THE NGĀTI AWA SETTLEMENT CROSS-CLAIMS REPORT

Downloaded from www.waitangi-tribunal.govt.nz

THE NGĀTI AWA SETTLEMENT CROSS-CLAIMS REPORT

WAI 958

WAITANGI TRIBUNAL REPORT 2002

The cover design by Cliff Whiting invokes the signing of the
Treaty of Waitangi and the consequent interwoven development of
Maori and Pakeha history in New Zealand as it continuously
unfolds in a pattern not yet completely known

A Waitangi Tribunal report
ISBN 1-86956-266-6
www.waitangi-tribunal.govt.nz
Typeset by the Waitangi Tribunal
Published by Legislation Direct, Wellington, New Zealand
Printed by SecuraCopy, Wellington, New Zealand
Set in Adobe Minion and Cronos multiple master typefaces

Downloaded from www.waitangi-tribunal.govt.nz

TABLE OF CONTENTS

TABLE OF MAPS

TABLE OF ABBREVIATIONS

app	appendix
CA	Court of Appeal
ch	chapter
doc	document
NZLR	*New Zealand Law Reports*
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph

'Wai' is a prefix used with Waitangi Tribunal claim numbers

The Honourable Parekura Horomia
Minister of Māori Affairs

and

The Honourable Margaret Wilson
Minister in Charge of Treaty of Waitangi Negotiations

Parliament Buildings
WELLINGTON

The Waitangi Tribunal
110 Featherston Street
WELLINGTON

26 July 2002

Tēnā kōrua

Enclosed is the Ngāti Awa Settlement Cross-Claims Report, the outcome of an urgent hearing in Rotorua from 17 to 18 June 2002 and in Wellington from 20 to 21 June 2002. This report deals with claims by Ngāti Haka Patuheuheu, Ngā Rauru o Ngā Pōtiki, the Wai 36 Tūhoe claimants, and Ngāti Rangitihi in relation to the settlement offer made by the Crown to Ngāti Awa.

The claimants allege that the policies and practices of the Crown in regard to the settlement of claims, and in particular the policy of 'substitutability', are in breach of the principles of the Treaty of Waitangi. They oppose the offer of certain items of redress to Ngāti Awa on the ground that they have customary interests in, and claims to, these items that have yet to be heard by the Waitangi Tribunal. They claim that they will be prejudiced by the inclusion of these items in the settlement package offered to Ngāti Awa.

The contested items of redress include the transfer to Ngāti Awa of an area of Crown forest licensed land comprised in the Matahina A1B, A1C, and A6 blocks. In addition, the claimants object to items of 'cultural redress' relating to the Matahina A4 and A5 blocks, Kaputerangi, Ōhiwa Harbour, and Moutohorā Island.

The original settlement offer to Ngāti Awa was amended in response to representations made to the Crown by cross-claimants and on the basis of the Crown's own historical research. The revised offer withdrew approximately 25 per cent of the Matahina Crown forest licensed land, and adjustments were also made with regard to the contested items of 'cultural redress', such as making items of redress non-exclusive.

The Tribunal's focus in the inquiry was on whether the Crown's policies, as expressed in the content of the settlement offer to Ngāti Awa, and the Crown's practices, as expressed in its communication and consultation with affected claimants, are in accordance with the

principles of the Treaty of Waitangi. We address the Crown's policy on Crown forest licensed lands in Treaty settlements; the cross-claimants' view of the Crown's policy; why the Crown rejects the approach advocated by the cross-claimants; and the application of the Crown's policy to the Matahina Crown forest licensed lands. We also address the items of cultural redress offered to Ngāti Awa; the Crown's communication and consultation with the cross-claimants; and the Crown's duty to preserve amicable tribal relations.

We find that the Crown's policies on the inclusion of Crown forest land in settlements, and the management of cross-claims to that category of redress, do not breach the principles of the Treaty. We acknowledge that Ngāti Awa, Ngāti Rangitihi, and the Ngāi Tūhoe claimants have demonstrated a threshold interest in Matahina, and we are satisfied that the factual basis exists for the Crown to implement its policy with respect to the Matahina Crown forest licensed lands.

We could not discern, in the Crown's approach to the inclusion of cultural redress in settlements, flaws that amount to a breach of the principles of the Treaty. We think that the Crown properly reviewed its position in relation to the Matahina A4 and A5 blocks. Otherwise, the cultural redress seems to us to be structured in such a way that appropriately recognises Ngāti Awa's mana, but leaves room for other groups to be recognised in future settlements.

With respect to Kaputerangi, it is our understanding that the effect of the transfer of the fee simple estate to Ngāti Awa, combined with the preservation of the reserve status, is to make Ngāti Awa kaitiaki of this land. The reserve status means that the area remains available for public access. We think it important that other Mataatua groups continue to be entitled to visit this place in accordance with their traditional norms. If it proves that, in practice, the access of the general public to the land interferes with those norms, we think that consideration should be given to changing the nature of the reserve status to make special provision for Mataatua iwi and hapū.

We find, with regard to the Crown's communication and consultation with the cross-claimants, that some of the language employed by the Crown to describe its policy – or perhaps the language by which the Crown's policies have become known – is unfortunate. We note, in particular, the description of Crown forest licensed lands as 'commercial assets' that are in their nature 'substitutable'. We also find that the Crown did not adequately disclose its policy agenda to the parties affected by the proposed settlement with Ngāti Awa. This is partly, we think, due to the fact that the Crown was developing its policy during the period when it was communicating with the cross-claimants. While we think that the cross-claimants have a justifiable sense of not having been dealt with properly, we hesitate to find that the Crown was acting in bad faith. We are conscious that prejudice to

the cross-claimants does not appear to have resulted from the Crown's failure to manage well the communication of its policy and the reasons for it.

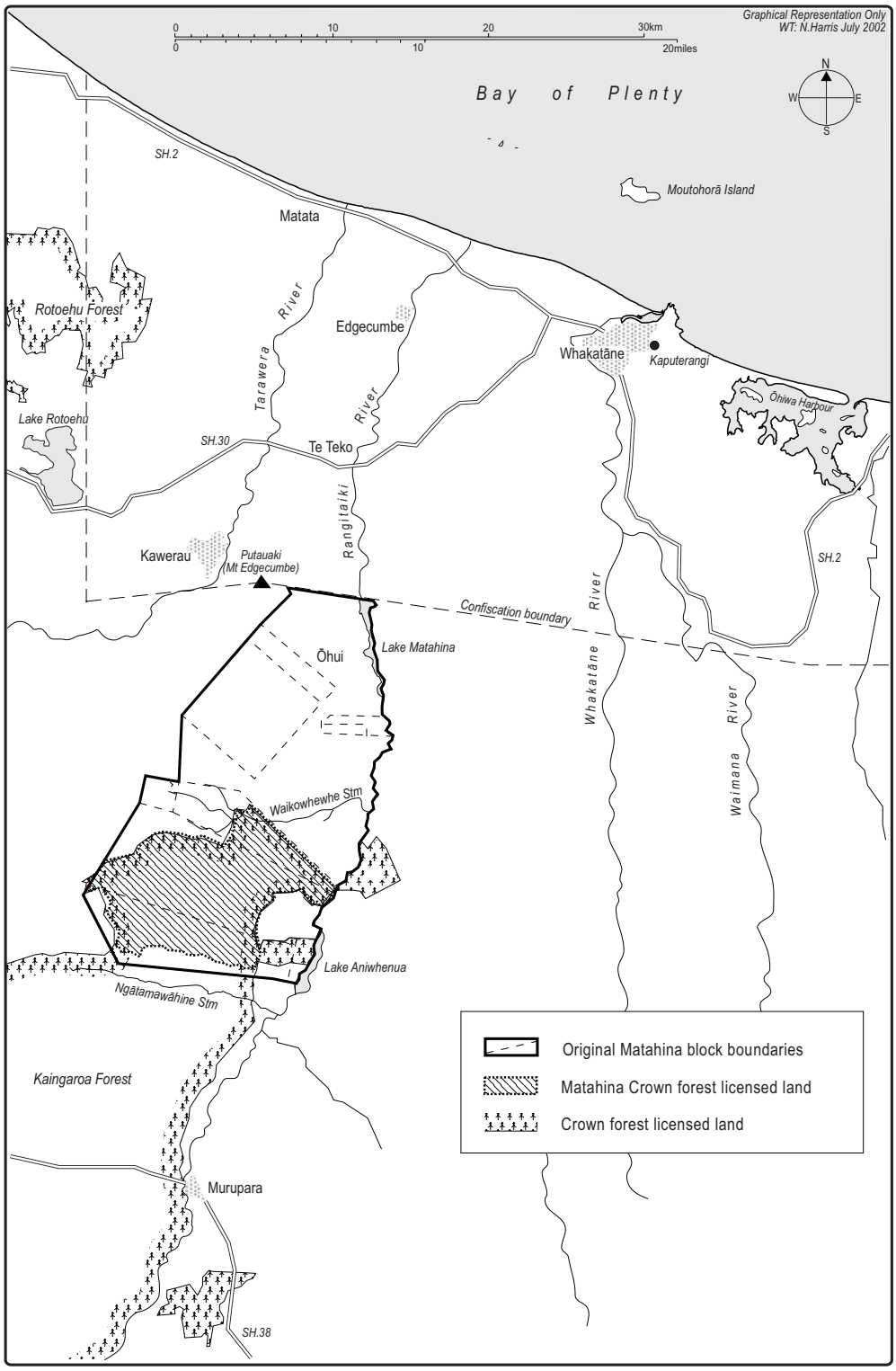
We acknowledge that the management of cross-claims is a difficult area. We think that the Crown should be pro-active in doing all that it can to ensure that the cost of arriving at settlements is not a deterioration of inter-tribal relations. The Crown must also be careful not to exacerbate situations where there are fragile relationships within tribes.

It was not clear to us to what extent the Crown officials see the Crown as obliged to take on responsibility for resolving conflicts arising from its offers of redress that are subject to cross-claims. We recommend that the Office of Treaty Settlements works to improve its officials' understanding of how this duty is fulfilled in practice.

Heoi anō e ngā rangatira, koianei ngā whakaaro ka pupū ake i te hinengaro o te Rōpu Whakamana i te Tirīti o Waitangi hei tātaritanga, hei wānanga mā kōrua.

Nāku noa

nā Judge Carrie Wainwright
Presiding Officer



Map 1: Location map

CHAPTER 1

BACKGROUND TO THE URGENT HEARING

1.1 The *Ngati Awa Raupatu Report*

In early October 1999, the Waitangi Tribunal released its *Ngati Awa Raupatu Report*, urging the settlement of all historical matters with Ngāti Awa.[1] The report concentrated on the raupatu or confiscation of some 245,000 acres of land from the hills beyond the original course of the Tarawera River to Ōhiwa Harbour, and the subsequent land reorganisation and relocations. While concerning all the hapū or tribes of the Rangitaiki district, the report focused on the claim by Dr Hirini Mead for 21 Ngāti Awa hapū – the largest claim in terms of land area and people involved. The Tribunal heard the Ngāti Awa and other claims over almost a year and a half during the course of 1994 and 1995.

Amongst other things, Ngāti Awa claimed that their land was wrongfully confiscated; that several hapū were required to relocate to blocks removed from their ancestral habitations where they could be kept under military surveillance; and that those charged in relation to murder did not receive a fair trial. The claim also contended that Ngāti Awa people, being branded as rebels, were wrongly excluded from the award of lands outside the confiscation boundary. The Tribunal found that the confiscation was clearly contrary to the Treaty of Waitangi and was satisfied that Ngāti Awa had valid Treaty claims in respect of the confiscation of lands as far east as Ōhiwa Harbour.[2]

The *Ngati Awa Raupatu Report* is not a full report on all aspects of the claims that were filed. Both Crown and claimant counsel considered that the main claims – relating to the raupatu and contemporary land allocations – were capable of settlement without the Crown concluding its evidence on these matters, and the Tribunal was asked to complete a report on the main issues. While the Tribunal did not investigate claims relating to the Native Land Court's award of lands outside the confiscation boundary and the acquisition of some of these lands by the Crown, the Tribunal considered that these matters should nevertheless be comprised within the settlement of the raupatu.[3]

The report noted that Tūhoe and Whakatōhea claimed interests in parts of the lands claimed as traditional territory by Ngāti Awa and that the Tribunal had no doubt that Tūhoe

1. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: GP Publications, 1999), p ix
2. Ibid, pp 1–4
3. Ibid, p 1

and Whakatōhea could establish close customary associations with parts of the lands affected by the Ngāti Awa claim. The Tribunal did not think it necessary or desirable to attempt to define boundary lines.[4] Among those claims not covered by the report were those of Tūhoe, Ngāti Whare, and Te Ika Whenua with regard to the Matahina district. The Tribunal reserved the rights of those other groups, stating that 'the finalisation of their claims, if proven, will be proposed in other inquiries still to be undertaken'.[5]

The claims not investigated, the Tribunal noted, related mainly to Rotoehu, Matahina, and the Tarawera Valley. The Tribunal said that 'a full examination of the extent to which the local hapū were disinherited would require an exhaustive analysis of Native Land Court records, which the Tribunal has been unable to make'. Nevertheless, the Tribunal considered that 'a settlement should be sought in respect of all historical matters'.[6]

The Tribunal stated that 'the complex pattern of overlapping claims and boundaries need not inhibit a settlement', and considered that it would be wrong 'if the return of particular lands had to depend upon the agreement of all contenders . . . The effect of requiring full agreements will only exacerbate the divisions caused by the wrongs already done'.[7] The Tribunal proposed that, 'where particular lands are sought and there is no agreement, the matter should be referred back to the Tribunal for a recommendation, after such further hearing of those interested as may be necessary'.[8]

1.2 The Redress Offered to Ngāti Awa

In December 1998, the Crown and Ngāti Awa entered into a heads of agreement for the settlement of all Ngāti Awa historical claims. A 'Ngāti Awa historical claim' is defined by the Office of Treaty Settlements as a claim that any Ngāti Awa person or group may have that 'arises from the Treaty of Waitangi or its principles, or from legislation, common law, fudiciary duty or otherwise', and that arises from or relates to acts or omissions committed before 21 September 1992 by or on behalf of the Crown, or by or under legislation.[9]

The settlement offer comprised a Crown apology, fiscal redress, mana recognition redress, and an overall settlement quantum. Ngāti Awa were advised that 'this is a comprehensive settlement offer, made on a without prejudice basis, and that the Crown wishes to negotiate a full and final settlement with Ngati Awa', and that 'elements of redress in the offer remain conditional on the resolution of cross-claims'.[10]

4. Waitangi Tribunal, *The Ngati Awa Raupatu Report*, p 4
5. Ibid, p 10
6. Ibid, p 8
7. Ibid, pp 131, 136
8. Ibid, p 136
9. Document A1, pp 4–5
10. Ibid, annex D

The Crown's settlement offer to Ngāti Awa was revised in October 2000 and included the following redress to which overlapping claimants object:

Items of cultural redress:

- Kaputerangi historic reserve: transfer of fee simple title subject to existing reserve status and continued public access;
- stratum title to Matahina A4: transfer of fee simple title;
- Matahina A5: transfer of fee simple title;
- Tauwhare Pā scenic reserve: vesting under section 26 of the Reserves Act 1977;
- Port Ōhope recreation reserve: transfer of title of a 10-hectare site, subject to existing reserve status, protection of important conservation areas, and continued public access;
- Port Ōhope recreation reserve: grant of a one-hectare nohoanga (temporary camping) entitlement;
- establishment of a joint management committee in respect of Moutohorā Island, Ōhope scenic reserve, and Uretara Island;
- statutory acknowledgement in relation to Ōhiwa Harbour; and
- a preferential right for Ngāti Awa to purchase up to 5 per cent of any tendered coastal marine space in Ōhiwa Harbour.

The cultural redress offered to Ngāti Awa includes items of exclusive redress (redress available to only one claimant group) and items of non-exclusive redress (redress that can be offered to more than one group).

Items of commercial redress:

- Matahina A1B, A1C, and A6 blocks (Crown forest licensed land): offer for purchase by Ngāti Awa of these three blocks within the Kaingaroa Forest, with accumulated rentals of (at this time) around $9.8 million; and
- Ōhope Beach Holiday Park: transfer of Crown's lessor interest subject to existing encumbrances and reserve status.

A total redress quantum of $42.38 million was established to settle all Ngāti Awa claims.[11]

On 3 January 2001, the Crown's settlement offer to Ngāti Awa was forwarded for comment to those claimants identified by the Office of Treaty Settlements as having overlapping interests. Follow-up letters were sent out on 30 April 2001.

1.3 The Ngāti Haka Patuheuheu Claim

On 20 December 2001, Robert Pouwhare filed a statement of claim with the Waitangi Tribunal on behalf of himself and Ngāti Haka Patuheuheu concerning 'the land of Ngati Haka/Patuheuheu that the Crown intends to offer to Ngati Awa to settle Wai 46'. The claim was

11. Ibid, annex AD

registered on 28 January 2002 as Wai 958. The lands identified in the claim are Matahina A5; Matahina A4; and Matahina blocks A1B, A1C, and A6. The claim also refers to 'the alienation of land and resources of Ngati Haka'. Ngāti Haka Patuheuheu are described as 'the tangata whenua of Waiohau, Te Houhi, the middle reaches of the Rangitaiki River and the Matahina area'. The claim alleges that 'the Matahina lands lie outside the Ngati Awa Raupatu boundary and within the Ngati Haka/Patuheuheu rohe', and that 'the transfer of the Matahina lands is inconsistent with the principles of the Treaty of Waitangi and will prejudice Ngati Haka/Patuheuheu'.[12]

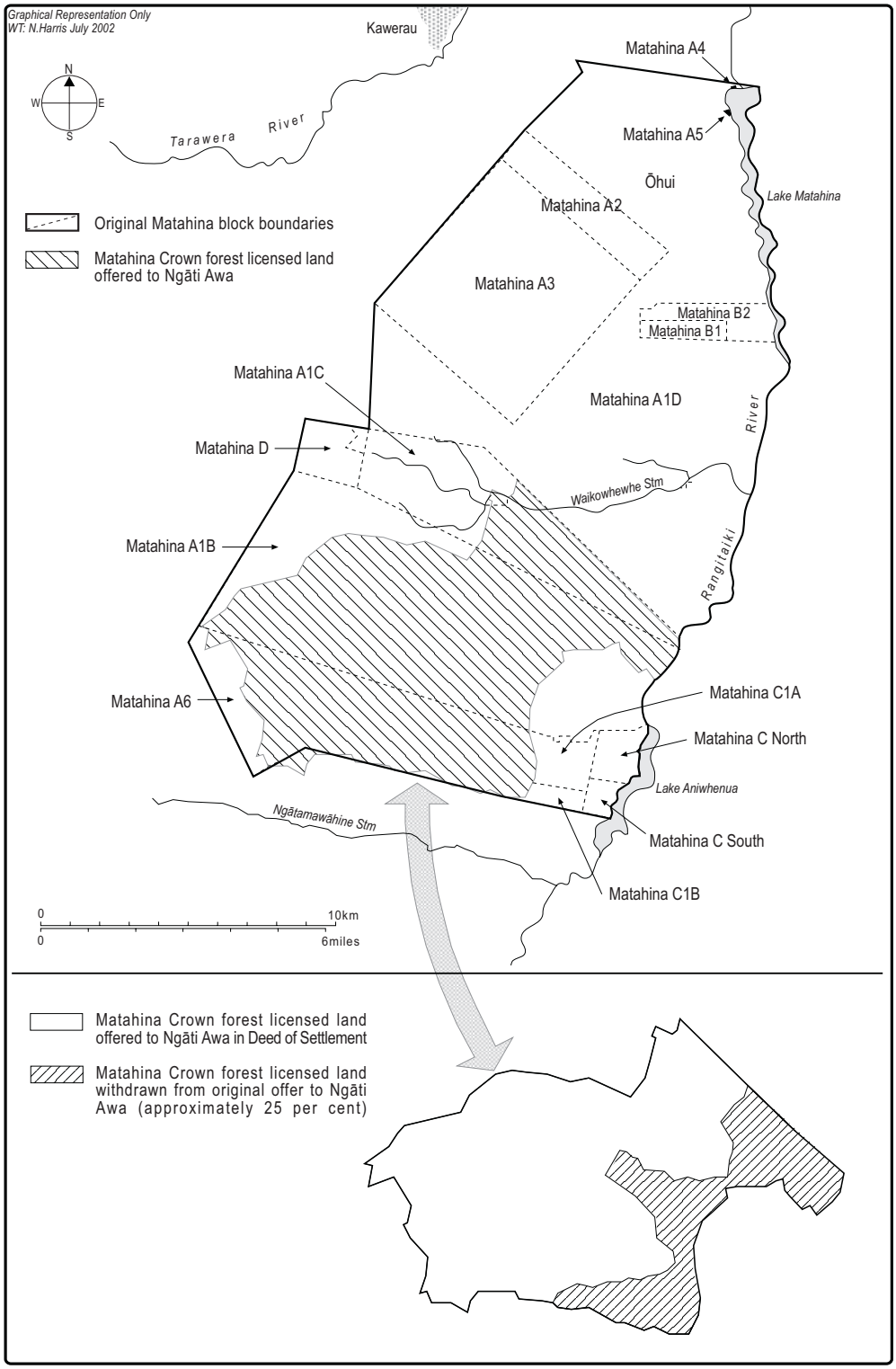
1.4 The Application for Urgency

The Wai 958 statement of claim was accompanied by an application for an urgent hearing. The application was made on the ground that the negotiation and ratification of a deed of settlement with Ngāti Awa, and subsequent settlement legislation, were imminent. A memorandum filed on behalf of Ngā Rauru o Ngā Pōtiki, a cluster of Tūhoe and Te Arawa claimants including Robert Pouwhare, accompanied the application. This memorandum stated that the contested land 'is of significance to all Tuhoe' and, because it 'lies within the Ngati Awa hearing district', the claimants have sought 'to utilise the leave reserved by the Ngati Awa Tribunal and have that Tribunal reconvene to hear these matters'.[13] In a memorandum filed on 20 December 2001, counsel for Ngā Rauru o Ngā Pōtiki likewise stated that they had 'resolved to seek a hearing and recommendation from the Ngati Awa Tribunal as to the Treaty compliance or otherwise of the proposal by the Crown to deal with the offered sites'.[14]

In memorandum and directions dated 25 January 2002, the deputy chairperson of the Waitangi Tribunal noted that 'reconvening the Wai 46 Tribunal is no longer practically possible, so the matter will have to be considered afresh by a separate Tribunal if it is considered at all'. Regarding the matter of urgency, submissions were called for from all the main interested parties; namely, the Ngāti Haka and Ngā Rauru claimants, the Tūhoe–Waikaremoana Māori Trust Board, Ngāti Awa, and the Crown.[15]

Submissions supporting the application for urgency were received on behalf of Robert Pouwhare for Ngāti Haka Patuheuheu; Sir John Tūrei and others for Ngā Rauru o Ngā Pōtiki; James Milroy and Tamaroa Nīkora on behalf of the Tūhoe–Waikaremoana Māori Trust Board and the Tūhoe tribe (Wai 36); and Leith Comer for Ngāti Rangitihi (Wai 524).[16] Submissions opposing the application were received from both Ngāti Awa and the Crown.[17]

12. Claim 1.1
13. Paper 2.1
14. Paper 2.3
15. Paper 2.2
16. Papers 2.4–2.8
17. Papers 2.9–2.11



Map 2: Original Matahina blocks showing Crown forest licensed land offered to Ngāti Awa

1.4

The Crown opposed the application on the ground that a Waitangi Tribunal hearing of this matter was premature. Crown counsel argued that the items of redress in question were 'still subject to the Crown confirming that cross-claims have been addressed to the satisfaction of the Crown'. The Tribunal was informed that the Crown had commissioned site-specific research in respect of Matahina A4 and A5, which 'will be considered, along with all other relevant issues raised by cross-claimants, when Ministers consider whether overlapping claims have been satisfactorily resolved'. The Crown also undertook to 'advise cross-claimants of how it intends to address cross-claims, and will [give] seven days notice of any intention to initial a Deed of Settlement with Ngati Awa'. Furthermore, the Crown submitted, no decision had yet been made in respect of the Matahina Crown forest licensed lands, and a meeting had been proposed at which Ngāti Awa and the overlapping claimants could 'explore whether there are alternative options to the transfer of the licensed lands to Ngati Awa'. As Ngāti Awa had indicated that they were unwilling to attend such a meeting, the Crown considered that 'it seems unlikely that cross-claim issues will now be resolved between the parties'.[18]

The Crown also noted that 'the process of resolving cross-claims involves a cautious balancing of competing interests', and submitted that, while no final decision regarding the resolution of cross-claims had yet been made, 'the process undertaken, including substantial consultation, indicates the Crown's awareness of these interests and of its Treaty obligations to both Ngati Awa and overlapping claimants'.[19]

Regarding the claims raised in the submission on behalf of Ngā Rauru o Ngā Pōtiki, the Crown stated that the claimants 'are not prejudiced by the offer of non-exclusive redress to Ngati Awa' and that the Crown 'retains the capacity to offer similar redress to other claimant groups'.[20]

On 8 February 2002, the Waitangi Tribunal declined the granting of urgency 'at this juncture', stating that, 'while the issues raised by the parties objecting to the current terms of settlement are serious ones, for the Tribunal to seek now to intervene would be premature'. It was noted that controversial elements of the settlement were still under negotiation, that those discussions should be allowed to run their course, and that there remained a possibility that the cross-claimants' objections could be met in a way that was acceptable to all. All the parties were urged to act in good faith to assist the Crown in resolving the competing interests of the various claimants. The Crown was also requested to ensure that 'sufficient time is left between the articulation of the final content of the settlement package and irrevocable steps being taken to sign off on that settlement'. The Tribunal noted that, while it did not wish to delay the implementation of Ngāti Awa's settlement, it was important that 'every effort is made to ensure that the relationship between Ngāti Awa and its neighbours is not

18. Paper 2.9, paras 50.1–50.2
19. Ibid, para 50.3
20. Paper 2.10, para 50.3

unnecessarily soured by the terms of the settlement, and that the legitimate future interests of other claimants are not unnecessarily prejudiced'.[21]

1.5 Further Developments and the Second Application for Urgency

On 26 February 2002, the Waitangi Tribunal received an amended statement of claim from Robert Pouwhare clarifying the Wai 958 claim. It was submitted that 'the Matahina Lands lie outside the Ngati Awa Raupatu boundary and within the Ngati Haka/Patuheuheu rohe', and that Ngāti Haka Patuheuheu had advised the Crown that they objected to the transfer of the Matahina lands to Ngāti Awa. It was acknowledged that the Crown had agreed to discuss some of the issues raised by Ngāti Haka Patuheuheu and that the Crown had commissioned Te Uira Associates to report on the interests of Ngāti Haka Patuheuheu in Matahina A4 and A5 (and Kaputerangi). It was further submitted that the Crown had refused to investigate the issues raised by Ngāti Haka Patuheuheu in relation to the Matahina Crown forest licensed lands because of the Crown's settlement policy. Ngāti Haka Patuheuheu alleged that the Crown's substitutability policy 'is inconsistent with the principles of the Treaty of Waitangi and will cause further loss and grievance to Ngati Haka/Patuheuheu'. It was also alleged that the transfer of the Matahina Crown forest licensed lands 'will affect the ability of the Crown to settle the claims of Ngati Haka/Patuheuheu as the Crown does not have sufficient land within the claim area to satisfy the claims of Ngati Haka/Patuheuheu'.[22] The Wai 958 amended statement of claim was registered by the Waitangi Tribunal on 4 June 2002.[23]

On 26 February 2002, a statement of claim was also filed by Sir John Tūrei and others on behalf of Ngā Rauru o Ngā Pōtiki concerning 'the overlapping interest of Tūhoe in certain land proposed to be transferred by the Crown to Ngati Awa'. In addition to the Matahina lands covered by the Ngāti Haka Patuheuheu claim, Ngā Rauru o Ngā Pōtiki objected to the Crown's offer to transfer to Ngāti Awa Kaputerangi historic reserve (subject to the Reserves Act 1977) and non-exclusive interests in Moutohorā Island and Ōhiwa Harbour. They also objected to the Crown's settlement policy under which the offer was made.[24] This claim was registered on 10 June 2002 as Wai 975, and consolidated with Wai 958 for inquiry, including urgent hearing, since both claims relate to similar issues of Crown policies and practices.[25]

On 31 May 2002, counsel for Robert Pouwhare submitted a memorandum renewing his application for urgency. It said that there had been discourse between the various affected parties, and that the Minister in Charge of Treaty of Waitangi Negotiations had adjusted the offer to Ngāti Awa. However, 'in the claimant's view the adjusted offer made by the Minister

21. Paper 2.13
22. Claim 1.1(a)
23. Paper 2.16
24. Claim 1.2
25. Paper 2.24

does not address the concerns of the claimant adequately'. It was noted that the Crown had ended negotiations over the contested aspects of the offer.

The Crown's proposed settlement offer to Ngāti Awa had been reduced. The Crown withdrew 25 per cent of the Crown forest licensed land known as Matahina A1B, A1C, and A6. The offer to transfer Matahina A5 to Ngāti Awa changed from an exclusive transfer to a non-exclusive statutory acknowledgement over the site in favour of Ngāti Awa.[26]

On 23 May 2002, the Office of Treaty Settlements informed counsel for Mr Pouwhare that 'the Crown and Ngati Awa negotiators intend to initial a Deed of Settlement as soon as possible, although this will not occur before 20 June 2002'.[27]

On 6 June 2002, the Waitangi Tribunal granted urgency, 'because of the importance of the practices and policies in question, and because of the irrevocability of the steps shortly to be taken by the Crown'. In granting urgency, Judge Carrie Wainwright noted that:

> I am now satisfied that the parties have concluded their discussions on the matters at issue between them. The Crown has revised its settlement offer to Ngāti Awa in response to the concerns of Ngāti Haka Patuheuheu. However, differences remain. These differences at their most basic are about whether certain items should or should not be included in the settlement package that the Crown has offered to Ngāti Awa. That is not the level at which the Tribunal is disposed to become involved.[28]

Counsel for Ngāti Haka Patuheuheu, was instructed to file a memorandum setting out those parts of the settlement offer to Ngāti Awa with which the claimant takes issue. She was directed also to set out the basis for her client's opposition to the Crown's policies and practices as expressed in the settlement. Counsel for the Crown was instructed to file a memorandum stating the basis for the Crown's decision to proceed with each element of the settlement on the current footing, with the reasoning behind, and the Treaty justification for, the policies and practices that are the subject of the applicant's claim.

A telephone conference was convened on the afternoon of 6 June 2002 to allow counsel for both Ngāti Haka Patuheuheu and the Crown to raise any additional issues prior to the confirmation of a hearing. Counsel for Ngāti Awa also participated. The interests of the Wai 36 claimants (James Milroy and Tamaroa Nīkora on behalf of the Tūhoe–Waikaremoana Māori Trust Board and the Tūhoe tribe) were noted, and they were granted leave to join the urgent inquiry as a party. The likely interests of the Wai 524 (Ngāti Rangitihi) claimants, who had earlier registered an interest in these matters, were also noted.[29]

The second application for urgency was not opposed by the Crown or Ngāti Awa, although both parties opposed having the hearing in Rotorua.[30] Counsel for the Tūhoe–

26. Paper 2.15
27. Paper 2.15(a), app L
28. Paper 2.14
29. Ibid
30. Papers 2.29, 2.33

Waikaremoana Māori Trust Board (Wai 36) opposed the urgent hearing on the ground that it was premature and should await the resolution of forthcoming High Court proceedings relating to this matter (discussed in section 1.6).[31]

On 11 June 2002, a memorandum was received from counsel for Ngāti Rangitihi claimants in which their objection to the inclusion of the Matahina lands in the Crown's settlement offer to Ngāti Awa was outlined.[32]

In a memorandum and directions dated 12 June 2002, Judge Wainwright confirmed that the hearing would take place in Rotorua on 17 and 18 June 2002.[33]

1.6 Proceedings in the High Court

In the memorandum of counsel for Robert Pouwhare dated 31 May 2002 renewing the application for urgency, the Tribunal was informed that the claimant had lodged proceedings in the High Court at Wellington (CP78/02) seeking:

> A declaration that the Minister will breach section 35 of the [Crown Forest Assets Act 1989] by transferring 75% of the Matahina Forest Land to Ngati Awa without first obtaining the applicant's consent or alternatively a recommendation pursuant to section 8HB or 8HE of the Treaty of Waitangi Act from the Waitangi Tribunal.[34]

On 6 June 2002, counsel for the Wai 36 claim advised the Tribunal that those claimants had also filed judicial review proceedings in the High Court (CP77/02) challenging the Minister's decision to enter into a deed of settlement with Ngāti Awa. It was noted that the issues raised in those proceedings are similar to the issues raised by counsel for Robert Pouwhare, except that 'they allege far more extensive breaches of the Minister's duties'.[35]

The Wai 36 proceedings allege that the provisional decisions of the Minister in Charge of Treaty of Waitangi Negotiations with regard to the offer of the Matahina Crown forest licensed land (as part of the Ngāti Awa settlement) contravene section 35 of the Crown Forest Assets Act 1989. The proceedings also allege that, in making her provisional decision, the Minister has breached the rules of natural justice in that:

> she has not afforded the [plaintiffs] the opportunity to establish their claim to the Matahina Block and to seek return of the Matahina Crown Forest Land pursuant to the Crown Forest Assets Act 1989 nor to address before the Waitangi Tribunal the other matters referred to in . . . the statement of claim.

31. Paper 2.31
32. Paper 2.32
33. Paper 2.34
34. Paper 2.15, para 17; paper 2.15(a), app J; paper 2.23
35. Paper 2.17, para 4; paper 2.19, app 1

1.6

It is contended that the Minister, in making her provisional decision:

> has predetermined that Ngati Awa has the paramount customary interests in the Matahina Block and in the Matahina Crown Forest Land before the Waitangi Tribunal has inquired into and reported on any claims to the Matahina Block and the Matahina Crown Forest Land.

Finally, the proceedings claim that the Minister's provisional decision is 'irrational in that no reasonable Minister could have decided to settle the Ngati Awa claim in that manner'.[36]

The two proceedings, while not consolidated, are to proceed jointly and will be heard on 1 and 2 August 2002.[37] Counsel for both the Wai 36 claimants and Robert Pouwhare were informed by the Crown Law Office that 'initialling the Settlement Deed by negotiators does not itself prejudice any rights claimed by the plaintiffs' and that:

> the Crown undertakes that it will not sign any Deed of Settlement before resolution of the High Court proceedings to be heard in August. Ngati Awa's solicitors have advised that this condition is acceptable to Ngati Awa.[38]

In her decision and directions of 6 June 2002, Judge Wainwright acknowledged that proceedings had been filed in the High Court 'challenging the legality of the proposal of the Minister for Treaty of Waitangi Negotiations to offer 75% of the Matahina Crown Forest Lands to Ngati Awa'. She noted that a declaratory judgment was sought, and considered this to be a discrete matter 'that does not impinge on the Tribunal's jurisdiction to inquire into whether or not the Crown's policies and practices have been, or are, Treaty-compliant'.[39]

36. Paper 2.19, app 1
37. Ibid, app 3
38. Ibid, app 2, para 3
39. Paper 2.14

CHAPTER 2

THE HEARING

The Tribunal hearing was held at the Rydges Hotel in Rotorua on 17 and 18 June 2002, and at the Quality Hotel in Wellington on 20 and 21 June 2002.

The Wai 958 Ngāti Haka Patuheuheu claimants were represented by Kathy Ertel with Liz Cleary; the Wai 975 Ngā Rauru o Ngā Pōtiki claimants by Te Kani Williams and (in Wellington) Annette Sykes; the Wai 36 claimants by David Ambler with John Koning; the Ngāti Rangitihi claimants by David Rangitauira (in Rotorua) and Peter Churchman (in Wellington); the Wai 46 Ngāti Awa claimants by Jamie Ferguson and Mātanuku Mahuika; and the Crown by Virginia Hardy with David Soper. Present from the Office of Treaty Settlements were Andrew Hampton (director); Deborah Collins (claims manager); and Maureen Hickey (historian).

Prior to the commencement of the hearing, the presiding officer informed counsel that, while the Tribunal would hear such evidence as was required to support the arguments and submissions of counsel, 'it is clear that the parties' contributions to the urgent inquiry, whether by way of argument or evidence, will need to be tightly controlled in order for the Tribunal to get through its business in two days'. Counsel for the Ngāi Tūhoe claimants (that is, claimants in Wai 36, Wai 958, and Wai 975) were advised to confer so as to ensure that the Ngāi Tūhoe evidence was not duplicated.[1] Counsel for Ngāti Awa noted that, since the claims were made against the Crown, Ngāti Awa would supplement the submissions and evidence presented by the Crown.

At the commencement of the hearing, the Tribunal advised counsel that it wished to hear evidence that provided a context within which to examine the arguments presented in submissions, and that submissions should be focused on alleged Crown breaches of the principles of the Treaty of Waitangi. The Tribunal was anxious to avoid being drawn into inter-tribal issues.

While it had been anticipated that two days would allow sufficient time to hear the claim, by the lunchtime adjournment of the second day of the hearing, it became obvious that additional time was needed. Arrangements were made for the hearing to continue in Wellington at the Quality Hotel on Thursday and Friday 20 and 21 June.

1. Paper 2.34

2

As a result of both the evidence presented and the extensive cross-examination of the Crown's witness, the Tribunal directed that closing submissions be filed in writing – claimant counsel by 27 June, and the Crown and Ngāti Awa by 2 July. Claimant counsel were granted the opportunity to address any new material in the Crown's closing submissions by 5 July. The Tribunal would then seek to report on the matter as soon as possible.

CHAPTER 3

EVIDENCE AND SUBMISSIONS

3.1 Submissions of Ngāti Haka Patuheuheu

In her submissions on behalf of the Wai 958 claim, claimant counsel identified Ngāti Haka Patuheuheu as a hapū that most closely affiliates to Tūhoe, stating that the hapū's 'core area' is 'the land and resources of Matahina, Galatea and Waiohau districts'.[1] While noting that Ngāti Haka Patuheuheu do not seek to stall the resolution of the Ngāti Awa claim, counsel stated that central to the Wai 958 claim is the expectation 'that the Crown is required to settle the Ngati Awa claim in a manner that does not prejudice the just and full settlement of the Ngati Haka Patuheuheu claim'.[2] In summary, the Wai 958 issues of claim relate to the offer of certain sites to Ngāti Awa; the process the Crown employed when dealing with the concerns raised by Ngāti Haka Patuheuheu about the offer; and the 'substitutability' policy adopted by the Crown.[3]

Claimant counsel posited four areas of Treaty obligation by the Crown:

(a) a fiduciary duty to claimants not yet heard by the Waitangi Tribunal, and/or not 're-sourced to formulate, study and present their claims';

(b) a duty to protect the rights and claims of Ngāti Haka Patuheuheu;

(c) a duty to provide redress to Ngāti Haka Patuheuheu and not to compromise the Crown's ability to provided redress; and

(d) a duty to conduct a proper inquiry into the claims of Ngāti Haka Patuheuheu before taking steps that do or may affect the rights of Ngāti Haka Patuheuheu.[4]

Counsel stated that, despite what the Wai 958 claimants regarded as 'the terms and limits' of the Waitangi Tribunal's *Ngati Awa Raupatu Report*, 'the Crown has resolved to offer an exclusive title to the Matahina Licensed Land and Matahina a4 to Ngati Awa and non-exclusive redress over Matahina a5'. This, she argued, 'is wrong when these sites are outside the ambit of the report and in an area highly contested by both Tuhoe and Ngati Awa'.[5]

With reference to the Crown's decision to adopt 'a cautionary approach' and withdraw 25 per cent of the Matahina Crown forest licensed land offered to Ngāti Awa, counsel stated that

1. Document a2, paras 2, 4
2. Ibid, para 2
3. Ibid, para 5
4. Ibid, para 6
5. Ibid, para 17

'a truly cautionary approach would have been to remove the Matahina Lands from the settlement offer until a full inquiry by the Waitangi Tribunal, the body constituted specifically for this purpose, had been undertaken'.[6]

Counsel argued that the Crown has a fiduciary responsibility towards Māori, and 'in the circumstances of this claim . . . should err on the side of the claimants as they are not in as strong a position as Ngati Awa'. Ngāti Haka Patuheuheu, she elaborated, 'have not had the resources that have been made available to Ngati Awa (including the provision by the Tribunal of a report) and were assured in the *Ngati Awa Report* that their claims would be heard if necessary'.[7] In her closing submissions, counsel further developed her argument that 'the Crown has a higher duty to Ngati Haka Patuheuheu than it does to Ngati Awa as Ngati Awa is in a more advanced position'.[8]

Counsel also submitted that the Crown is required 'in this modern context' to 'protect the ability of Ngati Haka Patuheuheu to bring their claims to assets within their rohe with the prospect of the fullest redress still available'. She argued that, in the case of the Matahina Crown forest licensed lands, the Crown 'proposes to remove the protections provided by the Crown Forests Assets Act'. This, she argued, 'in the absence of any inquiry by the Tribunal into the claims of Ngati Haka Patuheuheu (and others) . . . is manifestly contrary to the Treaty and the standards set and accepted by the Crown'.[9] She continued:

> That the Crown has offered this land to a Maori group in settlement of their Treaty grievance cannot undo the existence of the claim of Ngati Haka Patuheuheu and the Treaty requirements that this land not be disposed of unless and until the claims to that land have been heard by the Tribunal and recommendations made. To do otherwise is simply unfair to those who have not been heard and in breach of the Treaty.[10]

Counsel submitted that compensation to Ngāti Awa was long overdue, and that it would not be unreasonable to delay the outcome of the Ngāti Awa settlement until the completion of the Tribunal's Urewera inquiry. A delay of, say, five years, she claimed, was a 'blip'.[11]

Counsel questioned the extent of the Crown's inquiry into the history of the Matahina lands. She stated that the Crown 'was late to specifically inquire into the claims of Ngati Haka Patuheuheu', noting that 'the Te Uira Report, the sole research conducted to date on Matahina a4 and a5, was only commissioned in February 2002 and provided to the claimants on 22 March 2002'. She also stated that the Crown 'refused to consider the Matahina Forest Land at all'.[12] Counsel also noted, citing the evidence of Deborah Collins, that the

6. Document a2, paras 19–20
7. Ibid, para 23
8. Document a10, paras 87–116
9. Document a2, paras 34, 39
10. Ibid, para 41
11. Opening submission of Wai 958 claimant counsel, 17 June 2002, tape 1, side b
12. Document a2, paras 46–47

Crown's investigation into 'customary interests in the Matahina Block . . . was ultimately not a decisive factor as there appears to be sufficient other Crown forest land available to overlapping claimant groups in future negotiations should that be considered appropriate'.[13]

One of the points stressed by counsel was that the claimants 'were not informed of the criteria the Crown would use when satisfying itself that all cross claim issues had been addressed to the satisfaction of the Crown'.[14] In her closing submission, counsel explained that the Wai 958 claimants had focused on providing the Crown with evidence of their customary association with Matahina, and that 'the Crown never specified the matters it would consider in addition to the cultural interest factor'.[15]

Counsel suggested that there were other options available to the Crown to settle the Ngāti Awa claim without 'intolerance' to Ngāti Haka Patuheuheu either by establishing a trust, or by excluding the Matahina Crown forest licensed land from the settlement until the Urewera Tribunal has heard the Tūhoe claims. Regarding the Crown's 'substitutability' policy, counsel stated that underlying the policy are assumptions that are inconsistent with Treaty principles, including 'that there will be sufficient other land to compensate Maori' and that 'Crown Forest land is a purely commercial asset'.[16]

Counsel stated that the claimants considered the steps taken by the Crown to address the overlapping claim to be 'inadequate and contrary to Treaty principle'.[17] In closing, she stated that, in the claimants' view, the Tribunal 'cannot be at ease with the process, outcome or policy the Crown has adopted when considering the overlapping claims of Ngati Haka Patuheuheu'.[18] Counsel argued that while the Crown, from at least February 1998, had been aware of the Ngāti Haka Patuheuheu claim, and that the strongest relationship derived by Tūhoe to the Matahina land was through that hapū, they had never directly approached 'the tangata whenua'. Instead, she continued, the Crown consulted with the Tūhoe–Waikaremoana Māori Trust Board and, prior to that, Te Rūnanganui o Te Ika Whenua. She argued that these two groups have never represented or had the mandate of Ngāti Haka Patuheuheu.[19]

According to counsel, it was not until a letter dated 3 January 2001 that there was direct contact between the Crown and Ngāti Haka Patuheuheu, and it was at this time Ngāti Haka Patuheuheu were presented with the Crown's 'Proposed Package for Settlement of Ngati Awa Historical Claims'. This letter, she contended, came late in the process and left little time for response.[20] Counsel also stated that, in this letter, 'the Crown ought to have clearly pointed

13. Ibid, para 50
14. Ibid, para 60
15. Document a10, paras 81, 85
16. Document a2, paras 52–59, 66
17. Ibid, para 60
18. Document a10, para 33
19. Ibid, paras 38–54
20. Ibid, paras 55–56

out that it proposed to vest land claimed by Ngati Haka Patuheuheu exclusively in Ngati Awa'. She maintained that the information provided by the Crown suggests 'that it will protect the claims of other iwi'.[21]

Counsel noted that Ngāti Haka Patuheuheu were invited to comment 'on any issues Ngati Haka and Patuheuheu may have about particular items of redress in the settlement offer'. However, she argued, 'it is impossible to discern from the letter what information or "issues" the Crown may be looking to Ngati Haka Patuheuheu to raise or provide'. Counsel drew the attention of the Tribunal to Mr Pouwhare saying, in evidence, that 'it was not until November that I realised the impact of the Ngati Awa offer on Ngati Haka Patuheuheu'. Ngāti Haka Patuheuheu advised the Crown of their objections to the proposed settlement offer by letter dated 15 November 2001.[22]

Counsel stated that, once the Crown was aware of the Ngāti Haka Patuheuheu claim, they 'failed to make allowances for the vast differences in the state of research and resourcing between Ngati Awa and Ngati Haka Patuheuheu'. She also stated that 'when asked to provide resources to Ngati Haka Patuheuheu, the Crown refuses and downplays the level of information it requires'.[23] Counsel submitted that:

> The Crown requires a standard of proof (level unknown) as a threshold requirement before including forest land in a negotiated settlement. The problem with this approach is that Ngati Awa has not proved its interest in Matahina; no party has had the opportunity to do that. And, if Ngati Haka Patuheuheu is unable to establish 'proven' interest in other Crown Forest land, the bulk of their only licensed land will have already been removed.[24]

In her closing submissions, counsel outlined the policy applied by the Crown regarding the grant of Crown forest licensed land 'as now understood'. She stated that the criteria for providing forestry assets as redress require that 'the negotiating claimants can show a threshold interest in the land'; and that 'any claimants with overlapping interests in or claims to those blocks on offer can show threshold interests in other blocks, so that these blocks may be available for settlement with them at a later stage'. Counsel argued that there are two main problems with this policy. First, that 'receiving a block of Crown Forest land in settlement does not require a relatively strong interest in the block'; and secondly, that 'the quantum received as part of a fiscal redress package may mean that a claimant cannot afford to purchase an ancestral block'. She went on to say that 'even if a claimant can prove a dominant or strong interests in a particular block, this is not a determining issue, or even a persuasive factor for ots in offering this block as redress'. This, she continued, may mean that 'an overlapping claimant will not have the opportunity to receive their "primary" block', and that

21. Document a10, paras 60, 62
22. Ibid, paras 66–67, 73–74
23. Ibid, paras 77–78
24. Ibid, para 80

'claimants who are further down the negotiating queue will receive other blocks in fiscal redress instead'.[25]

Regarding the extent of the Crown's inquiry into the Ngāti Haka Patuheuheu claims to Matahina, counsel submitted that:

- the Crown failed to consult with the tangata whenua even though it knew that Ngāti Haka Patuheuheu claimed Matahina and sought resumption of the very land being dealt with;
- the Crown did not commit sufficient resources and time to the investigation of the cross-claims;
- the Crown did not make clear to the claimants each of the criteria it would consider;
- the Crown relied on material that the claimants object to and is central to their substantive claim (the Native Land Court minutes); and
- the Crown misconceived the evidence it did consider.[26]

3.2 Evidence for Ngāti Haka Patuheuheu

Counsel for Wai 958 called the claimant, Robert Pouwhare, to give evidence intended to cover 'the Crown process in which he participated, outline the claim of Ngati Haka Patuheuheu and the steps taken to have the Crown withdraw Matahina Lands and Kaputerangi and the reasons for that withdrawal'.[27] Mr Pouwhare spoke without a written brief of evidence, and confirmed that Ngāti Haka Patuheuheu are a Tūhoe hapū, who due to their location in the Matahina area, became a 'buffer people', or, borrowing from Judith Binney, people of the 'encircled lands'. He stated that Ngāti Haka and Patuheuheu are 'one and the same'. According to Mr Pouwhare, Ngāti Haka Patuheuheu are largely absent from the written narrative, and he called for greater research and analysis to be done for all parties, on all aspects of their history.

Mr Pouwhare described how Matahina had been contested for hundreds of years between Ngāti Haka Patuheuheu and Ngāti Awa. He referred to the Matahina lands as 'whenua tautohetohe' (contested lands) or 'whenua matewaka kāmehameha' (highly prized lands). Mr Pouwhare stated that land at Matahina had been taken from Ngāti Haka Patuheuheu through the actions of the Native Land Court in the 1880s, and by the hand of Crown purchasing agents and other individuals. He stated that 7000 acres were taken in 1886, and that later the Government had given Ngāti Haka Patuheuheu 300 acres at Te Teko in compensation. They had not wanted this land as it was within the Ngāti Awa rohe. In 1907, survey liens were taken in land from Matahina c and Matahina c1, leaving Ngāti Haka Patuheuheu

25. Ibid, paras 124–126
26. Ibid, para 130
27. Paper 2.39, para 3

'doubly dispossessed'. Mr Pouwhare stated that Matahina a1b, a1c, and a6 blocks remained important to Ngāti Haka Patuheuheu – that blood had been spilt there; that there was continued customary use (hunting); and this was the passageway through to Tarawera.

Mr Pouwhare also referred to Ngāti Haka Patuheuheu's connection with Kaputerangi through their tipuna, Tama ki Hikurangi, a descendant of Toi; to Ōhiwa Harbour, as a food gathering place for Tūhoe; and to Moutohorā Island, where Tūhoe harvest tītī, or muttonbirds.

Regarding the Ngāti Awa settlement, Mr Pouwhare stated that the Crown must act in accordance with tikanga, and in good faith. In closing, Mr Pouwhare read from the conclusion of part two of Judith Binney's overview report on the Urewera, 'Encircled Lands', adding that the Ngāti Haka Patuheuheu experience was a microcosm of this Tūhoe experience.[28]

3.3 Submissions of Ngā Rauru o Ngā Pōtiki

In his submissions on behalf of Ngā Rauru o Ngā Pōtiki, claimant counsel identified Ngā Rauru o Ngā Pōtiki as a 'cluster' of Tūhoe claimants involved in the Tribunal's Urewera inquiry, who have come together 'for the purposes of co-ordinating their claims'.[29] Included in Ngā Rauru o Ngā Pōtiki is the claim Wai 726, filed by Janet Carson and Robert Pouwhare for and on behalf of Ngāti Haka Patuheuheu.[30] According to counsel, in these proceedings Ngā Rauru o Ngā Pōtiki 'come in a supporting role', and:

> as an advocate for the many other hapu within their ranks including Ngāti Raka, Tamakaimoana, Hapu Oneone and Ngai Te Kapo to ensure their customary rights and obligations to ancestral lands and taonga tuku iho in Kaputerangi, Moutohora and Ohiwa are sustained for present and future generations.[31]

Counsel advised the Tribunal that 'neither the Tuhoe–Waikaremoana Trust Board nor Ika Whenua have represented those parties currently represented by Nga Rauru and therefore any agreements entered into by those bodies should not be seen as binding on those parties represented by Nga Rauru'.[32]

In addition to supporting the claims of Ngāti Haka Patuheuheu to Matahina, counsel identified other items of redress in the Crown's proposed offer to Ngāti Awa to which Ngā Rauru o Ngā Pōtiki object:

- Kaputerangi historic reserve;
- joint management of Moutuhora Island;

28. Oral evidence of Robert Pouwhare, 17 June 2002, tape 3, side a
29. Document a3, paras 1–2
30. Ibid, para 3
31. Document a12, paras 1–2
32. Document a3, para 69

- preferential right to 5 per cent of any tendered coastal marine space in Ōhiwa Harbour; and
- all the land on the north-western shore of Ōhiwa Harbour.

Counsel also stated that the issue before the Tribunal is whether the actions, policies, and practices of the Crown in offering these redress items to Ngāti Awa are in accordance with the principles of the Treaty of Waitangi.[33] He argued that, in order for the Crown to act in accordance with its fundamental Treaty obligations when considering appropriate redress, it must:

- allow or hear from all interested parties in respect of those areas of redress;
- provide or allow for the provision of appropriate resources to claimants to fully formulate, research, and present their claims in respect of those areas of redress;
- allow sufficient time for claimants (particularly where a Tribunal hearing is imminent) to present their claim before the Tribunal which is the appropriate body to make recommendations on claims;
- ensure that the transfer of areas of redress does not remove the Crown's ability to restore the rangatiratanga of claimants over those areas of lands and resources in the settlement area;
- ensure that a delineation between interests of claimants by virtue of the Crown's settlement policy is not unjust and improper;
- ensure the rights of claimants are reserved by giving effect to legislation as it currently exists;
- provide mechanisms to ensure the interests of affected claimants are protected.[34]

Counsel questioned Ngāti Awa's exclusive entitlement to the return of the contested areas of land, in the proportions set out by the Crown, when the claims of Ngā Rauru o Ngā Pōtiki and Ngāti Haka Patuheuheu to these lands are yet to be heard by the Waitangi Tribunal.[35] He stated that Ngāti Haka Patuheuheu and Ngā Rauru o Ngā Pōtiki have 'strong interests' in the Matahina block, Kaputerangi, Moutohorā Island, and Ōhiwa Harbour. He submitted that the Tribunal's Urewera hearings are imminent, at which time Tūhoe claimants will be in a position to have their evidence heard; and that, following this, Tūhoe claimants will be in a position to enter into negotiations with the Crown. He also submitted that:

> a recommendation from the Tribunal at this time that the Crown not transfer the Crown Forest Licensed Lands or the non-exclusive areas of redress would not prejudice the ability of Ngati Awa to settle the balance of its historical Treaty grievances and would not thwart the ability of Ngati Awa to settle its historical Treaty claims indefinitely.[36]

33. Ibid, paras 16–18
34. Ibid, para 20
35. Ibid, para 27
36. Ibid, para 30

Counsel requested that the Tribunal recommend that the Crown 'take an active role in trying to facilitate an agreement between Ngati Haka Patuheuheu, Nga Rauru, and Ngati Awa, by which the interests of those groups are recognised by means of joint ownership and management of sites'.[37]

Regarding Kaputerangi, counsel stated that Tūhoe and Ngāti Haka Patuheuheu do not claim Kaputerangi as their own 'but do dispute that it does belong solely to Ngati Awa and say that Ngati Awa are instead the guardians of Kaputerangi, our birthplace, the birthplace of our people'.[38] He submitted that, as such, the Crown's offer to transfer exclusive ownership of Kaputerangi in fee simple is inappropriate, and that 'the Crown's action in implementing such transfer is in conflict with the research that the Crown itself has commissioned'.[39] Counsel referred to the evidence presented by Mr Pouwhare, and also to the site-specific report commissioned by the Office of Treaty Settlements to investigate the customary associations of both Ngāti Awa and Ngāti Haka Patuheuheu with Matahina a4 and a5, and Kaputerangi. The proposal in itself, he continued, is a breach of Ngāti Haka Patuheuheu and Ngā Rauru o Ngā Pōtiki's 'treaty rights'.[40] While Ngāti Awa would be required to administer Kaputerangi as a historic reserve and acknowledge the interests of other iwi in both the deed of settlement and any interpretative material produced for the site, counsel stated that Ngāti Haka Patuheuheu and Ngā Rauru o Ngā Pōtiki are concerned that they 'are relegated to the same role and position of the general public and their history and association to the land becomes more and more diminished'.[41] This, counsel submitted, 'does not reflect Ngati Haka Patuheuheu's concept of kaitiakitanga'.[42]

With regard to Ōhiwa Harbour, counsel argued that Tūhoe have a history of strong association with the harbour, and have resided there 'since before Te Kooti'. Claimant evidence 'establishes that Ohiwa Harbour is a taonga to Tuhoe as not only was it an accessway for Tuhoe to the ocean but also an area where Tuhoe harvested kuku and other kai moana'. He submitted that, as such, the Crown's proposal 'to provide only a statutory acknowledgement' over the harbour is 'quite inappropriate'.[43] He argued that while the Crown have indicated that there is other Crown land potentially available for other claimants to the south and east of the harbour, 'this is not considered appropriate as this is an example of the Crown arbitrarily dictating to claimants what areas of land they are entitled to lay claim to without having heard evidence to be submitted by Tuhoe and Ngati Haka Patuheuheu'.[44] With regard to Moutohorā Island, counsel referred to claimant evidence that this was a traditional food gathering site of Tūhoe. He submitted that Ngāti Haka Patuheuheu and Ngā Rauru o Ngā

37. Document a3, para 30
38. Ibid, para 41
39. Ibid, paras 35–39
40. Ibid, para 39
41. Ibid, para 33
42. Ibid, para 40
43. Ibid, paras 43–44
44. Ibid, para 56

Pōtiki have indicated to the Minister in Charge of Treaty of Waitangi Negotiations that they would accept the Crown's variation to the offer to Ngāti Awa regarding the island, on the basis of the Crown assurance that their access rights can be recognised in the future.[45]

Counsel submitted that the 'substitutability policy' adopted by the Crown in determining the proposed settlement offer to Ngāti Awa 'is inconsistent with the principles of the Treaty of Waitangi and will cause further loss, grievance and prejudice to Ngati Haka Patuheuheu'.[46] He argued that, in adopting this policy with regard to the Matahina blocks, the Crown:

> fails to allow the interests of Ngati Haka Patuheuheu and Tuhoe to be addressed in respect of the specific areas of land which will be lost or [compromised] if provided to Ngati Awa, fails to safeguard Ngati Haka Patuheuheu's and Tuhoe's right to present its claim to the Urewera Tribunal in respect of these areas of land to the fullest possible extent and denies Tuhoe claimants rights as reserved in the *Ngati Awa Raupatu Report*.[47]

Counsel also argued that while the Crown maintains that it has acted in good faith towards Ngāti Awa and has offered the contested lands to Ngāti Awa to avoid prejudice and delay, 'the Crown have not acted in good faith towards Ngati Haka Patuheuheu and Nga Rauru'. He added that 'there appears to have been little consideration of the prejudice the Ministers decision may have on Ngati Haka Patuheuheu or Tuhoe'.[48]

With regard to the Crown's withdrawal of 25 per cent of the Matahina Crown forest licensed land offered to Ngāti Awa, counsel stated that it was 'unacceptable' for the Crown to 'impose its assessment of what a reasonable allowance is for customary interests in that area'. He also stated that Ngāti Haka Patuheuheu and Ngā Rauru o Ngā Pōtiki supported the option of either withdrawing the forestry redress from the offer until all claims are heard by the Tribunal, or placing it in some form of trust and providing a mechanism for subsequent allocation.[49] Counsel submitted that:

> the Crown has not met its duty to balance the interests of achieving settlement with Ngati Awa whilst preserving Ngati Haka Patuheuheu and Nga Rauru's interests in these specific redress areas and therefore has breached its obligation of good faith to Ngati Haka Patuheuheu and Nga Rauru.[50]

He submitted that, 'whilst the Crown can show that it has conducted an approach that engaged affected parties, it has not shown that it has undertaken a careful and considered approach that would satisfy the Tribunal that its process has been proper'.[51]

45. Ibid, paras 57–60
46. Ibid, para 62
47. Ibid, para 71
48. Ibid, paras 67–68
49. Ibid, paras 73–74
50. Ibid, para 77
51. Ibid, para 78

In his closing submissions, counsel drew on the evidence presented by Mr Pouwhare on behalf of Ngāti Haka Patuheuheu and Huka Williams on behalf of Ngā Rauru o Ngā Pōtiki, and also that presented by Tama Nīkora on behalf of the Wai 36 claim. He also referred to the site-specific research commissioned by the Office of Treaty Settlements. He submitted that when Ngāti Haka Patuheuheu have completed their research 'they will be in a position to present evidence before a properly constituted tribunal to establish their claim and entitlement to a dominant interest in the Matahina dam and Matahina Forest Blocks'.[52] He disputed that Ngāti Awa have a 'dominant interest' in these items, and stated that:

> what is of concern is Ms Collin's testimony that irrespective of whether Ngati Haka Patuheuheu or Tuhoe could establish a dominant interest in the Matahina Forest Block, it was highly likely that the Crown would have continued with its offer to provide the areas of contested redress to Ngati Awa.[53]

Counsel also stated that the consultation process that the Crown ran with Ngāti Haka Patuheuheu and Ngā Rauru o Ngā Pōtiki was 'hampered by a lack of funding, lack of time and a failure by the Crown to advise of the specific information sought'.[54] He submitted that the Crown 'would be creating a new injustice to Ngati Haka Patuheuheu and Tuhoe in providing the proposed settlement redress as far as the contested areas are concerned to Ngati Awa', and referred to Ms Collins' evidence that 'the Crown were not acting in accordance with Tikanga'.[55] He argued that the Crown 'should be required to establish dominant interest to land particularly where exclusive redress is to be provided and all attempts should be made in order to establish those dominant interests'.[56]

3.4 Evidence for Ngā Rauru o Ngā Pōtiki

Counsel for Ngā Rauru o Ngā Pōtiki had hoped to call Hohepa Kereopa to speak about the Tūhoe claims to Ōhiwa Harbour, but he was unavailable. Instead, Huka Williams described the links Tūhoe have to Ōhiwa, which is better known to Hapū Oneone as Te Koko ki Ōhiwa or Te Umutaonoa a Tairongo. Tairongo was the ancestor of Te Upokorehe, Hapū Oneone, Ngāti Raka, Ngāi Tūranga, and Tama kai moana. Ms Williams spoke of the conflicts between Tūhoe and Ngāti Awa at Ōhiwa, stressing that Tūhoe were never defeated there by Ngāti Awa.[57]

---

52. Document a12, para 11
53. Ibid, para 13
54. Ibid, para 26
55. Ibid, para 49
56. Ibid, para 52
57. Oral evidence of Huka Williams, 17 June 2002, tape 4, side a

3.5 Submissions of the Tūhoe–Waikaremoana Māori Trust Board

In his submission on behalf of the Wai 36 claimants, claimant counsel stated that the claim is brought on behalf of the Tūhoe tribe, its hapū, and all members of the Tūhoe tribe. He identified Ngāti Haka Patuheuheu as a Tuhoe hapū, stating that the Wai 36 claimants represent the interests of Ngāti Haka Patuheuheu 'at both a hapū and a tribal level'. He acknowledged that there are differences of view between the Wai 36 claimants and Mr Pouwhare in respect of issues of mandate and representation.[58]

The principal objection of the Wai 36 claimants to the Crown's settlement offer to Ngāti Awa concerns the transfer to Ngāti Awa of the Matahina Crown forest licensed lands, comprising Matahina a1b, a1c, and a6. Counsel stated that Tūhoe claim substantial interests in the Matahina block to the south of Ōhui, and exclusive rights to the area south of the Waikowhewhe Stream where the contested Matahina Crown forest licensed lands are located. The Wai 36 claimants also take issue with the Crown's proposal to transfer the Matahina lands before the Waitangi Tribunal's Urewera district inquiry has heard the claims relating to the Matahina block.[59] Counsel noted that 'the Matahina Crown Forest Land, aside from the insignificant Matahina c and c1 block and Waiohau b9 block, is the only licensed land or Crown commercial asset available for settlement of the Wai 36 claim'.[60] He stated that, if the Matahina Crown forest licensed lands are transferred to Ngāti Awa, the Wai 36 claimants and Tūhoe will be unable to seek final and binding recommendations from the Waitangi Tribunal for the return of those lands. Counsel submitted that the Wai 36 claimants believe that the Ngāti Awa claim can be settled without the Crown transferring the Matahina Crown forest licensed lands to Ngāti Awa, as Ngāti Awa can be offered other Crown forest licensed land from the Kaingaroa Forest.[61]

Counsel set out the Wai 36 claimants' belief that the Crown's actions in transferring the Matahina Crown forest licensed lands to Ngāti Awa are a direct contravention of the Crown Forests Assets Act 1989. This objection is made on the grounds that section 35 of this Act states that Crown forest assets cannot be disposed of until the Waitangi Tribunal has dealt with claims to these assets. The Wai 36 claimants also maintain that the transfer would go against the findings of the Waitangi Tribunal's *Ngati Awa Raupatu Report*, which, they claim, reserved the rights of Tūhoe and other groups to make claims to the Matahina block.[62]

The Wai 36 claimants object to the Crown's proposals to transfer the stratum title of Matahina a4 to Ngāti Awa and to grant Ngāti Awa a statutory acknowledgement over Matahina a5. This opposition is on the grounds that Tūhoe claims traditional interests in these blocks and the Waitangi Tribunal has yet to inquire into these claims. The Wai 36 claimants seek the return of Matahina a4 block and propose that Matahina a5 be vested in Ngāti Hāmua rather

58. Paper 2.31, paras 4–6
59. Ibid, app, paras 3, 11
60. Ibid, app, para 2
61. Ibid, app, paras 2–3, 11
62. Ibid, app, para 11

than Ngāti Awa, on the grounds that Ngāti Hāmua have affiliations with both Tūhoe and Ngāti Awa. They also oppose the Crown's proposal to vest the Kaputerangi historic reserve in Ngāti Awa. The claimants argue that this site is of significance to all tribes of Mataatua descent and should be vested in a combined Mataatua entity, rather than in Ngāti Awa alone.[63]

Regarding the Crown's offer of a number of items of non-exclusive redress to Ngāti Awa, counsel stated that the Wai 36 claimants oppose this offer unless both the deed of settlement and Ngāti Awa as an iwi expressly acknowledge that the Crown may offer similar redress to other iwi. These items include:

- Moutohorā Island;
- Uretara Island;
- certain rights to hangī stones on Moutohorā Island;
- the Tauwhare Pā scenic reserve;
- the Ōhope scenic reserve;
- protocols issued by the Ministers of Conservation and Fisheries;
- preferential rights to purchase coastal marine areas within Ōhiwa Harbour; and
- the appointment by the Ministers of Conservation and Fisheries of members of Ngāti Awa to advisory committees.[64]

With regard to the Crown's consultation process, counsel stated that 'the Crown's approach to consultation of the Wai 36 claimants has been piecemeal, rushed and without any regard for due process'. He asserted that the Crown's policies and practices will irreparably prejudice the Wai 36 claim. If the Matahina Crown forest licensed lands are transferred to Ngāti Awa, the Crown will have insufficient Crown forest licensed lands or Crown commercial assets to compensate Tūhoe. The Waitangi Tribunal would therefore be unable to make any binding recommendations to return such land to Tūhoe. As a consequence, Tūhoe will not be able to regain ancestral land in Matahina that, according to the Wai 36 claimants, was acquired by the Crown in contravention of the Treaty of Waitangi.[65]

In his closing submissions, counsel urged the Tribunal to 'consider the application before it and the actions of the Crown in the context of the Tuhoe claim before the Tribunal'. The Tūhoe claim, he argued, is 'well-founded and substantive' and 'includes a well-founded claim to the Matahina block'. Counsel argued that the Tūhoe historical evidence was relevant to the proceedings in that it provides 'a sound platform of evidence which demonstrates to the Tribunal that Tuhoe is able to claim substantial interests in the Matahina Block'. He submitted that, while in making its decision the Tribunal must proceed on the premise that both Tūhoe and Ngāti Awa claim substantial interests in the block, it is not the function of this Tribunal to determine the relativities of those interests.[66]

63. Paper 2.31, app, paras 3–5
64. Ibid, app, paras 8–10
65. Ibid, app, para 12
66. Document a11, paras 6–8

Counsel set out the historical basis for the Tūhoe claim to Matahina, as stated in the Wai 36 claim and in the evidence of Mr Nīkora, as:

- the recognition of Ōhui as a boundary between Ngāti Awa and Tūhoe, based on the 1830s peace agreement Te Tatau Pounamu i Ōhui;
- Tūhoe's claim through Ngāti Haka Patuheuheu to exclusive interests in the land south of the Waikowhewhe Stream as stated in the Native Land Court;
- Tūhoe's claim to interests in the northern part of Matahina through its hapū Ngāti Hāmua and Warahoe;
- the failure of the Native Land Court in 1881 and 1884 to award Tūhoe all of their Matahina lands. Tūhoe were awarded only 2000 acres, which comprise the Matahina c and Matahina c1 lands.

Counsel emphasised that the Wai 36 claimants contest Ngāti Awa's claim to the whole of the Matahina block.[67]

Counsel said that the Wai 36 claimants and counsel had only a very limited participation in the hearing of the Ngāti Awa claim in the Tribunal's eastern Bay of Plenty inquiry. Tūhoe informed that Tribunal of their position, and the Tribunal said that they would not be hearing Tūhoe claims. Counsel noted that the *Ngati Awa Raupatu Report* was not a full inquiry into all aspects of the Ngāti Awa claim. It did not consider claims in respect of the Native Land Court awards made in the Matahina block, which lies outside the confiscation boundary. The Tribunal made no recommendations regarding Matahina, but suggested the issue should be dealt with in future inquiries. Counsel quoted at length from the *Ngati Awa Raupatu Report*, emphasising the Tribunal's comment that contested areas of land should be referred back to the Tribunal for hearing and recommendation.[68] Counsel submitted that:

> the Ngati Awa Tribunal was not merely suggesting a 'possible' approach but was expressly proposing how such issues should be determined. That is, it set out the 'due process' that should be followed to resolve such competing claims.

He argued that on this basis the Crown's proposed settlement does not follow 'due process' and goes against the findings of the *Ngati Awa Raupatu Report*.[69]

Counsel set out a detailed chronology of the consultation process between the Crown and the Wai 36 claimants regarding the Matahina Crown forest licensed lands, and submitted that the Crown's consultation has been inadequate and flawed.[70]

Regarding alleged breaches of Treaty principles, counsel submitted that the Crown did not follow due process. He argued this on the grounds that the proposal to transfer 75 per cent of the Matahina Crown forest licensed lands to Ngāti Awa without the Waitangi

67. Ibid, paras 18–23
68. Ibid, paras 30–39
69. Ibid, paras 38–39
70. Ibid, paras 40–50

Tribunal having issued any report or having made any recommendations with regard to that land contravenes both the Treaty of Waitangi Act 1975 and the Crown Forest Assets Act 1989. Under these Acts, if agreement cannot be reached between cross-claimants, the Crown is obliged to let 'due process' take its course. In the case of Matahina, counsel submitted that this would mean the Waitangi Tribunal should investigate the claims to the block. He argued that the Crown is usurping the role of the Waitangi Tribunal in determining the relative interests of Ngāti Awa and Tūhoe to the Matahina block. Counsel criticised the Crown's approach to consultation, arguing that Tūhoe were not allowed sufficient time and funding to prepare or present evidence and that the Crown did not identify its policy considerations, such as the issue of 'threshold interest'.[71]

Regarding the principle of 'consistency and lack of bias towards competing claimants', counsel alleged that the Crown 'turn[ed] a blind eye to the Tuhoe rights and interests purely for the sake of achieving a Treaty settlement'.[72] He also stated that the Crown's actions will give rise to 'substantial and irreversible prejudice to Tuhoe', and that this will consist of both 'cultural prejudice' and 'commercial prejudice'.[73] With regard to 'cultural prejudice', counsel argued that the Crown's settlement with Ngāti Awa will prevent the return to Tūhoe of what the Wai 36 claimant's see as ancestral lands at Matahina, to which they have a strong historical and customary association. They maintain that the land south of the Waikowhewhe Stream was the ancestral land of Ngāti Haka Patuheuheu, and that it was alienated through Crown actions in breach of the Treaty of Waitangi. Counsel stated that Tūhoe are guided by the principle 'I riro whenua, me hoki whenua mai' (As land was taken, land should be returned).[74]

Counsel submitted that while the issue of cultural prejudice is important to the Wai 36 claimants, the primary focus of their complaint is with regard to commercial prejudice. They assert that Tūhoe's rohe contains a strictly limited quantity of Crown commercial assets available for the settlement of their claims. As the Urewera National Park is not available for settlement of claims, the main assets available are the areas of Crown forest licensed lands scattered around the edge of the Tūhoe rohe. Counsel pointed out that Crown forest licensed lands have a greater settlement value due to their accumulated rentals and that the Matahina lands are more valuable for Tūhoe as they border Tūhoe's other forest lands at Matahina f and Te Manawa o Tūhoe Trust block. Counsel went on to state that the other blocks of land identified by the Crown as being potentially available to Tūhoe are either small (in the cases of Matahina c and c1 and Waiohau b9) or the subjects of significant cross-claims (in the cases of the Whirinaki, Te Whāiti, Heruiwi, and Patunamu blocks).[75]

71. Document a11, paras 59–66
72. Ibid, para 67
73. Ibid, paras 73, 75
74. Ibid, paras 76–78
75. Ibid, paras 79–89

Counsel submitted that the Crown's argument is flawed in that it is premised on the idea that a negotiated settlement can be reached in which the Crown could offer Crown forest licensed lands to Tūhoe on the basis of Tūhoe's 'threshold interest' in that land. He argued that this cuts out the Waitangi Tribunal's ability to make binding recommendations under the Waitangi Tribunal Act 1975 and the Crown Forest Assets Act 1989. Counsel went on to argue that the ability of the Tribunal to make binding recommendations concerning State-owned enterprise land is 'the only "weapon" that Tuhoe has to either force or negotiate a fair and appropriate settlement with the Crown'.[76]

Counsel submitted that the Crown forest licensed land is the only land within the Tūhoe rohe that fits the criteria for binding recommendations from the Waitangi Tribunal. He stated that it is Crown policy that claimants can only seek binding recommendations from the Tribunal where they can establish a direct link between findings of Treaty breach and the resumable land. Counsel contended that the Wai 36 claimants could do this for the Matahina Crown forest licensed lands, as well as for Matahina c and c1 and Waiohau b9. He argued that they could not do this for the Te Whāiti, Whirinaki, Heruiwi, and Patunamu blocks. As such, counsel argued, the transfer of 75 per cent of the Matahina Crown forest licensed land to Ngāti Awa leaves Tūhoe able to seek binding recommendations only on the remaining 25 per cent, along with Matahina c and c1 and Waiohau b9.[77] This was described as a 'substantial and irreversible prejudice to Tuhoe'.[78]

3.6 Evidence for the Tūhoe–Waikaremoana Māori Trust Board

Counsel for Wai 36 called Tamaroa Nīkora to give evidence on behalf of the Wai 36 claimants. Mr Nīkora is a co-claimant for Wai 36 and is employed by the Tūhoe–Waikaremoana Maori Trust Board as the Wai 36 claim manager.

Mr Nīkora stated that Tūhoe's claims to Matahina are based on both the Tatau Pounamu i Ōhui agreement with Ngāti Awa and on 'the traditional occupation of Matahina by the Tūhoe hapu Ngati Haka/Patuheuheu and Ngati Hamua/Warahoe'. He asserted that the Native Land Court had caused significant prejudice to Tūhoe in the 1880s by failing to recognise their claims to Matahina and that the current Crown proposal to transfer Matahina forests to Ngāti Awa compounded this prejudice.[79]

Mr Nīkora gave an account of how the long historical conflict between Ngāti Awa and Tūhoe was eventually brought to a close by the peace agreement 'Te Tatau Pounamu i Ōhui' in the early 1830s. He maintained that the agreement not only brought peace between the

76. Ibid, paras 93–94
77. Ibid, paras 95–99
78. Ibid, para 99
79. Document a5, paras 19–20

two iwi but also established the boundary between them. He claimed that Ngāti Awa agreed that Te Tatau Pounamu i Ōhui laid down the boundary between Tūhoe and Ngāti Awa. He saw this as an acknowledgement by Ngāti Awa of Tūhoe's rights to Matahina lands to the south of Ōhui.[80]

Mr Nīkora then went on to outline the customary interests that Tūhoe claim in Matahina through Ngāti Haka Patuheuheu and Ngāti Hāmua and Warahoe. Mr Nīkora stated that Ngāti Haka Patuheuheu are descended from Ngāti Rākei who settled at Waiohau. Ngāti Haka Patuheuheu had a settlement at Raepōhatu in the southwestern corner of the Matahina block. Mr Nīkora quoted from the evidence Mehaka Tokopounamu presented in 1881 to the Native Land Court, to show that Tūhoe had claimed the area of Matahina to the south of the Waikowhewhe Stream and to the east of the Ngāti Rangitihi boundary. Mr Nīkora stated that Ngāti Haka Patuheuheu had remained undisturbed on their land throughout the early nineteenth century, and that the Ngāti Awa conquest of Ngāti Hāmua and Warahoe around 1817 had involved only land north of the Waikowhewhe Stream.[81]

Mr Nīkora stated that Ngāti Hāmua and Warahoe were closely related to the Tūhoe hapū Ngāi Te Kapo and Ngāi Tama. He quoted from the 1881 Native Land Court evidence of Paora Te Whāiti to show that Ngāti Hāmua claimed an area of land in the Matahina block from the Waikowhewhe Stream north to Ōtipa. Mr Nīkora described how, in 1817, Ngāti Hāmua and Warahoe were expelled from around Ōtipa and went to live with Tūhoe at Ruatāhuna. Ngāti Hāmua and Warahoe were invited back to the Ōtipa area by the Ngāti Awa chief Rangitūkehu, following Te Tatau Pounamu i Ōhui. Rangitūkehu gifted the northern Matahina lands back to Ngāti Hāmua and Warahoe. Ngāti Hāmua and Warahoe were absent from Matahina for a brief period during the wars of the 1860s but returned after this. Mr Nīkora believes that those sections of Ngāti Hāmua and Warahoe who were defeated by Ngāti Awa, but later returned to the land, were the sections of Ngāti Hāmua and Warahoe who were most closely related to Tūhoe and came under their mana.[82]

Mr Nīkora claimed that the decision of the Native Land Court in 1881 to award land south of Ōhui to Ngāti Awa was 'fundamentally flawed and a great injustice to Tuhoe'.[83] In 1881, the Native Land Court awarded the entire Matahina block to Ngāti Awa, on the grounds of Ngāti Awa's expulsion of Ngāti Hāmua and Warahoe in the early nineteenth century. According to Mr Nīkora, in 1881 Ngāti Hāmua and Warahoe were living at Ōtipa, and Ngāti Haka Patuheuheu at Raepōhatu. The Native Land Court reheard the Matahina case in 1884 on appeal, and awarded 2000 acres to Ngāti Haka Patuheuheu. Ngāti Hāmua were awarded 1500 acres and a small award was made to Ngāti Rangitihi. The bulk of the Matahina block was awarded to

80. Document a5, paras 21–31
81. Ibid, paras 33–35
82. Ibid, paras 36–41
83. Ibid, para 42

Ngāti Awa. Mr Nīkora maintained that this award was wrong in that all the land south of the Waikowhewhe Stream should have gone to Ngāti Haka Patuheuheu, who occupied all the area between Raepōhatu and the Waikowhewhe throughout the eighteenth and nineteenth centuries. He maintained that the Native Land Court evidence shows that Ngāti Awa war parties never conquered Ngāti Haka Patuheheu and never ventured south of the Waikowhewhe Stream. He also stated that the Native Land Court failed to acknowledge that Ngāti Hāmua and Warahoe returned to Matahina in the early 1840s as a consequence of Rangitūkehu's gift of land.[84]

Mr Nīkora then turned to the participation of Tūhoe in the Waitangi Tribunal's eastern Bay of Plenty inquiry, and to the Crown's and Ngāti Awa's consultation with Tūhoe with regard to the Ngāti Awa settlement. He stated that Tūhoe presented a number of submissions and reports to the eastern Bay of Plenty Tribunal, notably a submission regarding Tūhoe overlapping claims (including Matahina), a report on Tūhoe interests in Matahina c and c1, and a report on the Tūhoe tribal boundary, presented in September 1995. Mr Nīkora maintained that following the presentation of the latter report Tūhoe had no further role in the eastern Bay of Plenty hearings.[85]

Mr Nīkora presented a chronology of the consultation that occurred from February 1999 to May 2002 between the Office of Treaty Settlements, Ngāti Awa, and Tūhoe (represented by the Tūhoe–Waikaremoana Maori Trust Board) regarding the Matahina forests. Mr Nīkora did not consider the Crown's process of consultation to have been adequate. He emphasised that the Tūhoe–Waikaremoana Māori Trust Board representatives had made Tūhoe's interests in Matahina clear to the Crown and had stated their belief that the transfer of the Matahina Crown forest licensed lands to Ngāti Awa would result in significant prejudice to Tūhoe.[86]

Mr Nīkora argued that Tūhoe have suffered economically from the confiscation of their land, the failure of the Crown to build roads promised to Tūhoe, and from the geographical isolation of Tūhoe's rohe. He noted that Tūhoe had no large town or commercial centre within their rohe to provide economic opportunities. He pointed out that the only major Crown asset within the Tūhoe rohe, Te Urewera National Park, is part of the Department of Conservation estate and is therefore unavailable for inclusion in any settlement offer. As a consequence of this fact, the only Crown assets available for a settlement offer are the Crown forests at the margins of the Tūhoe rohe. Mr Nīkora argued that the Matahina forests would have the greatest strategic commercial value for Tūhoe as they border Tūhoe's existing forest holdings in Matahina c and c1 and Te Manawa o Tūhoe. He said that the other forests identified by the Crown as potentially available to Tūhoe as part of a settlement package, such as

84. Ibid, paras 42–49
85. Ibid, paras 52–56
86. Ibid, paras 57–90

Whirinaki, Te Whāiti, and Heruiwi, were not suitable as other iwi had stronger claims to them. Mr Nīkora maintained that Tūhoe has a greater need than Ngāti Awa for commercial assets. Tūhoe would suffer significant prejudice if the Crown forest licensed lands are transferred to Ngāti Awa as the Crown will be unable to provide adequate commercial redress to settle Tūhoe's claims.[87]

In response to the evidence presented by Ms Collins on behalf of the Crown, Mr Nīkora rejected the suggestion that a letter from the solicitor for the Tūhoe–Waikaremoana Maori Trust Board to Ngāti Awa's solicitors, dated 8 May 1995, indicated that the trust board would not make any claims to the Matahina block. According to Mr Nīkora, this letter related specifically to the Wai 386 claim concerning Matahina c and c1. He maintained that the letter was insignificant and irrelevant to any Tūhoe claims to the rest of Matahina. Mr Nīkora also rejected the suggestion that the report on the Tūhoe tribal boundary, presented by the Tūhoe–Waikaremoana Maori Trust Board to the Tribunal's eastern Bay of Plenty inquiry in September 1995, excluded any Tūhoe interest in the Matahina blocks. He stated that this was a brief report, prepared at short notice, which referred only to Tūhoe interests within the eastern Bay of Plenty confiscation district. Mr Nīkora also took issue with suggestions in Ms Collins' evidence that the forests of Kuhawaea, Whirinaki, Heruiwi, Te Whāiti, and Patunamu were potentially available for the settlement of the Wai 36 claim.[88] Mr Nīkora objected to this on the grounds outlined above, stating that 'if Tuhoe is to make any claim to any land it will be as Tuhoe and not through any other tribe'.[89]

3.7 Submissions of Ngāti Rangithi

Counsel stated that Ngāti Rangitihi object to the inclusion of Matahina lands in the Crown's settlement offer to Ngāti Awa on the grounds that it is inconsistent with the principles of the Treaty of Waitangi. Counsel explained that Ngāti Rangitihi's claim to these lands has not been heard or determined by the Tribunal, they have not received resources to research and present their claim to Matahina, and their claim is to be heard imminently as part of the Tribunal's Urewera inquiry.[90] Counsel argued that claims to Matahina a4, Matahina a5 and the Matahina Crown forest licensed lands 'should be left to be determined by the Urewera Tribunal'.[91] He also contended that the 25 per cent withdrawn from the offer of Matahina Crown forest licensed lands to Ngāti Awa 'will be insufficient for all claimants with an interest in these lands'. In addition, he noted that Ngāti Rangitihi:

87. Document a5, paras 92–99
88. Ibid, paras 103–109, 115–116
89. Ibid, para 116
90. Paper 2.32, paras 6–8
91. Ibid, para 9

has not consented nor has there been a recommendation pursuant to Section 8hb or 8he of the Treaty of Waitangi Act from the Tribunal, and therefore any transfer will prevent Ngati Rangitihi from seeking recommendations from the Urewera Tribunal under Section 8hb of the Act for the return of the licensed land.[92]

Counsel alleged that the inclusion of the Matahina lands in the settlement offer to Ngāti Awa breaches the principles of the Treaty of Waitangi, in that it:

- allows the interests of Ngāti Rangitihi to be lost or compromised;
- ensures Ngāti Rangitihi will never benefit from these lands;
- fails to safeguard Ngāti Rangitihi's right to present its claim to the Tribunal and obtain redress from these lands; and
- denies the rights of Ngāti Rangitihi to claim these lands.[93]

Counsel stated that Ngāti Rangitihi oppose the process employed by the Crown since it has become aware of Ngāti Rangitihi's claims and adopts the same basis of complaint as that advanced by counsel for Ngāti Haka Patuheuheu. He stressed, in particular, that there has been inadequate research into traditional interests in the Matahina lands.[94] Counsel alleged that the Crown's 'substitutability' policy is inconsistent with the Treaty principles of 'fairness' and 'acting in good faith' in that it:

- undermines the protections granted to Ngāti Rangitihi by the Crown Forests Assets Act;
- assumes Crown forest licensed land is a purely commercial asset;
- assumes other Crown forest licensed land will or can be found to satisfy Ngāti Rangitihi's claim; and
- assumes that the Tribunal will not consider the Matahina Crown forest licensed land as a material consideration when it determines the claim for Ngāti Rangitihi.

Counsel stated that Ngāti Rangitihi believe that the Crown will not have sufficient land within the claim area to satisfy Ngāti Rangitihi's claims.[95]

Counsel argued that in settling Ngāti Awa's claim with 'contested lands', the Crown has removed the opportunity for Ngāti Rangitihi to prove customary and historical links to Matahina a4, Matahina a5 and Matahina a1a, a1c, and a6 'sufficient to establish a threshold to enable negotiations to take place between Ngati Rangitihi and the Crown for settlement of its claim'.[96] He stated that Ngāti Rangitihi rejected the Crown's proposals and recommendations, and sought to have the settlement deferred until the completion of the Tribunal's Urewera and Rotorua hearings.[97] Counsel also submitted that, despite participating in the process, Ngāti Rangitihi 'have always viewed it as being tainted as to "fairness" and "good

92. Ibid, para 9
93. Ibid, para 10
94. Ibid, para 11
95. Ibid, para 12
96. Document a4, para 4
97. Ibid, paras 10–11

faith"'.[98] In conclusion, he submitted that Ngāti Rangitihi 'seek findings and recommendations that the Matahina lands not be transferred by the Crown to Ngati Awa until Ngati Rangitihi has been able to present its case and evidence to the Tribunal'.[99]

3.8 Evidence for Ngāti Rangitihi

Counsel for Ngāti Rangitihi called on David Potter to give evidence regarding Ngāti Rangitihi's association with Matahina. Mr Potter stated that he is a descendant of the Ngāti Rangitihi chief Tionga, who died in battle with Tūhoe in 1800. He recalled being told that Ngāti Rangitihi had occupied the western side of the Matahina block for centuries, most of the time living in peaceful association with Tūhoe. This association, he maintained, 'came to an abrupt end in the 1880s when Ngati Rangitihi lost the battle for the Matahina block in the [Native] Land Court'. Mr Potter stated that Ngāti Rangitihi still dispute the 1881 Native Land Court decision.[100]

Mr Potter, along with André Paterson, has an unregistered claim with the Waitangi Tribunal for the return of Ngāti Rangitihi lands in the Bay of Plenty, including 'the Rangitihi portion' of the Matahina block. The Matahina land is also included in the Wai 524 Ngāti Rangitihi claim lodged by Leith Comer. According to Mr Potter, Ngāti Rangitihi claim the western third of the Matahina block.[101]

Mr Potter stated that Ngāti Rangitihi have not received any research funding which, he claims, places them 'at a huge disadvantage compared to Ngati Awa'. He also informed the Tribunal that 'if the Crown was to settle with Ngati Awa now it would be disastrous for Ngati Rangitihi. Our lands would be beyond our reach forever. It would simply perpetuate a grievance; and it would be grossly unfair to us, and it would [be] against the spirit of the Treaty of Waitangi'.[102]

According to Mr Potter and Mr Paterson's unregistered claim, Ngāti Rangitihi is a Te Arawa sub-tribe who, following 'the arrival of the Te Arawa canoe':

> became established in the area extending from Rerewhakaaitu and Kaingaroa in the south. The east end of Lake Tarawera, Pokohu, Putauaki, Onepu, Matahina (In the East). Out to the coast along the line of the Tarawera river and west to Otamarakau (along the coast) and inland to Lake Rotoehu.[103]

98. Document a4, para 14
99. Ibid, para 26
100. Document a6, pp 1–2
101. Ibid, p 2
102. Ibid, p 3
103. Document a9, p 1

3.9 Submissions of the Crown

The Crown's opening submissions are outlined in the memorandum of Crown counsel, dated 14 June 2002. Counsel outlined the current state of the Crown's settlement negotiations with Ngāti Awa, and listed the redress contested by each claimant group. In opening, counsel submitted that the issue for this Tribunal is whether 'the contested policy, practice or conduct of the Crown arising in the context of the Ngati Awa settlement is in breach of the Treaty of Waitangi'.[104] Counsel contended that the focus should be on whether the Crown's process to reach settlement with Ngāti Awa is in breach of the Treaty, adding that this is not an inquiry into a final resolution of competing claims. In her closing submissions, counsel reminded the Tribunal that the Crown did not oppose the urgency application, and acknowledged the importance of the Tribunal's role in reviewing the Crown's actions, stating that this was consistent with the comments made in the *Ngati Awa Raupatu Report*.[105]

Counsel addressed the Treaty principles relevant to this case. Regarding the fundamental principle of 'the mutual obligation to act in good faith', she stated that, in negotiating Treaty settlements, the relevant obligation on the Crown is to balance the competing interests presented to it. She claimed that no perfect solution will be achievable, and that compromise by all interested parties will inevitably be required. In negotiating the settlement, the Crown has had to balance the competing imperatives of providing redress to Ngāti Awa, and preserving capacity to grant redress to other claimants.[106] Counsel submitted that 'if a balancing is to be effected in good faith', the Crown will be required to be informed of the competing interests; to take those matters of which it has been informed into account in reaching decisions about contested redress; and to 'conscientiously endeavour to minimise the negative impact of settlement on cross-claimants, while endeavouring to achieve an acceptable and durable settlement with Ngati Awa'.[107] Counsel submitted that the Crown has fulfilled these requirements in the manner in which it has approached the Ngāti Awa settlement and the now-contested redress. This has included 'amend[ing] the redress package in order to take into account the complexity of overlapping claims'.[108] In her closing submissions, counsel stated that, in the Crown's view:

> there is capacity for flexibility in the principles of the Treaty. Absolutism should be resisted. What is required is the practical application of Treaty principles (long title, Treaty of Waitangi Act 1975). Arguments relying on theoretical possibilities that rights might be impaired should give way to a fair balancing of competing interests, effected in good faith by the Crown.[109]

---

104. Paper 2.40, para 17
105. Document a13, para 5
106. Paper 2.40, paras 22–27
107. Ibid, para 28
108. Ibid, para 36
109. Document a13, para 8

3.9

Counsel brought to the attention of the Tribunal the section from the *Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* that states:

> 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 the historical Treaty grievances. Indefinite delay to the conclusion of Treaty settlements all around the country is an outcome that the Tribunal seeks to avoid.[110]

In her closing submissions, counsel added that 'by the time Cabinet took its decision on contested redress this year, the Crown was well-informed of competing interests' and that significant adjustments, requiring material concessions from Ngāti Awa, had been made to the redress package following consultation with cross-claimants.[111]

Counsel also stated, with regard to the issue of prejudice, that the Crown has:

> no doubt that the removal of the forestry redress, and perhaps also the cultural redress, would bring an end to the settlement. This is certainly the advice which Ngati Awa has provided both to the Crown and, at hearing, to the Tribunal. There is no reason for the Crown to doubt that advice.[112]

In her submissions, counsel questioned comments made by previous Tribunals regarding the inappropriateness of defining customary interests by drawing lines on maps. She stated that while the Crown wants to resist defining customary boundaries, 'the Crown and claimants are obliged to define geographical areas for the purpose of specifying property to be transferred or for exercising rights under protocols and similar redress instruments'. She noted that claimants seek such redress in settlement, particularly when the redress has an obvious commercial value, such as the forestry redress at issue here. 'In short', she concluded:

> the identification of historical interests, to the extent that they can be reconstructed, is not the only aspect to be weighed in determining settlement redress. It is for these kinds of reasons that the content of settlements involves an exercise of political judgement.[113]

Counsel submitted that the reasons behind the decision to include Matahina blocks a1b, a1c, and a6 (approximately 9153 hectares) in the settlement offer were that the blocks were within the rohe claimed by Ngāti Awa; the blocks constituted 6 per cent of the Kaiangaroa Forest only; and that 'there seemed to be good progress in resolving cross claim issues'. She

110. Paper 2.40, para 30; Waitangi Tribunal, *The Ngati Maniapoto/Ngati Tama Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2001), p 20
111. Document a13, para 10
112. Ibid, para 13
113. Paper 2.40, para 31

also noted that the offer was made 'conditional on the resolution of cross-claims'.[114] Counsel outlined the Crown's and Ngāti Awa's understanding of the overlapping interests in the Matahina lands, around the time of the Tribunal's eastern Bay of Plenty inquiry.[115] In summary, she stated that 'it appeared that Tuhoe and Ngati Haka Patuheuheu were agreeable, at the time of the Ngati Awa Tribunal hearings, that Ngati Awa's claim to Matahina blocks a1b, a1c and a6 would not be contested'.[116]

Regarding the negotiations with overlapping claimants concerning the Matahina blocks, counsel maintained that the Crown took a cautious approach.[117] The extent to which the Crown consulted with overlapping claimants was presented in the evidence of Ms Collins, and summarised by counsel in her submission. Counsel concluded that, by early 2002, the Crown was 'well-informed' about the cross-claimants' concerns regarding the forestry redress.[118] In her closing, counsel noted that much of the focus of the claimants' cross-examination of Ms Collins was on the early period of the Crown's understanding of cross-claim interests, and in particular the statements and undertakings made by the Tūhoe–Waikaremoana Māori Trust Board and Te Ika Whenua in 1995. These appeared to indicate that Tūhoe and Ngāti Haka Patuheuheu would limit their claims to Matahina to blocks c and c1. Ms Collins said that these statements initially gave the Crown some cause for optimism that cross-claims could be resolved by agreement. Later though, it was clear to the Crown that both the trust board and Ngāti Haka Patuheuheu had changed their positions regarding claims to Matahina lands. The Crown, in taking a cautious approach, had not relied on the 1995 understandings.[119] She concluded that 'an unwarranted emphasis has been placed on the period between 1995 and 2000', and that the 'proper focus for this inquiry should be from January 2001 when the Crown again tackled the issue of cross-claims and endeavoured to seek their resolution'.[120]

The Crown's approach to forestry redress, according to counsel's closing submissions, was refined over the period from the beginning of 2001 through to confirmation of the final offer to Ngāti Awa in May 2002. She noted that the broad ingredients of that policy were conveyed by the Crown from January 2001, and that the 'essential points' of this approach are that:

> the Crown would inquire into the historical connections to the land; customary interests would not be definitive; the Crown takes account of the commercial nature of the redress and considers whether granting that redress to one group will unduly prejudice another (ie the availability of other land).[121]

---

114. Ibid, paras 43–45
115. Ibid, paras 46–51
116. Ibid, para 52.1
117. Ibid, para 61
118. Ibid, paras 62–71
119. Document a13, paras 15–17
120. Ibid, para 20
121. Ibid, para 104

3.9

Regarding the communication of this policy to the Tūhoe–Waikaremoana Māori Trust Board, counsel stated that by the end of 2001, 'the Crown had identified that while it would inquire into historical customary interests, it had to take into account the commercial nature of forests'. The Crown's inquiry then focused on 'whether there was sufficient land with a potential to settle Tuhoe's claims so as to satisfy itself that the transfer of the Matahina lands to Ngati Awa would not unduly prejudice Tuhoe'.[122] Counsel submitted that 'by early 2002 the Crown had a clear idea of the Ngati Haka Patuheuheu (and Nga Rauru o Nga Potiki) concern about the forestry redress'. She stated that:

> It was apparent to the claimants that the Crown was blending a recognition of customary interests with the commercial nature of redress and looking to see that there was land elsewhere appropriate for any future settlement so as not to unduly prejudice the cross-claimants. Implicit in this latter point is an assessment of the size of the claim. No additional criteria were considered about which the claimants would have been unaware.[123]

With regard to Ngāti Rangitihi, counsel submitted that despite their 'limited engagement in the process', their interests were considered.[124]

Regarding the Crown's policy, counsel noted that forestry redress 'has the character of a significant commercial asset', and that the nature of such land may be complicated by the existence of important cultural and historical associations. She further noted Ms Collins' observation that there is an additional complication in that:

> claimant groups will often be at different stages of the negotiation process, or not in negotiation at all. This leads to uncertainties in mandate, and in the likely nature and extent of any future Crown settlement offer. As such, those groups not currently in negotiations will not have the same incentive to resolve overlapping claim issues.[125]

According to counsel, this means that the Crown 'is unlikely to be able to rely on consensus amongst claimants' and, as such, has been required to develop a framework for considering overlapping claims in which commercial and cultural aspects of the redress are balanced with the uncertainty of claims not yet prosecuted.[126] The Crown's policy of identifying a demonstrated threshold level of customary interest for each claimant group, and the application of this policy in the Ngāti Awa settlement offer of the Matahina Crown forest licensed lands, is outlined in Ms Collins' brief of evidence and discussed in section 3.10 below.

The Crown's inquiry into identifying customary interests in the Matahina block relied on Philip Cleaver's Tribunal-commissioned research report on the Matahina block, and a review of the 1881 and 1886 Native Land Court title investigations. Other sources consulted

122. Document a13, para 118
123. Ibid, para 131
124. Ibid, para 135
125. Document a1, para 160
126. Paper 2.40, para 72

included statements of claim to the Waitangi Tribunal, material from the Tribunal's Wai 46 record of inquiry, Tribunal research reports, material submitted by claimants, and other available sources. In addition, the Office of Treaty Settlements commissioned Te Uira Associates to investigate Ngāti Awa and Ngāti Haka Patuheuheu 'customary associations' with Matahina a4 and a5, as well as Kaputerangi.[127] It was noted that the Tūhoe–Waikaremoana Māori Trust Board declined to participate in the Crown-commissioned site-specific research.[128]

Counsel stated that, as a result of its inquiry, the Crown accepted that Ngāti Awa, Ngāti Haka Patuheuheu, Tūhoe, and Ngāti Rangitihi can each demonstrate a threshold interest in Matahina.[129] In her closing submissions, counsel commented that during the course of the hearing no 'significant new evidence' was presented that the Crown had not taken into account.[130] She noted that, 'in relation to traditional customary interests in Matahina, the evidence [presented at the hearing] was essentially further argument about the evidence which was before the Native Land Court in the 1880s'.[131] She also noted that 'the Crown considers that further inquiry is unlikely to bring exact definition to the historical interests', and that 'there is an aspect of unwillingness of the cross-claimants to co-operate in reaching a resolution to this issue'.[132] On this matter, she concluded that:

> For the Crown, the evidence it reviewed and the evidence at this hearing confirmed the contested nature of interests and the difficulty now of relitigating those interests with any precision. It was apparent that attachments to the land remained passionate from all sides. The assessment that all cross-claimants have a threshold interest is sustainable and cautious.[133]

As to the availability of land for other settlements, counsel contended that, because of the other lands found to be available for settlement of overlapping claims, 'essentially the Crown does not accept that provision to Ngati Awa of around 6,850 hectares of the licensed land in Kaingaroa Forest (the adjusted offer), and 2,539 hectares in Rotoehu Forest, totalling around 9,400 hectares is a settlement unfairly weighted in Ngati Awa's favour'.[134]

As to the relative strength of customary interests, counsel noted that it appeared to the Crown that there were clearly overlapping claims, and that 'none of the cross-claim interests appeared to be so emphatic as to suggest that no redress in the Matahina a blocks should be offered to Ngati Awa'. She also noted that the Crown does not consider the Tūhoe–

127. Document a13, para 58; doc a1(b), annexes bs, cf; oral evidence of Deborah Collins, 20–21 June 2002, tapes 8–12
128. Document a13, para 161
129. Paper 2.40, paras 76–81
130. Document a13, para 11
131. Ibid, para 66
132. Ibid, paras 64, 67
133. Ibid, para 76
134. Paper 2.40, paras 82–83

Waikaremoana Māori Trust Board's claim to exclusive interests in the areas south of the Waikowhewhe Stream to be convincing.[135]

Regarding the Crown's 'precautionary' approach, counsel stated that the evidence of overlapping interests and uncertainty about the size of future claims led to the withdrawal of 25 per cent of the land from the Ngāti Awa settlement. This provided approximately 2300 additional hectares in the Matahina area that could be offered in future settlements. The withdrawal of 25 per cent 'was not the result of a "scientific" calculation', but rather represented:

> an overall judgement on what might be a reasonable allowance for uncertainty in view of information on the relative strength of customary interests in the area, the other Crown forest licensed land available for use in settlement and the possible size of the historical Treaty claims.[136]

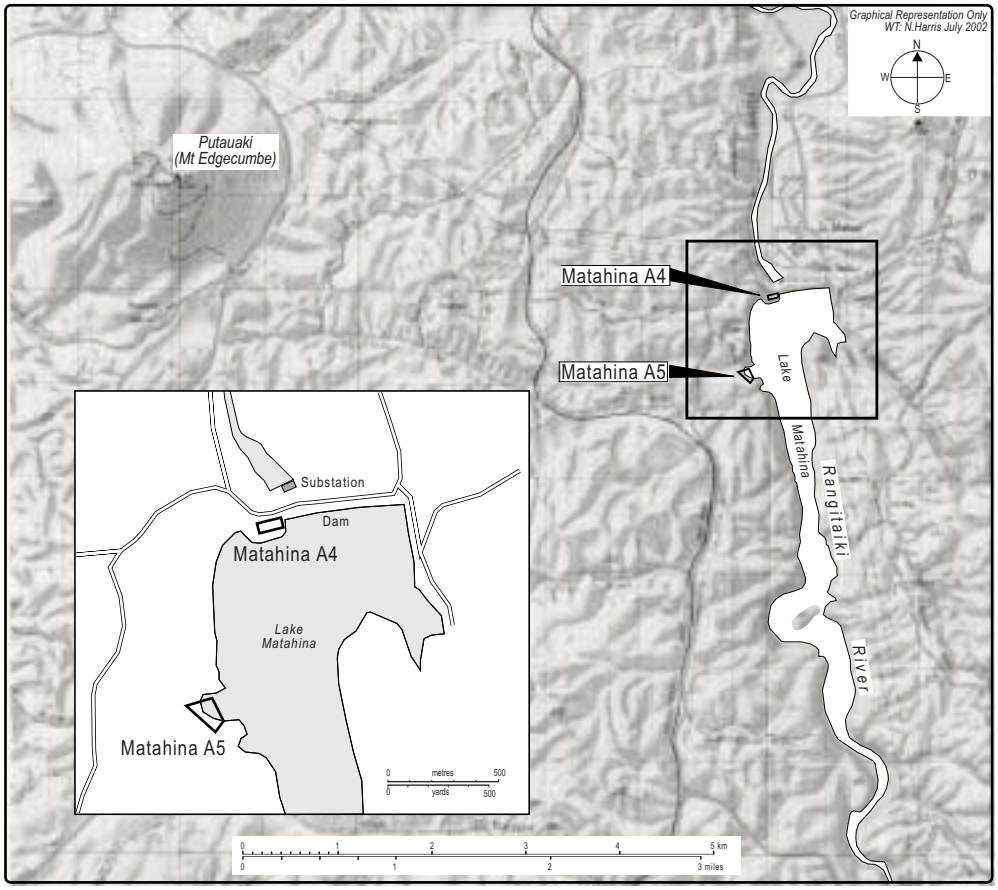
In her closing submissions, counsel also noted that the 75 per cent offer to Ngāti Awa was 'a reasonable reflection of the claims made by Ngati Haka Patuheuheu and others in the 1880s, that Ngati Awa has forgone licensed land beyond Matahina a1b, a1c, and a6, and the assessment of land available elsewhere for cross-claimants'.[137]

Counsel acknowledged, following the evidence presented by Ms Collins, that the issue of the size of Treaty claims was an area of uncertainty, with much depending on how the claimants come into negotiation and the nature of the claims.[138] She emphasised Ms Collins' points that this aspect could 'not be taken too far' and that the 'key issues were the "threshold interest" and "availability of other land"'. She stated that this uncertainty was the reason for the removal of 25 per cent of the Matahina blocks offered to Ngāti Awa.[139]

Counsel maintained that the Crown considered the alternative options proposed by the overlapping claimants regarding Matahina, and was not agreeable to either withdrawing the forestry redress until all claims had been heard by the Tribunal, or placing the forestry redress in trust for subsequent allocation. Removing the forestry redress would prejudice Ngāti Awa, while offering Ngāti Awa other Crown forest licensed land from within Kaingaroa Forest would shift the problem to where Ngāti Awa have tenuous associations, and setting aside the Matahina forest would defer the problem to a later date.[140]

Regarding the claimant argument that the offer of 75 per cent of the Matahina Crown forest licensed lands to Ngāti Awa will create a 'domino effect', counsel stated that such an approach 'seeks to downplay the Ngati Awa interest in Matahina and the fact that most of the Kaingaroa forest is contested'.[141] She referred to Ms Collins' evidence that Tūhoe has

135. Paper 2.40, para 86
136. Ibid, paras 88–89
137. Document a13, para 96
138. Ibid, paras 83–89
139. Ibid, para 89
140. Paper 2.40, paras 90–93
141. Document a13, para 97



Map 3: Matahina a4 and a5

interests in southern blocks 'but, for the purposes of this hearing at least, downplay those interests', while 'Ngati Awa doesn't have much elsewhere to go', leaving 'little flexibility to offer Ngati Awa other land'.[142] Counsel suggested that 'the real risk of a "domino effect" is that consideration of interests in Matahina alone would not resolve this matter. Logically, all other claims to the balance of the Kaingaroa forest (in the Rotorua, Urewera and Kaingaroa district inquiries) would need to be heard'.[143]

Regarding the issue of Treaty breach, counsel stated that the Crown has 'conscientiously endeavoured' to:

> alert cross-claimants to the redress being offered to Ngati Awa; conduct its own inquiry into the relative claims; take into account the submissions of claimants; agree with Ngati Awa to amend the offer accordingly; balance the cultural and commercial interests; assess that there is sufficient forestry land outside that offered to Ngati Awa to address outstanding claims so as to limit prejudice.[144]

142. Ibid, para 98
143. Ibid, para 99
144. Paper 2.40, para 99

3.9

The Crown, counsel continued, 'does not say that this is a perfect resolution, or that another decision-maker might not produce a different solution; however, the Crown considers its approach has been careful, conscientious and robust [and] meets the requirements of good faith'.[145]

Counsel then turned to the other items of redress objected to by the overlapping claimants: Matahina a4; Matahina a5; Kaputerangi historic reserve; Ōhope; and other items of non-exclusive redress. Following the findings of site-specific research and consideration by the Minister, the Crown concluded that Ngāti Awa had a dominant interest in Matahina a4 and that it should be transferred to Ngāti Awa. The site contained significant urupā for Ngāti Awa and had been acquired from Ngāti Awa for public works purposes in 1968.[146] Counsel noted that this redress had been 'misdescribed' by counsel for Ngāti Haka Patuheuheu as '"the stratum title to the Matahina dam", suggesting much more extensive redress than is the case'.[147] Site-specific research identified overlapping interests in Matahina a5. The Crown determined that non-exclusive redress here was appropriate, offering Ngāti Awa a statutory acknowledgement over this site.[148]

Site-specific research identified Kaputerangi as 'a site to which many iwi, and not only Mataatua iwi, associate through whakapapa'. According to counsel, Ngāti Awa accepts this, while other claimant groups acknowledge that Ngāti Awa are kaitiaki of Kaputerangi.[149] Counsel submitted that:

> the blending of vesting Kaputerangi in Ngati Awa subject to the Reserves Act, but with an undertaking that the significance to other iwi and, in particular Mataatua iwi, should be reflected in published or interpretation material is a proper balance of the specific and broad interests to this site.[150]

In her closing submissions, counsel elaborated further on the Crown's policy regarding cultural redress. She identified 'the key question' as 'assessing whether the decision to offer particular sites, and the process leading to the decision, have prejudiced the cross-claimants so as to warrant withdrawal of the offer in respect of a particular site'. Counsel submitted that 'the Crown considers that on the evidence available the particular offers (as revised) are justified'.[151]

Counsel noted that overlapping claimants have not clearly articulated any redress concerns associated with Ōhope, but listed possible contested sites of redress:

145. Paper 2.40, para 100
146. Ibid, paras 101–110
147. Document a13, para 150
148. Paper 2.40, paras 111–113
149. Ibid, para 115
150. Ibid, para 119
151. Document a13, para 147

- Port Ōhope recreation reserve (the vesting of a 10-hectare site subject to reserve status);
- Port Ōhope recreation reserve (a one-hectare nohoanga entitlement adjacent to the 10-hectare site); and
- Ōhope Beach Holiday Park (the transfer of the Crown's lessor interests subject to existing encumbrances and reserve status).

The remaining contested redress items are all items of non-exclusive redress. These include Ngāti Awa membership on joint management committees in relation to both Tauwhare Pā and Moutohorā Island; and a 5 per cent preferential tender right for any authorisations under the Resource Management Act in relation to Ōhiwa Harbour.[152] In her closing submissions, counsel said:

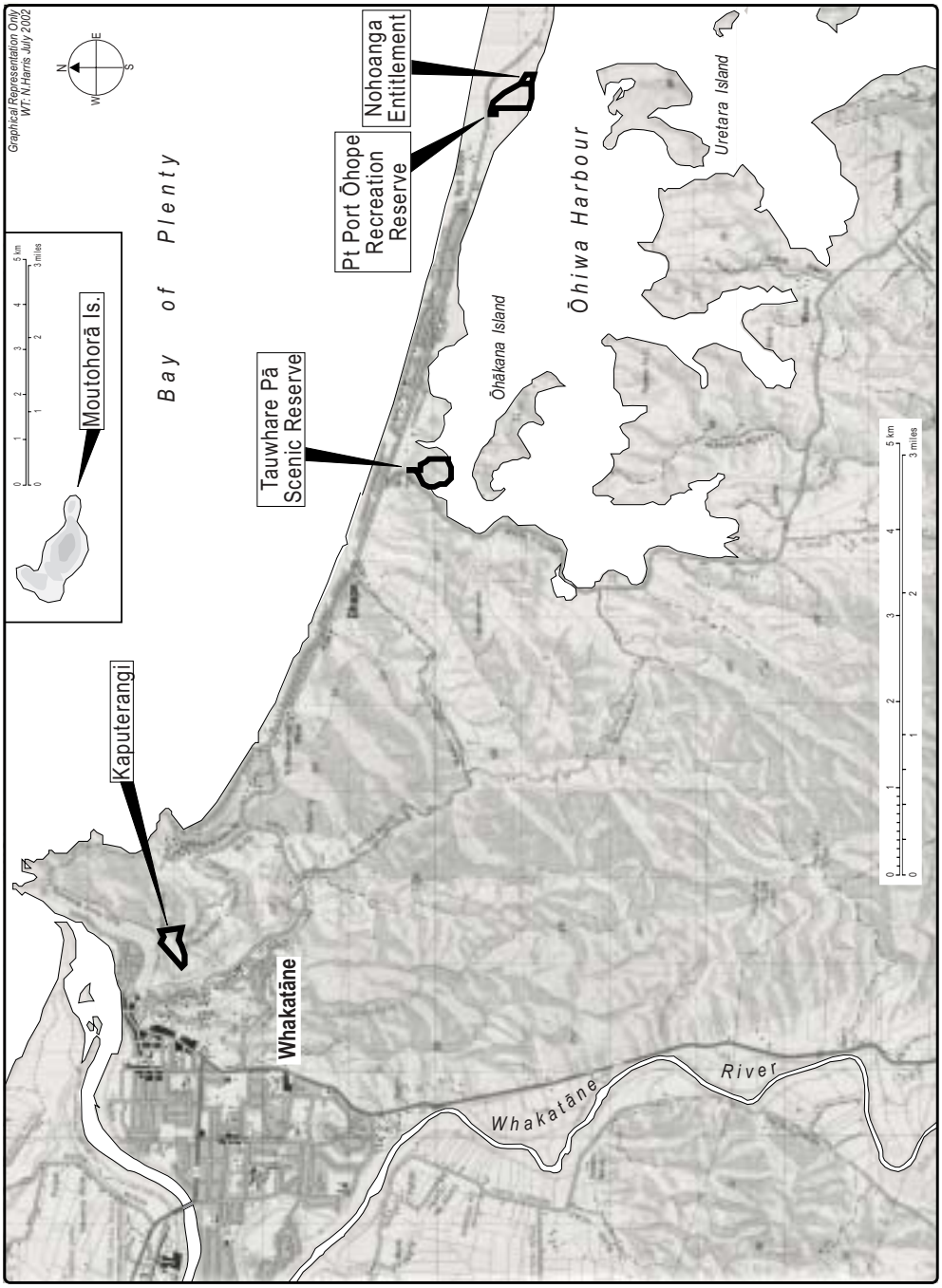
> The Crown remains baffled as to the complaint about [the items of non-exclusive redress], even after four days of hearing. The Crown does not see how non-exclusive redress, which by definition preserves the capacity for similar redress to be provided to other iwi/hapu, can be a breach of Treaty principles. No party has seriously contested that Ngati Awa is without interests in the non-exclusive redress.[153]

Counsel also stated that 'the Deed of Settlement will acknowledge that these items are non-exclusive redress and that the redress will not prejudice the Crown's ability to provide similar redress to other claimants who establish a well-founded claim'. This, she elaborated, was included in response to cross-claimants' concerns. 'Ngati Awa, as signatory to the Deed would agree to this.'[154]

Commenting on a question put to Ms Collins and Mr Hampton by Judge Wainwright regarding whether the Crown has an obligation to avoid creating conflict amongst claimants through its settlement processes, counsel stated in her closing submissions that:

> In the Crown's submissions the engagement with cross-claimants, the tone of correspondence, the meetings with officials and Ministers all demonstrate a desire and intention on the Crown's part that the settlement process not create further conflict . . . However, it is simply not within the Crown's power to guarantee that conflict will not arise . . . So long as claimants desire assets in settlement rather than cash, conflicts of some sort are likely to persist. The Crown submits it made reasonable effort to reassure claimants that the Crown was not making decisions about mana or defining historical boundaries and that in contested cases, cross-claimants concerns were taken into account and redress adjusted.

152. Paper 2.40, paras 120–127
153. Document a13, para 23
154. Ibid, para 173



Map 4: Contested items of 'cultural redress': Kaputerangi, Moutohora Island, and Ohiwa Harbour

Counsel further added that while 'none of that has satisfied the cross claimants . . . the Crown submits that it is not because of an absence of good faith on its part'.[155]

In conclusion, counsel stated that the Crown has met the relevant Treaty duties in preserving its ability to provide redress for overlapping-claimants, whilst endeavouring to achieve settlement with Ngāti Awa; in informing itself of competing interests; and in taking these matters into account in reaching decisions about contested redress. In addition, the Crown submitted that 'a full inquiry into customary interests, Treaty breaches, and the apportionment of redress, including to claimants whose general claims will not have been heard, is not warranted'. It was also submitted that 'the evidence points to a careful and considered approach on the Crown's part so as to satisfy the Tribunal that in Treaty terms the process has been proper'.[156]

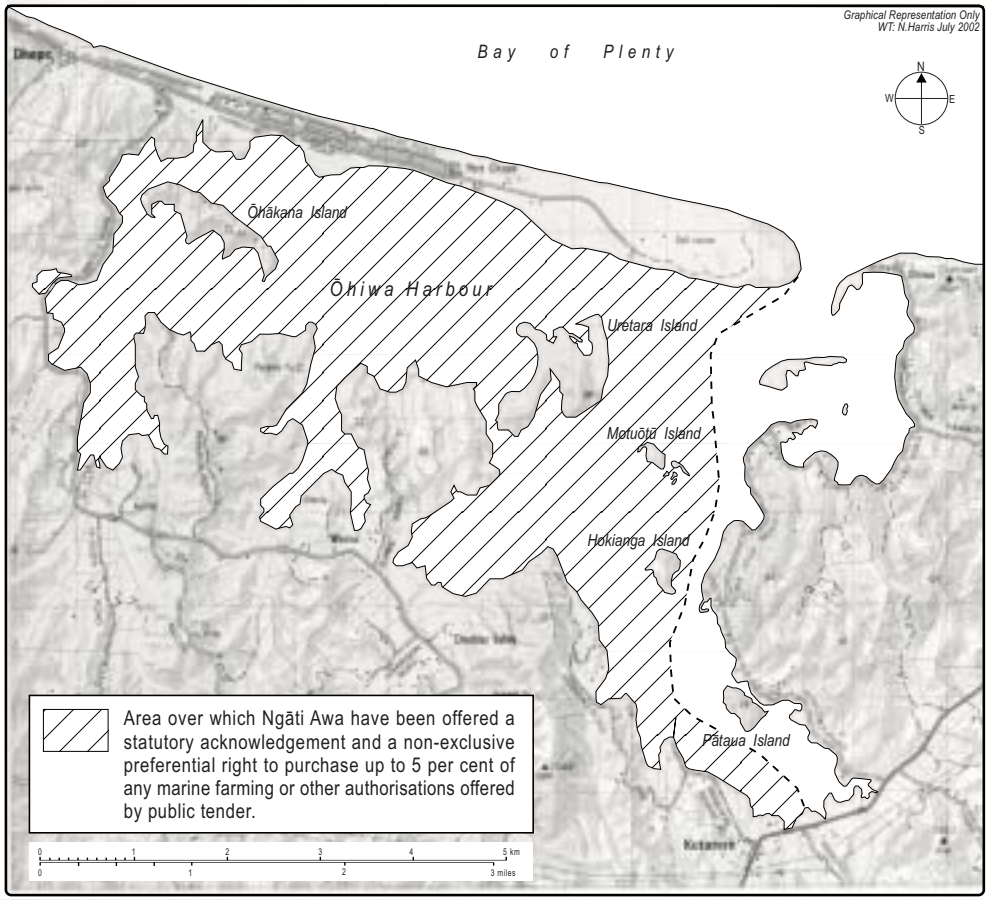
3.10 Evidence for the Crown

The Crown's evidence was filed in the form of a comprehensive written brief from Deborah Collins, manager, policy and negotiations, Office of Treaty Settlements.[157] At the hearing, Ms Collins read her brief aloud. Her evidence was amplified in some respects by answers to questions given by Andrew Hampton, director of the Office of Treaty Settlements.

Ms Collins presented an overview of the contested redress offered to Ngāti Awa; a discussion of the overlapping claimants and their objections to the redress offered to Ngāti Awa; and the background to the settlement negotiations with Ngāti Awa. She then outlined the consultation entered into by the Office of Treaty Settlements with the Tūhoe–Waikaremoana Māori Trust Board, Ngāti Haka Patuheuheu, Ngā Rauru o Ngā Pōtiki, and Ngāti Rangitihi. She set out the basis for the Crown's decision in respect of overlapping claims, and the policy arrived at in relation to exclusive cultural redress and Crown forest licensed land redress.[158]

Regarding the Crown's understanding of the overlapping claimants, Ms Collins stated that 'the Crown has been aware of the Tuhoe–Waikaremoana Maori Trust Board representing overlapping interests since the outset of negotiations with Ngati Awa'.[159] Regarding Ngāti Haka Patuheuheu, Ms Collins stated that the Crown, as part of its consultation process with overlapping claimants, had identified the Wai 726 claimants (Janet Carson and Robert Pouwhare on behalf of themselves and Ngāti Haka Patuheuheu) as 'potentially having an interest in redress offered to Ngati Awa'.[160] With regard to Ngā Rauru o Ngā Pōtiki, Ms Collins

155. Document a13, para 144
156. Ibid, paras 174–175
157. Documents a1, a1(a), a1(b)
158. Document a1, para 2
159. Ibid, para 3
160. Ibid, para 8



Map 5: Ohiwa Harbour

stated that the Crown became aware of the existence of this group in October 2001, and 'understands that Nga Rauru o Nga Potiki challenges the mandate of the Trust Board to represent Tuhoe'. She also stated that although Ngäti Haka Patuheuheu are part of Ngä Rauru o Ngä Pötiki, 'the Crown understands that Ngati Haka Patuheuheu are pursuing these proceedings on their own behalf, albeit with the support of Nga Rauru o Nga Potiki'.[161] Regarding Ngäti Rangitihi, Ms Collins stated that the Crown has been aware of the primary Ngäti Rangitihi claim (Wai 524) since the outset of negotiations with Ngäti Awa; and that the Crown was also aware that Ngäti Rangitihi 'claimed into the Matahina block in the Native Land Court hearings, and that part of the Matahina Block is included in the Ngati Rangitihi claim area'.[162]

Ms Collins provided an overview of the contested redress, and traced the basis of the Crown's offer of the contested redress items to Ngäti Awa. She stated that, in offering redress to Ngäti Awa:

161. Document a1, paras 9–10
162. Ibid, para 12

the Crown considered the nature and extent of the Ngati Awa claims, the evidence presented to the Ngati Awa Tribunal (including site-specific evidence), the redress sought, the instruments and interests available to the Crown for use in Treaty settlements, and the Crown's understanding of cross-claims.[163]

While Ngāti Awa did not seek the return of the Matahina Crown forest licensed lands in its claim before the Waitangi Tribunal, Ms Collins noted that 'as it is Crown policy to negotiate comprehensive settlements, redress was offered to settle all the Ngati Awa historical claims, including those relating to Matahina, notwithstanding that not all the claims had been heard'. She also noted that the Crown considered that, 'due to the seriousness of the claims, it was necessary to offer significant redress to Ngati Awa in the settlement of its claims'.[164] All potential redress items in the claim area were considered and Ngāti Awa specifically requested that the Matahina Crown forest licensed lands form part of the settlement. The Crown considered it appropriate to offer part of the Kaingaroa Forest to Ngāti Awa. The original Crown offer in 1998 of the Matahina Crown forest licensed lands was subject to 'the provision of Deeds with Tuhoe and Te Ika Whenua to the Crown's satisfaction confirming that cross-claims to these particular blocks have been resolved'.[165] Ms Collins stated that the offer was made 'on the basis of Ngati Awa's associations with the Matahina area'; and she referred to a number of documents that indicated to the Crown that neither the Tūhoe–Waikaremoana Māori Trust Board nor Te Ika Whenua would challenge the offer. She also stated that the Crown 'considered that there was a large amount of forest land available for offer to other claimant groups in future negotiations should that be appropriate'.[166] In response to a question from Judge Wainwright regarding the percentage of the Ngāti Awa redress represented by the Matahina Crown forest licensed land, Ms Collins and Mr Hampton indicated that it comprised roughly 25 per cent of the total settlement package.

Regarding the contested items of cultural redress, Ms Collins noted that there are two types of cultural redress: non-exclusive and exclusive redress. She explained that 'because the offer of non-exclusive redress to one group does not preclude the ability of the Crown to offer that same or similar redress to another group in the future if appropriate, the key consideration is whether the group receiving the redress has an interest justifying that redress be offered'.[167] Regarding the offer of exclusive cultural redress, Ms Collins stated that the Crown considers two factors: the relative nature and extent of claimant groups' customary interests in the specific site, given that the exclusive redress will generally only be offered to a group that can demonstrate a dominant interest; and whether the Crown can recognise the customary interests of other groups in relation to the site or the surrounding area. It was also noted

163. Ibid, para 18
164. Ibid, paras 19–20
165. Ibid, para 21
166. Ibid, para 22
167. Ibid, para 25

that all redress was offered subject to overlapping claims being addressed. Ms Collins then briefly described the contested items of cultural redress: Matahina a4 and Matahina a5; Kaputerangi historic reserve; Tauwhare Pā scenic reserve; Port Ōhope recreation reserve; Moutohorā Island; and the 5 per cent preferential tender right with regard to Ōhiwa Harbour.[168] In response to a question from Judge Wainwright regarding the sites of redress located on the western shore of Ōhiwa Harbour, Ms Collins stated that Ōhiwa Harbour is a site where all groups have use, access, and interests, but from the 1820s, Ngāti Awa had a dominant interest on the north-western side. When asked if all Crown sites in this area were being offered to Ngāti Awa, Ms Collins stated that all the reserves on the western side of the harbour, excluding those public reserves in high use, were offered, but that there were other sites on the southern and eastern shores and inland that could be available as settlement redress for other claimants. Ms Collins then outlined the Crown's understanding of the objections of the overlapping claimants.[169]

Ms Collins went on to describe in some detail the background to the Crown's negotiations with Ngāti Awa, and the ongoing consultation with the various other interested groups. She noted that Ngāti Awa and the Crown were unable to conclude a deed of settlement based on the original (December 1998) heads of agreement, but that during this period of negotiation Ngāti Awa endeavoured to resolve cross-claim issues through correspondence and meetings with cross-claimants. The Crown had sought to assist in the resolution of cross-claim issues, facilitating two meetings between representatives of Ngāti Awa and the Tūhoe–Waikaremoana Māori Trust Board, and providing the trust board with information regarding the settlement offer, and Tūhoe's overlapping claim. According to Ms Collins, discussions between Ngāti Awa and the trust board stalled. The Crown and Ngāti Awa agreed to a revised settlement offer in October 2000.[170] Ms Collins stated that 'at this time it had become apparent that it was not going to be possible for Ngāti Awa to obtain the agreement of all overlapping claimants, including the Tūhoe–Waikaremoana Maori Trust Board, to the settlement offer'. This, she continued, necessitated a change in policy. The revised settlement offer was made subject to 'the Crown confirming that all cross-claim issues in relation to any part of the settlement redress have been addressed to the satisfaction of the Crown'. This change in policy, according to Ms Collins, was informed by the views of the Ngāti Awa Tribunal.[171]

Ms Collins then proceeded to outline the subsequent attempts made by both Ngāti Awa and the Crown to address overlapping-claim issues. She referred to a schedule of correspondence between Ngāti Awa and overlapping claimants, and stated that, in addition, 'the Crown has actively consulted all claimants before the Tribunal that it is aware may have claims overlapping the Ngati Awa claim area, and who therefore may be affected by the redress offered

168. Document a1, paras 24–47
169. Ibid, paras 48–73
170. Ibid, paras 71–84
171. Ibid, para 85

to Ngati Awa'.[172] On 3 January 2001, the Office of Treaty Settlements wrote to all claimants it identified as having claims that may overlap with the redress offered to Ngāti Awa, advising them of the revised settlement offer of October 2000. Follow-up letters, inviting comment, were sent on 30 April 2001. Further correspondence and meetings between the Office of Treaty Settlements and the overlapping claimants were described. On 2 November 2001, officials from the Office of Treaty Settlements met with representatives of, and counsel for, Ngā Rauru o Ngā Pōtiki. On 23 January 2002, the Minister in Charge of Treaty of Waitangi Negotiations and Crown officials met with representatives of the Tūhoe–Waikaremoana Māori Trust Board. On 31 January 2002, the Minister met with Mr Pouwhare and representatives of Ngāti Haka Patuheuheu and Ngā Rauru o Ngā Pōtiki. On 21 February 2002, officials from the Office of Treaty Settlements met with Ngāti Rangitihi at Matatā.[173] On 31 January 2002, the Minister in Charge of Treaty of Waitangi Negotiations proposed that the Crown meet with representatives of Ngāti Awa, the Tūhoe–Waikaremoana Māori Trust Board, Ngā Rauru o Ngā Pōtiki, and Ngāti Haka Patuheuheu 'to explore whether there were alternatives to the current proposal to transfer Matahina licensed lands to Ngati Awa that were acceptable to all parties, including the Crown'. Te Rūnanga o Ngāti Awa advised the Office of Treaty Settlements that Ngāti Awa did not wish to attend the proposed meeting on the grounds that that the process would lead to further delay and prejudice Ngāti Awa.[174]

On 1 February 2002, the Office of Treaty Settlements wrote to the solicitors for the trust board, inviting their participation in site-specific research regarding Matahina a4, Matahina a5, and Kaputerangi, to be commissioned by the Office of Treaty Settlements. The trust board was also asked to provide information regarding Tūhoe's claimed interests in other forest blocks, and a map of the traditional Tūhoe boundary. The trust board declined to participate in the site-specific research or furnish the Office of Treaty Settlements with the requested information, as these were matters to be addressed by the Waitangi Tribunal.[175]

On 18 March 2002, the Office of Treaty Settlements wrote to the overlapping claimants advising them of the Crown's intended process for considering overlapping claim issues. This, according to Ms Collins, included ensuring that overlapping claimants:

> would have the opportunity to comment on the Minister's provisional decision, prior to the matter being referred to Cabinet for final Crown position, and an undertaking that the Minister would advise overlapping claimants of the Crown's decision at least 7 days before the Crown initials a Deed of Settlement with Ngati Awa, so as to allow them to take whatever action they might consider necessary at the time.[176]

172. Ibid, para 87
173. Ibid, paras 88–133
174. Ibid, para 107
175. Ibid, paras 108–109
176. Ibid, para 110

3.10

The site-specific research commissioned by the Office of Treaty Settlements was limited to the customary associations of Ngāti Awa and Ngāti Haka Patuheuheu with Matahina a4, Matahina a5, and Kaputerangi. Ms Collins stated that the research 'did not consider any wider Tuhoe customary associations given the Trust Board's decision not to participate'.[177] Ms Collins commented that, while:

> the Crown considers that it had reviewed all available primary and secondary sources, it considered it necessary to hear and consider the oral evidence of overlapping claimants. As such, the focus of [the] site-specific research report was on the oral histories of the overlapping claimants and Ngati Awa.[178]

On 28 March 2002, following briefings on 22 and 26 March, the Minister in Charge of Treaty of Waitangi Negotiations wrote to overlapping claimants, informing them of her provisional decisions regarding the Ngāti Awa settlement offer. It was at this juncture that the Minister advised that she intended to recommend to Cabinet that the Crown withdraw approximately 25 per cent of the Matahina Crown forest licensed lands from the offer to Ngāti Awa; that she would proceed with the offer to vest the fee simple estate of Kaputerangi historic reserve in Ngāti Awa, and transfer the stratum title to Matahina a4 to Ngāti Awa. She also announced that the offer to transfer Matahina a5 to Ngāti Awa had been withdrawn and replaced with an offer of statutory acknowledgement (non-exclusive redress) over this site. In relation to Ōhiwa Harbour and surrounding areas, the Minister proposed to continue with the original offers of redress with the exception of withdrawing the offer to vest Tauwhare Pā scenic reserve in Ngāti Awa as a reserve. Instead, the reserve will be included with those items over which a joint management committee is to be established. Ms Collins outlined the responses of the various overlapping claimants to the provisional decision. The Minister was made aware of these responses, and decided that no further amendments to the settlement package should be made. On 8 May 2002, the Minister recommended to the Cabinet Policy Committee a final Crown position on the settlement offer, and on 20 May 2002, Cabinet agreed to the proposed modifications. The Office of Treaty Settlements wrote to the overlapping claimants, informing them of Cabinet's decision on the Ngāti Awa settlement and consideration of cross-claims.[179]

Ms Collins emphasised in her evidence the difficulties faced by the Crown in addressing cross-claims. She outlined the Crown's competing obligations to the cross-claimants and to the party in settlement negotiation. The final settlement offer involved a balancing of the often competing interests that was essentially political in nature.[180]

---

177. Document a1, para 128
178. Ibid, para 129
179. Ibid, paras 134–150
180. Ibid, para 152

Ms Collins also stated that the Crown recognises that it is very difficult for claimant groups that are in negotiation to secure the agreement of overlapping claimants to the offer of particular items of redress, particularly when claimant groups are at different stages of the hearing or settlement process. It is for this reason, she continued, that Crown settlement offers are expressed to be subject to the Crown confirming that overlapping claims have been addressed to the satisfaction of the Crown. This approach, Ms Collins claimed, 'has been endorsed by the Waitangi Tribunal in the *Ngati Maniapoto/Ngati Tama Settlement Cross-Claims Report*'.[181]

She noted that 'where Crown forest land offered as commercial redress is subject to cross-claims, there is a need to balance the commercial nature of the asset, with the cultural and historical associations of those groups claiming an interest in the land'.[182] Under the Crown's current settlement policy, 'a group that selects forest land as redress, also receives the accumulated rentals relating to that land'. As the accumulated rentals are not considered to be part of the settlement quantum, this 'increases the financial incentive for groups to seek to maximise the amount of forest land that forms part of, or is available for, their settlement'.[183]

Ms Collins referred the Tribunal to a briefing paper prepared by the Office of Treaty Settlements for the Minister in Charge of Treaty of Waitangi Negotiations. The paper sets out a proposed policy for assessing overlapping claims to Crown forest licensed land and the application of that policy to the Matahina lands. The factors to be taken into consideration 'in coming to a Crown decision on an appropriate allocation of forest land' were expressed as follows:

a has a 'threshold' level of customary interest been demonstrated by each claimant group?
b if a threshold interest has been demonstrated:
    i what is the potential availability of other forest land for each group?
    ii what is the relative size of likely redress for the Treaty claims, given the nature and extent of likely Treaty breaches?
    iii what is the relative strength of the customary interests in the land?
c what are the range of uncertainties involved? The Crown should take a 'precautionary' 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.[184]

The briefing paper goes on to state that:

> The relative weightings given to each of these considerations will depend on the precise circumstances of each case. Broadly, a claimant group would not have to show the

181. Ibid, para 156
182. Ibid, para 158
183. Ibid, para 159
184. Ibid, para 162; doc a1, annex db, para 20

dominant interest in the forest land to be eligible to receive that land in redress, only a threshold level of interest. The strength of relative customary interests in the land is only likely to be a dominant factor when there is limited forest land available.

It is difficult to set a general standard for determining whether a threshold level of interest exists. If a claimant group was awarded the land by the Native Land Court, it is very likely that a threshold interest has been demonstrated. A likely indicator is also that a claim was made to the Native Land Court for the land, whether or not an award was made to that group. This recognises that Native Land Court awards often represent an attempt to rationalise customary interests, rather than to delineate them. It is possible that a threshold interest can be demonstrated in other ways, even if a group did not make a claim to the Native Land Court.[185]

Applying the policy framework to the case of Matahina, Ms Collins noted that in establishing threshold interests, the Crown has relied on the existence of a claim to the Native Land Court, whether or not an award was made to a particular group:

> Although there was some doubt as to whether Tuhoe could establish a threshold interest independent of Ngati Haka Patuheuheu, the policy was applied on the basis that Ngati Awa, Tuhoe, Ngati Haka Patuheuheu and Ngati Rangitihi could all establish a threshold interest to Matahina licensed lands.[186]

Regarding the availability of other Crown forest licensed land, Ms Collins stated that, in the Crown's view, 'there is little other Crown forest land that the Crown could offer to Ngati Awa as part of a negotiated settlement due to the difficulty Ngati Awa would have in establishing a threshold interest'.[187] It is also the Crown's view that there is sufficient Crown forest licensed land available to potentially settle claims with Tūhoe, Ngāti Haka Patuheuheu, and Ngāti Rangitihi. Ms Collins noted that the Crown 'acknowledges that uncertainty is created by the fact that it is not possible to predict how the various groupings will present themselves for negotiations with the Crown'.[188] She suggested that any combination of Tūhoe, Ngāti Haka Patuheuheu, Ngāti Ruapani, Ngāti Manawa, and Ngāti Whare could potentially form a single group for negotiation purposes. Ms Collins also identified the relative nature and extent of the Treaty claims of Ngāti Awa and the overlapping claimants as another factor taken into consideration by the Crown. She stated that the Crown, having considered the nature and extent of the overlapping claims 'as pleaded', 'considers that it is not evident that there would be any major imbalance in the availability of Crown forest land, relative to the nature and extent of Treaty breaches, between Tuhoe, Ngati Haka Patuheuheu, Ngati Rangitihi and Ngati Awa'.[189]

185. Document a1, annex db, paras 21–22
186. Ibid, para 175
187. Ibid, para 177
188. Ibid, para 183
189. Ibid, para 187

Ms Collins stated that, while the Crown has undertaken an analysis of the strength of customary interests in the Matahina block, 'this was ultimately not a decisive factor as there appears to be sufficient Crown forest land available to offer overlapping claimant groups in future negotiations should that be considered appropriate'. She added that, in the Crown's view, 'any customary interests of the overlapping claimants are not sufficiently strong so as to justify withdrawing the offer of forest land, as commercial redress, to Ngati Awa'.[190] Ms Collins went on to explain that the Crown, in applying the policy framework, and acknowledging that there were some uncertainties involved, considered it appropriate and necessary to adopt a precautionary approach in withdrawing approximately 25 per cent of the Matahina forest land from the offer to Ngāti Awa. The Crown considers that the area ultimately withdrawn (2264 hectares or 24.7 per cent of the Matahina licensed lands) 'could potentially be offered to Tuhoe/Ngati Haka Patuheuheu in any further settlement if appropriate'.[191] Ms Collins also noted that the Crown considered that it was necessary that 'any forest land transferred under settlement was subject to a mechanism protecting the wahi tapu of other iwi and providing for access to wahi tapu'.[192]

Ms Collins then outlined the implications of the modifications resulting from consideration of overlapping claims regarding the contested items of cultural redress (both exclusive and non-exclusive) offered to Ngāti Awa; that is, Matahina a4 and a5, the Kaputerangi historic reserve, Ōhiwa Harbour, and Moutohorā Island.[193]

In conclusion, Ms Collins stated that while the Minister in Charge of Treaty of Waitangi Negotiations 'has a clear desire to conclude settlement with Ngati Awa, she genuinely wanted to consider issues raised by overlapping claimants and did not push towards a settlement until such issues had been considered by her, despite the lengthy delays involved'.[194]

3.11 Submissions of Ngāti Awa

The Ngāti Awa submissions contained in the memorandum of claimant counsel dated 14 June 2002 were filed to supplement those of the Crown.[195] Counsel submitted that at the centre of the dispute over the Matahina lands is the issue of the respective customary interests of Ngāti Awa, Tūhoe, Ngāti Haka Patuheuheu, and Ngāti Rangitihi. Ngāti Awa's view is that Ngāti Awa have the predominant interest in the Matahina block, a view supported by the findings of the 1881 and 1884 Native Land Court hearings.[196]

190. Ibid, para 188
191. Ibid, para 194
192. Ibid, para 196
193. Ibid, paras 201–222
194. Ibid, para 223
195. Paper 2.46, para 2
196. Ibid, para 5

3.11

Counsel stated that the Matahina Crown forest licensed lands are a key component of the settlement package on offer to Ngāti Awa. Ngāti Awa sees Matahina as essential to the agreement as:

- Ngāti Awa believe the settlement quantum offered by the Crown is extremely modest given the extent and nature of the Crown's Treaty breaches in its past dealings with Ngāti Awa; and
- Ngāti Awa follow the principle of 'Kua riro whenua atu me hoki whenua mai', the return of land as compensation for land taken. The Matahina Forest lands are the single largest area of land Ngāti Awa would acquire through this settlement, without which the settlement could not proceed.[197]

Ngāti Awa signed the initial heads of agreement with the Crown in December 1998, followed by a revised heads of agreement in October 2000. Counsel stated that Ngāti Awa had, throughout this period, attempted to pursue dialogue with cross-claimants. Ngāti Awa had tried to talk to those who, to the best of their knowledge, were representatives of Tūhoe, Ngāti Haka Patuheuheu, and Ngāti Rangitihi.[198]

Counsel referred to a memorandum sent by counsel for Ngāti Awa to the eastern Bay of Plenty Tribunal on 11 April 1995. This memorandum stated that Ngāti Awa would not oppose the claims of Te Ika Whenua (who at this time were recognised as representing Ngāti Haka Patuheuheu) or Tūhoe regarding Matahina c and c1. In return, they asked that Te Ika Whenua and Tūhoe agree not to oppose Ngāti Awa's claims regarding the balance of the Matahina block.[199] Counsel then quoted from a letter from the solicitor of the Tūhoe–Waikaremoana Maori Trust Board, dated 8 May 1995. In this letter, the trust board's solicitor stated that neither the Wai 386 claim nor any other trust board claim related to the balance of the Matahina blocks and that the trust board would not be advancing a claim to the area of the Matahina block awarded to Ngāti Awa.[200] Counsel for the Te Ika Whenua claimants also declared in a memorandum of 23 May 1995 that Te Ika Whenua would not oppose Ngāti Awa claims to the balance of the Matahina blocks.[201]

Counsel maintained that Ngāti Awa accepted these statements and on the basis of them decided not to pursue their claims to the Matahina c blocks and to the Kaingaroa, Waiohau, Te Haehaenga, Ruawāhia, Tuarārangaia, and Ruātoki blocks. Counsel stated that this was a concession that Ngāti Awa would not have made if the Tūhoe–Waikaremoana Maori Trust Board or Te Ika Whenua had indicated they would pursue their claims to the balance of the Matahina blocks.[202]

197. Paper 2.46, para 6
198. Ibid, paras 13–16
199. Ibid, para 20
200. Ibid, para 21
201. Ibid, para 22
202. Ibid, para 25

Counsel pointed out that, as a result of the renewed claims by Tūhoe and Ngāti Haka Patuheuheu, Ngāti Awa made the following concessions:

- they agreed to a 25 per cent reduction in the area of Matahina Crown forest lands offered by the Crown, involving a financial loss to Ngāti Awa of around $3.3 million; and
- they agreed to the replacement of the offer of title to Matahina a5 with an offer of statutory acknowledgement.[203]

Counsel argued that the eastern Bay of Plenty Tribunal recognised the Ngāti Awa interests south of the confiscation boundary and recommended that a settlement of Wai 46 claims should include those claims outside the boundary. According to counsel, the Tribunal considered that settlements should proceed despite cross-claims and that the return of assets should not be dependent on the agreement of cross-claimants. Counsel argued that there are a number of other areas of Crown forest licensed land available for the settlement of Tūhoe and Ngāti Haka Patuheuheu's claims.[204]

Counsel contended that Ngāti Awa should not be forced to make any further concessions as they have acted in good faith in relying on the agreements made previously with the Tūhoe–Waikaremoana Maori Trust Board and with Te Ika Whenua acting on behalf of Ngāti Haka Patuheuheu. They argued that neither Ngāti Awa nor the Crown can be criticised for concluding a settlement on the basis of these agreements.[205]

Counsel argued that Tūhoe may also be offered non-exclusive redress in those areas of the Ngāti Awa settlement where non-exclusive redress has been granted to Ngāti Awa. Therefore, this type of redress could cause no prejudice to Tūhoe. Counsel stated that, as Kaputerangi was clearly within the traditional rohe of Ngāti Awa and not on land claimed by Tūhoe, it is entirely appropriate that the site should be returned to Ngāti Awa.[206]

In their closing submissions, Ngāti Awa sought not to traverse matters already addressed in the Crown's submissions, but to provide additional context and respond to some specific matters raised by Ngāti Haka Patuheuheu, Tūhoe, and Ngāti Rangitihi.[207]

Counsel argued that Ngāti Awa have strong claims to the Matahina a blocks, while the cross-claimants' interests in these blocks are overstated. They stated that in the 1881 Native Land Court hearing Ngāti Awa were awarded all of the Matahina a blocks, while in the 1884 hearing Ngāti Awa were awarded the balance of the blocks, after the removal of the 4500 acres in Matahina b, c, and d. Matahina b was awarded to Ngāti Hāmua, Matahina c to Ngāti Haka Patuheuheu, and Matahina d to Ngāti Rangitihi. In both hearings, the Native Land Court accepted Ngāti Awa's claims based on occupation and ancestral association. Counsel noted that, contrary to Mr Nīkora's assertions, Ngāti Awa historically saw its interests as

203. Ibid, paras 26–27
204. Ibid, paras 28–30, 33
205. Ibid, para 35
206. Ibid, paras 37–38
207. Document a16, para 1

extending south of the Waikowhewhe Stream. He cited the 1881 Native Land Court evidence of Hamiora Turuturu, where the Ngātamawāhine Stream was given as the southern extremity of Ngāti Awa's land interests.[208]

Counsel said that the Tūhoe–Waikaremoana Māori Trust Board had based its claim to Matahina, to an extent, on the interests of Ngāti Hāmua and Warahoe. They pointed out that Mr Nīkora had accepted that Ngāti Hāmua and Warahoe are affiliated to Ngāti Awa as well as to Tūhoe. Counsel stated that Ngāti Hāmua and Warahoe are currently aligned with Ngāti Awa, rather than with Tūhoe, and are represented on Te Rūnanga o Ngāti Awa.[209]

Counsel rejected arguments by Tūhoe and Ngāti Haka Patuheuheu that Ngāti Awa had not made explicit the fact that they were claiming interests in the Matahina a blocks. They argued that Ngāti Awa made it clear at the time of the Ngāti Awa Tribunal hearings that they were interested in the Matahina a blocks.[210]

Counsel also rejected the Tūhoe–Waikaremoana Māori Trust Board's argument that its solicitor's letter of 8 May 1995 (disclaiming interest in the Matahina a blocks), applied only to the Wai 386 claim and was completely independent of the Wai 36 claim. Counsel maintained that Ngāti Awa still believe that there was an agreement in 1995 between Ngāti Awa and Tūhoe over Matahina. It was on this basis that Ngāti Awa agreed it would not claim the Matahina c blocks, while Tūhoe agreed to drop any claims to the Matahina a blocks.[211]

Counsel stated that Ngāti Awa 'do not accept that the Crown has any greater or lesser obligation to Ngati Haka Patuheuheu, Tuhoe or Ngati Rangitihi than it does to Ngati Awa'.[212] They argue that the Crown is obliged to take into account the relative position of each competing iwi and act fairly and impartially in balancing their interests.[213]

Counsel reiterated the point that, if the Matahina a blocks did not constitute part of the Ngāti Awa settlement, the settlement would not go ahead.[214] The following prejudice would result if the transfer of the Matahina a blocks were delayed or prevented:

- any delay would thwart Ngāti Awa's longstanding desire to resolve its historical claims against the Crown. This would include cultural cost, in that many more of those involved in the claims might not live to see the claims resolved;
- Ngāti Awa would lose financially as they would be deprived of interest accruing on the settlement quantum from the day the agreement is signed;
- financial loss would also result if the accumulated rental on the 75 per cent of the Matahina a blocks allocated to them were lost;

208. Document a16, paras 6–8
209. Ibid, paras 10–11
210. Ibid, paras 13–15
211. Ibid, para 16–18
212. Ibid, para 20
213. Ibid, para 22
214. Ibid, paras 26, 30

- the Matahina a blocks comprise the largest area of land to be returned to Ngāti Awa under the settlement. The loss of Matahina a would be a cultural loss as well as a financial one, because Matahina is ancestral land.[215]

Counsel stated that Matahina a4 is an urupā of Ngāti Hāmua/Warahoe associated with the Ōtipa Pā. Ōtipa Pā was occupied by Ngāti Awa at the time of Te Tatau Pounamu i Ōhui. Given the current alignment of Ngāti Hāmua and Warahoe with Ngāti Awa, counsel argued that it is appropriate that Matahina a4 be returned to Ngāti Awa.[216]

Counsel stated that all parties accepted that Kaputerangi is within the territory of Ngāti Awa, and argued that Kaputerangi should be returned to Ngāti Awa. Ngāti Awa would then act as tangata whenua and kaitiaki of this site, acknowledging the ancestral associations of others to the site.[217]

With regard to Ōhiwa Harbour, counsel noted two different positions taken by the claimants and therefore made separate replies to each of them:

(a) The Tūhoe–Waikaremoana Maori Trust Board opposed exclusive or non-exclusive redress for Ngāti Awa at Ōhiwa Harbour on the grounds that Tūhoe also claimed interests there. Counsel for Ngāti Awa argued that the eastern Bay of Plenty Tribunal had found that Ngāti Awa had a predominant interest in the western shores of Ōhiwa Harbour. Therefore, the Crown's offer of redress in this area cannot be seen as a breach of Treaty obligations.

(b) Ngā Rauru o Ngā Pōtiki, through the evidence of Huka Williams, argued that Upokorehe, a hapū affiliated to Tūhoe, were the only group with interests at Ōhiwa and that Ngāti Awa had never conquered Tūhoe at Ōhiwa. Counsel pointed out that Ms Williams' evidence ran contrary to the findings of the eastern Bay of Plenty Tribunal.[218]

Counsel for Ngāti Awa rejected criticisms of the non-exclusive redress offered to Ngāti Awa at Matahina a5 and Moutohorā Island. They argued that, as the redress offered at these sites is non-exclusive, other parties would suffer no prejudice. If other parties can prove their claims, the Crown can also offer those parties non-exclusive redress.[219]

3.12 Evidence for Ngāti Awa

Counsel for Ngāti Awa called three people to give evidence regarding Ngāti Awa's associations with the contested redress items: Dr Hirini Moko Mead; Joe Mason; and Samuel Te Hau Tūtua.

215. Ibid, paras 29–31
216. Ibid, paras 32, 33
217. Ibid, paras 34–36
218. Ibid, paras 37–38
219. Ibid, para 40

3.12.1 Hirini Moko Mead

Dr Mead is the chairperson of Te Rūnanga o Ngāti Awa and the chief negotiator for the settlement of Ngāti Awa historical claims against the Crown. He was also research manager for the Ngāti Awa claims before the Waitangi Tribunal. Dr Mead explained that Te Rūnanga o Ngāti Awa is a body representing each of the hapū of Ngāti Awa, including Ngāti Hāmua and Warahoe.[220]

Dr Mead gave a description of the historical rohe claimed by Ngāti Awa. He described the Waikowhewhe Stream as falling within the core region claimed by Ngāti Awa, but maintained that this did not mean that Ngāti Awa had no claims beyond Waikowhewhe. Dr Mead pointed out that Rangitūkehu and other Ngāti Awa tīpuna had given evidence in the Native Land Court that showed Ngāti Awa had claims to areas all around the Matahina block into Kaingaroa, Pokohu, Te Haehaenga, and Tuarārangaia.[221]

Dr Mead described how the Native Land Court had awarded all of the approximately 79,000 acres of the Matahina block to Ngāti Awa in 1881. At the rehearing in 1884, the area awarded to Ngāti Awa was reduced. Ngāti Awa were awarded the 65,799 acres in Matahina a1, a2, a3, a4, and a5, while the Crown took the 8500–acre Matahina a6 block from Ngāti Awa for a survey lien. Ngāti Hāmua were awarded the Matahina b block of 1500 acres, while the Matahina c and c1 blocks, both of 1000 acres, were awarded to Ngāti Haka and Patuheuheu. Matahina d block, also of 1000 acres, was awarded to Ngāti Rangitihi. Dr Mead stated that Ngāti Awa believes that the Matahina c and c1 blocks should not have been awarded to Ngāti Haka Patuheuheu, but should have gone to Ngāti Awa.[222]

Dr Mead affirmed that Ngāti Awa refutes all Tūhoe claims to the Matahina blocks. He rejected any notion that Tūhoe had a claim to parts of the Matahina block through their connections with Ngāti Hāmua and Warahoe. Dr Mead pointed out that these two hapū had for many years now been considered to be hapū of Ngāti Awa and were represented on Te Rūnanga o Ngāti Awa. He also emphasised the fact that Te Rangitūkehu had gifted land at Matahina and Tuarārangaia to Ngāti Hāmua and Warahoe, a gift that was respected by all other hapū of Ngāti Awa.[223]

Ngāti Awa also refuted the claims of Ngāti Haka Patuheuheu to the Matahina blocks. Dr Mead maintained that Ngāti Haka Patuheuheu described themselves as having come from Ruatāhuna and as having then settled in Galatea. According to Dr Mead, in the 1830s Ngāti Haka Patuheheu were living at Galatea by the Tawhiuau maunga, under the leadership of the Ngāti Rongo chief Koura. They later moved to Te Houhi but were later forced out and lived for a time at Te Pūtere, before returning to Waiohau. Dr Mead contended that Ngāti Haka Patuheuheu were invited by Te Rangitūkehu to live at Ōtipa with Ngāti Hāmua and

220. Document a8, para 4
221. Ibid, para 12
222. Ibid, paras 14–15
223. Ibid, paras 17–19

Warahoe. Dr Mead quoted from evidence given by Te Rangitūkehu to the 1881 Native Land Court hearing to support this assertion. Ngāti Awa reject Ngāti Haka Patuheuheu claims to Matahina on the grounds that the associations of Ngāti Haka Patuheuheu with the area are very recent and not based on customary associations or residence.[224]

Dr Mead went on to outline the 200 years of conflict between Ngāti Awa and Tūhoe and the agreement of Te Tatau Pounamu i Ōhui, which brought the fighting to an end. He maintained that the warfare led to a wide geographical separation between the combatants, with Ngāti Awa based principally on the coast and around the Rangitaiki swamps and the pā of Matahina, while Tūhoe were centred around the Ruatāhuna and Te Whāiti areas. For much of this period of conflict, areas such as Waimana, Ruātoki, and Waiohau were deserted and were only reoccupied after the Tatau Pounamu. He therefore maintained that Tūhoe claims of continuous occupation of Te Houhi and Waiohau were not feasible.[225]

Dr Mead described the Tatau Pounamu and the significance of the Ōhui site. He disputed the Tūhoe claim that Ōhui was a boundary marker. Dr Mead stated, 'As I understand it, once the peace was negotiated each side selected a feature of the landscape as a symbol of the agreement'. He maintained that the ridge Ōhui was selected by the Te Pahipoto and Ngāti Awa chief Hātua as a symbol of the agreement, while the maunga Tawhiuau was selected as a symbol by the Ngāti Rongo and Tūhoe chief Koura. Dr Mead cited the Ngāti Awa tipuna Hamiora Pio's writings in support of this idea.[226] Dr Mead stated:

> Neither maunga is a boundary marker. Rather each is a symbol and a reminder to all that a tatau pounamu is in place and that a symbolic 'marriage' has been consecrated, made tapu and therefore must be upheld.[227]

Dr Mead described a number of places of significance to Ngāti Awa on the Matahina block as proof that Ngāti Awa had used the land there. Ngāti Awa had a number of pā on the Matahina block. Makarini Te Waru and Hamiora Tumutara, both Ngāti Awa witnesses at the 1881 Native Land Court hearing, stated that Ngāti Awa had cultivated a number of plantations at Matahina, as well as running sheep on the block and using wood from Matahina's forests. Dr Mead also quoted from Hamiora Tumutara's evidence to the effect that Ngāti Haka Patuheuheu were recent arrivals at Matahina and that Te Rangitūkehu had informed them that they had no right to be on the land.[228]

In discussing the issue of overlapping claims, Dr Mead stated that the Tūhoe–Waikaremoana Māori Trust Board had always been of the view that Ngāti Awa should deal with them in any issues regarding Ngāti Haka Patuheuheu. Te Rūnanga o Ngāti Awa had dealt with both the trust board and Te Rūnanganui o Te Ika Whenua, which had claimed

224. Ibid, paras 20–25
225. Ibid, paras 26, 28–29
226. Ibid, para 32
227. Ibid, para 33
228. Ibid, paras 34–38

to have a mandate to act for Ngāti Haka Patuheuheu. Dr Mead had also met with Robert Pouwhare.[229]

Dr Mead discussed Ngāti Awa's amended statement of claim in which the claim was made to the Matahina block. There had been some discussion of the fact that the amended statement of claim seemed to draw the Ngāti Awa boundary at the Waikowhewhe Stream. Dr Mead stated:

> I do not recall why this was or why the statement of claim was not further amended to reflect the fact that Ngāti Awa clearly had claims beyond this point. It has always been the Ngāti Awa position that the Matahina blocks are within our territory.[230]

Dr Mead discussed the position stated by Ngāti Awa's solicitors on 11 April 1995 regarding cross-claims to the Matahina blocks. Ngāti Awa declared that they would not oppose Tūhoe or Te Ika Whenua claims to Matahina c and c1 if the Tūhoe–Waikaremoana Māori Trust Board and Te Ika Whenua agreed not to oppose Ngāti Awa claims to the balance of the Matahina block. Dr Mead believed that communications from Tūhoe counsel on 8 May 1995 and from counsel for Te Ika Whenua on 23 May 1995 had constituted agreement to these terms by each of these parties.[231] Dr Mead further stated that, in the light of this perceived agreement, Ngāti Awa decided not to pursue their claims to the Waiohau, Tuarārangaia, Kaingaroa, and Ruātoki blocks.[232]

Dr Mead described how Ngāti Awa had signed the initial heads of agreement with the Crown on 21 December 1998. This heads of agreement had included a clause making it necessary for Ngāti Awa to provide deeds of agreement between Ngāti Awa and overlapping claimants. Ngāti Awa were able to enter into such a deed with representatives of Te Ika Whenua, on 19 May 1999, but were unable to obtain such a deed from representatives of the Tūhoe–Waikaremoana Māori Trust Board.[233] Dr Mead stated, 'It appeared to us that Tuhoe was now backing down from its earlier agreement before the Waitangi Tribunal'.[234] In October 2000, the Crown and Ngāti Awa signed a further heads of agreement, which this time did not require Ngāti Awa to obtain deeds from cross-claimants.[235]

Dr Mead outlined the significance of the Matahina blocks to Ngāti Awa, describing them as 'one of the corner stones of the Ngati Awa agreement'.[236] He emphasised the strong associations of many Ngāti Awa hapū with the Matahina blocks. Dr Mead reiterated the principle 'I riro whenuaatu me hoki whenua mai', stating that the Matahina blocks are essential to the Ngāti Awa settlement as the single largest area of land that Ngāti Awa would receive. He

229. Document a8, para 61
230. Ibid, para 62
231. Ibid, paras 64–68
232. Ibid, para 69
233. Ibid, paras 70–73
234. Ibid, para 73
235. Ibid, para 74
236. Ibid, para 75

added that Ngāti Awa considered the settlement quantum of $42 million to be insufficient compensation for their historical claims, and that the accumulated rentals from the Matahina blocks would supplement the settlement quantum and bring it to a more acceptable level.[237]

Ngāti Awa believe they have already made a number of significant concessions including:

- agreeing not to pursue claims to Matahina c and c1;
- not pursuing claims to the Kaingaroa, Ruātoki, Waiohau, and Tuarārangaia blocks;
- concessions regarding nohoanga sites, land at Te Pūtere, the status of Tauwhare Pā, and Uretara Island;
- the acceptance of a statutory acknowledgement regarding Matahina a5 rather than receiving title to it; and
- the acceptance that they would no longer be able to purchase 25 per cent of the Matahina Crown forest licensed land.[238]

Dr Mead pointed out that the inability to purchase 25 per cent of the Matahina Crown forest licensed lands would mean a loss to Ngāti Awa of around $3.3 million in accumulated rentals. He went on to say that he calculated that a further five years' delay to the Ngāti Awa settlement would lead to a loss of $9 million to Ngāti Awa. He also emphasised that such a delay would also mean a cultural loss, given that many Ngāti Awa elders who had been involved in the settlement process would die before they could see the settlement achieved.[239]

Regarding the prospect of mediation, Dr Mead stated:

> In our view we have made more concessions than can be reasonably expected of any iwi. There is an end point to aroha and to generosity of spirit. We are also not keen on further delays which a mediation process will inevitably cause. Mediation is not an option Ngāti Awa supports.[240]

3.12.2 Joe Mason

Joe Mason (Meihana) presented oral evidence regarding Kaputerangi. Mr Mason spoke in Māori. His evidence was translated into English by Pou Temara. He stated that he was very familiar with Kaputerangi and that Kaputerangi belonged to Ngāti Awa. Kaputerangi was associated with Toi and Tama ki Hikurangi, who were the main ancestors of all the Mataatua tribes. Mr Mason said the story of Kaputerangi began with Tīwakawaka who came by canoe to Aotearoa. The early people Te Hapū Oneone were the occupiers of Kaputerangi. Mr Mason declared that the fires of Te Hapū Oneone are extinguished and the mana of the land is now with the later immigrants Toroa and the others of the Mataatua waka. Despite this,

237. Ibid, paras 75–77
238. Ibid, paras 78–80
239. Ibid, paras 82–83
240. Ibid, para 85

all Mataatua also acknowledge descent from Te Hapū Oneone. Mr Mason stated that all Mataatua have access to Kaputerangi but Ngāti Awa are the people on that land. All Mataatua share such historical sites but the people who live there are the guardians of the sites.[241]

Mr Mason also spoke briefly about Moutohorā Island. He stated that this too was a significant site but not as significant as Kaputerangi. Mr Mason claimed that Ngāti Awa were the sole occupants of the island, which has urupā and food-gathering sites on it. Moutohorā was particularly well known for tītī, or muttonbirds. Mr Mason stated that Ngāti Awa allowed other tribes access to the food resources out of a sense of aroha, but that this access was closed off to Tūhoe during the 200-years war. The arrangements resumed once peace was made. Mr Mason related that in more recent times Ngāti Awa had imposed a rāhui on the island to allow its resources to regenerate. Ngāti Awa had been on the verge of lifting this rāhui when the Crown imposed its own restrictions on harvesting the island's resources.[242]

3.12.3 Samuel Te Hau Tutua

Samuel Te Hau Tūtua presented oral evidence regarding Ōhiwa Harbour. Mr Tūtua spoke in Māori. An English translation was given by Pou Temara. Mr Tūtua explained that the important ancestor for Ōhiwa Harbour was Tairongo. Ngāti Awa, along with all of Mataatua, have whakapapa links with Tairongo. Mr Tūtua stated that all Ngāti Awa hapū have close links with Ōhiwa Harbour. In the 1820s, the forces of Ngāti Awa and Ngāti Maru devastated the Ōhiwa area and defeated the Upokorehe people. Most of the Ōhiwa residents were taken away as slaves by Ngāti Maru and Ōhiwa was left under the control of Ngāti Awa.[243]

Mr Tūtua claimed that Te Whakatōhea were absent from Ōhiwa Harbour for over 40 years, presumably referring to a period in the early part of the nineteenth century. By the time Whakatōhea had returned to Ōhiwa, Ngāti Awa had sold Hokianga and Uretara Islands to Pākehā buyers. Mr Tūtua described how a Mr Black had run stock on Uretara Island for over 20 years, until the return of Whakatōhea. Whakatōhea drove Black off the island and the Ōhiwa Harbour was from that time on an area of contention between Ngāti Awa and Whakatōhea. Mr Tūtua claimed that when Upokorehe returned to the Ōhiwa area they lived at Waiotahe rather than at Ōhiwa itself.[244]

Mr Tūtua stated that Tūhoe had no part in the conflict between Ngāti Awa and Whakatōhea and had no fighting pā in the Ōhiwa area. Mr Tūtua said he was therefore surprised that Tūhoe and Ngāti Haka Patuheuheu were claiming to have interests in Ōhiwa. He acknowledged that Tūhoe, like all Mataatua, had rights of access to Ōhiwa.[245]

241. Oral evidence of Joe Mason, 21 June 2002, tape 13, side a
242. Ibid, side b
243. Oral evidence of Samuel Te Hau Tutua, 21 June 2002, tape 14, side a
244. Ibid
245. Ibid

Mr Tūtua described the Ngāti Awa territorial boundaries as laid down by the tipuna Hurunui Apanui, which included the Ōhiwa Harbour within Ngāti Awa's rohe. Mr Tūtua claimed that Tūhoe, on the other hand, had no fires lit at Ōhiwa, meaning that they had never occupied the harbour area. Mr Tūtua stated that Ōhiwa Harbour was open to everyone, but that Ngāti Awa alone had mana over the islands in the harbour until the confiscation in the 1860s.[246]

246. Ibid

Downloaded from www.waitangi-tribunal.govt.nz

CHAPTER 4

ANALYSIS, FINDINGS, AND RECOMMENDATIONS

4.1 The Crown's Settlement Offer to Ngāti Awa

In December 1998, the Crown and Ngāti Awa entered into a heads of agreement for the settlement of all Ngāti Awa historical claims. Accompanying the heads of agreement was an offer of settlement by the Crown. The offer was on terms that 'elements of redress in the offer remain conditional on the resolution of cross-claims'.[1] In October 2000, the Crown revised its settlement offer, and also changed the basis upon which cross-claims were to be dealt with. The Crown relieved Ngāti Awa of the responsibility for dealing with cross-claims. The Crown's letter of offer dated 4 October 2000 stated that the settlement offer was now subject to the Crown's confirmation that cross-claim issues in relation to the proposed redress had been addressed to the satisfaction of the Crown.[2]

The content of the settlement package was amended in response to the representations made to the Crown by cross-claimants, and on the basis of the Crown's own historical research. The changes made by the Crown were these:

- the withdrawal of approximately 25 per cent of the Matahina Crown forest licensed lands from the offer;
- the offer to transfer Matahina A5 was reduced to a non-exclusive offer of a statutory acknowledgement over this site;
- the offer to vest Tauwhare Pā scenic reserve in Ngāti Awa solely as a reserve became an offer to include the reserve within the area over which a joint management committee is to be established. Other tribes may subsequently also be represented on this committee;
- the Ngāti Awa deed of settlement is now to include an acknowledgement that Kaputerangi is significant to other iwi (including other Mataatua iwi), and Ngāti Awa is required to reflect this in published and interpretation materials produced about the site;
- the Ngāti Awa deed of settlement now includes a statement that the granting of non-exclusive redress to Ngāti Awa does not prejudice the Crown's ability to provide similar redress to other groups as part of a settlement, if appropriate.

1. Document A1(a), annex D, para 4
2. Ibid, annex AE, para 6(b)

The aspects of the settlement offer now on the table to which other claimants object are these:

- the transfer of 75 per cent of the Matahina Crown forest licensed lands (Matahina A1B, A1C, and A6) to Ngāti Awa;
- the vesting of the stratum title to Matahina A4 in Ngāti Awa;
- the granting to Ngāti Awa of a non-exclusive statutory acknowledgement in respect of Matahina A5;
- the vesting in Ngāti Awa of Kaputerangi historic reserve, subject to existing reserve status and the acknowledgement that Kaputerangi is significant to other iwi;
- the vesting in Ngāti Awa of 10 acres of the Port Ōhope recreation reserve, subject to reserve status, along with an adjacent one-hectare nohoanga entitlement;
- the establishment of a joint management committee over Moutohorā Island, Ōhope scenic reserve, and Tauwhare Pā scenic reserve, on which other tribal groups may also be represented;
- the granting to Ngāti Awa of a non-exclusive statutory acknowledgement in regard to Moutohorā Island, and the right to collect hāngi stones from the island;
- the granting to Ngāti Awa of a non-exclusive preferential right to purchase up to 5 per cent of any marine farming or other authorisations within part of Ōhiwa Harbour.

4.2 Issues

The Tribunal's focus in this inquiry is relatively narrow. We have been called upon to look into whether the Crown's policies and practices, as implemented in its settlement negotiations with Ngāti Awa, are in accordance with the principles of the Treaty of Waitangi.

We must determine whether:

1. the Crown's policies, as expressed in the content of the settlement offer; and
2. the Crown's practices, as expressed in its communication and consultation with affected claimants;

are in accordance with the Treaty principles.

Arising out of the first of these two main heads of inquiry are the following topics:

- the background to Crown forest licensed lands;
- the Crown's policy on the inclusion of Crown forest licensed lands in Treaty settlements;
- the cross-claimants' view of the Crown's policy;
- why the Crown rejects the approach contended for by cross-claimants;
- the application of the Crown's policy to the Crown forest licensed land at Matahina; and
- the Tribunal's findings.

We then consider the class of redress that the Crown calls cultural redress. Here, the topics are as follows:

- Kaputerangi;
- Matahina A4 and A5;
- Ōhiwa Harbour;
- Moutohorā Island; and
- the Tribunal's findings.

Under the second main heading, we investigate the Crown's practices, as expressed in its communication and consultation with affected claimants. We look at whether the Crown's conduct was compliant with the principles of the Treaty of Waitangi. We then consider whether the Crown recognised, and complied with, a duty to preserve amicable tribal relations. To the extent that the Crown's conduct was not compliant, we look at whether and to what extent prejudice resulted.

We will analyse, and make findings on, each of these topics in turn.

4.3 Crown Forest Licensed Lands

In 1988, the Government was in the throes of implementing its objective of corporatising, and subsequently privatising, State-owned businesses. Its legislative vehicle for this was the State-Owned Enterprises Act 1986. Section 9 of this Act made it illegal for the Government to do anything under the Act that was inconsistent with the principles of the Treaty of Waitangi. Relying on the words of section 9, Māori claimants sought to stop the Government from transferring assets out of public ownership without first finding the means of protecting the Māori interests in those assets. That Māori interest arose from the fact of their having claims before the Waitangi Tribunal in which the assets might comprise a portion of the settlement recommended by the Tribunal.

The New Zealand Māori Council brought its first successful challenge to the Crown's policy in what is now referred to as the lands case.[3] In 1987, the judges of the Court of Appeal issued their five landmark judgments. Their collective tenor was that the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably, and honourably towards the other.[4]

The upshot was that the Government was precluded from transferring the Crown's assets to the new State-owned enterprises without first making provision for the future Māori interest in those assets that could arise from a successful claim to the Waitangi Tribunal. The Court of Appeal required the Crown and Māori to sit down and work out a system of

3. *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA)
4. This was the recollection of the case expressed by the president of the Court of Appeal in *Te Rūnanga o Wharekauri Rekohu Incorporated & Ors v Attorney-General & Ors* unreported, 3 November 1992, CA297/92, p 8.

safeguards for Māori interests. The system of protections agreed upon provided for the mandatory return of State-owned enterprise land to Māori upon order by the Waitangi Tribunal.[5]

One of the new State enterprises that had been created was Forestcorp. Forestcorp was to take over the Crown's forestry assets. At the time of the lands case, it was assumed that when forests were sold by Forestcorp to third parties, the land on which the trees stood would comprise part of the transaction. It was also assumed that memorials on the certificates of title for the land would show that the land could be compulsorily resumed by the Crown following a decision by the Waitangi Tribunal.

Subsequently, however, the Government resolved to keep the land in Crown ownership, and sell instead a right to manage the land and cut the trees on it for a fixed period of years. Forestcorp would act as the Crown's agent. By this means, the Government hoped to maximise the value of the forests by bypassing the memorial system that came into play only on the transfer of *land*. There would be no system of protection for Māori interests in the cutting and management rights to be sold.

When the New Zealand Māori Council brought the case back to the Court of Appeal, the court made it clear to the Crown that no general sale of forestry rights without reference to the Māori interest in the forests would be allowed.[6]

The result was that the parties went away and together worked out a scheme that was enshrined in the Crown Forest Assets Act 1989. Under this Act, the forest land would stay in Crown ownership, but the forests would be sold outright. However, the Crown Forestry Rental Trust was established to hold all rentals on forest land until such time as Māori claims to forests had been heard by the Waitangi Tribunal. Where such a claim proved successful, the entitled Māori would receive rental payments on the forest land from the date of sale of the land (the accumulated rentals). The Crown would pay to the successful claimants at least 5 per cent of the value of the forests by way of recognition of the encumbrance on the land constituted by the owner of the trees. Interest on the trust's funds would be spent to assist Māori claimants in the preparation, presentation, and negotiation of their claims.

By means of this arrangement, the position of Māori claimants to forests was granted a measure of protection and the Government was able to pursue its policy of divesting itself of business interests.

Of recent times, the practice has emerged in negotiating Treaty settlements of claimants and the Crown agreeing between themselves the component of the settlement that comprises Crown forest licensed land. They make a joint approach to the Tribunal for the necessary orders, or alternatively effect their agreement by legislation.

5. The system of protections was legislated in the Treaty of Waitangi (State Enterprises) Act 1988.
6. *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA)

Difficulties of course arise where the Crown forest licensed land that the Crown wishes to offer to one group in settlement is also claimed by other groups that are not in settlement negotiations. That is the situation here.

4.4 The Crown's Policy on Crown Forest Licensed Lands in Treaty Settlements

The main focus of the cross-claimants in their evidence and submissions was on the proposal of the Crown to transfer to Ngāti Awa 75 per cent of the Crown forest licensed land comprised in Matahina A1B, A1C, and A6.

In addition to the Crown forest licensed land offered to them in the Matahina blocks, Ngāti Awa is to receive about a third of the Crown forest licensed land in the Rotoehu Forest. That element of the settlement package was not the subject of objection by the claimants appearing before this Tribunal.

It is relevant, however, to note the total Crown forest licensed land component of the proposed settlement package. This is because along with the Crown forest licensed land come the accumulated rentals on that land. These rentals are held by the Crown Forestry Rental Trust, until payable to the confirmed beneficiary. The accumulated rentals do not form part of the quantum of the settlement, but are in effect a kīnaki on the top. This kīnaki effect of course creates incentives for claimants to maximise the Crown forest licensed land component in their settlement, because the quantum of the accumulated rentals grows in proportion to the quantity of land transferred.

It is appropriate that the accumulated rentals do not form part of the quantum of the settlement, because the payment of accumulated rentals to entitled Māori was agreed as part of the Crown forest assets settlement between Māori and the Crown, described above. It seems to us that it would be wrong if the value of the accumulated rentals were included in the settlement quantum agreed now between claimants and the Crown, because the claimants' entitlement to the accumulated rentals was in effect part of that earlier settlement. We note, however, that Mr Hampton of the Office of Treaty Settlements informed the Tribunal that this is an issue that has been the subject of consideration in government policy circles, including the Māori Affairs Select Committee, in recent times.

There is no doubt that this legacy from the Crown forests assets settlement creates what The Treasury would, we think, call a distortion in the motivation of claimants in settlement negotiation with the Crown. Claimants are inevitably focused on maximising the Crown forest licensed land component in the settlement package, because the accompanying accumulated rentals inflate the effective value of the settlement. There is an extent to which this urgency hearing itself is a product of that distortion.

Ms Collins, of the Office of Treaty Settlements, expressed the Crown's position as follows:

> Resolution of cross-claim issues is increasingly becoming the most difficult issue confronting Treaty settlements, and the factor most likely to delay settlement. The Crown, in negotiating settlement packages, is aware of its Treaty obligations to (in this case) Ngāti Awa, and to overlapping claimants. Just as it needs to ensure that a settlement package will not affect the Crown's capacity to offer fair redress to overlapping claimants, it needs to ensure that Ngāti Awa receives a settlement offer that is fair and appropriate to settle its grievances. This involves a difficult balancing of often conflicting issues that ultimately requires the exercise of a political judgement.[7]

How does the Crown go about that balancing exercise?

First, as we mentioned above, the Crown no longer puts on the claimant party in settlement negotiations with the Crown the onus of resolving cross-claims. The position appears to be that the party in settlement negotiations (as Ngāti Awa is here) is expected to do the best it can to obtain agreement from its Māori neighbours to the content of the settlement package. But the Crown accepts that this will often be effectively impossible. This acceptance follows comments made by the Ngāti Awa Tribunal to this effect.[8] Now, the Crown simply needs to be satisfied that cross-claim issues have been addressed. In practice, this seems to amount to a requirement that best endeavours have been made under the circumstances. When officials think that all that can be reasonably done has been done, they draw a line and go no further. They accept that a certain degree of cross-claimant hostility to contested redress is inevitable.

It was not really clear to us to what extent the Crown officials see the Crown as obliged to take on responsibility for resolving conflicts arising from its offers of redress that are subject to cross-claim. This is an issue to which we will return (in section 4.12) where we deal with the Crown's duty to preserve amicable tribal relations.

It seemed to us that, during the time it was negotiating with Ngāti Awa, and then responding to the concerns of cross-claimants, the Crown was engaged in a process of developing and refining its policies with respect to the allocation of interests in Crown forest licensed lands, and the management of cross-claims to those lands. This process of developing the policy, and communicating it, is another matter to which we shall return (in section 4.11).

Ms Collins identified the document 'DB' annexed to her evidence as the culmination of the Crown's thinking on the allocation of rights to Crown forest licensed land, and the management of cross-claims. DB is a briefing paper to the Minister in Charge of Treaty of Waitangi Negotiations.[9] It was not written and sent until 22 March 2002, some six years into the negotiations with Ngāti Awa, and some three years into discussions with cross-claimants.

---

7. Document A1, para 152
8. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: GP Publications, 1999), pp 131–136
9. Document A1(b), annex DB

Where Crown forest licensed land is involved, the Crown recognises the need to balance the commercial nature of the asset with the cultural and historical associations of groups claiming an interest in the land.[10]

Drawing on the content of DB, Ms Collins said that the factors that the Crown considers in determining a fair allocation of forest land are these:

162.1 Has a threshold level of customary interest been demonstrated by each claimant group?

162.2 If a threshold interest has been demonstrated:

162.2.1 What is the potential availability of other forest land for each group?

162.2.2 What is the relative size of likely redress for the Treaty claims, given the nature and extent of likely Treaty breaches?

162.2.3 What is the relative strength of the customary interests in the land?

162.3 What are the range of uncertainties involved? The Crown should take a 'precautionary' approach in offering forest land to particular groups where uncertainties exist.[11]

This was the summary in Ms Collins' evidence. From it she omitted a continuation of paragraph 162.3 that was included in DB. In the original, the paragraph read like this:

> What are the range of uncertainties involved? The Crown should take a 'precautionary' approach in offering forest land to particular groups 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.[12]

Ms Collins and Mr Hampton made it clear that, in practice, the Crown may make the decision about whether blocks should or should not form part of a settlement without becoming heavily involved in measuring the relative customary interests of the various claimants to those blocks. Ms Collins explained that the relative strength of customary interests is likely to be a dominant factor only where there is limited Crown forest licensed land available.[13] Where the Crown is satisfied that cross-claimants have available to them other areas of Crown forest licensed land for potential future settlement, the exercise of evaluating the relative connections of the cross-claimants to the land in question will therefore assume relatively less importance.

10. Document A1, para 158
11. Ibid, para 162
12. Document A1(b), annex DB, para 20
13. Document A1, para 168

4.5 The Cross-Claimants' View of the Crown's Policy

Before us, we heard the Ngāi Tūhoe cross-claimants criticise the Crown's policy with respect to the inclusion in this settlement package of the Matahina Crown forest licensed land. The cross-claimants told us that the ancestral links of Ngāi Tūhoe with that land were stronger than those of Ngāti Awa. They said no proper assessment can be made at this time of the relative Māori interests in this land, because there has only been partial research, and no Waitangi Tribunal has inquired into it. The inquiry of the Ngāti Awa Tribunal was limited to the area within the confiscation boundary. The Matahina lands in question lie well south of that boundary. This means, they said, that the Crown should make no permanent allocation of interest in the forest land there to Ngāti Awa until such time as all the parties have been heard. This would enable findings to be made on the relative interests of the relevant Ngāi Tūhoe hapū, of Ngāti Rangitihi and Ngāti Awa, and for rights in the Matahina forest land to be allocated accordingly.

The cross-claimants allege that the Crown's policy breaches the principles of the Treaty. The breach of many alleged duties was pleaded, but we think that the essential complaint is that the Crown has not sufficiently protected the interests of claimants affected by its settlement offer to Ngāti Awa. Counsel for the Tūhoe–Waikaremoana Māori Trust Board emphasised in his submissions the prejudice to Ngāi Tūhoe arising from the loss of their opportunity to seek from the Waitangi Tribunal binding recommendations for the resumption of the Matahina Crown forest licensed lands. Cross-claimants also criticise the Crown's consultation with affected parties. They say that it was neither effective nor meaningful. This goes to the Crown's duty to exercise the utmost good faith in its dealings with Māori. We will deal with process issues separately in section 4.11.

4.6 Why the Crown Rejects the Approach Contended for by the Cross-Claimants

It was plain that the Crown understands the position for which the cross-claimants are contending. The cross-claimants want the Crown to step back from delivering to Ngāti Awa redress to which they might also one day be entitled once their claims have been fully researched, presented to the Waitangi Tribunal, and reported upon. Of particular concern, as we have said, is the Crown's intention to transfer 75 per cent of the Matahina Crown forest licensed lands.

These lands comprise part of the Kaingaroa Forest. The Tribunal intends hearing claims to the Kaingaroa Forest in its Kaingaroa and Urewera district inquiries. Ngāti Rangitihi's claims will probably be heard in both the Rotorua and Urewera district inquiries. The Tribunal's forward timetable is subject to change, depending on the speed of progress in active district inquiries. However, on the basis of current information, the Urewera Tribunal is due to

begin hearings in mid-2003. The Rotorua Tribunal is unlikely to begin hearings before the end of 2003. Hearings in the Kaingaroa district inquiry are unlikely to begin before 2006. Thus, the claims of all the cross-claimants to the Matahina Crown forest lands are unlikely to be reported upon before 2007. It would be only then that the respective interests of Ngāti Awa, the Ngāi Tūhoe hapū, and Ngāti Rangitihi, in the Matahina Crown forest licensed lands and in the other Crown forest licensed lands in which they potentially have interests, would be ascertained. We note that from our knowledge thus far of the claimants' competing views, we doubt that the relative interests of hapū and iwi in Matahina lands could ever really be stated with precision. Nevertheless, it is implicit in our analysis of the timing of the relevant district inquiries that we agree with the Crown's observation that, in order to satisfy the cross-claimants' requirements, inquiry could not be limited to the Matahina blocks. This is because the Tribunal would need to understand the totality of the cross-claimants' claims in order to assess whether and what quantity of land to recommend as redress, and in order to be satisfied that sufficient land is available in Crown hands to provide fair redress.[14]

Thus we see that the cross-claimants are inviting the Tribunal to take the view that where redress is contested, the Tribunal must hear all the cross-claimants. Where the contested redress is licensed land under the Crown Forests Assets Act 1989, the Tribunal should determine its allocation. The cross-claimants take the view that the delay that this would cause to settlement is a lesser concern than the potential prejudice to cross-claimants of settlements proceeding.

Ngāti Haka Patuheuheu takes the position that delay is not the only alternative to offering the redress proposed to Ngāti Awa. Their counsel instances the way in which the Maramarua Forest was handled in the settlement between the Crown and Waikato–Tainui. Effectively, the forest has been held aside for later determination of ownership as between Waikato–Tainui and a cross-claimant. Seven years after that settlement, no allocation has yet been made. Counsel also advocates what she calls a trust model. As we understand it, this would involve placing the disputed lands in trust pending later determination of rights. She also speaks of other redress being available for Ngāti Awa, and by this we assume she means cash.

How does the Crown respond to these arguments? Why has it resisted the cross-claimants' suggestions?

The Crown has comprehensively resisted the suggestion that settlements should be delayed until after the interests of all these claimants have been reported upon. Ms Collins said in her evidence:

> Waiting for these hearings to conclude would pose a significant delay to Ngāti Awa who have been in negotiations for over 5 years, and for other groups who may wish to enter into direct negotiations.[15]

14. Paper 2.39, para 29
15. Document A1, para 155

4.6

The Crown submitted in closing that it:

> does not accept Ms Ertel's submission that a delay of say, five years, would be a mere 'blip' in history. The settlement has been vigorously negotiated over several years. If there were further delay, and in particular, delay of the kind heralded by the cross-claimants, then the momentum towards settlement would be lost.[16]

The first reason offered by the Crown for rejecting the cross-claimants' position is therefore the unacceptability of delay in effecting settlements. The Crown quoted in support of its position the statement made by the Tribunal in the *Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report*. The Tribunal there said:

> 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 settlement policy would be very serious. It would thwart the desire on the part of both the Crown and Māori claimants to achieve closure in respect of their historical Treaty grievances. Indefinite delay to the conclusions of Treaty settlements all around the country is an outcome the Tribunal seeks to avoid.[17]

The second factor to which the Crown referred in support of its policy is that licensed land is a significant commercial asset. It needs to fit within the quantum of a redress package.[18]

Mr Hampton explained the Crown's process of negotiating settlements. A quantum is agreed between the parties. From that quantum, commercial assets may be 'bought'. Crown forest licensed land is classed as a commercial asset. The quantum limits the amount of licensed land that can be included in a settlement package.

There is not necessarily a correlation between the group with the dominant interest (presupposing that could be reliably ascertained) and a group entitled to have allocated to it that level of redress.

Traditionally, it was hapū groups that primarily held manawhenua. The Crown's policy is not to settle with hapū, but with large natural groupings of claimants. But, that point aside, the value of Crown forest licensed land is such that hapū, whose membership is usually relatively small, could expect to receive only small quantities of it by way of settlement.

Thirdly, there is the question of fairness. As the Crown said in submission:

> with commercial redress the Crown wants to provide fair redress for all claimant groups. Theoretically, a small group might be identified as having a dominant interest. Should they get all the licensed land? This would not be consistent with the Tribunal's approach

16. Document A13, para 13
17. Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2001), p 20
18. Document A13, para 36

that redress should be fair redress 'to compensate or to remove the prejudice' (section 6, Treaty of Waitangi Act 1975).[19]

A fourth point is that forestry land cannot necessarily be partitioned or shared, although these are options to be considered. On this, the Crown said:

> the division of Crown forest licensed land may need to take into account commercial imperatives and not simply traditional customary attachments. For licensed land to be an appropriate commercial asset it needs a viable acreage and, therefore, raises different issues even from transferring, say, a city office block.
>
> Licensed land cannot readily be shared (ie treated as non-exclusive redress) if all parties do not wish to combine in its management.[20]

That raises a further pragmatic point. Even if parties were prepared to participate in joint management, say if the land were placed in a joint trust, such an arrangement will usually involve a partial settlement of the claims of other claimants whose claims are at large, and whose mandate to settle has not been secured. There are obvious difficulties for the Crown, to which the Crown has referred in the context of the Ngāti Awa settlement, of being drawn into settling with other groups who are not in settlement negotiation with the Crown so as to be free to grant redress to a party that *is* in settlement negotiation. The Crown could easily end up effectively having partial settlements with claimants all around the country, the nature and extent of whose claims are only dimly perceived, and whose mandate and representation arrangements are not in place.

The Tribunal considers that there is a further point to be made in support of the Crown's approach. This point is, we think, implicit in its policy but was not really expressed except perhaps by Mr Hampton in response to questions asked by the presiding officer.

The Crown sees as part of its role a wider duty to ensure equity between claimants generally with respect to the availability of interests in Crown forest licensed lands as part of Treaty settlements.

The situation is this. The location and extent of Crown forest licensed landholdings is entirely arbitrary. Whether a tribe's rohe includes, or is near to, an area where there is also Crown forest licensed land is likewise a product of happenstance. The Crown's landholdings that are available for Treaty settlements are limited, and many claimants (like Ngāti Awa) wish to have land included as part of their settlements. This is a reflection of the high value of land in Māori culture. Claimant groups often seek symmetry between the land that was lost as a result of Treaty breaches and the return of land by the Crown in settlement therefor. While that symmetry will almost never be available, a cash-only settlement would be unacceptable to most claimants.

19. Ibid, para 40
20. Ibid, paras 37–38

The Crown wishes, to the extent it sensibly can, to share out the Crown forest licensed land between entitled Māori groups. It does not wish groups to be arbitrarily benefited because their tribal areas happen to include, or be near to, large quantities of Crown forest licensed land. This would lead to what is effectively a windfall gain that bears no relation to the relative level of harm, suffering and grievousness of breach experienced.

Finally, the Crown rejects the argument that the right of resumption enshrined in the Crown Forest Assets Act 1989 creates a legitimate expectation that can thwart the settlement of claims until such time as all claimants have been heard by the Waitangi Tribunal. The Crown says that the purpose of the forestry deal enshrined in the 1989 Act was to ensure that the Crown did not divest itself of assets it might require to settle Māori claims. Here, the Crown is using those very assets to settle claims. The Crown summarised its position in closing:

> If, in relation to licensed land, the Crown can demonstrate that it is acting in good faith in providing redress, and at the same time preserving reasonable capacity for other settlements in the future, it is difficult to see that the aspect of resumption should disturb this.[21]

4.7 The Application of the Crown's Policy Here

Ngāti Awa is a tribe that suffered from raupatu, and whose people were the victims generally of seriously prejudicial Crown conduct. Their settlement with the Crown is sizeable. However, there is no Crown forest licensed land in the areas where Ngāti Awa's interests are strongest. They have interests, together with Ngāti Tūwharetoa ki Kawerau and Ngāti Mākino, in Rotoehu Forest. The only other area of Crown forest licensed land where they have strong interests – although arguably outside their area of core interests – is at Matahina.

It is plain that other tribes also have interests there. We heard, and accept, that it is likely – even probable – that various Ngāi Tūhoe hapū, and Ngāti Haka Patuheuheu in particular, can demonstrate connections with the Matahina lands in question as strong as those of Ngāti Awa. Ngāti Rangitihi, too, have connections with part of those lands.

But, the Crown says, those groups have connections with *other* lands where Crown forest licensed land is located. Those areas of forest lands are potentially available for inclusion in their settlements, when that day comes.

The Crown says that its two criteria for determining whether the Matahina Crown forest licensed land should be included in their settlement with Ngāti Awa are:

- do Ngāti Awa have a threshold interest in that land?; and
- do the other groups who have threshold interests in that land also have threshold interests in *other* Crown forest licensed land that can be settled on them in the future?

21. Document A13, para 51

In the case of the Matahina land, it did not seem to us that the Crown's primary concern had been to assess the relative strength of the customary interests in the land. Ms Collins explained this by saying that the relative strength of customary interests is likely to be a dominant factor only where there is limited land available.[22] According to the Crown, that is not the case here.

Here, the Crown considers that there is opportunity for Ngāi Tūhoe to have settled on it up to 20,400 hectares of Crown forest licensed land, not including the Matahina licensed lands.[23] Those lands are located in the Patunamu Forest (which is likely also to be claimed by Ngāti Kahungunu and Ngāti Ruapani) – an area of approximately 3350 hectares; in the Heruiwi 1 and 2 blocks – an area of approximately 8300 hectares; and in the Matahina C and C1, Waiohau, Te Whāiti 1 and 2, and Heruiwi 4 blocks – an area of approximately 8840 hectares.[24] It is useful to note that the area of Crown forest licensed land to be included in the Ngāti Awa settlement package, taking into account the withdrawal of 25 per cent of the Matahina lands, is 9428 hectares.

Likewise, the Crown says that Ngāti Rangitihi will probably be able to demonstrate threshold interests in many other parts of the Kaingaroa forest. In particular, the Native Land Court awarded to Ngāti Rangitihi interests in the Paeroa East 1A and Paeroa East 1A West blocks, of which approximately 4000 hectares is now Crown forest land, and in the Rerewhakaitu block, of which approximately 1500 hectares is now Crown forest land.[25]

The Crown was satisfied that the Crown forest licensed land at Matahina should be settled on Ngāti Awa because it is the *only* Crown forest licensed land apart from the Rotoehu Forest in which Ngāti Awa can demonstrate a threshold interest. In other words, if Ngāti Awa were to be granted interests in licensed lands outside Rotoehu, this had to be it.

The Crown contrasted this with the position of Ngāi Tūhoe and Ngāti Rangitihi, with their relatively plentiful other options.

The policy explained by the Crown of course raises issues for hapū groups like Ngāti Haka Patuheuheu, who are naturally desirous of having available to them interests in Crown forest licensed lands that are within or close to their traditional tribal area, and to which they have strong ancestral links. For Ngāti Haka Patuheuheu, the Matahina forest lands are *the* forest lands with which they have these strong connections. They may well have connections with other forest lands, but they are not (they say) as strong. They have ties, but not (they say) ties that are as immediate or compelling. *These* are the lands that Ngāti Haka Patuheuheu want included in any settlement between it and the Crown.

In response, the Crown offers the arguments set out in section 4.4 above. It says further that it does not settle with hapū groups, but only with large natural groupings of claimants.

22. Document A1, para 168
23. Ibid, para 178
24. Ibid
25. Ibid, para 182

The Crown has focused on Ngāi Tūhoe as the larger group to which Ngāti Haka Patuheuheu, as a hapū, belongs. The wider group has claims into other areas. Secondly, the 25 per cent reserved from the Matahina lands to be settled on Ngāti Awa would be sufficient for that part of the Ngāi Tūhoe interest being expressed by Ngāti Haka Patuheuheu. That hapū is not, after all, so very large, and would not be expected to be the recipient of a settlement, or part of a settlement, that would be of such value as would equate to a larger share.

The effect of the Crown's policy for Ngāi Tūhoe is that the weight of the Ngāi Tūhoe grievances that are specific to these Matahina lands that are to be settled on Ngāti Awa will need to be expressed through the settlement on Ngāi Tūhoe of some or all of the 25 per cent of lands within these Matahina blocks retained by the Crown, and through transfer to them of lands elsewhere. The position is the same for Ngāti Rangitihi.

4.8 Findings on the Crown's Policy and its Application to the Matahina Lands

We agree with the Crown that, in a situation such as this, 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 Māori 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. The attachment of Ngāi Tūhoe hapū and Ngāti Rangitihi to the Matahina lands, and their desire to have them included in their tribal settlements, is entirely understandable. But likewise, these are lands with which Ngāti Awa also has ancestral connections. They too wish to have Crown forest licensed lands included within their settlement. Ngāti Awa suffered grievously from the Crown's Treaty breaches. These are the only licensed lands (apart from Rotoehu) where they can demonstrate a threshold interest. 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.

We do not consider it a viable option for lands that are the subject of dispute between competing tribal groups to be placed in a trust pending a final allocation when all claims have been heard and determined. That would not be viable because Ngāti Awa would not be able to sign off on its settlement with the Crown. The Matahina Crown forest licensed lands, together with the accumulated rentals from those lands, comprise a considerable proportion of the Ngāti Awa settlement – about 25 per cent, we were told. They comprise the largest land component in the settlement, and land is preferred to cash. If the lands were removed from

the settlement and placed in a holding pattern in which the ultimate ownership of the lands fell to be determined in the future, Ngāti Awa would have no certainty as to the actual content of its full and final settlement with the Crown. And yet they are required to make this critical decision now: will they endorse the deal that has been negotiated by their representatives and the Crown or not? How could such a decision be made? How would they judge whether the deal was going to be adequate for their needs or not? They would not know the extent of the deal. The effect of this, we think, is that the settlement would be unable to be concluded.

A moratorium on the award of Crown forest licensed lands until all claims have been heard would likewise delay the settlement of claims indefinitely. This, we think, is not a viable alternative either. Nor do we think it in keeping with the spirit and intent of the Crown Forest Assets Act 1989.

Nobody appearing before us supported delaying settlements with the Crown. The Tribunal can find no support in the Treaty for delaying settlements. The Tribunal has said in previous reports, and we repeat, that the settlement of Treaty grievances as soon as possible is an objective we applaud.[26]

We are mindful too of the urgings of the Ngāti Awa Tribunal for the parties to settle, even though the Tribunal had not reported on the area outside the confiscation boundary.[27] That Tribunal noted that the agreement of cross-claimants to the return of contested lands would probably not be possible. However, the Tribunal proposed that where particular lands are sought and there is no agreement, the matter should be referred back to the Tribunal for a recommendation after such further hearing of those interested as may be necessary.

Cross-claimants have told us that such further inquiry is necessary here, and one party at least has made application for the Ngāti Awa Tribunal to be reconvened for this purpose.

However, it is plain to us that the situation in which the Ngāti Awa Tribunal envisaged that their further inquiry might be required was one where the Crown proposed to allocate interests in a particular site or locality in proportion to the relative strength of the claims of the claimants. If such an exercise had been undertaken here, we would agree that the Ngāti Awa Tribunal (if it were available), or another Tribunal convened for the purpose, might usefully make further inquiry into the historical circumstances relating to the area in question. However, the Crown has said, and we accept, that the Government has arrived at a policy with regard to the allocation of interests in Crown forest licensed land that does not in all cases involve assessing the relative strength of customary interests in that land. Indeed, the relative strengths are likely only to be a dominant concern where those potentially entitled to be granted interests in certain Crown forest licensed land are predicted to have difficulty in demonstrating a threshold interest in any other areas of licensed land. The clear policy

26. Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* ; Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000)
27. Waitangi Tribunal, *The Ngati Awa Raupatu Report*, pp 8, 136

underpinning this is the desire of the Crown to achieve equity between claimants at the macro as well as the micro level.

It seems to us then that as the Crown is not, as a matter of policy and practice, inquiring extensively into the relative interests of claimants to the Crown forest licensed land at Matahina, further information about those interests elicited through a Tribunal inquiry is not really to the point. The question is whether the Crown's policy and practice, which the Crown says does not require further factual input, is in breach of the principles of the Treaty. If it is not, then further inquiry by the Ngāti Awa or any other Tribunal is not called for at this juncture, because more historical information is not germane to any of the decisions currently being made.

We should note, however, that it is by no means our impression that the Crown has made its decision to offer 75 per cent of the Matahina Crown forest licensed land to Ngāti Awa in a factual vacuum. Ms Collins' evidence, and the accompanying documentation, detailed a careful process in which the Crown has had access to a good deal of historical information about the Matahina lands, and the various tribal connections to them. From the material put before the Tribunal, to which we have referred in section 3.9, we agree with the Crown that there is sufficient information now available to establish that both Ngāti Awa and Ngāi Tūhoe have strong interests in the Matahina lands, and Ngāti Rangitihi too have interests in the western part of the block.

From the not inconsiderable volume of material available to us in the form of historical research reports, together with the evidence presented to us, we were able to reach these views on the factual situation:

- the Matahina lands are historically contested lands as between Ngāti Awa and Ngāi Tūhoe; it is not clear that either group held sway there for any substantial period;
- the Native Land Court processes ultimately resulted in Ngāti Awa being awarded the bulk of the land, but there is evidence to suggest that the Ngāi Tūhoe interests may not have been fully or objectively assessed;
- irrespective of what further hearings there are of evidence relating to these lands, it is likely that it will always be very difficult, from the distance of approximately 120 years, to unravel what happened in the various Native Land Court hearings, and what (if any) different awards ought to have been made;
- there are differences in interpretation over the effect of a peace agreement made at Ōhui, which has come to be known as Te Tatau Pounamu i Ōhui. This agreement is said by Ngāi Tūhoe to have established a southern boundary for Ngāti Awa at Ōhui; it is said by Ngāti Awa to have had no such effect. It is likely that it will always be very difficult now, with the scant contemporaneous commentary on the then understandings of Te Tatau Pounamu, either to reconcile the different interpretations, or decide in favour of one of them;

- hapū traditionally linked with these lands, including Ngāti Haka Patuheuheu and particularly Ngāti Hāmua and Warahoe, have whakapapa connections both with Ngāi Tūhoe and Ngāti Awa, with the links to these two over-groups waxing and waning with time and historical circumstance;
- there are differences of interpretation regarding the Waikowhewhe Stream. Ngāi Tūhoe claim that the stream marked Ngāti Awa's southern boundary. Ngāti Awa dispute this, claiming that the Waikowhewhe Stream falls within the Ngāti Awa area of claim, and that they claim beyond the stream;
- Ngāti Rangitihi have associations with the western side of the Matahina block, and were granted a portion of the block by the Native Land Court in 1884.

We think that it is extremely unlikely that any further evidence would show that any of these groups did *not* have ancestral links to this land. In other words, the current level of information supports the Crown's view that all three groups have threshold interests, with Ngāti Awa and Ngāi Tūhoe certainly having interests that go beyond that description. We are satisfied, therefore, that the factual basis exists for the Crown to implement its policy with respect to the Matahina Crown forest licensed lands. The policy itself must also, of course, be compliant with the principles of the Treaty.

We consider that the policy is so compliant. We consider that the reasons underpinning the policy, set out in section 4.6 above, are good reasons, and motivated by intentions that are consistent with the principles of the Treaty.

Indeed, the Tribunal would have to have very compelling reasons to act so as to thwart Ngāti Awa in their strong desire to conclude their many years of negotiation with the Crown by settling their grievances once and for all. The part of the proposed deal that relates to the Matahina lands is an important part. We consider that the means of dealing with the Matahina lands proposed by Ngāti Awa and the Crown, while not the only means, is a means not so wanting in good judgement and good faith for this Tribunal to be minded to ask the Crown to change it. We are conscious that, if we were to do so, there would be a high risk of derailing the whole settlement. We would be prepared to do that only if satisfied that the Crown is acting in breach of Treaty principle. It is not enough that we, or some of us, might ourselves have chosen to deal with the matter differently. Our focus is not on whether we like or approve the Crown's policy. It is on the Treaty, and whether or not the Crown has fallen foul of it. We are satisfied that, so far as this policy is concerned, it has not.

There is an aspect of the Crown's policy, however, that requires further comment. The Crown decided to offer the Matahina Crown forest licensed land to Ngāti Awa without a full inquiry to ascertain whether Ngāti Awa's interests were dominant there. The Crown maintain that there was no need for such an inquiry because the Ngāti Rangitihi and Ngāi Tūhoe claims would be able to be settled by means of Crown forest licensed land located in other places where those groups have threshold interests.

The Ngāi Tūhoe claimants have queried the Crown's assessment. They say that in those other places, other local iwi and hapū will have dominant interests. They speak of a domino effect, with groups having manawhenua in Crown forest licensed land being pushed out in favour of larger groups with only a threshold interest.

It seems to us that the Crown has a difficult balancing exercise on its hands. We do not consider that the Crown's approach is wrong in principle. We find favour particularly with the flexibility imported by the precautionary approach that is employed where there are uncertainties. That precautionary element came into play in this case, where the Crown withdrew parts of the redress in response to the uncertainties introduced by the cross-claimants' representations.

Nevertheless, it is apparent that the Crown will need to be very careful to ensure that it *does* retain the capacity to do justice to all.

With respect to the cross-claimants appearing in this urgent hearing, the Crown has identified particular blocks, to which we have referred in section 4.7, where it considers the claimants will be able to demonstrate a sufficient level of interest to justify the inclusion of these lands in future settlements. The Crown has given no guarantees. But its duty to act in good faith certainly comes into play here. If these claimants' claims against the Crown are proven, they will be looking to the Crown for satisfaction partly in the form of Crown forest licensed land. They will have a call on the blocks identified by the Crown. The Crown must ensure that it remains in a position to do for these cross-claimants what, out of a concern for good faith and fairness, it has done for Ngāti Awa.

Further comment is also required on an aspect of Treaty breach alleged by the Ngāi Tūhoe cross-claimants, and in particular by counsel for the claimants in Wai 36. Counsel submitted that the Crown's policy dispossesses Ngāi Tūhoe of a right to appear before the Waitangi Tribunal to establish its links to the land in question, and by that means to obtain binding recommendations for its resumption. His submissions in this regard are premised on the belief that the Tribunal's assessment of entitlement to contested Crown forest licensed land will be based on the relative strength of customary interests. We simply note that this may indeed be the basis upon which the Tribunal will issue binding recommendations. But the question of how the Tribunal will interpret and implement its powers under the Crown Forest Assets Act 1989 is still open, because the jurisdiction remains untried. It is also possible that in its application of the relevant sections, the Tribunal will seek to bring about a result not so very different from that which the Crown's policy here endeavours to achieve. We certainly do not consider that it is a matter about which counsel can properly claim there is a decided view.

4.9 Cultural Redress

With regard to the items of cultural redress opposed by the cross-claimants, the Tribunal considers the claims in regard to Kaputerangi and the Matahina A4 and A5 blocks to be the most significant.

4.9.1 Kaputerangi

The Crown offered to vest in Ngāti Awa the fee simple estate in the Kaputerangi historic reserve, subject to the continuation of its reserve status. The site is approximately five hectares and is located to the east of Whakatāne. The Crown determined that Kaputerangi was highly significant to Ngāti Awa in terms of the iwi's ancestry and identity, and because Ngāti Awa have continuously occupied this area. Kaputerangi is also located in what the Crown has determined to be Ngāti Awa's 'core area'. Ngāi Tūhoe claimants object to the offer on the ground that Kaputerangi is important to all Mataatua iwi as it is the pā site of Toi, and is near the landing place of the Mataatua waka. Site-specific research commissioned by the Crown indicated that many iwi, including Mataatua iwi, associate with Kaputerangi through whakapapa. The Crown also understands that this is accepted by Ngāti Awa, and that other claimant groups acknowledge that Kaputerangi is within the area occupied by Ngāti Awa, and that Ngāti Awa are the kaitiaki of Kaputerangi.

The Crown submitted that the decision to proceed with the offer to transfer the fee simple estate to Ngāti Awa (subject to reserve status) was based on the understanding that only Ngāti Awa have a dominant interest in the site deriving from both occupation and ancestral associations. The Crown and Ngāti Awa have agreed that the interests of other iwi in Kaputerangi be acknowledged in the deed of settlement, and reflected in any published or interpretation materials produced by Ngāti Awa about the reserve. The Crown has indicated that it considers these concessions to be 'broadly consistent with the guardianship role of Ngāti Awa' with regard to Kaputerangi.

4.9.2 Matahina A4 and A5

The Crown originally offered to vest the stratum title of Matahina A4, and the title of Matahina A5, in Ngāti Awa. This decision was made on the grounds that both sites are significant urupā for Ngāti Awa, and that the sites were taken from Ngāti Awa for public works purposes in 1968. Matahina A4 is a one-acre site adjacent to the Matahina Dam. It does not include land under the dam or any part of the lakebed. Matahina A5 is an approximately three-acre block located on the western bank of Lake Matahina. The area includes a small portion of the lakebed.

Both the Tūhoe–Waikaremoana Māori Trust Board and Ngāti Haka Patuheuheu object to the offer of these sites to Ngāti Awa. The Crown commissioned site-specific research as well as carrying out its own historical investigation. This research confirmed to the Crown that the Matahina area was contested and occupied by a number of groups over a long period of time, and that the area was significant to each of them. The Crown determined that Ngāti Awa had a dominant interest in Matahina A4, primarily through the interests and associations of the hapū Ngā Mahi, Ngāti Hāmua, and Warahoe, as demonstrated in evidence presented to the Native Land Court. The Crown found that while Ngāti Awa had strong interests in Matahina A5, there was insufficient historical evidence of associations with Matahina A5 to justify an offer of exclusive redress.

On this basis, the Crown decided to proceed with the offer to Ngāti Awa of the stratum title to Matahina A4, but withdrew its offer to transfer Matahina A5. Instead, Ngāti Awa were offered the grant of a statutory acknowledgement in respect to Matahina A5, which is non-exclusive. The Crown can offer a statutory acknowledgement to other claimants in the future if appropriate. The Crown has also indicated that it retains the ability to provide other cultural redress in the area, for example the lakebed of Lake Matahina.

The other items of contested cultural redress relate to Ōhiwa Harbour and to Moutohorā Island.

4.9.3 Ōhiwa Harbour

The Crown initially offered Ngāti Awa exclusive cultural redress to the north and west of Ōhiwa Harbour, recognising Ngāti Awa's customary interests in this area. The Crown offered to vest 10 hectares of the Port Ōhope recreation reserve in Ngāti Awa subject to reserve status, along with an adjacent one-hectare nohoanga (temporary camping) entitlement. The Crown also offered to vest Tauwhare Pā scenic reserve in Ngāti Awa as the administering body of the reserve, under section 26 of the Reserves Act 1977.

Following objections by the Tūhoe–Waikaremoana Māori Trust Board to the offer of redress in this area, and in light of its own research, the Crown found that the strength of Ngāti Awa's interests in the area justified the offer of exclusive redress. The Crown identified other Crown land around the southern and eastern shores of Ōhiwa Harbour as being potentially available for future settlements with other groups, if appropriate. The Crown proceeded with the offers relating to the Port Ōhope recreation reserve.

With regard to Tauwhare Pā scenic reserve, the Crown acknowledged that there is evidence of 'fluctuating fortunes' of different iwi in this area, and that other groups might be able to demonstrate particular relationships with the pā site. The Crown indicated that, at Ngāti Awa's request, they would adjust the original offer to vest the reserve in Ngāti Awa as the administering body to an offer to include the reserve within a joint management

committee to be established over Moutohorā Island and Ōhope scenic reserve. This is non-exclusive redress, as representatives of other iwi may be appointed to the committee.

Ngāi Tūhoe claimants also objected to the offer to grant Ngāti Awa a preferential right to purchase up to 5 per cent of any authorisations within the Ōhiwa Harbour that the Minister of Conservation may offer by public tender in accordance with part VII of the Resource Management Act 1991. This would include, for example, the granting of marine farming authorisations. While this offer is exclusive to the extent of this 5 per cent, the Crown argues that it is effectively non-exclusive as similar redress may be offered to other claimant groups as part of future settlements if appropriate. This recognises that the Crown does not consider that Ngāti Awa had exclusive rights to the harbour.

4.9.4 Moutohora Island

Ngāti Awa had initially requested that Moutohorā Island be transferred to them as part of the settlement on the grounds that they had occupied the island until the early nineteenth century and that it remains an important mahinga kai site. The Crown opposed such a transfer because of the high conservation values attached to the island. They instead offered to recognise Ngāti Awa interests by establishing a joint management committee to allow Ngāti Awa participation in the management of the island under the Reserves Act. This is non-exclusive redress, as the Crown retains the ability to appoint other iwi to the joint management committee as part of future settlements if appropriate. The Crown is also offering Ngāti Awa a statutory acknowledgement and the right to collect hāngi stones from the island. This is also non-exclusive redress.

4.10 The Tribunal's Findings on Cultural Redress

We cannot discern, in the Crown's approach to the inclusion of cultural redress in settlements, flaws that go to Treaty compliance. We think that the Crown properly reviewed its position in relation to the Matahina A4 and A5 blocks. Otherwise, the cultural redress seems to us to be structured in a way that appropriately recognises Ngāti Awa's mana, but leaves room for other groups to be recognised in future settlements.

With respect to Kaputerangi, we agree with claimants that it is unfortunate that the fluid layering of rights conferred through tikanga must be supplanted by European law. However, we also accept that the Crown is obliged to operate in this context.

It is our understanding that the effect of the transfer of the fee simple estate to Ngāti Awa, combined with the preservation of the reserve status, is to make Ngāti Awa kaitiaki of this land. The reserve status means that the area remains available for public access. We think it important that Mataatua iwi and hapū continue to be able to express their connection to this

place in accordance with their traditional norms. If it proves that, in practice, the access of the general public to the land interferes with those norms, we think that consideration should be given to changing the nature of the reserve status to make special provision for Mataatua iwi and hapū. We think it appropriate that the Crown provides an undertaking to review the situation with Ngāti Awa and relevant other Mataatua groups (including Ngāi Tūhoe groups) in five years' time. If, at that time, it appears that the ability of these groups to express their connection with Kaputerangi is being compromised by the access of the general public, the Crown should make such changes to the status of the land as are necessary and possible.

4.11 The Crown's Communication and Consultation with Cross-Claimants

In section 4.8, we have said that we consider that the Crown's policies on the inclusion of Crown forest licensed land in settlements, and the management of cross-claims to that category of redress, do not breach the principles of the Treaty.

We do note, however, that some of the language employed by the Crown to describe its policy – or perhaps language by which the Crown's policies have become known – is unfortunate.

It is not, we think, helpful to characterise Crown forest licensed lands as 'commercial assets' that are in their nature 'substitutable'.

It is clear that Crown forest licensed lands have a commercial value, and that value is one to which Māori people are fully alert. We have discussed the appeal of the accumulated rentals to those in settlement negotiations with the Crown. And Mr Nīkora made clear to the Tribunal that, in addition to the tribe's objections to the redress for Ngāti Awa based on ancestral connections with the Matahina lands, Ngāi Tūhoe would prefer to receive in settlement these forest lands rather than other forest lands because they are better located to form an economic unit with Ngāi Tūhoe's other forest holdings.

However, everyone knows, including the officers of the Crown, that, to Māori, land is never purely a commercial asset. It is a taonga tuku iho; an integral part of Māori self-identification; and a tangible expression of whakapapa.

Nor is land ever 'substitutable' in Māori 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 Māori groups who can make those connections. In that sense, the forestry land at Matahina is certainly *not* substitutable for forestry land elsewhere.

It struck us, therefore, that the Crown had been rather obtuse in the communication of its policy. Its pragmatic underpinnings had been masked by language guaranteed to raise cultural hackles.

The questions we had about the communication of the Crown's policy in this case were not limited to its nomenclature, however.

In hearing, we heard a great deal from the cross-claimants about who was told what when. In particular, it was apparent to us that there are representation issues between the Ngāi Tūhoe cross-claimants that counsel for Ngāti Haka Patuheuheu and Ngā Rauru o Ngā Pōtiki brought out in the form of criticisms of the Crown. The Crown had allegedly not responded sufficiently early to the fact that these groups were no longer under the umbrella of larger tribal groups.

Another issue was whether the Crown had relied – wrongly, it was alleged – on earlier intimations that Ngāi Tūhoe and Ngāti Rangitihi were not pursuing their interests in the Matahina Crown forest licensed land.

Ultimately, we do not think that either of these topics requires a great deal of focus. We were satisfied, on the evidence, that all of the groups that appeared before us were in consultation long enough for their concerns to be understood by the Crown. We felt that they had long enough to gather together the material that was required under the circumstances.

We felt the difficulty was more that the Crown did not really disclose its policy agenda to the parties affected by the proposed settlement with Ngāti Awa.

We do not suggest that the Crown was being deliberately secretive. It was more that the Crown did not convey to the Māori groups concerned the real policy basis for the Crown's decision that the links of other tribal groups with the Crown forest licensed land at Matahina are to be forgone in favour of Ngāti Awa's.

It seemed to us that at no point were the cross-claimants put on notice that the Crown was not going to be swayed from its point of view that these lands should go to Ngāti Awa *even if* the cross-claimants could show that their customary interests were dominant. The Crown did make clear its view that the cross-claimants' claims could potentially be satisfied by the grant of Crown forest licensed lands elsewhere in the future. But we do not think the cross-claimants understood that this meant that the assessment of the relative strength of the customary interests in the land was a very secondary concern. The Tūhoe cross-claimants in particular seemed to us to have been consistently of the view that the proposed inclusion of the Matahina forest lands in the settlement with Ngāti Awa was predicated on the Crown's view that Ngāti Awa's interests there were stronger than those of Ngāi Tūhoe.

We think it is not surprising that the cross-claimants did not really understand where the Crown was coming from. We do not think that any of the letters we have been referred to really articulate the essence of the policy, *and* the reasoning behind it. If they had, we think that the cross-claimants would have been in a better position. They would not have agreed with the policy, because it runs counter to their perception of their interests at this point in time. Nevertheless, they were entitled to know precisely what game they were in, and we do not think the Crown's communications that we have seen put them properly in the picture.

4.11

This is partly, we think, a function of the fact that the Crown was developing its policy during the period when it was communicating with the cross-claimants. In the Crown's communications with the Minister over time, it is not hard to discern that the officials' perception of the precise nature of the balancing act in which the Crown was engaged was changing. It had not crystallised until March of this year, in the briefing to the Minister numbered 'DB' in the bundle. By then, there had been many interchanges between Crown officials and cross-claimants in which we think there was a distinct potential for cross-claimants to be less than clear about what the Crown wanted from them, and how final decisions would be made.

In particular, it seems to us that the cross-claimants were not put in a position to understand fully the context within which the historical material they were providing would be used. Its relative unimportance, given the Crown's assessment of the sufficiency of other Crown forest licensed land that was available for the settlement of their claims, was not appreciated. We do not think it was clearly communicated.

We do not think that the Crown's failure to deliver consistently a clear and well-reasoned message to cross-claimants arose from bad faith. The truth of the matter was that officials were, to an extent, making it up as they went along. While the main messages, and the thinking behind them, may not have changed very much, the relative importance of the different factors that were being considered, and the management of uncertainties, did.

We think that the cross-claimants have a justifiable sense of not having been dealt with properly. But we hesitate to find that the Crown was acting in bad faith. We do not think that any double-dealing was going on. It was more that Crown officials did not have immediate answers for situations as they developed, and were doing the best they could in an awkward situation. Nevertheless, we do not think that this is good enough.

We are conscious, though, that prejudice to the cross-claimants does not appear to have resulted. They say that they are prejudiced by the policy itself, in that they will no longer have the opportunity to receive as redress for their claims 75 per cent of the Matahina Crown forest licensed lands. But we have found that policy does not breach the principles of the Treaty. We are here considering whether the claimants have been prejudiced by the Crown's failure to communicate its policy clearly and well. Ultimately, they have not. The Crown demonstrated to us in the presentation of its evidence and submissions that it understands the cross-claimants' concerns. The Crown is the decision-maker here. It determines what it will offer to Ngāti Awa. Its unwillingness to change course arises not from any failure to hear and understand the cross-claimants, but from its belief that its policy is the better one. We do not think that there is anything further the cross-claimants could have done or said that would have bettered their position with the Crown.

Accordingly, notwithstanding the failure on the part of the Crown to manage well the communication of its policy and the reasons for it, we do not think that the cross-claimants have ultimately been prejudiced by that failure.

4.12 The Crown's Duty to Preserve Amicable Tribal Relations

There is no doubt that the management of cross-claims is a difficult area. To put it bluntly, if the Crown wants to get on with the process of settling claims, it is obliged to choose between claimants whose interests may not always have been the subject of comprehensive reports. In this process, groups of Māori will inevitably be annoyed, disappointed, hurt, sad, even angry – sometimes in turn; sometimes all at once.

We approve the objective of settling claims, even where all the matters upon which decisions are being made are not fully known.

But 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.

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. As we have said, we consider that, in these settlement negotiations, the Crown did not achieve this objective.

We have recorded how, in its dealings with Ngāti Awa, the Crown initially put the onus on Ngāti Awa to resolve cross-claims. Then, in 2000, the Crown changed the requirement. Now it was enough for the Crown to be satisfied that cross-claims had been addressed.

It is not clear from this requirement who is supposed to be addressing the cross-claims. In the case of the Ngāti Awa settlement, it is apparent that Crown officials took on themselves the responsibility of contacting cross-claimants, explaining what was going on, and trying if possible to obtain their agreement to the settlement package on offer to Ngāti Awa.

Those officials knew that communications between Ngāti Awa and Ngāi Tūhoe had broken down. Ngāti Awa told the Tribunal about how they had made a decision not to have any more meetings about the content of the settlement package, because they were sick of making concessions. Many of those concessions had been sought because of the Crown's endeavours to meet the concerns of cross-claimants.

We understood Ngāti Awa's feelings. But we did wonder whether perhaps it would have been available to the Crown to identify some areas – particularly in the category of cultural redress – where further discussion could have borne fruit. It seemed to us, for instance, that understandings could have been arrived at with respect to Kaputerangi. Arriving at understandings on cultural redress is possibly most critical for future relations.

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. 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 Māori that the settlements seek to achieve.

We consider that the Crown should not be satisfied that cross-claims have been addressed until really no stone has been left unturned. Even if a consensual approach can be achieved only in relation to *one* item of contested redress, that can ameliorate the wider relationships in issue. The Crown has a duty in this regard, flowing from the principles of partnership and good faith under the Treaty of Waitangi.

It is not clear to us to what extent the officials working on the Ngāti Awa settlement understood the nature of the Crown's responsibility in this regard. Crown counsel referred to the duty to minimise the negative impact of settlement on cross-claimants as one of the factors it is required to balance in achieving a settlement.[28] However, we were concerned that the need to manage the detrimental effect on relationships between claimant groups, whenever and wherever possible, may not have been given sufficient weight by officials implementing the Crown's policy.

In its decision on the application for an urgent hearing in relation to the Crown's proposed settlement with Ngāti Ruanui, the Waitangi Tribunal indicated to the Crown the proactive nature of its duty to minimise negative effects of Treaty settlements. That was a case where the breakdown in relationships was internal to the tribe. The Tribunal there encouraged Crown officials to find, and where necessary pay for, techniques to help those concerned work through the impasse.

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–Māori relations if this area of risk is not carefully and positively managed.

We accept that, in this case, the failure by the Crown to ensure that all options were tried did not amount to an absence of good faith. We think that officials had not fully appreciated the nature and extent of their duty.

We recommend that the Office of Treaty Settlements works to improve its officials' understanding of how this duty might be fulfilled in practice, including familiarity with mediation techniques, the employment of marae processes, and the use of third-party facilitators.

28. Paper 2.40, para 28

Dated at Wellington this 26th day of July 2002

C M Wainwright, presiding officer

M C Bazley, member

A Koopu, member

J T Northover, member

THE SEAL OF THE WAITANGI TRIBUNAL

Downloaded from www.waitangi-tribunal.govt.nz

APPENDIX

RECORD OF INQUIRY

RECORD OF HEARINGS

The Tribunal

The Tribunal consitituted to hear Wai 958, concerning both the inclusion of certain lands and interests within the heads of agreement between the Crown and Ngati Awa for the settlement of the latter's historical claims and the Crown's settlement policy and practice, comprised Judge Carrie Wainwright (presiding), Dame Margaret Bazley, Areta Koopu, and Joseph Northover.

The Counsel

Counsel appearing were Kathy Ertel with Liz Cleary for the Wai 958 claimants; Te Kani Williams and Annette Sykes for the Wai 975 claimants; David Ambler with John Koning for the Wai 36 claimants; David Rangitauira and Peter Churchman for the Wai 524 claimants; Jamie Ferguson and Mātanuku Mahuika for the Wai 46 claimants; and Virginia Hardy with David Soper for the Crown.

The Hearings

The claim was heard at the Rydges Hotel, Rotorua, on 17 and 18 June 2002 and the Quality Hotel, Wellington, on 20 and 21 June 2002. The Tribunal heard from Robert Pouwhare, Huka Williams, Tama Nīkora, David Potter, Deborah Collins, Andrew Hampton, Dr Hirini Mead, Joe Mason, and Samuel Tūtua.

RECORD OF PROCEEDINGS

1. Claims

1.1 Wai 958

A claim by Robert Pouwhare on behalf of himself and Ngāti Haka Patuheuheu concerning the inclusion of the Matahina A1B, A1C, A4, A5, and A6 blocks within the heads of agreement between the Crown and Ngāti Awa for the settlement of the latter's historical claims, 20 December 2001

(a) Amended statement of claim, 26 February 2002

1.2 Wai 975

A claim by Sir John Turei, Mat Te Pou, Wairere Tame Iti, Robert Powhare, Wharekiri Biddle, and Tom Winitana on behalf of themselves and Ngā Rauru o Ngā Pōtiki concerning the inclusion of the Matahina A1B, A1C, A4, A5, and A6 blocks and interests in Motuhorā Island and Ōhiwa Harbour within the heads of agreement between the Crown and Ngāti Awa for the settlement of the latter's historical claims, 26 February 2002

2. Papers in Proceedings

2.1 Memorandum from Wai 958 claimant counsel to Tribunal requesting urgency, 20 December 2001

2.2 Memorandum from deputy chairperson to parties directing registrar to register claim 1.1 as Wai 958 and directing claimants, Crown, Ngāti Awa, and Tuhoe–Waikaremoana Maori Trust Board to file submissions on granting of urgency, 25 January 2002

(a) Declaration that notice of registration of claim 1.1 given, 28 January 2002

List of parties sent notice of registration of claim 1.1, 1 February 2002

2.3 Memorandum from Wai 975 claimant counsel to Tribunal requesting reconvening of Wai 46 Tribunal and requesting recommendation that the Crown take no further steps towards divesting itself of any interest in claimed areas or creating any interest in those areas in any other party, 20 December 2001

2.4 Memorandum from Wai 524 claimant counsel to Tribunal advising latter that Ngāti Rangitihi do not want Matahina lands transferred to Ngāti Awa and requesting notice of any urgent hearing, 30 January 2002

2.5 Memorandum from Wai 958 and Wai 975 claimant counsel and Crown counsel to Tribunal seeking extension for filing of submissions on urgency, 1 February 2002

2.6 Memorandum from Wai 36 claimant counsel to Tribunal supporting Wai 958 application for urgency, 1 February 2002

2.7 Submission of Wai 958 claimant counsel supporting earlier application for urgency (paper 2.1), 4 February 2002

2.8 Memorandum from Wai 975 claimant counsel to Tribunal requesting urgency, 4 February 2002

2.9 Submission of Crown counsel opposing Wai 958 application for urgency, 4 February 2002

2.10 Submission of Crown counsel opposing Wai 975 application for urgency, 4 February 2002

2.11 Submission of Wai 46 claimant counsel opposing Wai 958 application for urgency, 4 February 2002

2.12 Memorandum from deputy chairperson to parties authorising Judge Carrie Wainwright to determine Wai 958 application for urgency, 5 February 2002

2.13 Memorandum from Judge Carrie Wainwright to parties declining Wai 958 application for urgency, 8 February 2002

2.14 Memorandum from Judge Carrie Wainwright to parties granting renewed Wai 958 application for urgency and directing parties to file memoranda setting out their positions with respect to Ngāti Awa settlement offer and Crown policies and practices, 6 June 2002

2.15 Memorandum from Wai 958 claimant counsel to Tribunal renewing application for urgency, 31 May 2002
(a) Supporting documents to paper 2.15

2.16 Memorandum from Tribunal to registrar directing latter to register claim 1.1(a), 4 June 2002

2.17 Facsimile from Wai 36 claimant counsel to Tribunal giving notice of Wai 36 claimants' interest in Matahina lands and requesting postponement of proposed telephone conference between Judge Carrie Wainwright, Wai 958 claimant counsel, and Crown counsel, 6 June 2002

2.18 Memorandum from Judge Carrie Wainwright to parties summarising 6 June 2002 telephone conference between Judge Wainwright, Wai 958 claimant counsel, Wai 975 claimant counsel, Wai 46 claimant counsel, and Crown counsel on timetabling of High Court proceedings and Tribunal hearing, granting of leave to Wai 36 claimants to join inquiry, and filing and service of documents, 6 June 2002

2.19 Covering letter from Crown counsel to Tribunal, 6 June 2002
Statement of claim of first and second plaintiffs in *Milroy and Anor v Attorney-General* (High Court, Wellington, CP77/02), 17 April 2002
Letter from Crown counsel to plaintiff counsel advising latter that no undertaking to defer initialling of deed of settlement between Ngāti Awa and Crown can be given and proposing timetable for hearing, 5 June 2002
Letter from Crown counsel to plaintiff counsel proposing timetable for High Court proceedings and advising latter of Crown's willingness to defer initialling of deed of settlement between Ngāti Awa and Crown pending resolution of High Court proceedings, 24 May 2002
Minute of Justice Gendall allocating urgent fixture and reserving leave for applications for interim relief with respect to *Milroy and Anor v Attorney-General* (High Court, Wellington, CP77/02) and *Pouwhare v Attorney-General* (High Court, Wellington, CP78/02), 27 May 2002

2.20 Letter from Wai 524 claimant counsel to Tribunal requesting service on Ngāti Rangitihi of documents filed in relation to Wai 958 urgent hearing and agreeing to timetable for filing of memoranda set out in paper 2.18, 7 June 2002

2.21 Memorandum from Wai 958 claimant counsel to Tribunal setting out claimant's position with respect to Ngāti Awa settlement offer and Crown policies and practices, 9 June 2002

2.22 Memorandum from Wai 975 claimant counsel to Tribunal setting out claimants' position with respect to Ngāti Awa settlement offer and Crown policies and practices, 9 June 2002

2.23 Facsimile from Wai 958 claimant counsel to Tribunal providing additional information on High Court proceedings involving Ngāti Haka, 4 June 2002
Letter from Tribunal to Wai 958 claimant counsel outlining status of renewed application for urgency and requesting additional information on High Court proceedings involving Ngāti Haka, 31 May 2002

2.24 Memorandum from deputy chairperson to registrar directing latter to register claim 1.2 as Wai 975, 10 June 2002

2.25 Declaration that notice of registration of claim 1.2 given, 11 June 2002
List of parties sent notice of registration of claim 1.2, 11 June 2002

2.26 Direction of deputy chairperson constituting Tribunal of Judge Carrie Wainwright (presiding), Dame Margaret Bazley, and Areta Koopu to hear claim Wai 958, 10 June 2002

2.27 Memorandum from Wai 975 claimant counsel and Wai 958 claimant counsel to Tribunal requesting consolidation of claim Wai 975 with claim Wai 958, 26 February 2002

2.28 Memorandum from Tribunal to parties advising latter of request from Wai 958 claimant that urgent hearing be held in Rotorua and inviting comment on venue, 11 June 2002

2.29 Memorandum from Crown counsel to Tribunal naming Wellington as preferred venue for urgent hearing, 11 June 2002

2.30 Memorandum from Wai 36 claimant counsel requesting extension for filing and serving memorandum setting out claimants' position with respect to Ngāti Awa settlement offer and Crown policies and practices, 11 June 2002
Covering facsimile from Wai 36 claimant counsel to Tribunal accompanying 11 June 2002 memorandum setting out claimants' position with respect to Ngāti Awa settlement offer and Crown policies and practices, 11 June 2002

2.31 Memorandum from Wai 36 claimant counsel to Tribunal setting out claimants' position with respect to Ngāti Awa settlement offer and Crown policies and practices and naming Wellington as preferred venue for urgent hearing, 12 June 2002

2.32 Memorandum from Wai 524 claimant counsel to Tribunal setting out claimants' position with respect to Ngāti Awa settlement offer and Crown policies and practices, 11 June 2002

2.33 Memorandum from Wai 46 claimant counsel to Tribunal opposing choice of Rotorua as venue for urgent hearing and naming Wellington as preferred venue, 12 June 2002

2.34 Memorandum from Tribunal to parties declining to adjourn scheduled urgent hearing, naming Rotorua as venue for urgent hearing, and directing parties to advise Tribunal of evidence to be presented and time required for such presentation, 12 June 2002

2.35 Memorandum from Crown counsel to Tribunal concerning giving of notice to David Potter of urgent hearing, 12 June 2002

2.36 Memorandum from Wai 524 claimant counsel to Tribunal advising latter of David Potter's membership of Ngāti Rangitihi Claims Committee, 13 June 2002

2.37 Letter from Crown counsel to registrar advising latter of counsel's inability to meet filing deadline and giving anticipated filing date, 13 June 2002

2.38 Letter from Te Kani Williams to registrar advising latter of his appointment as counsel for Wai 975 claimants with respect to urgent hearing, 13 June 2002

2.39 Memorandum from Wai 958 claimant counsel to Tribunal giving notice of intention to call two witnesses at urgent hearing, outlining time required for witnesses, and listing evidence to be referred to, 14 June 2002

2.40 Memorandum from Crown counsel to Tribunal setting out Crown's position with respect to Ngāti Awa settlement offer and Crown policies and practices, 14 June 2002

2.41 Memorandum from Wai 36 claimant counsel to Tribunal giving notice of intention to call one witness at urgent hearing and outlining time required for witness, 14 June 2002

2.42 Memorandum from Wai 524 claimant counsel to Tribunal listing evidence to be referred to at urgent hearing, 14 June 2002

2.43 Memorandum from Crown counsel to Tribunal advising latter of filing of brief of evidence of Deborah Collins (doc A1) and outline of Crown counsel's submissions on application of Treaty principles, 14 June 2002

2.44 Memorandum from Wai 46 claimant counsel to Tribunal giving notice of intention to call three witnesses at urgent hearing, advising Tribunal of counsel's inability to meet filing deadline, and giving anticipated filing date, 14 June 2002

2.45 Memorandum from Wai 975 claimant counsel to Tribunal giving notice of intention to call two witnesses at urgent hearing and outlining time required for witnesses, 14 June 2002

2.46 Memorandum from Wai 46 claimant counsel to Tribunal setting out claimants' position with respect to Ngāti Awa settlement offer and Crown policies and practices, 14 June 2002

2.47 Memorandum from Wai 524 claimant counsel to Tribunal outlining discussions undertaken by Ngāti Rangitihi with respect to Ngāti Awa settlement, 19 June 2002

2.48 Memorandum from Crown counsel to Tribunal disclosing four documents brought to attention of Crown as part of High Court discovery process, 25 June 2002

2.49 Memorandum from Wai 958 claimant counsel to Tribunal requesting confirmation of reconvening of Ngāti Awa Tribunal or reasons for failure to reconvene Tribunal, 3 July 2002

2.50 Memorandum from Wai 958 claimant counsel to Tribunal seeking leave to file draft research report, 8 July 2002

2.51 Memorandum from Wai 36 claimant counsel to Tribunal opposing granting of leave to file draft research report and declining consent to release said report, 10 July 2002

2.52 Memorandum from Tribunal to parties declining application to reconvene Ngāti Awa Tribunal and declining application for leave to file draft research report, 11 July 2002

RECORD OF DOCUMENTS

A Documents Received to End of Hearing

A1 Brief of evidence of Deborah Collins, undated
(a) Supporting documents to document A1, vol 1
(b) Supporting documents to document A1, vol 2

A2 Opening submissions of Wai 958 claimant counsel, 17 June 2002

A3 Submissions of Wai 975 claimant counsel, 17 June 2002

A4 Submissions of Wai 524 claimant counsel, 18 June 2002

A5 Brief of evidence of Tamaroa Nīkora, 17 June 2002

A6 Brief of evidence of David Potter, undated

A7 Office of Treaty Settlements, *Healing the Past, Building the Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 1999), pp 23, 61

A8 Brief of evidence of Dr Hirini Mead, 20 June 2002

A9 Claim by David Potter and Andre Paterson on behalf of themselves as members of Ngāti Rangitihi concerning confiscation of Bay of Plenty lands and destruction of resources, 21 March 2002

A10 Closing submissions of Wai 958 claimant counsel, 27 June 2002

A11 Closing submissions of Wai 36 claimant counsel, 27 June 2002

A12 Closing submissions of Wai 975 claimant counsel, 26 June 2002

A13 Closing submissions of Crown counsel, 2 July 2002

A14 Submissions of Wai 958 claimant counsel in reply to closing submissions of Crown counsel, 5 July 2002

A15 Submissions of Wai 36 claimant counsel in reply to closing submissions of Crown counsel, 5 July 2002

A16 Closing submissions of Wai 46 claimant counsel, 5 July 2002

A17 Submissions of Wai 36 claimant counsel in reply to closing submissions of Wai 46 claimant counsel, 8 July 2002

ACKNOWLEDGEMENTS

The Tribunal would like to acknowledge the contributions of the staff who assisted in preparing for the urgent hearing. They facilitated the speedy execution of the hearing, and the efficient production of this report within tight deadlines. In particular, we acknowledge Heidi Hohua for claims administration duties; Peter Clayworth for research and report-writing assistance; Noel Harris for mapping services; Dominic Hurley for production work; and especially Ewan Johnston for his outstanding efforts in coordinating the production of this report, and also for his considerable role in its writing.

Downloaded from www.waitangi-tribunal.govt.nz