crown thought through this proposal before initialling the KEC deed of settlement. In our view, references to the proposal by the Crown at our hearing are in the nature of an *ex post facto* justification of its plan to receive the accumulated rentals for itself.

Tribunal finding

The Crown's inclusion in the deed of settlement of provisions deeming itself to be a confirmed beneficiary of the accumulated rentals on deferred selection land, without consultation and in disregard of its 1989 commitments, constitutes a breach of the principles and duties imposed by the Treaty of Waitangi and discussed in our first settlement process report (see pp 20–38).

Future directions

The 1989 agreement was reached in the expectation that all Treaty claims affecting CFL lands would be settled within four years. For a number of reasons, this has not happened. In our view, it is time for the parties to the 1989 agreement, along with iwi and hapu, to review the situation. We return to this view at the conclusion of our report.

Summary

The key points in this chapter were:

- The provisions of the KEC deed of settlement which offer a right of deferred selection over CFL lands, and which deem the Crown a confirmed beneficiary of the accumulated rentals on deferred selection land, are inconsistent with the 1989 agreement. This was not in dispute.
- In terms of the Treaty, however, our view is that the deferred selection mechanism, by increasing the amount of central North Island CFL land available to the KEC in the settlement – land that was subject to overlapping claims – and thereby reducing the CFL land available to all other iwi in future Treaty settlements, the Crown's duty of active protection of the interests of all Maori was increased. Under the circumstances, the highest standards of communication and meaningful consultation were required.
- For the Crown to have introduced into a Treaty settlement a provision whereby it would receive accumulated rentals for CFRT for itself is in breach of the principles and duties imposed by the Treaty. Furthermore, we are concerned at the Crown's apparent failure to communicate the proposal to affected parties, in particular CFRT, the New Zealand Maori Council, and the Federation of Maori Authorities, until the deed of settlement went public.

Notes

1. *New Zealand Maori Council v Attorney-General* unreported, 2 July 2007, Court of Appeal, CA241/07, para 43
2. Counsel for Ngati Tuwharetoa, opening submission on behalf of all claimants, 25 May 2007 (paper 3.3.36), p 2
3. Crown counsel, closing submissions, 6 July 2007 (paper 3.3.59), p 5
4. Ibid
5. *New Zealand Maori Council v Attorney-General* unreported, 4 May 2007, Gendall J, High Court, Wellington, CIV-2007-485-000095, para 89
6. *New Zealand Maori Council v Attorney-General* unreported, 2 July 2007, Court of Appeal, CA241/07, para 47
7. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 22 July 2005 (doc B3(6)), paras 15–18
8. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 15 August 2005 (doc B3(8)), p 5
9. Crown forestry agreement 1989, cls 7, 11(iv), (v)
10. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 22 July 2005 (doc B3(6)), p 3
11. OTS to CFRT, 20 December 2005 (doc B38(17))
12. Ben Dalton, brief of evidence, 19 April 2007 (doc B23), p 3
13. Treasury, report on benefit to Crown from forestry covenant with KEC, 27 July 2006 (doc B2(2))
14. Minister of Finance to Minister in Charge of Treaty of Waitangi Negotiations, 20 September 2004 (doc B3(4))
15. Minister in Charge of Treaty of Waitangi Negotiations to Minister of Finance, 17 December 2004 (doc B3(5))
16. Crown counsel, closing submissions, 6 July 2007 (paper 3.3.59), p 7

CHAPTER 4

PROTECTION OF INTERESTS OF OVERLAPPING CLAIMANTS

Introduction

This chapter sets out to answer the following question: Has the Crown ensured that the commercial and cultural interests of central North Island groups outside the KEC will not be prejudiced as a result of the KEC settlement?

In order to address this question, we review the Crown's Treaty settlement policy in respect of overlapping claims to commercial redress assets. We then discuss the application of that policy during the KEC negotiations. This discussion focuses on: the Crown's approach to consultation with overlapping claimant groups during negotiations; its assessment of the threshold interests of those groups in the various central North Island CFL lands; and its assessment of the appropriateness and sufficiency of the central North Island CFL land remaining after the KEC settlement to provide for future Treaty settlements with other central North Island iwi.

Crown Settlement Policy

We begin by briefly reviewing current Crown Treaty settlement policy, to provide a background to the discussion of the various Crown processes undertaken during the KEC negotiations, which comprise the bulk of the chapter.

Commercial versus cultural redress

Crown settlement policy makes a fundamental distinction between commercial and cultural redress. OTS's settlement and negotiation guide *Ka Tika a Muri, Ka Tika a Mua* (usually referred to simply as the *Red Book*) explains the nature and purpose of commercial redress:

> Financial and commercial redress means the part of the settlement that is primarily economic or commercial in nature, and which is given a monetary value. This value is the redress quantum. Financial redress refers to the portion of the total settlement the claimant group receives in cash and commercial redress refers to any Crown assets, such as property, that contribute to the total redress quantum.
>
> . . . . .
>
> The key aim of providing a redress quantum to claimant groups is in recognition and settlement of historical claims against the Crown under the Treaty of Waitangi. A guiding principle is that the quantum of redress should relate fundamentally to the nature and extent of the Crown's breaches of the Treaty and its principles.[1]

In many cases, claimant groups will choose to take some or all of the commercial redress quantum, in the form of Crown-owned proprieties, in place of cash. CFL lands are such a Crown-owned commercial property. In general, the Crown regards commercial properties as 'substitutable' when used in this way.[2] In other words, the Crown's policy is to treat commercial properties as a substitute for cash and therefore as being free of cultural or ancestral associations.

Cultural redress stands in direct contrast to commercial redress under Crown policy. *Ka Tika a Muri, Ka Tika a Mua* describes the relationship between the two:

> Many aspects of cultural redress do not have a direct monetary value, and so do not count against the redress quantum (monetary value of the settlement). If cultural redress does involve the transfer of land to a claimant group this is usually done by way of gift by the Crown to the claimant group. This means that the value of such land is not charged to the claimant group as part of their redress quantum. This approach recognises the cultural rather than commercial nature of the sites involved.[3]

There is an important qualification to the Crown's 'substitutability' policy in relation to commercial redress, however: claimant groups can receive assets only within their 'area of interest'. In other words, a group must be able to demonstrate a minimum level of customary interest in a property to receive it in a Treaty settlement, despite the fact that the property is treated as a purely commercial asset. This minimum level of customary interest is called a 'threshold interest'.

Threshold interests

The identification of the various iwi threshold interests in a block is particularly critical in cases of Crown commercial redress properties in which more than one iwi have interests. OTS director Paul James described to us the working definition of threshold interests used by the office:

> The concept of a threshold interest means that a claimant group can demonstrate that they have customary associations with a piece of Crown land, but not necessarily the only interest in that land.[4]

Because the test for determining threshold interests is deliberately kept low, and because the transfer of a commercial asset such as CFL land is necessarily exclusive, the Crown will often need to determine which of two or more groups with interests in a block will receive the land in a settlement. Thus, some transparent, straightforward way of assessing the relative interests of overlapping groups is required. *Ka Tika a Muri, Ka Tika a Mua* sets out Crown policy for allocating CFL lands subject to overlapping threshold interests:

> Where there are valid overlapping claims to a site or area, the Crown will only offer exclusive redress in specific circumstances. For example, when several groups claim an area of licensed Crown forest land, the Crown considers the following questions:
>
> - has a threshold level of customary interest been demonstrated by each claimant group?
> - if a threshold interest has been demonstrated:
>   - what is the potential availability of other forest land for each group?
>   - what is the relative size of likely redress for the Treaty claims, given the nature and extent of likely Treaty breaches?
>   - what is the relative strength of the customary interests in the land?, and
> - what are the range of uncertainties involved?
>
> The Crown is likely to take a cautious approach where uncertainties exist, particularly where overlapping claimants may be able to show breaches of the Treaty relating to the land, and would lose the opportunity to seek resumptive orders from the Tribunal.[5]

It further states that the relative weighting given to each of these factors must be considered case by case, depending

on the precise circumstances which apply, but that, broadly speaking, it is not necessary for a group to demonstrate a *dominant* customary interest in a block to become eligible to receive land in that block in a settlement.[6] We now discuss the Crown's methodology for determining the threshold interests of iwi in central North Island CFL blocks during the KEC negotiations.

Application of Policy during KEC Negotiations

During its negotiations with the KEC, the Crown needed to maintain contact with other central North Island groups with interests in the lands it proposed to transfer to the KEC in the settlement. It needed to do so both to keep all groups abreast of developments in the negotiations generally, and to build up an accurate picture of the interests of those overlapping groups, to ensure their interests were protected. We now turn to consider the Crown's consultation with overlapping claimant groups, and the various assessments it undertook during the negotiations to protect their interests.

Consultation with overlapping groups

Since 2002, the Crown has stressed the importance of early engagement with overlapping claimants. At our June 2007 hearing, Paul James stated that the Crown had heeded Waitangi Tribunal recommendations in its cross-claims reports issued in 2002 and 2003.[7] He commented that 'the Crown sought to engage early' with overlapping claimants after signing the terms of negotiation with the KEC in 2004.[8]

What this meant in practice, however, was that OTS sent three rounds of form letters to overlapping claimants during 2005 and 2006, explaining the progress of KEC negotiations, asking for information about their interests, and inviting them to discuss their interests directly with the KEC.[9] Much of this correspondence was described in a table filed by the Crown, showing a chronology of consultation with overlapping claimants. The chronology illustrates the dearth of direct engagement with these groups: in its description of 110 communications with overlapping claimants in 2005 and 2006, only two refer to face-to-face meetings with the claimants.[10]

While the Crown failed to engage directly with the five groups listed in its consultation chronology, it failed to engage *at all* with several other groups. The five groups listed in the consultation chronology were Ngati Rangitihi, Ngati Whakaue, Ngati Makino, Ngati Haka–Patuheuheu, and Ngati Tuwharetoa. At our June hearing, there were several other groups that claim not to have been consulted at any stage: some of Ngati Whaoa and Ngati Tahu, Ngati Te Rangiunuora, Ngai Tuhoe, the New Zealand Maori Council, Ngati Rangiteaorere, Ngati Karenga, and Ngai Moewhare. We acknowledge that some of these groups are involved in mandate disputes with the KEC, but surely they, too, deserve to be consulted. After all, the Crown consulted Ngati Tutemohuta and the Tauhara hapu by writing letters to their counsel, even though these groups are part of wider Ngati Tuwharetoa.[11] The omission of the wider Ngai Tuhoe iwi (as distinct from Ngati Haka–Patuheuheu) from the consultation process appears to be particularly serious. According to the 2001 census, Ngai Tuhoe number approximately 30,000. Ngai Tuhoe presented extensive tangata whenua evidence at the Tribunal's recent central North Island inquiry.[12] Volume 1 of the Tribunal's central North Island report refers frequently to their customary interests within the inquiry area.[13]

Similarly disadvantaged were those Te Arawa groups that continue to contest their inclusion in the KEC mandate, including Ngati Whaoa, Ngati Tamakari, and Ngati Te Rangiunuora. In our first settlement process report, we found that these groups objected to direct participation in the KEC settlement, and we recommended 'hui or mediation' as a path towards the resolution of their disputes (see pp 188–189). Crown engagement with these groups is the only way that they can obtain access to commercial, as well

as to cultural, redress so that subsequent settlements meet the requisite standards of fairness for all claimants.

We have already discussed our views on the Crown's approach to consultation in full in our first settlement process report. We note that the Tamaki Makaurau Tribunal has also recently reminded OTS that letters are not enough.[14] At our June 2007 hearing, the Crown accepted in principle that our findings in respect of its process of consultation on cultural redress matters could also be applied to its consultation over commercial redress. In our earlier report, we identified many flaws in the Crown's process for engaging with overlapping claimants:

- a reliance on written correspondence and a failure to engage face-to-face with overlapping claimant groups;
- a failure to respond meaningfully to the information provided by claimants and their concerns over the proposed redress;
- a failure by officials to fully inform the Treaty Negotiations Minister of important developments on overlapping claims issues, and of the expectation among overlapping claimants that negotiations would begin soon;
- delays in communicating with some groups;
- a failure to allow sufficient time for overlapping claimant groups to research and prepare a full response describing their interests, or to take into account the fact that many of these groups had little or no resourcing to undertake such research;
- a failure to provide full and clear information to overlapping claimant groups about the Crown's expectations and processes in assessing their interests; and
- a tendency to prefer the KEC's advice on matters of custom over that of any other group (see pp 69–75).

Tribunal finding

We consider that the Crown's failures in respect of consultation over commercial redress constitute a breach by the Crown of its Treaty duties to act honourably and with the utmost good faith, and to actively protect the interests of all Maori.

Assessment of threshold interests of overlapping groups

The Crown's assessment of the interests of overlapping groups was based on consultation with the groups themselves, and its own in-house research. We deal with each of these in turn.

Consultation on overlapping interests

Paul James identified the consultation round that followed the signing of the agreement in principle as being the fullest and the most important in the Crown's assessment of overlapping interests. At this stage, he said:

> the Crown wished to identify groups that may be able to demonstrate a threshold interest through other forms of historical and customary evidence, if not through a claim to the Native Land Court. This information was coupled with extensive consultation with claimants who had overlapping interests.[15]

However, none of the claimants at our June 2007 hearing accepted that the Crown had properly consulted with them over their threshold interests. Paranapa Otimi of Ngati Tuwharetoa referred to the map illustrating the Crown's representation of his iwi's threshold interests as 'rubbish'. When asked by his counsel whether this map accurately reflected Tuwharetoa's interests, Mr Otimi replied that the Crown never consulted Tuwharetoa about this. He implied that, without kanohi ki te kanohi consultation, accuracy (and mutual respect) was impossible.[16] Chris McKenzie, the Ngati Raukawa witness, repeatedly referred to the unsatisfactory information provided in the Crown's coloured maps filed in February 2007. As far as Raukawa were concerned, these maps came 'out of the blue', and the Crown made no attempt to explain the omission of any reference to Ngati Raukawa in them.[17]

Our finding in respect of the Crown's general approach

to consultation applies here also. We would further note that the negative consequences of this approach went beyond failing to keep overlapping groups properly informed of the development of negotiations. The lack of full and robust engagement with overlapping claimant groups about their interests in central North Island CFL lands resulted in a Crown process of determination of interests which was virtually unilateral. Further, any assessment made by the Crown about overlapping interests on the basis of a flawed consultation process would necessarily be built on a flimsy foundation, putting the interests of overlapping claimant groups at greater risk. We acknowledge, however, that the Crown did also carry out in-house research. We now turn to review that in-house research process.

In-house research

Prior to the June 2007 hearing, the Tribunal asked the Crown to file material showing how it had assessed the interests of hapu and iwi in central North Island CFL lands.[18] In response, the Crown filed three large folders of Native Land Court records and related evidence.[19] The Crown noted that the evidence was filed 'by way of example only', to show the kind of historical material drawn on in its analysis, but not necessarily the full extent of that material. Accepting that point, we have nevertheless found it instructive to review the historical evidence on which the Crown's in-house research was based.

Most of the material consisted of copies of original nineteenth-century Native Land Court minutes, with little associated analysis. Only six original Native Land Court blocks, out of more than 20 affected by the KEC settlement, were included in the material filed. Apart from the production of nearly complete Native Land Court title determination minutes for these six blocks, there is little consistency in the information supplied. For example, at tab 5 on Rerewhakaitu, there is an unattributed one-page summary of who appeared at an 1881 Native Land Court hearing, but there is no hectareage or survey plan information. A useful section from Kawharu et al's 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report' is also attached, but this is the only block for which this sort of information is supplied.[20] Kaingaroa 1 is better described, with a fuller title determination summary and both hectareage and Maori land plan references. Further, what can only be described as a scathing indictment of the Crown's 1880 acquisition of this block, taken from historical evidence filed in the central North Island inquiry, is attached.[21] The even larger Kaingaroa 2 block lacks a similar sort of historical commentary to assist readers with interpretation of the barely legible raw Native Land Court minutes.[22]

We acknowledge that we have not seen all the evidence gathered and analysis done by the Crown in its determination of threshold interests. However, on the basis of what we have seen, we are far from convinced that the Crown has developed a consistent and robust methodology for determining the threshold interests of central North Island iwi in CFL lands. Certainly, few, if any, claimants had confidence in the Crown's ability to judge the strength of their customary land interests. At our June hearing, both counsel for Ngati Raukawa Richard Boast and counsel for Ngati Makino Annette Sykes questioned Mr James on the Maori cultural and language skills of his staff. Mr James was prepared to accept the implied criticism, while maintaining that OTS had the ability to contract in such expertise.[23]

Tribunal comment

As a result of the inadequacies of the processes underpinning the Crown's assessment of overlapping interests, it appears that several errors have been made. In closing submissions, claimant counsel detailed instances of failures by the Crown to protect their clients' customary interest in particular lands which will pass to the KEC. These included, for example:

- Ngati Whakaue, who claim interests in the Horohoro CFL block and Horohoro State Forest;[24]
- Ngati Haka–Patuheuheu, who claim interests in Kaingaroa 1 and 1A;[25]

- Ngai Tuhoe, who claim interests in Kaingaroa 1, 1A, and 2;
- Ngati Tuwharetoa, who claim interests in the Pukuriri, Waimaroke, Wairapukao, and Reporoa CFL blocks;[26] and
- Ngati Raukawa, who claim interests in Horohoro State Forest.[27]

Other claimant groups disputed the Crown's assessment of their interests in the CFL lands which will remain available for future Treaty settlements after the KEC settlement (shown in appendix III). These included:

- Ngai Tuhoe, whose claimed interests in Kaingaroa 1 are not recognised in the Crown's assessment;
- Ngati Rangitihi, whose claimed interests in Rotoehu are not recognised in the Crown's assessment; and
- Ngati Haka–Patuheuheu, whose claimed interests in Kaingaroa 1A are not recognised in the Crown's assessment.

A more robust process, including a fuller explanation of the Crown's policies and process in this area, would have avoided this situation.

Finally, we note that the Crown's assessment was very poorly communicated to the parties affected by it. So far as we are aware, at no point prior to the present inquiry did the Crown disclose to overlapping claimant groups the coloured threshold interest maps, and the accompanying table summarising its assessment of their threshold interests, which it filed in evidence in our inquiry. These maps show the Crown's assessment of the threshold interests of 13 overlapping groups in approximately 30 CFL land areas.

There are significant problems with these maps, in our view. They cover a region much larger than either the KEC 'area of interest' (shown with a dotted line on the maps), or the Waitangi Tribunal's central North Island inquiry area, meaning that any detail on the location of the CFL blocks proposed to pass to the KEC is lost. Adding to the visual confusion, the threshold interest areas of each group are superimposed on black outlines of the original Maori land blocks. The composite map showing the interests of all groups is almost unintelligible, because it shows so many overlaps, particularly in the Kaingaroa area.[28] Despite the flaws in the Crown maps, the failure to distribute these to overlapping groups constituted a lost opportunity for effective and informed consultation.

For the sake of clarity, we have prepared simplified maps for eight overlapping groups, together with a map showing the location of all CFL blocks. These maps vividly illustrate the complexity of customary interests in the central North Island CFL lands. They are attached to this report at appendix IV. We have simplified the maps, for example, by removing the outlines of the original Maori land blocks.

Assessment of appropriateness of remaining central North Island CFL land

During our June 2007 hearing, there was much talk of the sufficiency of remaining central North Island CFL lands to provide for future settlements with central North Island iwi. In our view, the concept of sufficiency, and the attendant focus on the area of CFL land available, is restrictive. It suggests an analysis based almost entirely on commercial grounds. We understand the Crown's distinction between cultural redress and commercial redress, and its reasons for making such a distinction. We note also that the Crown does in fact recognise the cultural value of commercial redress lands, to a very limited extent, through its threshold interests policy. However, as we discuss further below, we consider that the unique central North Island situation demanded a full consideration of cultural, as well as commercial, value in providing for the future allocation of CFL land. We now turn to consider the Crown's assessment of both the appropriateness (in cultural terms) and the sufficiency of remaining CFL lands.

It hardly needs stating that Maori do not divide their rights and interests in land along cultural and commercial lines. In her opening submissions, counsel for Ngati Tuwharetoa, Karen Feint, stated that claimant cultural considerations dictated that ancestral land was not

'inter-changeable' and that it was 'culturally offensive' for OTS to suggest otherwise.[29] Claimant rejection of the concept of substitutability arises from their belief in the inherent cultural value of land, especially the ancestral associations that make such land unique.

Paul James indicated that the Crown was cognisant of the relationship between commercial and cultural redress. He stated that:

> the Crown understands that many claimant groups place a premium upon obtaining land (as opposed to cash) as commercial redress . . . [This] informs the Crown's efforts to provide licensed land so as to balance historical customary attachments with the commercial aspects of the redress.[30]

Mr James noted that 'the Crown continued refining its knowledge of the interests of overlapping claimants' during the KEC negotiations, based on, among other things, evidence filed in the Tribunal's central North Island and Te Urewera inquiries.[31] As a result of this refinement, the Crown withdrew some of the CFL land initially offered to KEC: a substantial portion of the Kaingaroa Pukuriri CFL block, and smaller portions of the Headquarters and Reporoa CFL blocks. In their 15 August 2005 briefing to the Treaty Negotiations Minister, officials advised that this withdrawal was 'prudent to further safeguard the interests of overlapping claimant groups'. OTS identified the groups most affected as Ngati Manawa, Ngati Rangitihi, and Ngati Tuwharetoa.[32] We note that the Crown did make some attempt to accommodate overlapping claimants in this culturally significant area.

Other groups have not had their interests recognised in the remaining CFL lands – for example, Tuhoe in Kaingaroa 1, or Ngati Haka–Patuheuheu in Kaingaroa 1A. This may reflect the Crown's reliance on Native Land Court records in its assessment of threshold interests: the central North Island Tribunal also found that 'the interests of Tuhoe, Ngati Haka Patuheuheu, and Ngati Hineuru were not properly recognised in the titles that resulted from the Native Land Court in the Kaingaroa district'.[33]

Further, the Crown table of the interests of overlapping groups in central North Island CFL lands remaining after the KEC settlement (see app III) unaccountably omits non-KEC Te Arawa groups (apart from Ngati Rangitihi) from its allocation of threshold interests at Kaingaroa.

Tribunal comment

These kinds of issues were at the core of many of the claims before us. Claimant groups objected to seeing parts or all of certain CFL blocks, located on land of enormous cultural significance for them, passing to the KEC by way of commercial redress. In particular, Te Arawa groups that chose to remain within the Tribunal's central North Island inquiry may feel that they have been excluded from a rightful share of CFL land in which they have strong customary interests. We are not satisfied that any Treaty analysis was undertaken by officials. Being 'fair' to overlapping claimants, in the context of these claims, means more than simply having enough land. It requires a stringent analysis of the historical data, a clear understanding of the nature of the overlapping claimant groups, their claims, and their interests, and a set of transparent criteria to apply in making any assessment of these interests. In our view, the Crown has not done enough during the KEC negotiations to recognise the underlying cultural significance of the CFL lands to all central North Island iwi, both Te Arawa and non-Te Arawa.

Assessment of sufficiency of remaining central North Island CFL land

Central to the Crown's case in this inquiry was the frequently stated position that, following the KEC settlement, sufficient CFL land would remain to provide for future Treaty settlements with all other central North Island iwi. It repeatedly assured overlapping claimants during the KEC negotiations, and during our inquiry, that sufficient CFL land will remain available for them.[34] Mr James said that:

At all times in formulating appropriate redress for KEC, Crown officials were aware of and accommodated the need to ensure that sufficient land remained available to satisfy settlements with overlapping claimants.

He maintained that approximately 63 per cent of the Kaingaroa, Whakarewarewa, Rotoehu, and Horohoro CFL land remained available for future settlements.[35] The basis of the 63 per cent figure appears to be the assessment shown in the table included in Paul Jackson's evidence, entitled 'Balance of central North Island Crown forestry licence land available for Treaty of Waitangi Settlements'.[36] However, when we attempted to compare Mr Jackson's table with the equivalent table prepared by OTS (reproduced in this report as appendix III), we encountered problems. The data in OTS's table uses both CFL units and ex-Maori land descriptions. Thus, the table lists CFL units in the Whakarewarewa Forest (Highlands CFL, Tokorangi CFL, and Whaka CFL), but for the Kaingaroa Forest, ex-Maori land areas replace the CFL units (Kaingaroa 1, 1A, and 2). This creates confusion about which CFL units have been allocated to which groups. The Kaingaroa allocations are further confused because the multiple overlaps there have not been factored into the hectare columns. The Crown has identified interests for five separate groups in the more than 41,000 hectares of Kaingaroa 1 area (which contains over five CFL units): Ngati Rangitihi, Ngati Haka–Patuheuheu, Ngati Tuwharetoa, Ngati Manawa, and Ngati Whare. But the hectare columns show an area of more than 41,000 hectares against *each* of these five groups. The effect of the Crown's presentation of the data is to inflate the apparent total area available to each of the five groups. The table appears to show that, for four of the groups, a greater area of land will be available to them than was allocated to the KEC.

Apart from this lack of clarity over which CFL areas might be available to which groups for use in Treaty settlements, we have two more substantive concerns with the Crown's assessment of sufficiency. First, it is not clear that all groups have been provided for in the assessment. The Crown has apparently overlooked Ngati Raukawa's interests in Horohoro and Patetere, interests described by Ngati Raukawa before the central North Island Tribunal.[37] Similarly, the Crown has failed to recognise Ngai Tuhoe interests in Kaingaroa. Furthermore, the Crown apparently overlooked smaller groups such as Tapuika, Ngati Rangiteaorere, Ngati Tamakari, Ngati Te Rangiunuora, and Ngati Whaoa from consideration in such commercial redress.

Secondly, it is not clear that the Crown undertook a full reassessment of the area of land required for future central North Island Treaty settlements, following the introduction of the deferred selection mechanism and the Kyoto forestry covenant features into the KEC settlement. As we described in chapter 2 of this report, the amount of land which the KEC was able to acquire under the quantum, and by using the accumulated rentals from the quantum land, was massively increased during the course of negotiations. The last material changes in the Crown's assessment of the sufficiency of remaining CFL lands were based on the information-gathering process which followed the signing of the agreement in principle in September 2005. It was not until late June 2006, however, that the effect of the forestry covenants on the quantity of land available to the KEC became clear. In effect, by halving the value of the CFL land in the pool, the introduction of the covenants doubled the quantity of land available to the KEC.

Tribunal comment

Although we cannot say for sure, we consider it likely that the right of deferred selection over CFL lands, and forestry covenants, will be used in future central North Island settlements. We are not convinced, however, that the Crown undertook a full reassessment of the sufficiency and appropriateness of remaining CFL lands in the light of both these major developments. It follows that, if other central North Island iwi will receive Treaty settlements in the future on

a similar basis to that received by the KEC, any development which increased the area of CFL land passing to the KEC might also be offered to other central North Island iwi. We would expect therefore that such developments might trigger a major re-evaluation by the Crown of the land required to accommodate future central North Island settlements. We acknowledge that the pool on offer was reduced after the right of deferred selection was extended to cover CFL lands in the Crown's second offer. However, we were not made aware of any equivalent alteration following the agreement over the covenants, which had an equal, or perhaps more significant, impact on the area of land passing to the KEC.

Additionally, we consider that overlapping groups should have been provided with expert advice on commercial redress when considering the impact of matters as technically demanding as the effect on their interests of the deferred selection mechanism and the forestry covenants. The Crown should ensure that professional advice is made available to overlapping claimants, at reasonable cost, in situations such as this. A recent recommendation by the Tamaki Makaurau Tribunal is pertinent: that the Crown fund the other, overlapping, groups to 'enable them to analyse the redress on offer' and 'form a view on what other available commercial redress is comparable.'[38]

The inclusion of the deferred selection mechanism and Kyoto forestry covenant features in the KEC settlement may have significantly disadvantaged overlapping claimants. These claimants were not privy to the confidential negotiations on such matters. They did not know the precise location of the deferred settlement land until it was disclosed in evidence filed by the Crown in advance of our June 2007 hearing. This ruled out meaningful consultation over how it affected their interests. Nor did overlapping claimants have any knowledge of the magnitude of the price reduction resulting from the forestry covenants. Indeed, it was not made apparent until the last day of our June 2007 hearing, when Mr Jackson confirmed that the size of the Crown appropriation required to cover the difference in the Crown's market valuation of the lands passing to the KEC and the actual sale price agreed by the parties was $85 million.[39] This information had initially been excised from Mr Jackson's brief of evidence, and was included only after Tribunal member the Honourable Doug Kidd noted at our hearing that the size of the appropriation had been a matter of public record since the publication of the Budget in May 2007. We make general comment on the Crown's filing of evidence in our earlier report of cultural redress.

The Crown must now, in the interests of fairness, offer overlapping claimants comparable treatment. We are not confident that it can assure those claimants that it will do so.

Conclusion

In our hearing, the Crown made much of statements in the Tribunal's *Ngati Awa Settlement Cross-Claims Report* which appear to approve, in principle, of the Crown's overlapping claims policy. That Tribunal stated:

> We agree with the Crown that, in a situation such as this [where the Crown is faced with overlapping claims to CFL land proposed for use in a Treaty settlement], judgement and caution is required. It is not an easy situation. It is not a situation to which tikanga really speaks, because the disposition of the Crown's forest licensed landholdings, and the relative claims of Maori groups to them, are a product of the post-colonial era. Perhaps it can be said, though, that there is a natural pragmatism inherent in tikanga which, in our view, finds expression in the essentials of the Crown's policy.
>
> There really is no solution that the Crown could come to here that would be universally applauded . . . Pragmatism and fairness are principles that have led the Crown to the solution they propose, and this Tribunal can see no Treaty basis for differing from the Crown as to the substance of its policy. While the implementation of the policy produces negative effects for some groups, we consider that those negative

> effects are, on balance, less than those that would arise from the alternatives.[40]

Similarly, this comment by the Ngati Maniapoto/Ngati Tama settlement cross-claims Tribunal is often raised in relation to overlapping claims issues:

> If the Tribunal were to take the view that the Crown ought not to deliver redress to any claimant where there are overlapping or cross-claims, the repercussions for the Crown's settlement policy would be very serious. It would thwart the desire on the part of both the Crown and Maori claimants to achieve closure in respect of their historical Treaty grievances. Indefinite delay to the conclusion of Treaty settlements all around the country is an outcome that this Tribunal seeks to avoid.[41]

We, too, recognise the difficulty faced by the Crown in seeking a compromise between the cultural and commercial interests of different groups, and the undesirability in principle of delaying the settlement of Treaty claims.

In our view, however, the situation in our inquiry in respect of the proposed KEC settlement is significantly different from the situation addressed by either of those Tribunals. Simply put, more groups claim interests in the lands proposed to be transferred to the KEC, and the CFL assets at stake are far larger and more valuable. No previous Tribunal, until the Tamaki Makaurau Tribunal earlier this year, has considered a situation involving such a complex mesh of overlapping claims as we face here.

The table of overlapping interests reproduced in appendix III, and maps showing the threshold interests of overlapping groups in appendix IV, well illustrate the number of different groups that have recognised interests in the CFL blocks which will remain after the KEC settlement. It should also be noted, because many claimants argued that their interests in certain of these remaining CFL blocks had not been recognised, that the real situation is more complex than even the Crown's assessment suggests.

The Crown failed to adapt its policy to the unique situation of overlapping cultural and commercial interests created by the KEC settlement. We consider that inflexible application of its existing policy was inappropriate and inadequate in this case. In our view, the Crown should have adapted the application of its policy to take account of the unique circumstances in the central North Island: in particular, the area and value of the CFL lands and the large number of major overlapping claimant groups in the region. We note the Tamaki Makaurau Tribunal's recent comment that both cultural and commercial redress should 'take into account and reflect the multi-layered nature of these multiple interests'.[42] Because the Crown did not fully apprise itself of these interests, and take them into account, we have grave concerns that both the commercial and cultural interests of overlapping claimant groups will be prejudiced by the KEC settlement.

Making matters worse is the fact that, because the Crown's consultation processes have not been transparent and robust, they have left overlapping claimant groups suspicious and fearful. The Crown's attitude has been 'trust us, we know what we're doing', but they have left these groups with no confidence that this is the case.

Summary

The key points in this chapter were:

- The Crown's consultation with overlapping claimants in respect of commercial redress issues was the same as its consultation over cultural redress issues. In our first settlement process report, *The Report on the Impact of the Crown's Settlement Policy on Te Arawa Waka*, we found that this process was flawed and inadequate, and therefore that the Crown had breached its Treaty duties to protect the interests of overlapping claimants.
- The same finding applies to the Crown's consultation over commercial redress. The Crown failed to fully and robustly engage with overlapping claimant groups. Its

consultation consisted almost entirely of correspondence by letter. Overlapping claimant groups were not provided with sufficient information, or resources, or time, to make informed decisions about how the KEC settlement would affect their interests. Some groups were not communicated with at all.

- One result of this failure by the Crown was that its information on the threshold interests of overlapping claimants in central North Island CFL land may be inaccurate. Certainly, the Crown's assessment is disputed by several claimants.
- Another result is that the Crown's ability to provide appropriate CFL land to remaining central North Island groups is uncertain. Further, it is not clear that the Crown fully reassessed its ability to provide sufficient CFL land to all non-KEC groups in the light of two major developments during the KEC negotiations which increase the area of CFL land in that settlement: the extension of the right of deferred selection to CFL lands, and the introduction of forestry covenants over those lands.
- While earlier Tribunals have found that the Crown's overlapping claims and threshold interest policies are consistent with Treaty principles, we consider that their findings were made in regard to situations which were significantly different from the situation we are considering here. In our view, the Crown should have adapted the application of its policy to take account of the unique circumstances in the central North Island: in particular, the area and value of the CFL lands and the large number of major overlapping claimant groups in the region.

Notes

1. OTS, *Ka Tika a Muri, Ka Tika a Mua: He Tohutohu Whakamarama i nga Whakataunga Kereme e Pa Ana ki te Tiriti o Waitangi me nga 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: OTS [2002]), pp 87–88
2. Ibid, p 90
3. Ibid, p 98
4. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), p 18
5. OTS, *Ka Tika a Muri, Ka Tika a Mua: He Tohutohu Whakamarama i nga Whakataunga Kereme e Pa Ana ki te Tiriti o Waitangi me nga 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: OTS [2002]), p 58
6. Ibid, pp 59–60
7. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002); Waitangi Tribunal, *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wellington: Legislation Direct, 2003)
8. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), p 14
9. Ibid, pp 14–15
10. The two meetings are those with Ngati Rangitihi and Ngati Whakaue in September 2006: doc B32.
11. Counsel for Tauhara hapu to OTS, 18 July 2005 (doc A32(a)(91)); counsel for Tauhara hapu to OTS, 12 October 2005 (doc A32(a)(95)); counsel for Ngati Rangiteaorere and Ngato Wahiao to OTS, 14 November 2005 (doc A32(a)(97)); OTS to counsel for Tauhara hapu, 18 November 2005 (A32(a)(98)); counsel for Ngati Rangiwewehi, Tauhara hapu, Ngati Rangiteaorere, and Ngati Wahiao to OTS, 9 December 2005 (doc A32(a)(99)); OTS to counsel for Ngati Rangiteaorere, 21 December 2005 (doc A32(a)(102)); OTS to counsel for Ngati Tutemohuta, 29 June 2005 (doc A32(a)(106)); counsel for Ngati Tutemohuta to OTS, 28 July 2005 (doc A32(a)(107)); OTS to counsel for Ngati Tutemohuta, 2 September 2005 (doc A32(a)(108)), 9 September 2005 (doc A32(a)(109)), 27 October 2005 (doc A32(a)(110))
12. Wai 1200 ROI, docs D9–D12 (for Ngati Raukawa); Wai 1200 ROI, docs C16–C22 (for Ngai Tuhoe)
13. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims (Stage 1)*, 4 vols (Wellington: Waitangi Tribunal, 2007), vol 1
14. Waitangi Tribunal, *The Tamaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 109
15. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), p 27
16. Paranapa Otimi, oral evidence, 25 June 2007 (recording 4.4.3)
17. Chris McKenzie, brief of evidence, 13 June 2007 (doc B16), pp 6, 16–18
18. Presiding officer, memorandum concerning reconvening of Tribunal, 24 May 2007 (paper 2.7.3)
19. OTS, evidence concerning Kaingaroa forest blocks, undated (doc B4)
20. Ibid (doc B4(5), Rerewhakaitu)

21. Ibid (doc B4(9), Kaingaroa 1)
22. Ibid (doc B4(10), Kaingaroa 2)
23. Counsel for Ngati Raukawa, oral submissions, 27 June 2007 (recording 4.4.3); counsel for Ngati Makino, oral submissions, 25 June 2007 (recording 4.4.3)
24. Counsel for Ngati Whakaue, closing submissions, 4 July 2007 (paper 3.3.54), p 2
25. Counsel for Ngati Haka–Patuheuheu, closing submissions, 26 June 2007 (paper 3.3.46), p 3
26. Counsel for Ngati Tuwharetoa, closing submissions, 5 July 2007 (paper 3.3.55), p 7
27. Counsel for Ngati Raukawa, closing submissions, 4 July 2007 (paper 3.3.57), p 4
28. OTS, mapbook showing threshold interests in remaining Crown forest licensed land, undated (doc A76), pp 5–18
29. Counsel for Ngati Tuwharetoa, closing submissions, 5 July 2007 (paper 3.3.55), p 5
30. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), p 17
31. Ibid, p 25
32. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 15 August 2005 (doc B3(8)), para 25
33. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims (Stage 1)*, 4 vols (Wellington: Waitangi Tribunal, 2007), vol 1, p 125
34. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32), pp 20–21, 34, 41, 44, 48, 56, 60
35. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), pp 21, 27
36. Paul Jackson, brief of evidence, 27 June 2007 (doc B22(b)), sch 1
37. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims (Stage 1)*, 4 vols (Wellington: Waitangi Tribunal, 2007), vol 1, pp 96–98
38. Waitangi Tribunal, *The Tamaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 108
39. Paul Jackson, brief of evidence, 27 June 2007 (doc B22(b)), p 12
40. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report*, p 76
41. Waitangi Tribunal, *The Ngati Maniapoto/Ngati Tama Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2001), p 20
42. Waitangi Tribunal, *The Tamaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 105

CHAPTER 5

FINDINGS AND RECOMMENDATIONS

Summary of Findings

In chapters 3 and 4, we found that the Crown has breached the Treaty in the following ways:

- A provision was included in the KEC deed of settlement to deem the Crown a confirmed beneficiary of CFRT rental moneys. We have seen no evidence that the Crown sought the consent of Maori generally, or the Maori parties to the 1989 agreement specifically, before including this provision in the deed.
- The Crown failed to engage fully and robustly with all central North Island groups with interests in the lands affected by the KEC deal. The Crown failed to meet directly with these groups, and failed to communicate with them early in the development of the offer to the KEC. Some groups were not communicated with at all, while those groups that were were simply sent pro-forma letters which failed to convey all the information necessary for them to make fully informed decisions.

As a result, the Crown's determination of the threshold customary interests of central North Island groups outside the KEC appeared to be unilateral. We are not satisfied that the Crown had all the information it required to make these determinations in an accurate and fair manner. The Crown's treatment of CFL lands as 'substitutable' according to their commercial value, sharply distinguished from their cultural value, is unsatisfactory, and may have resulted in ownership of sites of great cultural importance to overlapping groups passing to the KEC.

Further, the Crown's limited contact with non-KEC central North Island groups leads us to doubt the robustness of its analysis of the sufficiency of remaining CFL lands for future settlements with other central North Island iwi. We are not confident that the Crown will be able to offer commercial redress to remaining central North Island iwi on a similar basis to that offered to the KEC. We note, for example, that Ngai Tuhoe has not been factored into the sufficiency equation in relation to the Kaingaroa forests, but that the central North Island Tribunal has recently noted that they have customary interests in that area which would be sufficient at least to constitute a threshold interest. It is also unclear to us how the Crown amended its offer in the light of two major developments during negotiations (the extension of the right of deferred selection to cover

CFL lands, and the introduction of a forestry covenant over those lands), the combined effect of which increased the KEC's purchasing power from approximately 20 per cent of the hectare pool of CFL land initially offered, to 100 per cent (albeit of a reduced pool) by June 2006.

It should be remembered that these Treaty breaches come on top of our findings in the *Report on the Impact of the Crown's Settlement Policy on Te Arawa Waka* that the Crown breached the Treaty by:

- failing to act as an honest broker during the KEC negotiation process; and
- failing to protect the customary interests of overlapping groups in the cultural redress sites offered to the KEC.

In particular, the Crown's processes for consulting with overlapping groups during the KEC negotiations were inadequate and failed to protect the interests of overlapping groups in the cultural redress sites offered to the KEC.

We consider that there is a high risk that significant prejudice will accrue to central North Island iwi outside the KEC if the settlement proceeds in its current form. The Crown has failed to fulfil its Treaty duties to actively protect the interests of all Maori, and to treat Maori groups equitably.

Conclusions

The central North Island CFL lands are a unique asset in terms of their size (approximately 190,000 hectares in total), their commercial value, their cultural significance, and the number of large iwi whose interests overlap the land. Among those iwi are the 11 collective groups represented by the KEC: Ngati Ngararanui, Ngati Kearoa/Ngati Tuara, Ngati Tura/Ngati Te Ngakau, Ngati Te Roro o Te Rangi, Ngati Tuteniu, Ngati Uenukukopako, Tuhourangi/Ngati Wahiao, Ngati Tahu/Ngati Whaoa, Ngati Pikiao, Ngati Rongomai, and Ngati Tarawhai. By its own reckoning, the Crown also recognises the interests of the following overlapping groups in these lands: Ngati Makino, Waitaha, Ngati Whakaue, Ngati Rangiwewehi, Ngati Rangitihi, Ngai Tuhoe, Ngati Haka–Patuheuheu, Ngati Tuwharetoa, Ngati Manawa, Ngati Whare, Ngati Hineuru, Ngati Kahungunu, Tamawhiti/Hauiti, and Ngati Rangi. Lastly, there are those other groups that appeared at our June 2007 hearing, whose claim to interests in these lands has not yet been recognised, perhaps most notably Ngati Raukawa. While all of these iwi and hapu have dominant customary interests in particular areas, these interests are rarely if ever exclusive interests.

Te Arawa, along with these other central North Island groups, have waited since 1989 for the transfer of CFL in Treaty settlements. The proposed KEC settlement is not the first settlement to transfer central North Island CFL lands to a claimant group, but the area involved (approximately 51,000 hectares) is far greater than that awarded to Ngati Awa (9428 ha) or Tuwharetoa ki Kawerau (844 ha). The allocation and transfer of the central North Island CFL lands is the largest and most significant process in Treaty settlements since the allocation of fisheries quota under the Sealord deal. For that reason, it is absolutely critical for the durability of all settlements with central North Island iwi that processes which provide for the transfer of these major assets are fair, robust, and consistent with the principles of the Treaty.

The recent history of the Te Arawa settlement has not been without its troubles. In the 1990s, attempts were made to negotiate a collective settlement with all central North Island iwi. There was wide support for this idea, although many central North Island groups were not ready in terms of mandate development and research preparation to enter into negotiations with the Crown at that time. As late as 2002, such an approach was still contemplated. However, for reasons which are beyond the scope of this report to describe, these collective approaches have not succeeded.

Since the collapse of these collective initiatives, there

have been other developments. Groups such as Ngati Tuwharetoa and Ngai Tuhoe have sought to have their claims heard before the Waitangi Tribunal. Others, such as the Te Arawa groups represented by the KEC, Ngati Manawa, and Ngati Whare, have sought to negotiate a Treaty settlement directly with the Crown. The proportion of the Te Arawa population represented by the KEC has fallen from most of Te Arawa in the early stages of the mandating process to approximately half by the time the deed of settlement was signed. Much of the background to this is covered in the Tribunal's two Te Arawa mandate reports. As the size of the KEC mandate was reduced, the number of central North Island groups with overlapping interests outside the KEC increased. The Crown and the KEC have been left negotiating a settlement involving CFL land and cultural sites over which many other groups have interests. By the Crown's own assessment, not a single hectare of the 51,000 hectares to be transferred in the KEC settlement can be claimed exclusively by groups within the KEC. Every hectare is overlapped. At the time of the second Te Arawa mandate report, it was clear to that Tribunal that this situation would eventuate, hence the concern expressed by that Tribunal over the Crown's proposal for the management of overlapping claimants' issues:

> we do not believe that to proceed with negotiations with just over half of Te Arawa, and to leave the other groups waiting (for an unspecified time) for an opportunity to negotiate and settle their claims, would be consistent with Treaty principles. This would not in effect be a comprehensive settlement of Te Arawa's historical claims, no matter how narrowly the terms of negotiation define 'Te Arawa'. Nor would it properly safeguard the overlapping core claims of other Te Arawa groups. We believe that Treaty breaches and prejudice will inevitably arise.[1]

We have heard in great detail about the development of Crown policy for managing overlapping claims, and the processes by which that policy was implemented. We are fully au fait with the intricacies of the commercial redress terms in the KEC deed of settlement. We have found in this report that important aspects of these processes, and of the terms of the deed, are inconsistent with the Treaty. We made similar findings in respect of cultural redress in our first settlement report.

The hearing of the present claims and the preparation of this second report have been done as quickly as possible in order to make recommendations before the introduction of the settlement legislation removes our jurisdiction. The pressure of time has not prevented us, however, from satisfying ourselves that the fundamental flaws in the Crown's processes will leave non-KEC central North Island groups exposed to great risk that their interests will be prejudiced through this settlement.

All the claimants in this inquiry sought, by way of relief, a recommendation that the deferred selection process (including the deeming of the Crown to be a confirmed beneficiary of CFRT funds) be removed from the settlement, or that the entire KEC settlement be put on hold pending the proper resolution of overlapping claims issues, or both.

Counsel for Te Pumautanga made brief but effective submissions at our June hearing. He made it plain that Te Pumautanga wanted the settlement to proceed. He noted that affiliate groups had already invested significant time and energy in preparing to receive settlement assets and developing governance structures. It must be remembered that the KEC negotiated this settlement in good faith, establishing a mandate, pursuing its interests through negotiations, and generally arranging its affairs in accordance with the Crown policies of the time. Simply put, the KEC and Te Pumautanga have done nothing wrong.

In considering what recommendation to make, we have two options before us. On the one hand, we could recommend that the KEC settlement proceed despite its flaws, perhaps with some modification, and hope that, despite the Crown's failure to engage robustly with overlapping groups, their interests will not be prejudiced as a result. On the other, we could recommend to the Treaty Negotiations

Minister that the flaws in the process are too great to allow the settlement to proceed, and that the settlement Bill should not be introduced into the House.

Both options create disadvantage for one group or another. The first option creates the potential for the interests of all central North Island iwi outside the KEC and Te Pumautanga to be prejudiced. Important cultural and commercial assets will pass out of their reach permanently, by a process from which they feel excluded. Their ability to claim these assets in the future will be removed. The second option creates a more certain disadvantage, for a smaller group. The affiliate hapu and iwi of Te Pumautanga will not receive the settlement in its current form, a settlement for which they have negotiated for almost three years. Their receipt of a settlement in any form will be delayed by months.

We see Treaty settlements as critical to the future of our country. For this reason, we consider that any recommendation that a proposed settlement not proceed should be made only as an absolute last resort. However, on balance, we cannot endorse the KEC settlement in this form. We have not made this decision lightly, but we have grave concerns about the impact of this settlement on overlapping iwi, and on the durability of future central North Island settlements. We find the arguments of the claimants in this inquiry – that their interests have not been protected during the KEC negotiations, and that they will be irreversibly prejudiced if the settlement proceeds – persuasive. We note that, according to the Crown's figures, the total combined population of Te Arawa (including groups within and outside the KEC), Ngati Tuwharetoa, Ngai Tuhoe, Ngati Manawa, and Ngati Whare is 100,000.[2] There may be a delay for the approximately 24,000 iwi and hapu members represented by Te Pumautanga, but the competing equities here warrant, at the very least, a reassessment of the terms of the settlement. On balance, we think that to defer the settlement by a few months, while all outstanding issues are addressed, is the appropriate course of action.

Future settlements cannot proceed like this. In particular, the Crown must seek to redress the imbalance in information and resources between the negotiating parties. It cannot continue to 'pick favourites' and make decisions on tribal interests in isolation, based on inadequate information. At present, overlapping claimants seem to be treated as 'risk groups', to be kept at arm's length. To alienate groups with whom it will inevitably have to deal in the future is not a sustainable strategy for the Crown: it cannot conduct substantive consultation with these groups on the basis of a letter or two.

Recommendation

We cannot endorse the KEC settlement in its current form. However, as we continue to stress, we believe that the affiliate iwi and hapu represented by Te Pumautanga deserve a settlement. We recommend that the proposed settlement be varied and delayed pending the outcome of a forum of central North Island iwi convened by Te Puni Kokiri. All the parties to our inquiry (including the New Zealand Maori Council and the Federation of Maori Authorities), plus the KEC and CFRT, should participate in this hui. The purpose of this forum would be to reach agreement on:

- principles to guide decision-making over the allocation of central North Island CFL land;
- the overall proportionality to apply to the allocation of assets between different iwi; and
- the priority given to particular iwi in respect of CFL assets in each geographical area.

We expand on this proposal below.

A Way Forward

Previous attempts to pursue comprehensive multi-iwi settlements over central North Island forest lands have not succeeded. However, all parties seem to agree that this is a good idea in principle. Annette Sykes's questioning

of various claimant groups at our June hearing, regarding their attitude to collective settlement and collective post-settlement activity, showed that all claimants in this inquiry are committed to the idea at some level. It occurs to us that, at this juncture, the time is ripe to attempt such an approach again. The hearing stages of the Waitangi Tribunal's central North Island and Te Urewera inquiries are now complete, and the evidence filed in those inquiries is on the public record. The final volumes of the central North Island report have now been released. The Te Urewera Tribunal intends to issue its report in 2008. Ngati Manawa, Ngati Whare, and half of Te Arawa are in negotiations with the Crown. Ngai Tuhoe and Ngati Tuwharetoa have made progress towards mandating a body to negotiate their claims. Without doubt, a greater number of central North Island iwi are further down the track towards readiness for negotiations than was the case in the mid and late 1990s. Historical evidence on the Treaty claims of most of these groups has been prepared, presented, and examined in the Waitangi Tribunal process.

What we propose is that a forum of all iwi with interests in central North Island CFL lands be constituted. The aim of the forum would be to negotiate between members, according to tikanga, high-level guidelines for the allocation of CFL lands. Neither the Crown nor CFRT nor the Waitangi Tribunal need be involved in it, other than perhaps to assist in resourcing. The New Zealand Maori Council and the Federation of Maori Authorities should be present, to represent the general interests of Maori nationally, and in recognition of their status as the Maori parties to the very agreement which ensured the retention of CFL lands for Treaty settlement purposes. They would undoubtedly have ideas for what to do with any CFL lands left over after central North Island settlements have been completed. The forum may take a different form, but the critical thing is that these decisions are made by the central North Island iwi themselves (with the council and the federation), on their own terms, answerable to one another.

The first job of such a forum would be to agree on the guiding principles by which decisions on allocation would be made: for example, the extent to which customary interests should determine allocation, and the extent to which the CFL lands should be treated as purely commercial assets. Following agreement on these principles, forum members would then decide on a framework for allocation. Such a framework might have two dimensions: first, the overall proportionality of assets which would transfer to each group; and secondly, the priority given to the various groups in any given geographical area, based on the strength of their customary interests. Issues of mana whenua may have greater bearing on the priority given to groups in a specific area.

There is an obvious precedent for such an approach: the Maori Fisheries Commission. The task faced by a forum established on the lines we propose here would in fact be smaller than the one faced by that commission. First, the number of groups involved is smaller. Secondly, we do not propose that a central North Island iwi forum would receive the settlement assets and allocate them to its members. Rather, its role would be limited to setting out a clear and agreed framework within which the represented groups and the Crown would negotiate their settlements.

This approach would also benefit the Crown, insofar as it would no longer be in the unenviable position of determining the allocation of settlement assets between these groups, based on its understanding of their customary interests and of the potential size and shape of future settlements. Equally, Maori would have an assurance that the allocation of CFL assets had been undertaken fairly, transparently, and according to tikanga. Iwi may consider, post-settlement, managing their forest assets collectively, to maximise combined commercial returns and to create opportunities for flexible arrangements in respect of cultural practices and access. Most importantly, we consider that truly durable Treaty settlements would grow out of such a process. We are not confident that this will be the case if the KEC deed of settlement proceeds in its current form.

Notes

1. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 112
2. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 2 September 2004 (doc B3(3)), p 2

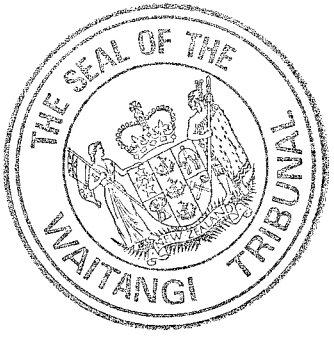
Dated at Wellington this 30th day of July 2007

Judge Caren Leslie Fox, presiding officer

Peter Philip Brown, member

Honourable Douglas Lorimer Kidd DCNZM, member

Tuahine Northover MNZM, member



APPENDIX I

DEVELOPMENT OF CROWN OFFER OF CFL LAND TO THE KEC

The table on the following page shows the development of the Crown offer of CFL land to the KEC.

CFL block name (forest name)	First Crown offer 25 July 2005 (TPA c62,000 ha)	Second Crown offer 17 August 2005 (TPA < 51,000 ha)	Agreement in principle 5 September 2005 (TPA c51,000 ha)	Deed of settlement 30 September 2006 (Total area c51,000 ha)
Waimaroke CFL (Kaingaroa Forest)	Lots 1, 2 DPS 47428 Lots 1, 3 DPS 19572	Lots 1, 2 DPS 47428 Lots 1, 3 DPS 19572	Lots 1, 2 DPS 47428 Lots 1, 3 DPS 19572	Lots 1, 2 DPS 47428 Lots 1, 3 DPS 19572
Waimangu CFL (Whakarewarewa Forest)	Lot 1 DPS 57559	Lot 1 DPS 57559	Lot 1 DPS 57559	Lot 1 DPS 57559
Pukuriri CFL (Kaingaroa Forest)	Lots 1, 3, 4, 6 DPS 73202	*Part Lot 1,* *Part Lot 6 DPS 73202*	*Part Lot 1,* *Part Lot 6 DPS 73202*	*Part Lot 1,* *Part Lot 6 DPS 73202*
Reporoa CFL (Kaingaroa Forest)	Lot 1 DPS 45063 Lot 1 DPS 55285 Lot 1 DPS 55286 Lot 1 DPS 64818 Lots 1, 2 DPS 55284 Lot 1 DPS 55287 Lot 1 DPS 27452 Lot 1 DPS 55758	*Lot 1 DPS 45063* *Lot 1 DPS 55285* *Lot 1 DPS 55286* *Lot 1 DPS 64818* *Lots 1, 2 DPS 55284* *Lot 1 DPS 55287* *Lot 1 DPS 27452*	*Lot 1 DPS 45063* *Lot 1 DPS 55285* *Lot 1 DPS 55286* *Lot 1 DPS 64818* *Lots 1, 2 DPS 55284* *Lot 1 DPS 55287* *Lot 1 DPS 27452*	*Lot 1 DPS 45063* *Lot 1 DPS 55285* *Lot 1 DPS 55286* *Lot 1 DPS 64818* *Lots 1, 2 DPS 55284* *Lot 1 DPS 55287* *Lot 1 DPS 27452*
Wairapukao CFL (Kaingaroa Forest)	*Part Lot 1 DPS 47427*	*Part Lot 1 DPS 47427*	*Part Lot 1 DPS 47427*	*Part Lot 1 DPS 47427*
Highlands CFL (Whakarewarewa Forest)	*Part Lot 1,* *Lot 2 DPS 57556*	*Part Lot 1,* *Lot 2 DPS 57556*	*Part Lot 1,* *Lot 2 DPS 57556*	*Part Lot 1,* *Lot 2 DPS 57556*
Horohoro CFL	*Lots 1–6 DPS 62530*	*Lots 1–6 DPS 62530*	*Lots 1–6 DPS 62530*	*Lots 1–6 DPS 62530*
West CFL (Rotoehu Forest)	*Lot 1 DPS 45081* *Lot 1 DPS 53628* *Part Lot 1 DPS 57554* *Lot 1 DPS 57547*	*Lot 1 DPS 45081* *Lot 1 DPS 53628* *Part Lot 1 DPS 57554* *Lot 1 DPS 57547*	*Lot 1 DPS 45081* *Lot 1 DPS 53628* *Part Lot 1 DPS 57554* *Lot 1 DPS 57547* *Lots 1, 2,* *Part Lot 3 DPS 53632* *Lot 2 DPS 68401*	*Lot 1 DPS 45081* *Lot 1 DPS 53628* *Part Lot 1 DPS 57554* *Lot 1 DPS 57547* *Lots 1, 2,* *Part Lot 3 DPS 53632* *Lot 2 DPS 68401*
Headquarters CFL (Kaingaroa Forest)	*Part Lot 2 DPS 45072*			

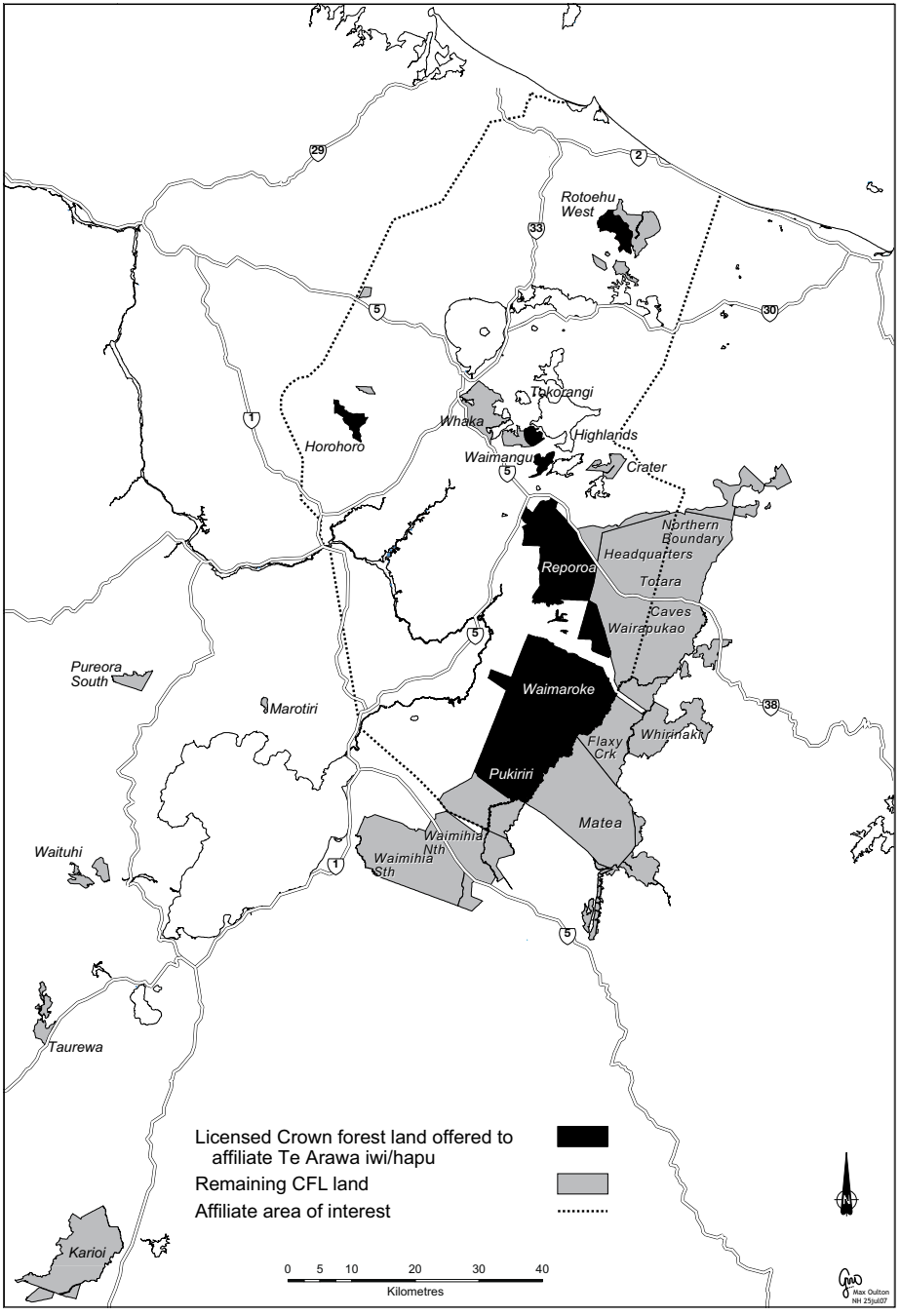
Note: Plain text denotes entire CFL block; italics denotes part CFL block

TPA – total pool area

APPENDIX II

LOCATION OF CFL LANDS IN KEC DEED OF SETTLEMENT

The map on the following page shows the location of CFL lands in the KEC deed of settlement.



Location of CFL lands in the KEC deed of settlement

APPENDIX III

THE CROWN'S ASSESSMENT OF OVERLAPPING INTERESTS

The table on the following pages shows the Crown's assessment of the threshold interests of overlapping CNI claimants in the remaining CFL lands. It is based on material from pages 28 and 29 of Paul James's brief of evidence of 18 April 2007 (doc B21(a)).

CFL forest name	Area (ha)	Groups with non-overlapped interests	Groups with overlapped interests
Crater Forest/Rerewhakaitu	1081	Ngati Rangitihi	
Erua Forest	184	Ngati Tuwharetoa	
Gwavas	8426		Ngati Kahungunu
Heruiwi 4	2368		Ngai Tuhoe Ngati Manawa Ngati Whare Ngati Hineuru Ngati Kahungunu
Heruiwi	8484		Ngati Manawa Ngati Whare
Kaingaroa 1	41,238		Ngati Rangitihi Ngati Haka Pataheuheu Ngati Tuwharetoa Ngati Manawa Ngati Whare
Kaingaroa Forest/Rerewhakaitu	1742	Ngati Rangitihi	
Karioi	11,018		Ngati Tuwharetoa Tamawhiti/Hauiti Ngati Rangi
Marotiri Forest	166	Ngati Tuwharetoa	
Matahina A	2415	Ngati Haka Pataheuheu	
Matahina C	499	Ngati Haka Pataheuheu	
Part Esk	7558		Ngati Hineuru Ngati Kahungunu
Part Kaweka	7522		Ngati Hineuru Ngati Kahungunu
Part Patunamu Forest	3236		Ngai Tuhoe Ngati Kahungunu
Part Remainder Horohoro	205		Ngati Whakaue Ngati Rangiwewehi
Part Remainder Rotoehu	3597		Ngati Makino–Waitaha
Pohokura	2896		Ngati Manawa Ngati Hineuru

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Pukahunui	18,750	Ngati Manawa	
Pureora South Forest	1022	Ngati Tuwharetoa	
Remainder Kaingaroa 1A	50		Ngati Rangitihi Ngati Manawa Ngati Whare
Remainder Kaingaroa 2	7340		Ngati Rangitihi Ngati Tuwharetoa Ngati Manawa
Rotomahana Parekarangi	69	Ngati Rangitihi	
Runanga 1	1308		Ngati Tuwharetoa Ngati Hineuru Ngati Kahungunu
Runanga 2	4125	Ngati Tuwharetoa	
Tauhara Middle 3	398	Ngati Tuwharetoa	
Taurewa Forest	1322	Ngati Tuwharetoa	
Te Whaiti 1	739		Ngai Tuhoe Ngati Manawa Ngati Whare
Te Whaiti 2	739		Ngai Tuhoe Ngati Manawa Ngati Whare
Waimihia North Forest	7161	Ngati Tuwharetoa	
Waimihia South Forest	16,030	Ngati Tuwharetoa	
Waiohau B9	784		Ngai Tuhoe
Waituhi Forest	1179	Ngati Tuwharetoa	
Whakarewarewa/Highlands; Whakarewarewa/Tokorangi; Whakarewarewa/Whakarewarewa block	4577	Ngati Whakaue	
Whirinaki	3643		Ngai Tuhoe Ngati Manawa Ngati Whare
Total CFL area remaining	17,1871		

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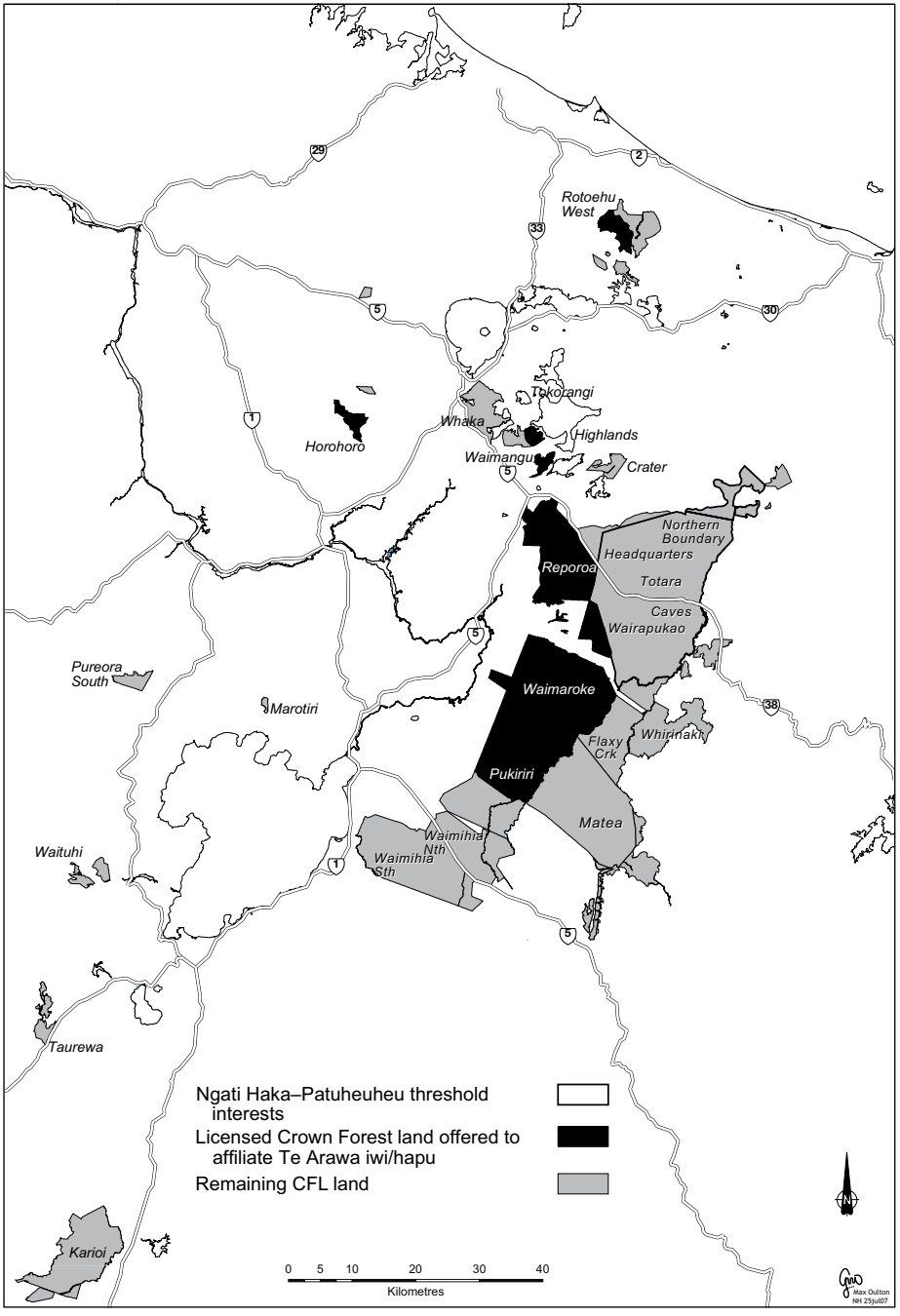
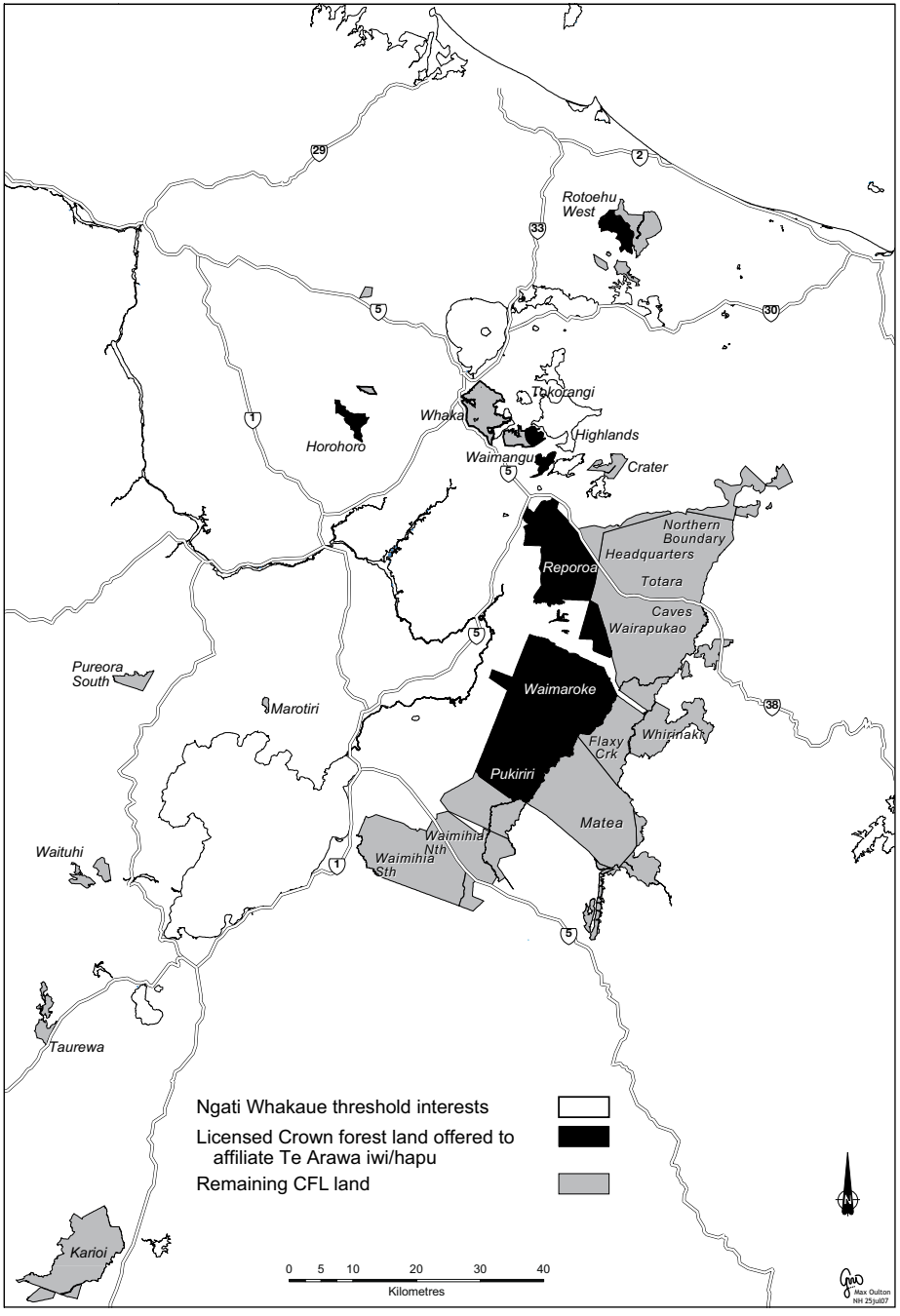
APPENDIX IV

THE CROWN'S ASSESSMENT OF THRESHOLD INTERESTS

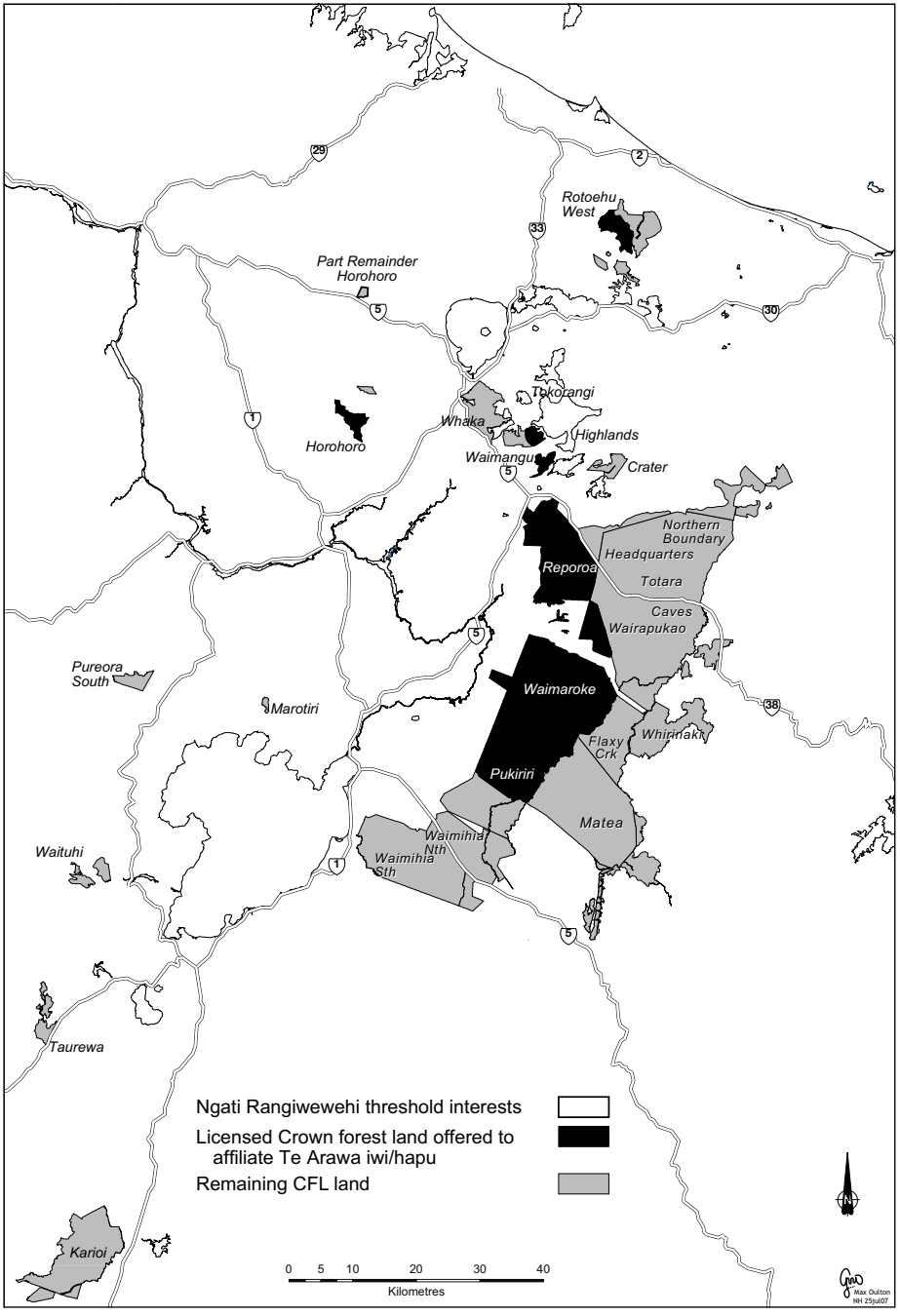
The eight maps that follow show the Crown's assessment of the threshold interests of Ngati Haka–Patuheuheu, Ngati Whakaue, Ngati Rangiwewehi, Ngati Makino–Waitaha, Ngati Manawa, Ngati Tuwharetoa, Ngai Tuhoe, and Ngati Rangitihi in the remaining central North Island Crown forestry licence land.



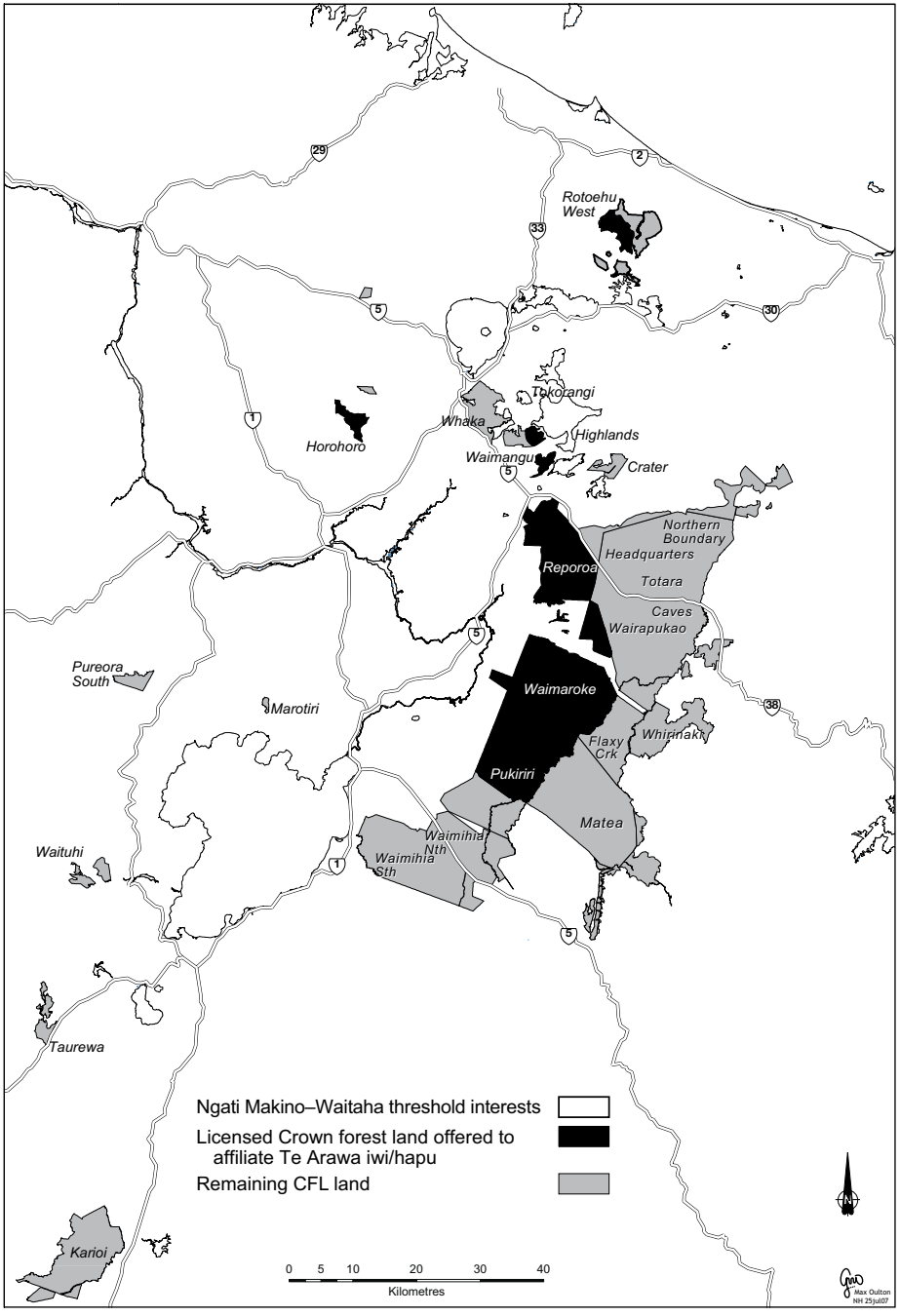
Crown assessment of threshold interests of Ngati Haka–Patuheuheu in remaining central North Island Crown forestry licence land



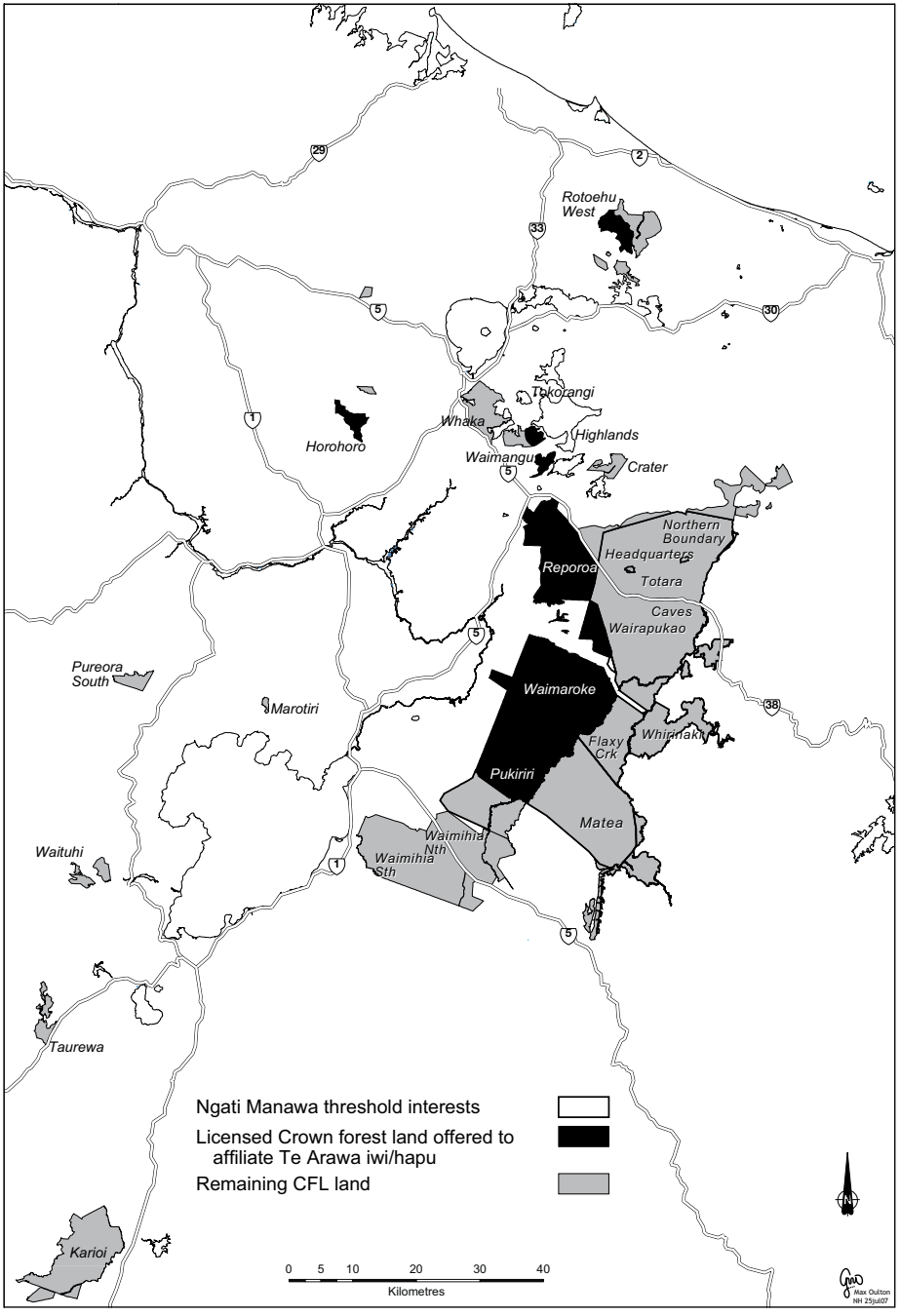
Crown assessment of threshold interests of Ngati Whakaue in remaining central North Island Crown forestry licence land



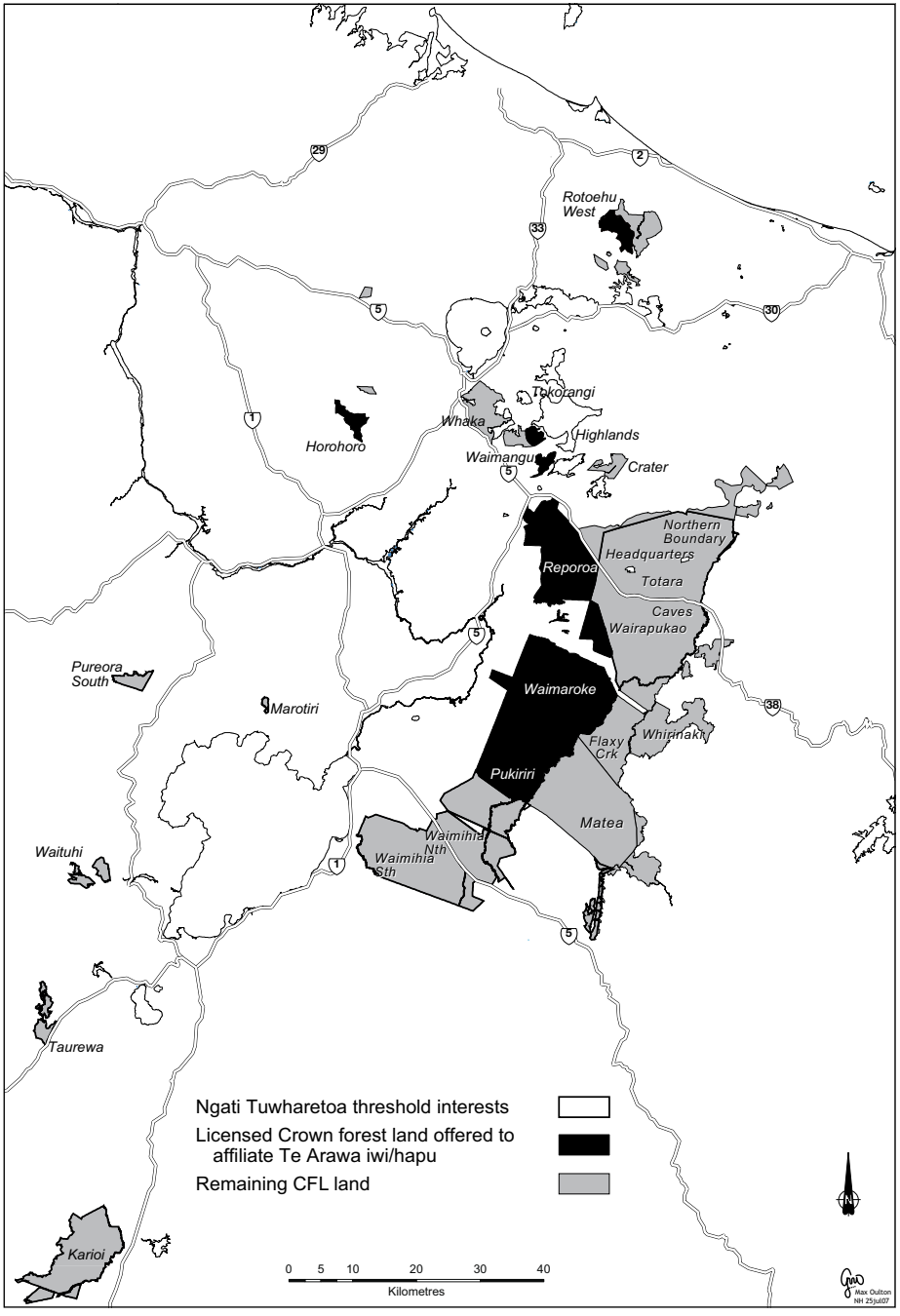
Crown assessment of threshold interests of Ngati Rangiwewehi in remaining central North Island Crown forestry licence land



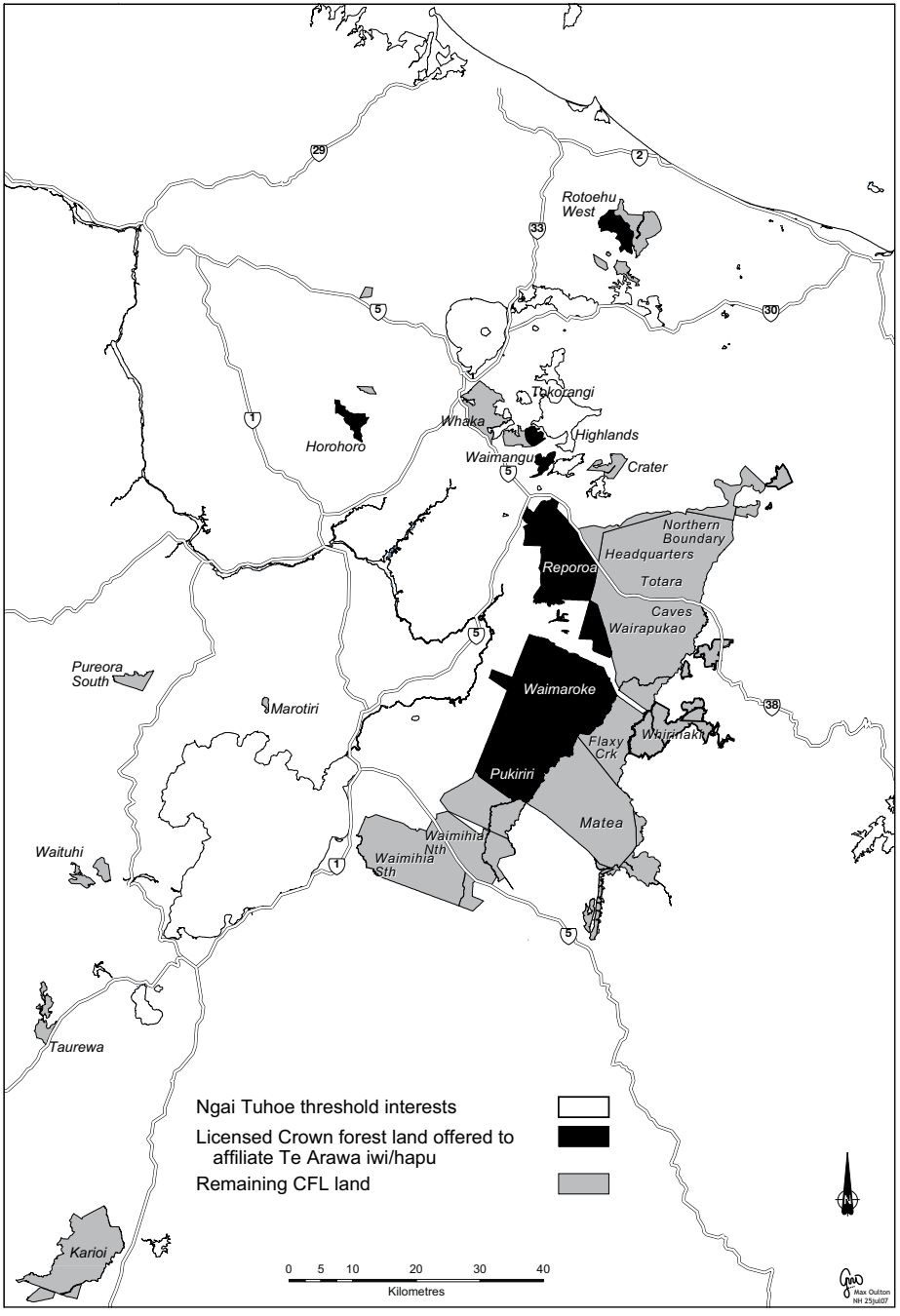
Crown assessment of threshold interests of Ngati Makino–Waitaha in remaining central North Island Crown forestry licence land



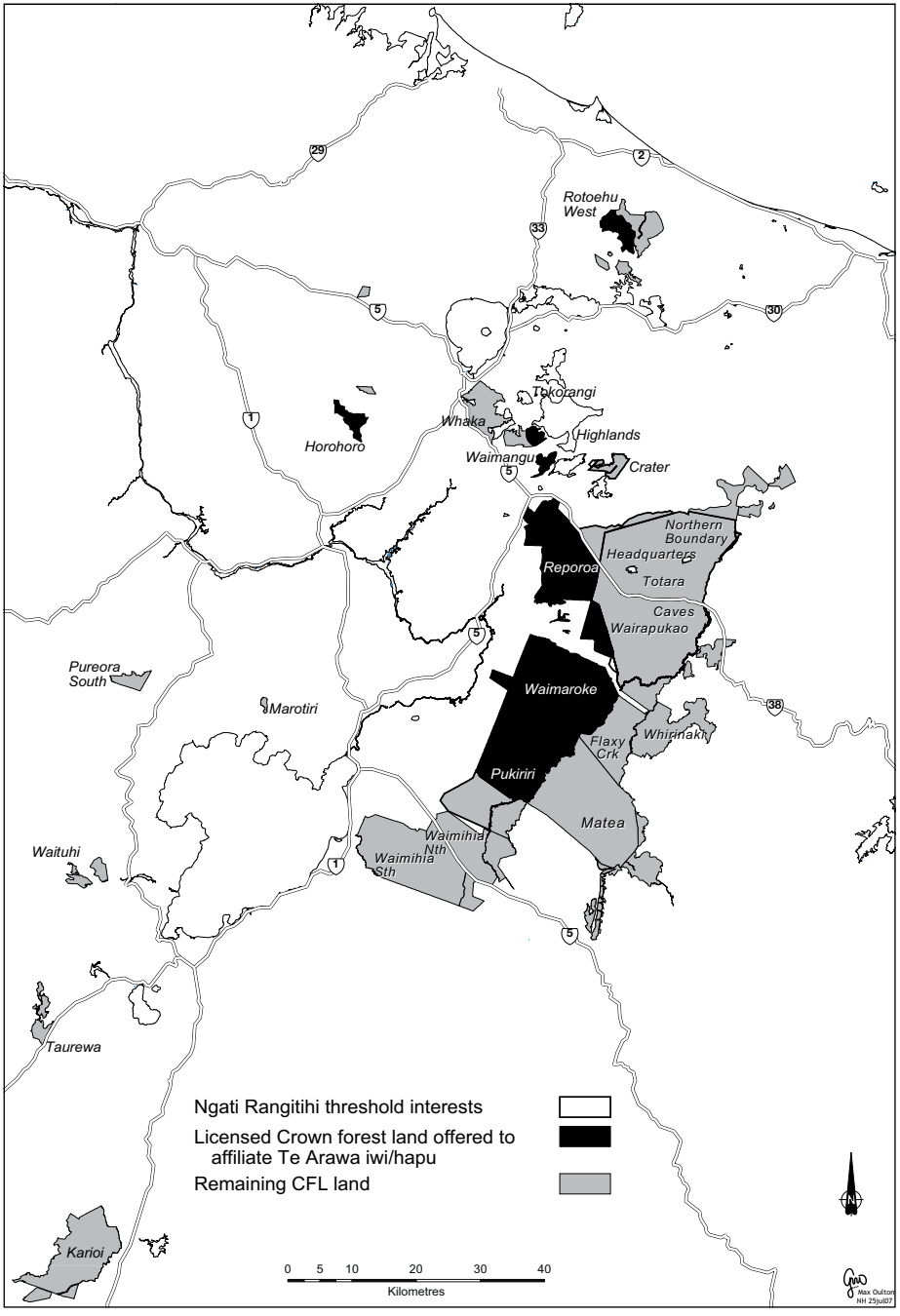
Crown assessment of threshold interests of Ngati Manawa in remaining central North Island Crown forestry licence land



Crown assessment of threshold interests of Ngati Tuwharetoa in remaining central North Island Crown forestry licence land



Crown assessment of threshold interests of Ngai Tuhoe in remaining central North Island Crown forestry licence land



Crown assessment of threshold interests of Ngati Rangitihi in remaining central North Island Crown forestry licence land