IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-2033
[2017] NZHC 389

BETWEEN	NGĀTI WHĀTUA ŌRĀKEI TRUST Plaintiff
AND	ATTORNEY-GENERAL First Defendant
AND	NGĀTI PAOA IWI TRUST Second Defendant
AND	MARUTŪĀHU ROPU LIMITED Third Defendant

Hearing: 19, 20 October 2016

Appearances: J E Hodder QC, J W J Graham & R M A Jones for Plaintiff
D A Ward for First Defendant
D J Goddard QC & L Theron for Second Defendant
P F Majurey for Third Defendant

Judgment: 9 March 2017

JUDGMENT OF PAUL DAVISON J

This judgment was delivered by me on 9 March 2017at 2.30 pm
pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Chapman Tripp, Wellington
Crown Law Office, Wellington
Meredith Connell, Auckland
Atkins Holm Majurey, Auckland

Introduction

[1] The defendants have applied to strike out the plaintiff's claim in which it applies for judicial review and declaratory relief in relation to three decisions made by the Minister of Treaty of Waitangi Negotiations regarding land located on the Auckland isthmus and proposed by the Crown to be applied to the settlement of the Treaty of Waitangi claims of the second and third defendants, Ngāti Paoa and Marutūāhu. A second application by which the plaintiff sought an interim order declaring that the first defendant ought not take any preparatory or actual steps to transfer the land to Ngāti Paoa or Marutūāhu pending further order of the Court was withdrawn by the plaintiff and is not pursued.

[2] The plaintiff's application alleges that the decisions made by the Minister are reviewable. They are: firstly, on 17 August 2015 the Minister made a preliminary decision to transfer land at 71 Grafton Road and 136 Dominion Road Auckland (the Ngāti Paoa properties), to Ngāti Paoa (the preliminary Ngāti Paoa decision).

[3] Secondly: the following year on 21 May 2016, the Minister having reconsidered the matter made a further and revised decision to offer Ngāti Paoa the opportunity to purchase the Ngāti Paoa properties from the Crown subject to legislation being enacted to give effect to the proposal. On 8 July 2016 the Minister wrote to the plaintiff and second defendant informing them that he had concluded that there were no overlapping claims that prevented a treaty settlement agreement being reached between the Crown and the second defendant (the "revised Ngāti Paoa Decision").

[4] Thirdly: on 13 May 2016, the Minister made a final decision to offer the third defendant iwi group the opportunity to purchase nine central Auckland properties, and transfer another cultural redress property (the Marutūāhu properties), as redress for that iwi's historical Treaty claim (the Marutūāhu decision).

[5] In brief summary, the plaintiff alleges that in making the decisions regarding the proposed transfers for Treaty settlements of land in respect of which it claims it

has ahi kā[1] and mana whenua, the Crown was required to exercise any powers to make the decisions in accordance with tikanga and its obligations arising under and by virtue of: the Treaty of Waitangi, a 2011 Deed of Settlement, the Ngāti Whātua Ōrākei Claims Settlement Act 2012 and otherwise, and to inform itself regarding such matters by consulting with the plaintiff before making any decisions. The plaintiff says that in making the decisions the Minister either failed to take into account relevant considerations relating to the plaintiff's mana whenua and ahi kā, or misdirected himself as regards the relevant considerations, and that he adopted and applied an overlapping claims policy which fails to recognise and address the plaintiff's mana whenua and ahi kā. The plaintiff maintains that as a matter of tikanga, it retains primary, pre-eminent, and exclusive mana whenua through ahi kā in relation to certain land in the central Auckland area, which includes the area in which the properties proposed to be transferred to the second and third defendants are located.

[6] The defendants say that the decisions made by the Minister did not have any effect on the interests of the plaintiff, but were merely preliminary steps taken in relation to the preparation of proposed legislation which would, if passed by Parliament, operate to transfer the land to the defendants or enable them to purchase it. The defendants say that the decisions made by the Minister involved policy and political considerations relating to Treaty claims and settlements, and were closely tied to the development and proposal of legislation. The defendants say that the principle of comity that exists between the judicial and legislative branches of government applies here, and the challenged decisions, being well within the sphere of parliamentary process, are consequently beyond the reach of judicial review.

[7] The issue then, is whether the plaintiff's claim against all three defendants should be struck out.

Plaintiff's substantive application for judicial review

[8] The properties which are the subject of the Minister's decisions are located within an area of the Auckland isthmus which has historical and cultural significance

[1] Ahi kā: burning fires - rights to land by occupation.

for Ngāti Whātua Ōrākei[2] and for a number of other iwi, including the second and third defendants.[3] The land in question can, for present purposes, be conveniently described as "the 2006 right of first refusal land", as it was identified and described in those terms in an agreement entered into by the Crown and Ngāti Whātua in 2006 to define an area of Auckland over which the Crown then proposed to grant Ngāti Whātua a right of first refusal to purchase any Crown land located within that defined area, should the Crown decide to sell any of it, during the following period of 100 years. The land is also described as the 1840 transfer land, as the 2006 right of first refusal land contains an area of approximately 3500 acres that was transferred by Ngāti Whātua to the Crown in October 1840.

[9] In the application for judicial review proceedings, the plaintiff seeks the following declarations:

(a) a declaration that Ngāti Whātua Ōrākei has ahi kā and mana whenua in relation to the 2006 RFR Land and the 1840 Transfer Land;

(b) a declaration that when applying its overlapping claims policy to any land within the area of the 2006 RFR Land and the 1840 Transfer Land the Crown must act in accordance with tikanga, and in particular Ngāti Whātua Ōrākei tikanga;

(c) a declaration that Crown development and making of offers to include land in the 2006 RFR Land and the 1840 Transfer Land in a proposed settlement with iwi who do not have ahi kā in respect of that land must be made in accordance with tikanga, and in particular Ngāti Whātua Ōrākei tikanga;

(d) a declaration that in order to comply with tikanga when contemplating, developing or making decisions under its overlapping

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2 In this judgment 'Ngāti Whātua' should be read as a reference to Ngāti Whātua Ōrakei rather than any other group whose name also contains the words 'Ngāti Whātua'.

3 The Waitangi Tribunal noted in its 2007 Tāmaki Makaurau Settlement Process report, that the Auckland isthmus area, Tāmaki Makaurau, had in the pre–Pākehā contact era been the subject of "successive waves of invaders" who competed for dominance down the centuries, giving rise to "dense layers of interests". As at 2007 the Tribunal noted that 10 tangata whenua groups were involved in asserting interests in Tāmaki Makaurau.

claims policy to offer any interest in land within the 2006 RFR Land or the 1840 Transfer Land as part of a proposed Treaty settlement with an iwi which does not have ahi kā in respect of those lands, the Crown must:

(i) appropriately consult with Ngāti Whātua Ōrākei as the iwi having ahi kā;

(ii) acknowledge the ahi kā of Ngāti Whātua Ōrākei as the iwi having ahi kā;

(iii) decline to include the land in the proposed settlement if there is evidence that the transfer of the land would unjustifiably erode the mana whenua of Ngāti Whātua Ōrākei as the iwi having ahi kā;

(iv) decline to include the land in the proposed settlement where the land has previously been the subject of a gift to the Crown unless Ngāti Whātua Ōrākei, the gifting iwi, has provided its consent to the transfer;

(e) a declaration that the Ngāti Paoa Decision, the Revised Ngāti Paoa Decision and the Marutūāhu Decisions have been developed and made inconsistently with the Crown's obligation to make those decisions in accordance with tikanga; and

(f) a declaration that the Ngāti Paoa Decision, the Revised Ngāti Paoa Decision and the Marutūāhu Decisions have been developed and made inconsistently with the Treaty of Waitangi and its principles, and Ngāti Whātua Ōrākei's rights as affirmed by the United Nations Declaration on the Rights of Indigenous Peoples.

Relevant history of Ngāti Whātua's settlement with the Crown

[10] In order to put the proceeding in context it is necessary to briefly review the history of Ngāti Whātua's involvement with and connection to the land comprised within the 2006 right of first refusal area, and also review the background of events and context which led to the Minister making the three challenged decisions.

[11] Several months after the signing of the Treaty of Waitangi on 6 February 1840, Ngāti Whātua transferred the Crown approximately 3500 acres of land upon which large parts of central Auckland have since been developed and established. The land is located between Hobson Bay, Cox's Creek and Maungawhau (Mt Eden). As I have said, this is appropriately referred to by the plaintiff as the 1840 transfer land.

[12] In 2003, the Crown entered into negotiations with the Ngāti Whātua Ōrākei Māori Trust Board regarding the settlement of historical claims made by Ngāti Whātua alleging breaches of the Treaty by the Crown by alienating certain land within the area transferred by Ngāti Whātua to the Crown in 1840. On 9 June 2006, those negotiations resulted in the parties entering into a written Agreement in Principle (AIP) providing for the settlement of the plaintiff's historical claims. The AIP included a commitment that the parties would work together in good faith to develop a deed of settlement which would include the full details of the redress to be provided for final settlement of Ngāti Whātua's historical claims.

[13] The AIP also provided for an agreed historical account to be included within the deed of settlement which would outline the historical relationship between the Crown and Ngāti Whātua. The agreed historical account, together with Crown acknowledgements and an apology, were described in the AIP as being the cornerstone of the Crown's settlement offer.

[14] The AIP also made provision for the deed of settlement to include a Right of First Refusal (RFR) for a period of one hundred years, to be granted to Ngāti Whātua Ōrākei's governance entity in respect of all Crown owned properties within the RFR area as defined in a map of the Auckland isthmus attached to the AIP. The area identified in this map is more extensive than the 1840 transfer land area, and extends

south across the Auckland isthmus to the Manukau Harbour and north-west to the Whau River. In addition to Crown owned properties within the RFR, the RFR provisions were to apply to properties owned by Transit New Zealand, the Auckland District Health Board, the Royal New Zealand Naval Housing on Auckland's North Shore and several Crown owned properties on which police stations are located.

[15] As well as dealing with historical claims, the AIP also provided that the Deed of Settlement and settlement legislation would include provisions addressing cultural redress, pursuant to which the Crown would vest in Ngāti Whātua the ownership of what were termed the Cultural Redress Properties. These cultural redress properties were: Maungakiekie (One Tree Hill Domain); Maungawhau (Mount Eden Historic Reserve); Pukatapapa (Mount Roskill, Winstone Park Domain); and Purewa Creek Stewardship area.

[16] The AIP contained an acknowledgement that it was entered into by the parties on a without prejudice basis, and was "non-binding and does not create legal relations". The AIP provided that its terms and the proposed deed of settlement would be subject to the passing of settlement legislation to give effect to parts of the settlement and subject to Ngāti Whātua supporting the passage of such settlement legislation.

The Waitangi Tribunal's Tāmaki Makaurau settlement process report

[17] The terms of the AIP entered into between the Crown and Ngāti Whātua gave rise to widespread discontent within other iwi and tangata whenua groups of Tāmaki Makaurau (the Auckland area) who were affected by the AIP, and who were dissatisfied with their exclusion from the settlement negotiations between the Crown and Ngāti Whātua. These iwi claimed the process had failed to give them an opportunity to assert their customary interests over land within the Auckland isthmus including land located within the 2006 right of first refusal area. They claim to have equally strong interests in the Auckland isthmus, as does Ngāti Whātua. As a result of steps taken by a number of other iwi, the Waitangi Tribunal convened an urgent hearing in March 2007 to hear and consider their criticisms of the negotiation

process which had led to the Ngāti Whātua AIP with the Crown. The Tribunal subsequently presented a report dated 12 June 2007.[4]

[18] While the Tribunal did not conduct an inquiry into the relative merits of the historical Treaty claims of the Tāmaki Makaurau tangata whenua, the Tribunal nevertheless concluded that the process undertaken by the Crown whereby only a single claimant group's interests were recognised was seriously flawed and contrary to tikanga:[5]

> The use of 'predominance of interests' as a basis for giving exclusive rights in cultural sites to one group – even when other groups have demonstrable interests that have not been properly investigated – is a Pakeha notion that has no place in Treaty settlements. Where there are layers of interests in a site, all layers are valid. They derive from centuries of complex interaction with the whenua, and give all groups with connections mana in the site. For an external agency like The Office of Treaty Settlements to determine that the interests of only one group should be recognised, and the others put to one side, runs counter to every aspect of tikanga we can think of. It fails to recognise the cultural resonance of iconic sites, and the absolute imperative of talking to people directly about what is going on when the allocation of exclusive rights in maunga is in contemplation…

[19] The Tribunal further observed:[6]

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

[20] When presenting its report to the Minister of Maori Affairs, the Tribunal said:

> The report concerns the process followed by the Office of Treaty Settlements to arrive at a treaty settlement with Ngāti Whātua o Ōrākei. Our inquiry focused especially on how the Crown dealt with the numerous tangata whenua groups in Tāmaki Makaurau other than Ngāti Whātua o Ōrākei. We conclude that, as regards those groups, the Crown's policy and practice has been unfair, both as to process and as to outcome.
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> Our primary and strong recommendation is that the proposed settlement with Ngāti Whātua o Ōrākei not proceed at this stage. Instead, the Office of Treaty Settlements should now work with the other tangata whenua groups

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4 Waitangi Tribunal *The Tāmaki Makaurau Settlement Progress Report* (Wai 1362, 2007).
5 At 96-97.
6 At 99.

to negotiate settlements for them. Once that is done – and not before – it will be possible to arrive at a situation where appropriate redress (both cultural and commercial) is offered not only to Ngāti Whātua o Ōrākei, but to all the tangata whenua groups in Tāmaki Makaurau. Then, the mana of all would be upheld, relationships would be restored, and reconciliation would be possible.

[21] In its recommendations the Tribunal further said: [7]

> We were faced with drivers that were very difficult to reconcile. On the one hand, we do not want to get in the way of the Crown settling with Ngāti Whātua o Ōrākei. It seems wrong to us that Ngāti Whātua o Ōrākei should suffer for the defects in the Crown's process. Although, as regards the protection of the interests of other tangata whenua groups, Ngāti Whātua o Ōrākei probably made the Crown's job of delivering a good process harder, ultimately it is the Crown's process. It is the Crown's responsibility to manage the self interest of a settling group so that the interests of other tangata whenua groups are not unfairly jeopardised. We now confront the difficulty of doing justice to other tangata whenua groups without adversely affecting Ngāti Whātua o Ōrākei, given that they are now in expectation of receiving the benefits of settlement which come to them via a faulty process. If Ngāti Whātua o Ōrākei gets all that the Crown has offered to them, how will the interests of the other tangata whenua groups be protected? And what will be the value of a settlement that is so flawed … What concerns us is the unfairness to the other tangata whenua groups inherent in both the cultural and commercial redress now on offer to Ngāti Whātua o Ōrākei.

[22] And further when addressing the issue of cultural redress:[8]

> A draft settlement that recognises the interests of one group only and exclusively, carries the implication that the interests of the others are such that they can either be ignored or denied. This sets one group above the others, and against the others, as regards the mana and wairua inherent in the maunga, and this is quite simply a bad thing to do.
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> …
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> We think that the stage needs to be set for the involvement in settlement negotiations of all the other tangata whenua groups ….
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> The first step, unfortunately, is that this draft settlement really must be stopped in its tracks. This does not mean that the draft settlement with Ngāti Whātua o Ōrākei has no future. Rather, we see a scenario in which that draft settlement is held in abeyance while another draft settlement (or possibly draft settlements)[9] with which it is intrinsically linked is negotiated. Once the Crown has negotiated a draft settlement with the other tangata whenua

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7 At 103.

8 At 105-107.

9 Tribunal Report footnote: "Ideally, in order to save time, the other tangata whenua groups in Tāmaki Makaurau would co-operate to fit together into one grouping for the purposes of settling with the Crown. Whether or not that will prove possible remains to be seen; it is to be determined by those groups and the Crown."

groups they can all be looked at together so the Crown can then work out with those groups:

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

- fair access to the commercial redress available.

[23] Following the Tāmaki Makaurau Settlement Process Report, the Minister for Treaty Negotiations obtained a report from Sir Douglas Graham dated 24 June 2009 (The Graham Report). The Graham Report proposed a new approach for treaty settlements in the regions of Tāmaki, Hauraki and Kaipara where there were overlapping tribal interests. In relation to Tāmaki, the report relevantly recommended that the provisions of the Ngāti Whātua RFR which would have granted Ngāti Whātua exclusive rights of first refusal, and exclusive ownership of the Auckland maunga, be removed. The Graham Report recommended that the Ngāti Whātua AIP provisions granting an exclusive right of first refusal over an area of central Auckland be replaced by the grant of a new right of first refusal to a group comprising the various iwi of Tāmaki, to extend over surplus Crown properties held within a wider area of the Auckland region. The Report further recommended that the Ngāti Whātua AIP provisions which would have resulted in the three Auckland isthmus maunga being transferred to Ngāti Whātua as their sole and exclusive property, also be removed and replaced by provisions for the maunga to be transferred to a collective group of Tāmaki iwi to be formed for the purpose sharing joint ownership.

[24] Following the release of the Graham Report, a collective of iwi to be known as Ngā Mana Whenua o Tāmaki Makaurau (the Tāmaki Makaurau Collective) was formed to negotiate with the Crown and seek Treaty redress by way of ownership of the maunga located on Auckland's isthmus, and a collectively held right of first refusal to purchase surplus Crown land located in the Auckland region. Contemporaneously with the collective negotiations, each of the iwi comprising the Tāmaki Makaurau Collective separately negotiated with the Crown for the settlement of their iwi-specific Treaty claims relating to Tāmaki. These negotiations led to the formation of the Ngā Mana Whenua o Tāmaki Makaurau and Crown Framework Agreement (the Framework Agreement), in February 2010.

[25] The Tāmaki Makaurau Collective included Ngāti Whātua, Ngāti Paoa and three other iwi of the Marutūāhu ropu, together with the other iwi who claimed interests in Tāmaki Makaurau.

[26] The Framework Agreement contained an acknowledgement recognising that each iwi has legitimate cultural and historical interests within Tāmaki Makaurau. Clause two of the Framework Agreement states:

> The iwi/hapū members of Ngā Mana Whenua o Tāmaki Makaurau (or other name chosen by the iwi/hapū) recognise they each have legitimate spiritual, ancestral, cultural, customary and historical interests within Tāmaki Makaurau.

[27] Redress in respect of the maunga of Tāmaki Makaurau was provided for in the Framework Agreement, by the Crown offering to transfer ownership to the Tāmaki Makaurau Collective of the Crown owned parts of eleven maunga located on the Auckland isthmus, which included the three previously proposed to be transferred to the exclusive ownership of Ngāti Whātua.[10]

[28] The Framework Agreement also provided that the Crown would offer members of the Tāmaki Makaurau Collective a right of first refusal in respect of all land held by core Crown agencies in the Tāmaki Makaurau area. The right of first refusal would continue for 170 years from the date the agreement came into force, and apply to the area of the Auckland region defined on a map appended to the agreement, which was a significantly more extensive area than that encompassed by the right of first refusal previously proposed in the Ngāti Whātua AIP. The Tāmaki Makaurau Collective right of first refusal area extends from the mouth of the Waikato River on the west coast, northwards beyond the Waitakere ranges and to the east extends from Miranda on the Thames coast to the North encompassing Waiheke and other islands of the Gulf.

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[10] The maunga being: Maungakiekie (One Tree Hill); Maungawhau (Mt. Eden); Puketapapa/Pukewiwi (Mt.Roskill); Te Kopuke (Mt. St John); Maungarei (Mt. Wellington); Takarunga (Mt. Victoria); Otahuhu (Mt. Richmond); Te Pane o Mataoho/Te Ara Pueru (Mangere Mountain); Ohuiarangi (Pigeon Mountain); Ohinerau (Mt. Hobson); and Te Tatua a Riukiuta (Big King).

[29] At the same time Ngāti Whātua Ōrākei also renegotiated its original AIP, leading to the execution of a supplementary agreement (the Supplementary Agreement). This is also dated February 2010.

[30] The recitals to the Supplementary Agreement state:

> On 9 June 2006, the Crown and the Trust Board entered into an Agreement in Principle (the AIP) for the settlement of Historical Claims of Ngāti Whātua o Ōrākei.
>
> Since then there has been a report of the Waitangi Tribunal dated 12 June 2007 being a report on Urgent Inquiry named the Tāmaki Makaurau Settlement Process Report.
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> Both before and after the said Waitangi Tribunal Report, the Trust Board and the Crown have been in discussions with other iwi and hapū groups who claim interests in the Auckland area. Most recently those discussions have been facilitated by Sir Douglas Graham.
>
> The Trust Board and the Crown are now in agreement as to how the AIP might be modified to enable negotiations to be concluded through a Deed of Settlement and, subsequently for appropriate legislation to be passed in the New Zealand Parliament.

[31] The Supplementary Agreement provided for the deletion of the right of first refusal provisions as contained in the original AIP, and stipulated that the provisions of the Framework Agreement now provided redress relating to the right of first refusal redress. Other provisions deleted the map attached to the original AIP defining the right of first refusal area, and the definition of the specified area pertaining to the right of first refusal.

[32] Also removed from the AIP were the clauses providing for the Crown to vest Maungakiekie, Maungawhau, and Puketapapa in Ngāti Whātua's ownership as cultural redress properties. The Supplementary Agreement stated that the provisions of the Framework Agreement provided Ngāti Whātua with cultural redress relating to the maunga.

[33] The Supplementary Agreement was signed for and on behalf of the Crown by the Minister for Treaty of Waitangi Negotiations, and by the Minister of Māori Affairs. For Ngāti Whātua the agreement was signed by the Chairperson of the Ngāti

Whātua o Ōrākei Trust Board; the Deputy Chairperson and other trustees of the Trust Board.

[34] The formation and execution of the Framework Agreement and the Supplementary Agreement evidenced the carrying into effect of the recommendations made in the Graham Report. Relevantly and significantly, Ngāti Whātua had joined with other iwi of Tāmaki Makaurau to seek collective redress so far as the Auckland isthmus maunga were concerned, and by way of a collective interest in a new right of first refusal over core Crown land located in the Auckland region. To become involved and participate as a member of the collective group of iwi comprising the Tāmaki Makaurau Collective, Ngāti Whātua had agreed with the Crown to remove and delete the terms of the AIP which were otherwise intended to provide for it having an exclusive right of first refusal over a large part of central Auckland, and exclusive ownership of the three maunga. The other terms of the AIP remained in effect and required the Crown and Ngāti Whātua to proceed to settle the plaintiff's historical claims by entering into a deed of settlement.

Ngāti Whātua o Ōrākei and Ngāti Whātua o Ōrākei Trustee Limited Deed of Settlement of Historical Claims

[35] By a Deed of Settlement dated 5 November 2011 the Crown and Ngāti Whātua set out the terms upon which Ngāti Whātua's historical claims were to be resolved. The agreement set out in the deed was expressed to be final, and conditional upon settlement legislation coming into force.

[36] The Deed of Settlement referred to the original AIP of June 2006 and to the Supplementary Agreement in the following terms:

> The Board and the Crown –
>
> by agreement dated 9 June 2006, agreed, in principle, that Ngāti Whātua Ōrākei (then known as Ngāti Whātua o Ōrākei) and the Crown were willing to enter into a deed of settlement on the basis set out in the agreement; and
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> by supplementary agreement dated 12 February 2010, agreed in principle, how the agreement dated 9 June 2006 should be amended to reflect the negotiations that took place after the Waitangi Tribunal's Tāmaki Makaurau Settlement Process Report; and …

[37] And further provided that:

> …the parties - in a spirit of co-operation and compromise, wish to enter, in good faith, into this deed settling the historical claims; and agree and acknowledge as provided in this deed.

[38] The Deed of Settlement contained an apology by the Crown to Ngāti Whātua for not having honoured its obligations to the iwi under the Treaty, and stated that by means of the settlement the Crown would seek to begin the process of repairing its relationship with Ngāti Whātua.

[39] Under a heading entitled "Acknowledgements" the Deed of Settlement provides:

> 4.1 Each party acknowledges that –
>
> 4.1.1 the other parties have acted honourably and reasonably in relation to the settlement; but
>
> 4.1.2 full compensation of Ngāti Whātua Ōrākei is not possible; and
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> 4.1.3 Ngāti Whātua Ōrākei intend their foregoing of full compensation to contribute to New Zealand's development; and
>
> 4.1.4 the settlement is intended to enhance the ongoing relationship between Ngāti Whātua Ōrākei and the Crown (in terms of Treaty of Waitangi, its principles, and otherwise).
>
> 4.2 Ngāti Whātua Ōrākei acknowledges that, taking all matters into consideration (some of which are specified in clause 4.1), the settlement is fair in the circumstances.
>
> **SETTLEMENT**
>
> 4.3 Therefore, on and from the settlement date, -
>
> 4.3.1 the historical claims are settled; and
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> 4.3.2 the Crown is released and discharged from all obligations and liabilities in respect of the historical claims; and
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> 4.3.3. the settlement is final.
>
> 4.4 Except as provided in this deed or the settlement legislation, the parties' rights and obligations remain unaffected.

[40] The right of first refusal was provided for as follows:

> Ngāti Whātua Ōrākei and the Crown acknowledge that a right of first refusal over land in Tāmaki Makaurau will be provided in the Tāmaki Makaurau collective deed in accordance with clauses 4.8 to 4.13.

[41] The clauses of the Deed at 4.8 to 4.13 referred to above contained an acknowledgement by Ngāti Whātua that cultural redress relating to the maunga on the Auckland isthmus, and commercial redress by means of a right of first refusal over land in Tāmaki Makaurau, were provided for and contained in the Tāmaki Makaurau collective deed and Framework Agreement.

[42] The Deed also provided for the terms of the Deed and settlement set out therein to be conditional on settlement legislation coming into force and stated that within 12 months of the date of the deed the Crown was required to propose a draft settlement bill for introduction to the House of Representatives. The effect of the deed was also stipulated within its terms. Paragraph 7.7 provided that the deed is "without prejudice" until it becomes unconditional, being a reference to the settlement legislation contained in paragraph 7.4 coming into force.

The Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed

[43] The following year in September 2012, the Crown entered into a Collective Redress Deed (the Collective Deed), with the Tāmaki Makaurau Collective.

[44] The effect of the Collective Deed was expressly set out:

> This deed does not settle any of the historical claims of the iwi and hapū of Ngā Mana Whenua o Tāmaki Makaurau.
>
> This deed provides collective Treaty redress for historical claims in respect of the shared interests of the iwi and hapū of Ngā Mana Whenua o Tāmaki Makaurau. The iwi and hapū of Ngā Mana Whenua o Tāmaki Makaurau acknowledge that the redress under this deed will be part of each iwi and hapū Treaty settlement.

[45] Prior to execution of the Collective Deed, a process of ratification of its terms had been undertaken, whereby each iwi comprising the Tāmaki Makaurau Collective, had ratified the deed and approved its signing on their behalf by specified mandated signatories. The Collective Deed contains a schedule setting out details of each iwi's ratification and the percentage of support for the deed by members of each

iwi. In the case of Ngāti Whātua the Collective Deed records that 97 per cent of members voted in favour of ratifying the deed. All other iwi had voted to show similarly high levels of support for the deed.

[46] The Collective Deed:

(a) Was expressed to be conditional on the Tāmaki Makaurau Collective legislation coming into force.

(b) Required the Tāmaki Makaurau Collective to establish the legal entities necessary for the implementation of the terms of the deed and performance of responsibilities under the intended legislation.

(c) Recorded the Crown's intention to enact legislation to give effect to the terms of the deed, and to establish a statutory authority (the Maunga Authority), including representatives of Ngāti Whātua, the Marutūāhu Collective, and other iwi representatives and members appointed by the Auckland Council to manage and administer the maunga.

(d) Provided for the vesting of the twelve specified maunga located in Tāmaki Makaurau into the ownership of the Tāmaki Makaurau Collective, and the terms upon which the maunga would be held and managed for the common benefit of iwi and hapū of the Collective and the other people of Auckland.

(e) Recorded the intention of the Crown to enact legislation to vest four motu[11] (islands) of the Hauraki Gulf into the ownership of the Tāmaki Makaurau Collective, following which they would be vested back in the Crown by the Tāmaki Makaurau Collective to be held for the benefit of the people of New Zealand. The deed also provided for the co-governance of the motu, preparation of a conservation management plan, and membership by representatives of the Tāmaki

[11] Motuihe Island, Motutapu Island, Rangitoto Island, and Tiritiri Matangi Island.

Makaurau Collective on a conservation board with jurisdiction over and including the inner islands of the Hauraki Gulf.

(f) Set out the terms of a right of first refusal to purchase Crown-owned properties to be granted by the Crown to the Tāmaki Makaurau Collective over Crown owned properties located in the Auckland region, for a term of one hundred and seventy two years.

[47] However, some Crown owned land was expressly excluded from the ambit of the right of first refusal. The Collective Deed provided:

> The iwi and hapū of Ngā Mana Whenua o Tāmaki Makaurau record their agreement that the RFR is not to apply to any land (including a cultural redress property or land used for financial and commercial redress) that is required for the settling of historical claims under the Treaty of Waitangi, being those relating to acts or omissions of the Crown before 21 September 1991.
>
> To give effect to that agreement, the Tāmaki Makaurau collective legislation will, as provided by section 119 of the draft bill,[12] provide for the removal of any land required for another treaty settlement.

The Ngāti Whātua Ōrākei Claim Settlement Act 2012

[48] The legislation required to give effect to the agreement recorded in the Deed of Settlement entered into between Ngāti Whātua and the Crown was enacted as the Ngāti Whātua Ōrākei Claims Settlement Act 2012 (the Ngāti Whātua Settlement Act), and received Royal Assent on 19 November 2012. Its purpose as described in s 3 is, "to give effect to certain provisions of the deed of settlement, which is a deed that settles the historical claims of Ngāti Whātua Ōrākei".

[49] The Ngāti Whātua Settlement Act provided that Ngāti Whātua's historical claims brought against the Crown were settled, and that the settlement was final, with the Crown being released and discharged from all obligations and liabilities in respect of those claims.[13]

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12 Note: s 119 of the draft bill, was enacted as s 120 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2104.

13 Ngāti Whātua Ōrākei Claims Settlement Act 2012, s 13.

[50] The Act recognised that the Crown was not prevented from providing similar redress to persons other than Ngāti Whātua.[14]

The Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014

[51] The legislation to give effect to the terms and agreement set out in the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed, was enacted as the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Collective Redress Act).

[52] The purpose of the Collective Redress Act as set out in s 3 is:

> The purpose of this Act is to give effect to certain provisions of the collective deed, which provides shared redress to the iwi and hapū constituting Ngā Mana Whenua o Tāmaki Makaurau, including by −
>
> (a) restoring ownership of certain maunga and motu of Tāmaki Makaurau to the iwi and hapū, the maunga and motu being treasured sources of mana to the iwi and hapū; and
>
> (b) providing mechanisms by which the iwi and hapū may exercise mana whenua and kaitiakitanga over the maunga and motu; and
>
> (c) providing a right of first refusal regime in respect of certain land of Tāmaki Makaurau to enable those iwi and hapū to build an economic base for their members.

[53] The Collective Redress Act sets out the terms on which the Crown will provide cultural and commercial redress to the Collective, and to the legal entities it established to carry out functions on its behalf. The cultural redress sections of the Act provide for the vesting of maunga in the ownership of the Collective and for participation in management of the maunga by a Maunga Authority with members comprising representatives of iwi, including Ngāti Whātua.

[54] Part 4 of the Act contains the provisions dealing with the Crown making commercial redress and granting to the collective a right of first refusal for the purchase of Crown owned land within the "RFR area" being the area of Auckland delineated on a plan annexed to the Collective Deed.

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[14] Ngāti Whātua Ōrākei Claims Settlement Act 2012, s 19.

[55] The meaning of RFR land is defined in s 118 of the Act. The circumstances wherein land which would otherwise be RFR land will cease to be, are set out in s118(2)(d) which provides that land will cease to be RFR land if:

> (d) for RFR land required for another Treaty settlement, notice is given for the land under section 120.

[56] Section 120 of the Act provides:

> **Land required for another Treaty settlement ceasing to be RFR land**
>
> (1) The Minister for Treaty of Waitangi Negotiations must, for RFR land required for another Treaty settlement, give notice to both the RFR landowner and the Limited Partnership that the land ceases to be RFR land.
>
> (2) The notice may be given at any time before a contract is formed under section 127 for the disposal of the land.
>
> (3) In this section, RFR land required for another Treaty settlement means RFR land that is to be vested or transferred as part of the settling of historical claims under the Treaty of Waitangi, being historical claims relating to acts or omissions of the Crown before 21 September 1992.

Crown settlements with other iwi

Ngāti Paoa

[57] By a document entitled, "Agreement in Principle Equivalent" (AIPE) dated July 2011, Ngāti Paoa and the Crown recorded the terms upon which the Crown would provide redress for historical Treaty claims of Ngāti Paoa. The AIPE noted that Ngāti Paoa was also a party to both the Hauraki Collective Framework Agreement and the Tāmaki Collective Framework Agreement. The AIPE also stated that the redress provided to Ngāti Paoa via the various iwi specific and collective settlements would together settle the historical Treaty of Waitangi claims of Ngāti Paoa. The agreement provided for cultural, financial and commercial redress to be provided to Ngāti Paoa either as part of the collective or to Ngāti Paoa specifically. As regards commercial redress, the agreement recorded Ngāti Paoa seeking the right to purchase eight properties including the properties in Dominion Road and Grafton Road (the Ngāti Paoa properties) which are located within the area described above as the Ngāti Whātua 1840 Transfer land. The agreement provided for the preparation

of a deed of settlement and was expressed to be non-binding and not creating any legal relations, with the final settlement to be conditional on the approval of Cabinet.

[58] Significantly, the AIPE does not contain any provision making the terms of settlement subject to the enactment of legislation to give effect to the agreed terms, although Cabinet's approval was to be sought to enable Ngāti Paoa to proceed to purchase the commercial redress properties prior to the finalisation and execution of their deed of settlement.

Marutūāhu Iwi

[59] On 17 May 2013 the Marutūāhu Iwi and the Crown signed the Record of Agreement in relation to Marutūāhu Iwi Collective Redress (the Marutūāhu RoA). The RoA provided for the execution of a deed of settlement to incorporate the agreed terms, which would provide that settlement was to be conditional on settlement legislation coming into force. The agreement provided for the Crown to provide commercial redress by way of the opportunity to purchase a number of commercial properties also located within the central Auckland area, and which were also located within the area of the Ngāti Whātua 1840 Transfer land.

First challenged decision : the Minister's preliminary decision - 17 August 2015 (the Ngāti Paoa preliminary decision)

[60] The plaintiff seeks judicial review of the Minister's decision made on 17 August 2015 as regards the Crown settlement with Ngāti Paoa, which the Minister described in his correspondence with the plaintiff's representatives as being a preliminary decision as regards proposed redress for Ngāti Paoa.

[61] In his affidavit the Minister has set out the background and context of the preliminary decision. On 6 July 2015, Cabinet agreed to transfer up to 17 properties to the Ngāti Paoa post-settlement governance entity, prior to any initialling of a deed of settlement, on the basis that the transfer would form part of the Ngāti Paoa Treaty settlement package, and would be subsequently recorded in their deed of settlement.

[62] The Minister's preliminary decision of 17 August 2015 is referred to in two letters of that date. In a letter sent by the Minister to representatives of the second defendant on that date, he referred to having received their account of meeting with Ngāti Whātua, and said:

> Thank you for your engagement in the overlapping claims process with Ngāti Whātua Ōrākei in relation to your redress offer of the opportunity to purchase 71 Grafton Road and 136 Dominion Road and for your letter dated 14 August 2015 updating me on your meeting with Ngāti Whātua Ōrākei.
>
> The redress offer to Ngāti Paoa is based on Ngāti Paoa's historical and contemporary interests, with a view to providing appropriate and fair redress. Based on the information the Crown has received, I have determined that Ngāti Paoa have interests in the central Tāmaki region and accordingly, my preliminary decision is to confirm the redress offer of the opportunity for Ngāti Paoa to purchase 71 Grafton Road and 136 Dominion Road.
>
> Ngāti Whātua Ōrākei have not yet presented any historical or contemporary evidence to suggest that Ngāti Paoa do not have interests in this region, or that this offer of redress is not fair.
>
> I have notified Ngāti Whātua Ōrākei of my preliminary decision and asked them to provide me with any feedback or additional information by Monday 31 August. I intend to make a final decision shortly thereafter.

[63] The Minister also wrote to representatives of Ngāti Whātua on 17 August 2015 to acknowledge having received and considered their expression of concern in relation to the provision of redress for other iwi within Ngāti Whātua's core area of interest. The Minister wrote:

> Notwithstanding that, in relation to Ngāti Paoa, this offer of redress is not guided by the concept of 'layers of interest'. Rather the redress offer is based on considering Ngāti Paoa's historical interests in this region, and providing an appropriate and fair offer of redress. Based on the Information the Crown has received, I have determined that Ngāti Paoa have interests in the central Tāmaki region and accordingly my preliminary decision is to confirm the redress offer of the opportunity for Ngāti Paoa to purchase 71 Grafton Road and 136 Dominion Road.

[64] In this letter the Minister noted that Ngāti Whātua had not thus far presented any historical or contemporary evidence to suggest that Ngāti Paoa did not have interests in the Tāmaki region, and he advised that should they wish him to take any such information into account in making his final decision, they should advise him by 31 August 2015, and that he intended to make his final decision shortly thereafter.

[65] On 26 August 2015, Ngāti Whātua filed proceedings in the High Court at Auckland challenging the Crown's process in dealing with overlapping Treaty claims. The second defendant, Ngāti Paoa, brought an application seeking preliminary and separate determination of the question of whether the Crown's power to alienate land in the central Auckland region was subject to the common law constraints alleged and pleaded by Ngāti Whātua, and generally whether the Crown was required to inquire into and determine Ngāti Whātua's claim to enjoy exclusive mana whenua in the central Auckland region before deciding whether to transfer land to Ngāti Paoa pursuant to a Treaty settlement. The application was heard before Wylie J, who delivered his judgment on 4 March 2016 declining Ngāti Paoa's application.[15]

Second challenged decision: the Minister's revised decision - 8 July 2016[16] (the revised Ngāti Paoa decision)

[66] In his affidavit the Minister explains that having further considered the matter in light of Ngāti Whātua's continued concerns, he revised his preliminary decision, and on 21 May 2016 decided that the Crown should not proceed with any transfer of the properties prior to settlement being reached with Ngāti Paoa, and that it would be for Parliament to enact legislation to give effect to the terms of any settlement reached and to authorise any sale and transfer.

[67] Accordingly, by letter dated 2 June 2016, the Office of Treaty Settlements advised Ngāti Whātua representatives that the Minister had revised his earlier preliminary decision, and now proposed that Ngāti Paoa be given a right to purchase the properties, and that the proposed sale would only be implemented by settlement legislation with any right given to Ngāti Paoa being conferred pursuant to an Act of Parliament. The letter further stated:

> The Crown will not dispose of the properties prior to settlement legislation being enacted, and no legislation will be proposed without a deed of settlement having been entered into with Ngāti Paoa. The Crown will provide Ngāti Whātua Ōrākei with four weeks' notice of any deed initialling.

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15 *Ngāti Whātua Ōrākei Trust v Attorney General* [2016] NZHC 347.

16 As is clear from the relevant correspondence, the actual date of the Minister's decision was 21 May 2016. Although the plaintiff has challenged the Minister's revised decision as being made on 8 July 2016, that was the date upon which the Minister wrote to the plaintiff advising of the decision he had made on 21 May 2016.

> Given the properties will not be alienated from the Crown unless Parliament permits it, the Minister considers he is able to proceed to a final decision on the revised redress proposal.

[68] Then, on 8 July 2016, the Minister again wrote to the Ngāti Whātua representatives advising that he had made a final decision as regards an offer to Ngāti Paoa in relation to the purchase of the Dominion Road and Grafton Road properties. The Minister wrote:

> On 21 May 2016 I revised my preliminary decision. I decided the Crown would not sell the properties. Rather, it would be for Parliament to authorise any transfer and proposed that settlement legislation would provide that Ngāti Paoa be given a right to purchase the properties at settlement date. Given the properties will not be alienated from the Crown prior to settlement date and unless Parliament permits it, I consider I am able to proceed to a final decision on the revised redress proposal. I note the final decision relates simply to the offer of redress: Ngāti Paoa may or may not accept.
>
> I have decided that there are no overlapping claims that prevent further work on reaching an agreement with Ngāti Paoa, to be implemented by legislation. I intend proposing that settlement legislation would constitute a right to purchase the properties at settlement date. I have instructed officials to continue negotiations with Ngāti Paoa and to continue parallel drafting of legislation.

Third challenged decision: Minister's decision regarding the Marutūāhu Collective – 13 May 2016 (the Marutūāhu decision)

[69] On 22 April 2016, the Minister wrote to Ngāti Whātua representatives following Ngāti Whātua engaging with the Crown regarding a Treaty claim by the Marutūāhu Collective relating to one cultural redress property and nine commercial properties located in Tāmaki Makaurau. The Minister wrote:

> You have raised several concerns with me and my officials in relation to the provision of redress for other iwi within your core area of interest. I understand your concerns to be primarily about the 2006 Ngāti Whātua Ōrākei Agreement in Principle exclusive Right of First Refusal area (the "2006 proposed RFR area") and the Crown's application of the "layers of interest" concept as referenced in the 2007 Tāmaki Makaurau Settlement Process Report.
>
> The "2006 proposed RFR area" referred to was rescinded during the Ngāti Whātua Ōrākei settlement negotiations and after consideration of the Waitangi Tribunal's 2007 Tāmaki Makaurau Settlement Process Report.
>
> The 2006 proposed RFR area was not included in the 2010 Ngāti Whātua Ōrākei refined Agreement in Principle or the Ngāti Whātua Ōrākei Deed of Settlement.

> The Crown has not recognised an exclusive area of interest for Ngāti Whātua Ōrākei and has never given undertakings that redress would not be provided to other iwi in this area. This has been communicated to Ngāti Whātua Ōrākei via a memo from the former Chief Crown Negotiator on 27 September 2011 before Ngāti Whātua Ōrākei initialled their deed of settlement. The provision of redress to other iwi was also contemplated in that s120 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 provides for land to be removed from the Tāmaki Collective right of first refusal if required for another Treaty settlement.
>
> I therefore do not consider the "2006 proposed RFR area" excludes the Crown from offering redress to other iwi with interests in the Tāmaki Makaurau region.
>
> As you know, the "layers of interest" concept was a consideration in Ngā Mana Whenua o Tāmaki Makaurau negotiations, focused on the maunga and the area wide RFR, resulting in the Ngā Mana Whenua o Tāmaki Collective Redress Act 2014. For clarity, the offer to Marutūāhu Collective is not guided by the concept of the "layers of interest".
>
> The redress offer is based on consideration of the Marutūāhu Collective's historical interests in Tāmaki Makaurau and providing an appropriate and fair offer of redress. Based on the information the Crown has received, I have determined the Marutūāhu Collective have interests in central Tāmaki Makaurau.
>
> Accordingly my preliminary decision is to confirm the redress offer of one cultural redress property and the opportunity to purchase up to nine commercial properties in Tāmaki Makaurau for the Marutūāhu Collective.

[70] In a further letter to the Ngāti Whātua representatives dated 13 May 2016, the Minister noted that Ngāti Whātua had neither consulted with the Marutūāhu Collective nor provided the Minister with any information to consider in making a final decision. The Minister advised that his final decision was to confirm the redress offer of one cultural redress property and the opportunity to purchase up to nine commercial properties in Tāmaki Makaurau for the Marutūāhu Collective. The Minister wrote:

> My final decision is to confirm the redress offer of one cultural redress property and the opportunity to purchase up to nine commercial properties in Tāmaki Makaurau for the Marutūāhu Collective.

[71] As stated by the Minister in his affidavit, the decisions that he made regarding the proposed Treaty settlement with Ngāti Paoa involving the transfer of the properties at Grafton Rd and Dominion Road, and the proposed settlement with Marutūāhu involving the offer of an opportunity to purchase nine properties and the transfer of one cultural redress property, were not decisions that were themselves

intended by either party to create any legal obligations to effect settlements on those terms. The Minister's decisions were that the terms of the respective settlements were acceptable to the Crown. The decisions were a necessary, but nevertheless preliminary, step in the process leading to the proposing of legislation for the consideration of Parliament, and which if enacted would give legal effect to settlements on those agreed terms.

[72] Although the current application by the defendants seeking an order striking out the proceeding must of course be determined by reference to the facts as pleaded by the plaintiff in its statement of claim, the factual background which I have set out is consistent with both the contents of the statement of claim, and the relevant and available evidence appearing from the affidavits and exhibits filed in connection with the current application. The real dispute between the parties relates to the plaintiff's claim that the Minister was required to consider and apply tikanga and recognise Ngāti Whātua's mana whenua and ahi kā, and to consult with Ngāti Whātua before making any decisions regarding the use of land falling within the 2006 right of first refusal and 1840 transfer land areas.

The Minister explains

[73] The Minister has sworn an affidavit in which he describes the Crown's policy for dealing with concurrent and overlapping Treaty claims when other groups claim interests relating to a settling group's geographic area of interest. The Minister explains that while the Crown prefers any such overlapping claims and disagreements to be settled by negotiation and mutual agreement between the iwi concerned, where agreement cannot be reached, the Crown may have to decide whether the respective claims have been addressed to the point where the Crown is willing to make redress by including land in a settlement. In making such a decision as to whether to offer a particular property or properties as redress, the Minister explains that the Crown is guided by three general principles. They are: the Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations; the Crown's wish to maintain, as much as possible, its capability to provide appropriate redress to other claimant groups in order to achieve a fair settlement of their historical claims; and the Crown's wish to ensure that the redress

offered to the claimant group then engaged in settlement negotiations strikes a balance between the Crown's obligations to that group and its ongoing obligations and relationships with overlapping settled groups.

[74] The overlapping claims policy referred to by the Minister is described in a booklet published by the Office of Treaty Settlements entitled, "Healing the past, building a future". The section headed "Overlapping claims or shared interests" sets out the approach taken by the Crown when confronted with overlapping claims, and includes the following explanation of the policy which is consistent with the Minister's description as set out in his affidavit:

> Addressing overlapping claims is a key issue for settlements, particularly in the North Island where there are many overlapping claims.
>
> The settlement process is not intended to establish or recognise claimant group boundaries. Such matters can only be decided between claimant groups themselves.
>
> …
>
> The Crown can only settle the claims of the group with which it is negotiating, not other groups with overlapping interests. These groups are able to negotiate their own settlements with the Crown. Nor is it intended that the Crown will resolve the question of which claimant group has the predominant interest in a general area. That matter can only be resolved by those groups themselves.
>
> Disagreements relating to overlapping claims may arise from the Crown proposing a particular form of redress, such as the transfer of a site or property to one claimant group to the exclusion of another. Where there are overlapping claims, such exclusive redress may not always be appropriate. Often both groups have an interest, such as historical or cultural associations, in a site or property and these interests can be accommodated by a form of redress which is non-exclusive. This allows the interests of different groups to be recognised and accommodated.
>
> Clearly, the Crown would prefer that disagreements over redress were settled by mutual agreement between claimant groups. However in the absence of agreement amongst them, the Crown may have to make a decision. In reaching such a decision on overlapping claims, the Crown will be guided by two general principles:
>
> - the Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations, and
>
> - the Crown's wish to maintain, as far as possible its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims.

[75] The Minister in his affidavit explains that when assessing whether to use particular property for the purpose of a Treaty settlement, including assessing the impact of overlapping claims, he must consider a range of fiscal matters, such as:

(a) the financial cost of the settlement to the Crown;

(b) the management of the overall financial cost of Treaty settlements more broadly; and

(c) a number of confidential decisions by Cabinet setting policy and financial parameters for particular iwi negotiations in particular areas.

[76] The Minister further explains the Crown approach to the Treaty settlement process as follows:

> The Treaty settlement process is not intended to, and does not, establish or definitively recognise claimant group boundaries according to tikanga. Settlements may recognise areas of interest, but iwi and/or settling groups may have overlapping areas of interest. Most settlements are entered into with "large natural groups" that are not necessarily the same as, or are often a confederation of, traditional groupings. Redress is provided to the post-settlement entity selected by the large natural group. Further, the settlement process does not create or confirm any exclusive status, such as exclusive mana whenua or ahi kā. Such matters can only be decided between claimant groups themselves.
>
> The vesting of a particular site as redress should not be seen as a signal that the Crown is making such a determination. Rather, it is simply a recognition that the Crown accepts that a claimant group has a level of interest that the Crown considers makes the particular grant of redress appropriate in light all other circumstances.
>
> When a settlement involves the transfer of Crown-owned property to the claimant group, the Crown's practice generally is to transfer property that is in the claimant's area of interest and not property that is outside that area of interest. The Crown has sometimes made exceptions to this approach.
>
> In my experience, assessing which redress to use is often a highly political and intensely negotiated aspect of the Treaty settlement process. Treaty negotiations are difficult and quintessentially political processes requiring compromises on all sides. Among other things, proposals have to take into account the location and value of the properties, whether they are being sought for commercial or cultural redress, and the balance of the settlement packages available to each group.

> This is particularly challenging in an area such as Tāmaki Makaurau where there are multiple overlapping claims and interests and a shortage of Crown properties available for use as commercial redress.

[77] In his affidavit the Minister also explains the practice of legislative drafting which is undertaken contemporaneously with the drafting of Treaty settlement deeds. The drafting of legislation to give effect to the terms of a deed, and in parallel with the drafting of a deed, enables both parties to ensure that the draft legislation covers and gives effect to everything in the deed. The Minister says that the practice of parallel drafting was first used in 2008 and is now a standard part of Crown engagement with Māori over Treaty settlements, and assists by reducing delay in addressing historical Treaty grievances. He further explains that the settlement of historical claims in a deed of settlement is ordinarily made and expressed to be conditional on settlement legislation being passed.

[78] While the terms of settlement are for the Crown and the claimant group to agree, it is up to Parliament to ultimately decide whether those terms should be given the force of law. The settlement, and any property transfers for which it provides, becomes effective if, and only if, it is approved by legislation enacted by Parliament.

The strike-out application

[79] On 11 July 2016, the defendants applied to strike out the proceeding in its entirety on the grounds that:

(a) The Crown has made policy decisions that the properties that are the subject of the claim, should be transferred to Ngāti Paoa and Marutūāhu as components of their Treaty settlements, to be given effect by legislation. The Crown does not intend to transfer the properties unless and until those transfers are authorised by Parliament; and

(b) The Crown's policy decisions to include rights for Ngāti Paoa and Marutūāhu to acquire land in a proposed Treaty settlement that will

only be given effect by legislation, are not amenable to judicial review.

[80] The defendants say that in these circumstances the plaintiff's claim seeking judicial review and declaratory relief cannot succeed, and discloses no reasonable cause of action or is frivolous and vexatious.

Principles of strike-out

[81] The application to strike-out is made pursuant to r 15.1 of the High Court Rules which provides that the Court may strike out all or part of a pleading if it:

> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.

[82] There is no major disagreement between the parties in regards to the applicable principles of strikeout which were summarised by the Court of Appeal in *Attorney-General v Prince*:[17]

> (a) the application proceeds on the assumption that the facts pleaded in the statement of claim are true;
>
> (b) before the Court may strike out proceedings, the causes of action must be so clearly untenable that they cannot possibly succeed;
>
> (c) the Court's jurisdiction is to be exercised sparingly, and only in a clear case where the Court is satisfied that it has the requisite material; and
>
> (d) the fact that the application to strike out raises difficult questions of law and requires extensive argument does not preclude jurisdiction.

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[17] *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267-268.

[83] Mr Hodder QC for the plaintiff emphasises that, in novel and developing areas of law, the threshold for granting a strikeout is high, and the applicant bears an onerous task.[18] This is acknowledged by the defendants, however counsel for the second defendant, Mr Goddard QC, refers to the observations of William Young J in *Attorney-General v Body Corporate 200200:*[19]

> On the one hand, the Courts should not lightly deny plaintiffs the opportunity to proceed to trial on novel issues of law… On the other hand, however, defendants ought not to be subjected to the substantial costs, much of which is usually unrecoverable, in defending untenable claims.

[84] This case does involve issues that are novel. The plaintiff says that this is the first judicial review concerning Crown conduct after the settlement of a Treaty claim. Wylie J also recognised the novel nature of the proceedings when considering Ngāti Paoa's interlocutory application.[20] While this is obviously a relevant factor to consider, the fact that a claim involves a novel area of law does not preclude strike-out if the claim is nonetheless clearly untenable.

The defendants' submissions

[85] Counsel for each of the three defendants made separate submissions in support of the strike-out application, while also adopting and relying on the submissions made on behalf of the other defendants, with the first and third defendants substantially adopting and relying on the submissions made on behalf of the second defendant by Mr Goddard. Accordingly, it is expedient to address the submissions of the defendants together.

[86] The strike-out application is advanced on three main grounds. These grounds are not entirely distinct and there is some overlap between them. These grounds are broadly that:

(a) pursuant to the principles of non-interference or comity, the Court will not review the process for developing a proposal which will be put to Parliament;

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18 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].
19 *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA) at [51].
20 *Ngāti Whātua Ōrākei v Attorney General*, above n 15, at [30].

(b) no decision has been made which affects Ngāti Whātua Ōrākei's rights; the transfers will only take effect if legislation is passed; and

(c) the preliminary Ngāti Paoa proposal has been abandoned, and consequently had no possible effect on the plaintiff.

[87] The first ground, based on the principle of non-interference or comity, is central to the application and was the focus of the majority of the parties' submissions and so it is an appropriate place to start. Mr Ward, for the first defendant, submits that general Crown practice is to implement Treaty settlements by the enactment of legislation, to give effect to the terms of settlement contained in a settlement deed. Deeds of settlement themselves usually include draft legislation that the Crown proposes to put before Parliament, so that the parties are clear as to what is to be submitted for Parliament's consideration. Therefore, while the negotiated terms of settlement are set out and contained in a settlement deed, the settlement is expressly conditional on the passing of legislation giving effect to the terms of the deed, and it is the enacted legislation that actually settles the claim.

[88] In his submissions, Mr Ward notes that the Crown is currently in negotiations with a number of iwi that claim interests in the central Auckland area. A critical part of any Treaty settlement is the negotiation of the particular redress to be provided by the Crown to the claimant group. Where the redress includes the transfer of property, the Crown's strong preference is to use Crown properties located within the settling group's geographic area of interest, whilst recognising that such areas of interest are often the subject of other competing and overlapping claims. When making a decision to offer redress to settle a claim by way of the transfer of property located in areas subject to overlapping claims, rather than attempting to resolve the competing claims, the Crown makes the decision based on fiscal and political considerations and subject to the enactment of legislation to give effect to the proposed terms of settlement.

[89] Mr Ward submits that Ngāti Whātua Ōrākei's claim invites the Court to directly involve itself in what are political and legislative matters, by having the Court declare the procedural and substantive steps the executive must take when

developing proposed legislation. He submits this would be contrary to the principle of comity. Mr Ward describes the principle as "… a constitutional principle of mutual non-interference between the judicial and the legislative branches of government … which extends to policy development processes that are preliminary to the introduction of legislation."

[90] Mr Ward says that it is a fundamental constitutional principle, based on the principle of Parliamentary sovereignty, that the courts will not review the development of Government policy preparatory to the introduction of legislation. The Executive and any citizen should be free to put any proposal to Parliament, which has its own mechanisms for dealing with matters placed before it. He further submits that the Executive is able to enact legislation that: authorises something that it currently unlawful; or retrospectively renders lawful some action or matter that was unlawful.[21]

[91] Mr Ward relies on the description of the principle as stated by Cooke P in *Te Runanga o Wharekauri Rekohu v Attorney-General* as authority for the proposition that Ministers must be free to decide what they will invite the House to consider and, he submits that the principle of comity must extend and apply to the policy development process including introductory or preliminary matters involved in preparations for the passing of legislation.[22]

[92] That case, often for convenience referred to as *Sealords*, centred on a deed entered into by representatives of certain iwi on one hand and Crown representatives on the other. The deed, in essence, provided that the Crown was to provide Māori with capital to participate in a joint venture to purchase Sealord Products Limited. In return, Māori would agree to withdraw all existing litigation and support the repeal of all legislative references to Māori fishing rights and interests. The proceeding was brought by representatives of other iwi and Māori groups who opposed the deed, and whose major complaint was that the deed purported to be a deed of settlement on

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21 *New Plymouth District Council v Waitara Leaseholders Association Inc* [2007] NZCA 80, (2007) 2 NZTR 17-005 at [63] and [64]; *Comalco Power (New Zealand) Ltd v Attorney-General* [2003] NZAR 1 (HC).

22 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General [Sealords]* [1993] 2 NZLR 301 at 308 (CA).

behalf of Māori generally. In the High Court, Heron J declined applications for interim relief and for strike out.[23] On appeal, the Court of Appeal described the principle of non-interference:[24]

> There is an established principle of non-interference by the Courts in Parliamentary proceedings. Its exact scope and qualifications are open to debate, as is its exact basis. Sometimes it is put as a matter of jurisdiction, but more often it has been seen as a rule of practice. [authorities omitted] However it be precisely formulated and whatever its limits, we cannot doubt that it applies so as to require the Courts to refrain from prohibiting a Minister from introducing a Bill into Parliament.
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> As held in *Eastgate*, the proper time for challenging an Act of a representative legislature, if there are any relevant limitations, is after the enactment.

[93] The Court of Appeal considered that the principle was a corollary of the principle that a right to freedom of expression in public and political affairs necessarily exists in a system of representative government. Pursuant to that principle, a Minister cannot be judicially prevented from presenting (or be compelled to present) a measure for consideration to a representative assembly. The Court then stated:[25]

> The point that does matter, in our opinion, is that public policy requires that the representative chamber of Parliament should be free to determine, what it will or will not allow to be put before it. Correspondingly Ministers of the Crown must remain free to determine, according to their view of the public interest, what they will invite the House to consider.
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> ….
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> Parliament is free to enact legislation on the lines envisaged in the deed or otherwise. Whether or not it would be wise to do so and whether there is a sufficient "mandate" for any such legislation are political questions for political judgment. The Court is not concerned with such questions.

[94] Mr Hodder for the plaintiff submits that the principle of comity and its applicability in the present case have been misconstrued by the defendants. He submits that the concept of a non-justiciable policy decision is used in contrast to, and to distinguish, decisions that may be determined having regard to their legality,

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23 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* HC Wellington, CP682/92, 12 October 1992.

24 At 307-308.

25 At 309.

and resolved by reference to a "legal yardstick".[26] Mr Hodder says that the *Sealords* case relates to the concept of non-justiciable policy decisions, and that category of decision is most evident in relation to "political questions for political judgment" such as the wisdom of enacting or not, any particular piece of legislation.

[95] The case of *Curtis v Minister of Defence*, involved a challenge by a number of concerned citizens to a decision by the Minister of Defence to disband the air combat force of the Royal New Zealand Air Force. The plaintiffs sought a declaration that the Minister had exceeded his legal powers as vested in him under s 7 of the Defence Act 1990 to control the New Zealand Defence Force. The Court of Appeal in its judgment delivered by Tipping J said: [27]

> There is no need to cite extensively from authority to support the proposition that decisions of the Executive government, here the Minister of Defence under s 7 of the [Defence] Act, concerning the manner in which and the extent to which the armed forces are to be equipped, deployed and controlled, are not matters into which the Courts will generally go. The touchstone for judicial intervention will always be lawfulness. In making the kind of decisions now under discussion, those concerned must act lawfully but this means that the decision must be susceptible of assessment in terms of legality before the Courts can become involved.
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> …
>
> A non-justiciable issue is one in respect of which there is no satisfactory legal yardstick by which the issue can be resolved. That situation will often arise in cases into which it is also constitutionally inappropriate for the Courts to embark.

[96] In *Comalco Power (New Zealand) Ltd v Attorney-General* the plaintiffs sought declarations, including that any act on the part of the Crown introducing legislation which would directly or indirectly prevent the Crown from performing its contractual obligations, would constitute an actionable breach of contract.[28] The plaintiffs were parties to or claimed benefits under, two supply contracts for the sale of electricity by the Government for the purposes of operating an aluminium smelter. The Crown sought to change the price component of the agreement, but was unable to obtain the consent of the other parties as required by the terms of the contract. Two Ministers then made statements to the effect that if the price increase proposed

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26 See *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [27].
27 At [23] – [27].
28 *Comalco Power (New Zealand) Ltd v Attorney-General* [2003] NZAR 1 (HC).

could not be achieved by way of agreement, it would be obtained and imposed by the enactment of legislation. Heron J struck out the proceedings, concluding that:[29]

> … it is a matter of irresistible logic, that if the ultimate Act is in all respects lawful and beyond reach of [the] Courts then steps taken to reach that objective must likewise be protected. I uphold the Crown's submission that introductory or preliminary matters going to the passing of legislation are as protected as the legislation itself.

[97] *Comalco* was followed by McGechan J in *Westco Lagan v Attorney-General*,[30] and later discussed by the Court of Appeal in *Milroy v Attorney-General*.[31] In the latter case, the Crown had entered into an agreement with Ngāti Awa for the settlement of claims which had been found by the Waitangi Tribunal to be made out. The agreement required the transfer, in accordance with legislation proposed to be introduced and enacted, of certain Crown forest land to Ngāti Awa. Tūhoe was a cross-claimant to the land, and the Tūhoe plaintiffs brought the proceedings to challenge the transfer being implemented prior to the Tūhoe claim before the Waitangi Tribunal was determined. They said that if the land was transferred, it would no longer be available to be returned to Tūhoe in the event of a recommendation to that effect being made by the Tribunal, and that such a transfer would be inconsistent with two agreements entered into between the Crown and Māori given effect to by the Crown Forests Assets Act 1989. In *Milroy*, as in the present case, the settlement would only be given effect and the transfer proceeded with if the proposed legislation was passed. The plaintiff's claim was dismissed in the High Court by Goddard J who held that neither the Minister's decision nor Cabinet approval of that decision were reviewable. Counsel for the appellants before the Court of Appeal acknowledged that the legislation proposed to implement the policy was not reviewable and framed the case as being a challenge to the lawfulness of the advice that had been given by officials to the Minister. The Tūhoe appellants argued that the advice of the officials upon which the Minister had relied when making the challenged decision, was incomplete, inaccurate, and failed to address all relevant considerations. The Court of Appeal in its judgment delivered by Gault P, discussed and applied the non-interference principle, stating:[32]

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29 At 15.
30 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [29].
31 *Milroy v Attorney-General* [2005] NZAR 562 (CA).
32 At [11].

> In reality the argument outlined represents an attempt to draw the Court into an examination of the accuracy and completeness of the advice of officials in the course of the formulation of government policy even though no rights are affected by the advice. This would take the Courts into the very heart of the policy formation process of government. We were not referred to any authority for such a course. It was submitted that in the overall process of settling Treaty claims the advice given by officials has the potential to affect rights.
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> …
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> However, counsel was driven to accept that the provision of the advice in issue does not affect the rights of any persons or even have the potential to do so. It is the resulting legislation and Executive acts in accordance with it that will have that impact.

[98] The Court of Appeal also referred to its earlier *Sealords* decision, and noted that the circumstances of that case were indistinguishable in principle from those presented by the case before it, saying: [33]

> The advice of officials is a mere preliminary having no legal effect; *New Zealand Maori Council v Attorney General* [1996] 3 NZLR 140 at p160. The formulation of government policy preparatory to the introduction of legislation is not to be fettered by judicial review. The position can be no different merely because government or Crown actions pursuant to legislation, when passed, would be contrary to law without that legislation.

[99] Counsel for the Tūhoe appellants submitted that there must be cases in the Treaty process where the Courts should intervene, but was unable to identify any legal principle by which to distinguish between policy formulation that would be reviewable and that which would not. The appellants' counsel proposed a test for when the Court should intervene based on, "remoteness from the processes of Parliament – the closer to the introduction of legislation the more reluctant the Courts would be to intervene.[34] The Court of Appeal disagreed:[35]

> Such an approach is unacceptably vague and is not supported by authority. It would blur the boundaries between the role of the Executive government and that of the Courts. It would invite curial review of research, advice and opinion for which no objective justiciable guidelines are available. As this Court said in *Curtis v Minister of Defence* [2002] 2 NZLR 744, at para [27]:
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> > A non-justiciable issue is one in respect of which there is no satisfactory legal yardstick by which the issue can be resolved. That situation will often arise in cases into which it

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33 At [14].
34 At [15].
35 At [16].

> is also constitutionally inappropriate for the Courts to embark.
>
> The established test is not by reference to remoteness in time or evolution but by function. The formulation of legislative proposals is part of the business of government.
>
> The importance of the process for addressing claims in respect of breaches of the Treaty is fully recognised. Where that involves the exercise by the Executive of statutory or prerogative powers, lawfulness can be challenged on established grounds for judicial review. But where the action challenged does not itself affect the rights of any persons and is undertaken in the course of policy formulation preparatory to the introduction to Parliament of legislation, the Courts will not intervene. Proposed legislative conduct of the Crown said to depart from a previous stance and to be inconsistent with Treaty rights may be within the jurisdiction of the Waitangi Tribunal and may be the subject of representations to the Select Committees of Parliament. But, as Goddard J said, the Courts cannot help.

[100] *Milroy* and *Sealords* were followed by the Court of Appeal in *New Zealand Māori Council v Attorney-General* in which the New Zealand Māori Council and the Federation of Māori authorities, claimed that the Crown had breached its obligations to Māori claimants by entering into a deed of settlement of Treaty claims with groups associated with Te Arawa. [36] The plaintiffs sought declarations to the effect that: the proposed land transfer was inconsistent with the Crown's fiduciary duty; was in breach of the Crown's contractual obligations; and its statutory duties, and argued that the matter was justiciable. The Court of Appeal said:[37]

> [Counsel] sought to distinguish *Milroy* on the basis that it was a judicial review action, unlike the present case which relied on either the direct enforceability of the Treaty or a breach of the July 1989 agreement and the 1989 Act. We accept that *Milroy* was an action for judicial review unlike the present case, but the key finding of the Court in *Milroy* is that the Courts will not interfere with actions of the Executive which are preparatory to the introduction of legislation. …
>
> If the legislation is passed, therefore, what is proposed in Part 12 [of the settlement deed] will be lawful. If the legislation is not passed, what is proposed in Part 12 will not happen. Either way, there is no action or proposed action of the Crown, other than the introduction of the legislation which could be the subject of a declaration. And as both the *Sealords* case and *Milroy* establish, the courts will not grant relief which interferes or impacts on actions of the Executive preparatory to the introduction of a Bill to Parliament, because to do so would be to intrude into the domain of Parliament.
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> ….

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36 *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 (CA).

37 At [57], [60] and [83].

> The third declaration sought by the appellants is to the effect that the issues arising from the settlement deed are justiciable. We can deal with this briefly. We are unable to give such a declaration because in our view it does not correctly state the law. The position is, as noted at para [60] above, that stated in the decisions of this Court in the *Sealords* case and *Milroy*. The settlement deed in this case is in the nature of a political compact, as were those in issue in the *Sealords* case and *Milroy*. The obligation of the Crown to introduce a Bill to give effect to the proposed settlement is an Executive act so closely tied to the parliamentary process that it would breach what Cooke P called the "established principle of non-interference by the Courts in parliamentary proceedings" if the Court were to issue a declaration that had the effect of deterring the introduction of the Bill. The combination of this principle and the essentially political nature of the settlement deed means that the issues relating to the settlement deed are not justiciable.

[101] On the basis of these authorities, the defendants submit that the principle of comity is engaged as a matter of function and substance rather than timing. Mr Ward argues that the declarations sought by Ngāti Whātua Ōrākei would require the Court to be drawn into conflict with the elected branches of Parliament over whether and how the Executive should consider and propose legislation. He argues that the effect of the declarations sought by the plaintiff would be to constrain the way in which Ministers may draft proposals to put to Parliament. He notes that Ngāti Whātua Ōrākei has attempted to frame the declarations in relation to the Crown's overlapping claims policy in an attempt to avoid the non-interference principle, but, he submits, that approach makes no difference. The overlapping claims policy is part of the policy process of determining what Ministers may decide to include in draft legislation.

[102] Mr Ward further submits that Ngāti Whātua Ōrākei's claim cannot succeed as its rights have not yet been affected and will only be affected if Parliament passes the settlement legislation. He submits that although the Crown considers that its process and proposals are lawful and sound, even if they were not, Parliament would nonetheless be entitled to change the law in a manner contrary to Ngāti Whātua Ōrākei's tikanga or contrary to any other rights, interests or legal obligations if it chose to do so.

[103] Counsel for Ngāti Paoa, Mr Goddard QC, also submits that the process of settling overlapping claims is a difficult and essentially political question involving balancing the interests of settling groups and cross-claimants against the backdrop of

finite resources and political pressure to achieve settlement with many claimants in as short a period as possible.

[104] Mr Goddard correctly says that judicial review is concerned with the lawful exercise of public powers, citing *Ririnui v Landcorp Farming Ltd*,[38] and submits that the decisions challenged by the plaintiff did not involve the exercise of a public power or powers as they were merely planning or preparatory decisions affecting the contents of proposed legislation. They were decisions that were not intended or indeed capable of affecting Ngāti Whātua's interests without the enactment of legislation. So, says Mr Goddard, preliminary decisions as to what land was to be used for the proposed settlement with Ngāti Paoa, and consequently which land would be referred to in the proposed legislation were clearly not decisions made pursuant to the exercise of a public power. He submits that even if it would be unlawful to decide to transfer the properties in the absence of such legislation, it is not unlawful (and therefore must be lawful), for the Minister to first decide that it would be in the public interest to transfer certain properties if authorising legislation was enacted.

[105] Mr Goddard also referred to the Supreme Court's comments when dismissing an application for leave to appeal in the *Waitara Lease Holders Association* case as an example of the Courts' recognition of the supremacy of Parliament and ability to legislate to authorise that which otherwise be unlawful. [39] The Supreme Court said:[40]

> …there is a fundamental difficulty with the proposed appeal which means that it could not succeed. That difficulty faced by the applicant is that it would be a term of the contract with the Crown that the land would not be transferred by the Council to the Crown until authorising legislation has been passed by Parliament. Even if the land were held upon trust in the way claimed by the applicant, contrary to the view of the Court of Appeal, it would always be open to the Council to approach Parliament for legislation authorising a departure from the terms of the trust. It therefore cannot possibly be unlawful for the Council to resolve to enter into a contract with the Crown which is subject to the passage of legislation of that kind.

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38 *Ririnui v Landcorp* [2016] NZSC 62, [2016] 1 NZLR 1056.

39 *Waitara Leaseholders Association Inc v New Plymouth District Council* [2007] NZSC 44, (2007) 2 NZTR 17-011.

40 At [2].

Plaintiff's submissions

[106] Mr Hodder for Ngāti Whātua Ōrākei does not take issue with the principle of comity, but submits that it is not relevant to this case and that every case turns on its own context and complexities as stated in *Sealords*. He submits that the defendants' strikeout application seeks to expand the settled principle of non-interference with Ministerial conduct within or immediately prior to Parliamentary process.

[107] He submits that it cannot be the case that Ministerial mention of the possibility of legislation means that Ministerial decision making is thereby immunised from review, and further says that the fact that the context is a Treaty settlement similarly does not render the decision making immune from review. He submits that where existing rights and interests are affected, and the relevant considerations are not limited to policy, political and other areas within the particular province of the executive branch of government, the decision making is, in principle, amenable to judicial review.

[108] Mr Hodder says that in this proceeding the plaintiff seeks declarations and thereby clarification of the legal relationship between Ngāti Whātua and the Crown. In particular the plaintiff seeks declarations to the effect that: the Crown is meaningfully committed to conducting itself consistently with a relationship of mutual trust, co-operation and respect for the Treaty of Waitangi and its principles; that the Crown has failed to do so by disregarding tikanga relating to the land within Ngāti Whātua's primary area of interest before making decisions to transfer certain parcels of land within that area to the second and third defendants.

[109] In this context, Mr Hodder also refers to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP),[41] and the Canadian Supreme Court case of *Haida Nation v British Columbia (Minister of Forests).*[42] In *Haida,* the Haida people had for a century claimed title to their traditional homeland, which comprised two main islands and a number of smaller islands located to the west of the mainland of British Columbia, and to the waters surrounding it, but their title had never been legally

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41 *The United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007), arts 8, 11, 18, 19, 37, and 43.

42 *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511.

recognised. They challenged decisions made by the Province of British Columbia Minister of Forests to grant the replacement of a licence to cut trees on the Haida homeland, and to subsequently transfer the licence to a corporation. The Haida people challenged the Minister's decisions as being made without their consent and without prior consultation with them. At issue was whether the provincial government owed a duty to the Haida people, and specifically whether it owed a duty to consult with them about decisions to harvest the forests, and to accommodate their concerns about what should be harvested, before they had proven their title to the land and their Aboriginal rights. Mr Hodder refers to the Supreme Court's finding that the source of the government's duty to consult with the Haida people is grounded in the honour of the Crown, which applies in all dealings with Aboriginal peoples, and which gives rise to different duties in different circumstances. Mr Hodder submits that the concept of the honour of the Crown applies in the present case and provides support for the plaintiff's proposition that the Crown in the present case was required to consult with Ngāti Whātua before embarking on any arrangements with other iwi that would result in the transfer of land to them.

[110] Mr Hodder also relies on the provisions of the UNDRIP declaration, and specifically to art 19 dealing with consultation and co-operation in good faith prior to implementing legislation or administrative measures that may affect them, and to art 37 which provides that indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements. It is appropriate to recognise however, as noted by Mr Ward in his submissions, that when announcing New Zealand's support for the UN Declaration, the Minister for Maori Affairs said that where the declaration sets out aspirations for rights to and restitution of traditionally held land and resources, New Zealand has, through its well established processes for resolving Treaty claims, developed its own distinct approach. Mr Ward referred to the Minister's statement as including: [43]

> In moving to support the Declaration, New Zealand both affirms those rights and reaffirms the legal and constitutional frameworks that underpin New Zealand's legal system. Those existing frameworks, while they will continue to evolve in accordance with New Zealand's domestic circumstances, define

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[43] Dr Pita Sharples, Minister of Māori Affairs "Announcement of New Zealand's Support for the Declaration on the Rights of Indigenous Peoples" (UN Permanent Forum on Indigenous Issues, New York, 20 April 2010) at [8].

> the bounds of New Zealand's engagement with the aspirational elements of the Declaration.

[111] While New Zealand has declared its support for the UNDRIP declaration, it is clear that the existing legislative and legal framework by which Treaty claims are dealt with and determined in New Zealand defines the bounds of this country's engagement with the provisions and principles of the declaration, they being consistent with the duties and principles contained and inherent in the Treaty. Similarly the concept of the honour of the Crown as recognised by the Supreme Court of Canada in *Haida* does not in my view add anything more in describing the nature and extent of the obligations on the Crown in the circumstances of this case as regards its relationship with Māori than are presently recognised by and in the Treaty.

[112] Mr Hodder refers to the provisions of the Ngāti Whātua Ōrākei Claims Settlement Act 2012, and specifically ss 6 and 7, wherein the Crown acknowledged that a large amount of Ngāti Whātua's land was alienated from 1840 by way of Crown purchases and acquisitions, which diminished the ability of Ngāti Whātua Ōrākei to exercise mana whenua. That Act contains an apology by the Crown for not having honoured its obligations to Ngāti Whātua Ōrākei under the Treaty, and records the Crown's intention, by means of the settlement, to atone for past wrongs and begin a process of healing and repairing its relationship with Ngāti Whātua Ōrākei based on trust and respect for the Treaty and its principles.

[113] The plaintiff contends that in light of the Crown statements and apology, together with the recognition of its profound connection with the land within its "primary area of interest", Ngāti Whātua did not expect to find that land held by the Crown and located within that area, would be unilaterally proposed by the Crown to be transferred to another iwi in part settlement of historical claims by that iwi. Mr Hodder submits that the Ngāti Whātua Ōrākei Settlement Deed and the Act "constrain the Crown's ability to deal with the land in that way."

[114] The plaintiff says that by means of the declarations it is seeking clarification of its post-settlement rights both generally and in relation to the land chosen by the Crown for use in settlements with other iwi. Mr Hodder says that while the plaintiff

is seeking clarification of those legal rights, it is not attempting to interfere in the legislative process. He says that in contrast to the facts of the cases relied on by the defendants, in the present case the plaintiff is seeking clarification of existing legal rights, and does not seek to constrain any Parliamentary consideration of legislation currently before the House of Representatives, or the introduction of a bill to the House. He submits that at a high level, Ngāti Whātua Ōrākei is asking the Court to recognise that in the post-settlement context, the Crown owes ongoing obligations to settled iwi, pursuant to and arising from settlement deeds, legislation, and the common law, which are enforceable in relation to the Crown's conduct, outside and beyond the scope of any legislative process relating to other Treaty settlements.

[115] Mr Hodder submits that the cases referred to by the defendants (*Milroy v Attorney-General*; *Comalco Power (New Zealand) Ltd v Attorney-General*) are distinguishable from the present case, as can be shown by reference to a number of more recent cases In particular, Mr Hodder relies on *Port Nicholson Block Settlement Trust v Attorney-General*,[44] *Ririnui v Attorney-General*,[45] and *Te Ohu Kai Moana Trustee Ltd v Attorney-General*.[46]

[116] Mr Hodder submits that the three challenged decisions in the present case are further removed from the legislative process than was the case in any of the cases cited by the defendants. He submits that this present case does not cross the constitutional boundary as there is no direct comment on legislation. He notes that while the defendants refer to draft bills being prepared and underway, the plaintiff has not seen those bills and the declaratory relief sought does not engage with those bills at all. Further, he argues that the defendants' position would result in all future settlement decisions being insulated from review, which would be contrary to the majority decision in *Ririnui*.

[117] *Port Nicholson* also involved cross-claims. In that case, Taranaki Whānui argued that the Crown was in breach of the Taranaki Whānui Deed of Settlement and Settlement Act by entering into a Deed of Settlement with Ngāti Toa that was inconsistent with that Deed and Act. The Crown argued in that case that the subject

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44 *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181.
45 *Ririnui v Attorney-General*, above n 38.
46 *Te Ohu Kai Moana Trustee Ltd v Attorney-General* [2016] NZHC 1798, [2016] NZAR 1169.

matter of the proceeding was non-justiciable as the Ngāti Toa Deed of Settlement was a preparatory step towards legislation. Williams J reviewed the existing authorities including *Milroy*, *New Zealand Māori Council v Attorney General* (Crown Forest Assets),[47] and *Comalco*. The Judge distinguished *Comalco* on the basis that whereas, in that case, the plaintiffs had sought orders that the introduction of legislation would constitute a breach of contract, Taranaki Whānui did not go that far. Rather, Taranaki Whānui sought declarations in "more passive declaratory language" which focused on consistency between the Taranaki Whānui Deed and Act and the Ngāti Toa Deed. [48] The Judge said:[49]

> The orders sought [in Comalco] included a declaration that the introduction of such legislation would constitute a breach of contract. Unsurprisingly, the declarations were refused.
>
> The declarations sought in this case do not go that far. They focus on consistency only between the Taranaki Whanui Deed and Act and the Ngati Toa Deed. Taranaki Whanui has stepped back from an attempt to have the court order the Crown to amend the Ngati Toa Deed of Settlement to a less problematic process of construing the promises the Crown made to Taranaki Whanui in its Deed and comparing those to the promises made to Ngati Toa in its Deed.
>
> In my view, this relief, if justified on the merits, does not cross the line scribed by the Court of the Appeal in the *Milroy* and *Crown Forest Assets cases*. It does not attempt to intervene in the legislative process, leaving it to the executive to decide what, if anything, it should do with such declarations if made.
>
> There are additional considerations. Unlike the way the case appears to have been pitched in Milroy, there are rights at issue here. If Taranaki Whānui is correct in the assertions made, then they have rights and interests under the Settlement Deed and Act that are, or may be, justiciable. There is a satisfactory legal yardstick that a court can utilise in resolving the controversy.
>
> Provided they are careful not to cross the boundary into the domain of Parliament or the executive's role in advancing legislation, it would be wrong in principle and dangerous in practice for the courts to leave the Crown to "acquit itself as best it may" as the "sole arbiter of its own justice", where the controversy raises justiciable issues of statutory or deed interpretation or indeed of customary law if properly pleaded. The practical reality is that recourse is often had to the Waitangi Tribunal in the first instance in these controversies, a body expert in Treaty settlements and customary rights. But the work of that Tribunal does not mean that this court has no ongoing role. Rather, as in much Treaty rights litigation over the past

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47 *New Zealand Māori Council v Attorney-General* [2007] NZCA 269, [2008] NZLR 318.
48 At [58].
49 At [61]-[63] (footnotes omitted).

> generation in which both the courts and the Waitangi Tribunal have been utilised by Māori in the same conflict, it simply means that this court must tread carefully and deferentially along paths that the Tribunal has already travelled.

[118] Despite finding that the issues were justiciable, Williams J nonetheless declined to grant relief on the merits of the substantive claim.

[119] Mr Goddard, for Ngāti Paoa, and in fact counsel for all defendants, seeks to distinguish *Port Nicholson*. He submitted that there was nothing in that case which supports the ability to seek declarations of the kind sought by the defendants in the present case. In oral argument, Mr Goddard noted that as Williams J had declined to grant the declarations sought, his Honour's observations as to the circumstances wherein it may be appropriate for the Court to decide issues relating to an alleged inconsistency between Crown obligations as provided for in a settlement deed, and another subsequent proposed Treaty settlement may be justiciable, were obiter. He submitted that in any event, notwithstanding the finding of justiciability in *Port Nicholson*, it is nevertheless clearly distinguishable.

[120] In submitting that *Port Nicholson* is distinguishable, Mr Goddard focuses on the different nature of the declarations sought. The declarations sought in that case were, in summary, that the cultural redress offered to Ngāti Toa was inconsistent with the statutory acknowledgments previously made by the Crown in the Taranaki Whānui Settlement Act, and that the commercial and cultural redress being offered to Ngāti Toa was inconsistent with the terms of the earlier Taranaki Whānui settlement. Mr Goddard describes these as "passive declarations" in contrast to those sought by Ngāti Whātua Ōrākei which would prescribe what the Crown ought to do and, more specifically, what the Crown ought to do when applying the overlapping claims policy for the purpose of developing and proposing legislation. The declarations sought by the plaintiff are clearly not passive in nature, and would prescribe the manner by which the Crown would be required to proceed when considering making an offer of land situated within the Ngāti Whātua area of interest, when endeavouring to settle an overlapping Treaty claim subject to approval and authorisation by Parliament.

[121] Mr Hodder does not agree that the distinction between passive declarations sought in *Port Nicholson* and normative declarations sought in this case is correct. He submits, instead, that both cases involve declarations of existing rights and what they mean. While in a limited sense this may be correct, the fact remains that the declarations sought by Ngāti Whātua Ōrākei would equate to the Court prescribing what the Crown ought to consider when formulating proposals for legislation.

[122] In my view, any declaration that would require the Crown, when it is formulating a Treaty settlement offer intended to be made subject to the enactment of authorising legislation, to proceed in the prescriptive manner sought and contended for by the plaintiff, would clearly intrude into the realm of interference with parliamentary business, and into the very area into which the Court should not go.

[123] As the Court of Appeal emphasised in *Milroy*, the focus is not on the remoteness of the decision from the political process but instead on the function of the decision. Where the challenged decision relates to matters involving the development or application of political policy, in a pre-legislative context, as was the case here, the function of the decision was not that of determining the nature and extent of Ngāti Whātua's rights in terms of mana whenua and whether it would be adversely affected by the settlement proposal, but rather was an intensely political decision, closely tied to the preparation and presentation of legislation to Parliament. Even if the decision did in fact adversely affect the rights of Ngāti Whātua in a way that breached the common law by failing to recognise and apply tikanga and common law, the enactment of authorising legislation would render those actions and the transfer of land provided for by the legislation lawful.

[124] The second decision which Ngāti Whātua Ōrākei relies on is the Supreme Court decision in *Ririnui v Attorney-General*.[50] In that case the applicant, a representative of Ngāti Whakahemo, attempted to halt the sale by Landcorp of a farm over which Ngāti Whakahemo claimed mana whenua. The principal relief sought was an order setting aside the agreement for sale and purchase. During the sale process, Landcorp was erroneously advised by the Office of Treaty Settlements that Ngāti Whakahemo's Treaty claim had already been settled. The decisions for

[50] Above n 38.

review were: Landcorp's decision to enter into a sale and purchase agreement, the Minister's decision not to offer an undertaking or take other steps to protect Ngāti Whakahemo's position, and the advice given by OTS that Ngāti Whakahemo's claim had been settled. Arnold J, also writing on behalf of Elias CJ,[51] stated:[52]

> While the modern view is that courts have the power to review all exercises of public power whatever their source, the courts accept that some exercises of public power are not suitable for judicial review because of their subject matter. Decisions about the allocation of national resources or involving issues of national defence or national security or involving national political or policy considerations have been held to be not reviewable by the courts, although courts in recent times have been more willing to review decisions in areas previously regarded as inappropriate for review, the most obvious example being decisions in relation to national security. Courts have treated decisions about Treaty of Waitangi settlements as inappropriate for judicial review, not simply because they often involve legislation but also because the issues involved in settlements — such as the nature, form and amount of redress — are quintessentially the result of policy, political and fiscal considerations that are the proper domain of the executive rather than the courts.
>
> That does not mean, however, that any decision having some Treaty context is inappropriate for judicial review. In the present case, Ministers did decide to intervene on behalf of Ngāti Mākino, with telling effect, while almost at the same time advising Ngāti Whakahemo that such intervention was not possible. There is no indication in the record before the Court that the Ministers' decision not to intervene on behalf of Ngāti Whakahemo was based on anything other than the Crown's mistaken view as to the settlement of Ngāti Whakahemo's historical claims (a concluded settlement was, of course, not a disqualifying consideration in the case of Ngāti Mākino). That is, it does not appear that there were any additional policy or similar considerations involved. This being so, if the Ministers' non-intervention decision breached some principle of public law, the fact of the Treaty context should not preclude review.

[125] Arnold J further said:[53]

> While it is true that many decisions made in connection with Treaty settlements will not be justiciable as they will involve policy, political, fiscal and similar considerations that are the particular province of the executive, that does not apply to all decisions having a Treaty dimension. In the present case, Ministers decided to intervene on behalf of Ngāti Mākino because they thought their particular circumstances justified intervention. When Ngāti Whakahemo sought intervention, however, the Ministers' refusal was based on the Crown's erroneous view of Ngāti Whakahemo's position, which overwhelmed or sidelined any other consideration. In these circumstances,

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51 Glazebrook J also agreed with this portion of Arnold J's decision at [147].
52 At [89]-[90].
53 At [98](e).

> we consider that the Ministers' decision is, in principle, amenable to judicial review.

[126] Mr Hodder argued that the decision in this case, that the relevant land was available for settlements with Ngāti Paoa and Marutūāhu, is a decision that fell into the category described by Arnold J, of being based solely on an incorrect understanding of the legal position. To use Arnold J's wording this erroneous view of the legal situation, "overwhelmed or sidelined any other consideration".

[127] The defendants seek to distinguish *Ririnui*. They point out that in that case there was no intended legislative context, and submit that that is the crucial distinction. Mr Goddard submits that the direct connection to legislative approval was critical having regard to the function over remoteness comments in *Milroy.* Mr Majurey submits that the present case also differs from *Ririnui* as, in that case, there was a discrete and material error, which was distinct from any other considerations rather than the absence of policy considerations. Mr Majurey submits that here there was no such error in the present case which overwhelmed or sidelined all other considerations.

[128] This highlights the difference between the parties. The plaintiff submits that the decisions made and the declarations sought relate solely to legality and the rights of Ngāti Whātua Ōrākei. The defendants, in contrast, submit that the decisions involve political, policy, fiscal and other considerations, and the Court cannot adjudicate on those decisions without itself infringing the principle and practice of comity.

[129] Mr Hodder also refers to and relies on Simon France J's observations in *Te Ohu Kai Moana Trustee Limited v Attorney-General,* and particularly His Honour's statement:[54]

> I am comfortable with the concept emerging from *Port Nicholson* that there may be a spectrum and it is a matter of assessing on which side of the line a particular proceeding falls. The mere presence of legislation in the House cannot operate as a ban on consideration of all related issues.

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[54] Above n 46 at [24].

[130] Notwithstanding the concept of a spectrum, I nevertheless agree with the defendants' submission, that here the function of the challenged decision making was closely tied and related to the development of legislation. While, as stated by the Supreme Court, Treaty context itself does not preclude review, in the present case, the function and nature of the decisions, and the relief sought mean that it would be inappropriate for the Court to intrude into what is clearly decision making falling within the province of the executive branch of government in determining how best to proceed in the public interest in settling the overlapping Treaty claims of the second and third defendants.

[131] There is a further aspect of the judgment in the *Te Ohu Kai Moana* case, that is of assistance here. Simon France J resisted an invitation by the plaintiff to allow the matter to proceed on the basis that the granting and terms of any declarations regarding whether the establishment of a Kermadec Ocean Sanctuary by way of legislation would be in breach of the Crown's duty of good faith, could be considered at the relief stage of the Court's consideration. His Honour said of that submission:[55]

> The terms of this proposed declaration also illustrate why I do not accept it is a matter that can just be considered at the relief stage. One does not get to that point without the filing of evidence, the hearing of submissions and the writing of a judgment which assesses whether the basis for a declaration is made out. A breach of the comity principle is not avoided by withholding a formal declaration having already written a judgment, the reasons of which potentially impeach the proposed legislation.

[132] The *Te Ohu Kai Moana* case is an illustration of this Court recognising and respecting the independent legislative branch of government, and exercising the restraint essential to the separate constitutional relationship between the legislature and the courts. The Kermadec sanctuary would only be established by the enactment of legislation, and the challenged terms said to be inconsistent with the plaintiffs' rights and benefits as conferred by their Treaty deed of settlement related to the proposed contents of the legislation. While the existence of legislation before the House did not prevent consideration by the Court, the fact that the legislation was to be considered by Parliament remained a crucial feature. The same or a very similar situation exists in the present case.

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55 At [30].

[133] Here there is however one declaration sought which I consider is a passive declaration. That is:

> (a) a declaration that Ngāti Whātua Ōrākei has ahi kā and mana whenua in relation to the 2006 RFR Land and the 1840 Transfer Land.

[134] This issue relating to the claims by several iwi groups of mana whenua in connection with the Auckland isthmus is one which has already been recognised by the Waitangi Tribunal. In the circumstances I do not consider that the Court should embark on consideration of whether a declaration in the terms sought by the plaintiff should issue. Firstly, the Tribunal which has specialist knowledge and expertise has already considered the question of the overlapping and co-existing mana whenua of a number of other iwi in relation to the land comprising and including that described as the 2006 RFR Land and the 1840 transfer land. And secondly, I consider that there would be no utility in the making of such a declaration, when the question of whether Ngāti Whātua has ahi kā and mana whenua in relation to the land has been overtaken by the now recognised claims of mana whenua by the other iwi comprising the Tāmaki Makaurau Collective, claims the plaintiff itself acknowledged by joining the Collective and agreeing to share the redress provided to the Collective by the Crown.

Analysis and conclusion

[135] At the heart of the plaintiff's claim in this proceeding is its contention that, by virtue of its mana whenua and ahi kā, it has superior and exclusive subsisting rights over the land transferred to the Crown in 1840, being the area of land identified by the right of first refusal provided for in the 2006 AIP. However the claim to have exclusive and pre-eminent rights to the land is wholly inconsistent with the formal legal steps taken by Ngāti Whātua following the release of the Waitangi Tribunal's Tāmaki Makaurau Settlement Process Report in 2007. Confronted by the claims of other iwi who also asserted mana whenua over the Auckland isthmus and central Auckland area, and the Tribunal's report which recognised the mana whenua of those other iwi in Tāmaki Makaurau, and which recommended that the draft settlement with Ngāti Whātua be "stopped in its tracks", Ngāti Whātua agreed to relinquish the

exclusive right of first refusal provisions contained in its AIP with the Crown, to be replaced with a shared right of first refusal to be held in common with a Collective. The terms of the legal documentation that followed made it absolutely clear that the exclusive right of first refusal provisions of the AIP were removed and replaced by the right of first refusal granted by the Crown to the Tāmaki Makaurau Collective. Significantly, the mana whenua of the other iwi, which of course included the second and third defendants, was recognised by the Crown by the transfer of the maunga on the Auckland isthmus to the Collective, and the recording of their ownership on the titles of the maunga. Ngāti Whātua fully participated throughout that process, including executing the Deed of Settlement of Historical Claims in November 2011 in which they acknowledged that the right of first refusal over land in Tāmaki Makaurau would be provided in the Tāmaki Makaurau Collective Deed. The Tāmaki Makaurau Collective specifically provided that the right of first refusal would not apply to any land that was required for the settling of historical claims under the Treaty.

[136] Those deeds were in each case expressly entered into in good faith, to settle the historical claims made by Ngāti Whātua and the other iwi. Both the Ngāti Whātua Deed of Settlement and the Tāmaki Makaurau Collective Deed of Settlement were given effect by subsequent enactment of legislation. In the case of the Ngāti Whātua Ōrākei Settlement Act, it specifically provided that the Crown was not prevented from providing, or agreeing to introduce legislation providing or enabling the same or similar redress to iwi other than Ngāti Whātua, or of disposing of land.

[137] Although Mr Hodder refers to the Minister's affidavit evidence that draft bills are being prepared, he also says that the plaintiff has no knowledge of any such draft bills and has not seen them, there is no reason whatsoever to question the accuracy of the Minister's evidence that at the time he swore his affidavit, the point had been reached where the drafting of legislation to give effect to the Ngāti Paoa and Marutūāhu Collective settlement deeds was underway. This is clearly not a case of the Minister referring to legislation in order to "immunise" his decisions. The intention to proceed on the basis that the terms of the deeds of settlement would be

given effect, only if and when authorising legislation was enacted was clearly and expressly referred to in the course of the negotiations.

[138] Accordingly, when viewed against that factual background, the plaintiff's claim to mana whenua and common law rights obliging the Crown to consult with it and to secure their consent before proceeding with negotiations towards Treaty settlements with other iwi involving land in central Auckland is confronted by the fact that Ngāti Whātua have voluntarily entered into agreements which engage with those rights and those of other iwi, in a collective manner which is inconsistent with Ngāti Whātua's present claim to exclusive or primary rights that are superior or pre-eminent over those of the other iwi.

[139] An examination of the background events and context in which the Minister made the three challenged decisions clearly shows that the function of the decisions in each case was closely related to the development and preparation of legislation, which, if enacted by Parliament, would establish the legal authority for the transfer of the selected properties to Ngāti Paoa and the Marutūāhu Collective.

[140] The first decision (the preliminary Ngāti Paoa decision) was effectively cancelled and superseded by the revised Ngāti Paoa decision. The decision was never of any effect. It is not susceptible to judicial review and the application for its review must consequently fail.

[141] All three decisions were made having regard to government policy for dealing with overlapping Treaty claims, and involved political and fiscal factors to determine how best to proceed having regard to the public interest in achieving settlements of those Treaty claims. In making the challenged decisions, the Minister, was engaged in making a quintessentially political decision as part of a process of making or offering redress to Ngāti Paoa and the Marutūāhu Collective in circumstances where overlapping claims had been made, and where the iwi were themselves unable to reach agreement. The Crown's decision to submit the negotiated terms of settlement to Parliament for consideration of the enactment of authorising legislation was made having regard to a wide range of political and fiscal factors, as well as the Crown's wish to conclude what were considered to fair and

appropriate settlements with those iwi groups without further delays and in the public interest.

[142] It is equally clear in my view that following the Minister's revised decision, the contemplated transfers to Ngāti Paoa and Marutūāhu were always intended to be undertaken only if authorised by legislation. My conclusion on this issue means that, irrespective of any interests of Ngāti Whātua that may have been affected or infringed by the Minister's actions of negotiating with other iwi in relation to possible Treaty settlements that would involve the transfer of land from within the area the plaintiff considers to be its core area (or area of primary interest), the Minister's revised Ngāti Paoa decision and the Marutūāhu decision are also not justiciable. There is no legal yardstick against which to examine and assess whether the challenged decisions were made pursuant to a lawful exercise of public power, when the decisions made by the Minister involved the subjective consideration of political and fiscal factors, and were in any case preparatory to legislation, without which they would be of no effect.

[143] While the plaintiff argues that it is not seeking to interfere with the legislative process, and that the declarations it seeks are necessary to clarify and determine the nature and scope of the post-settlement obligations owed to Ngāti Whātua by the Crown, and which apply whenever the Crown contemplates settlements with other iwi that would involve the transfer of land located within what Ngāti Whātua considers its core area of interest, in the absence of a judicially reviewable decision, the Court will not embark on a process that necessarily involves consideration of declarations that are directed at imposing obligations or constraints on the Crown in relation to the preparation of legislation to be submitted for the consideration of Parliament, and the Court would not grant the declaratory relief sought.

Plaintiff's claim struck out

[144] For these reasons, in my view the plaintiff's claim against the defendants cannot possibly succeed, and consequently the defendants' application is upheld, and the plaintiff's claim against all three defendants struck out.

[145] The defendants are entitled to costs, and I direct that the parties are to file memoranda as to costs. The defendants' memoranda are to be filed within 10 working days following release of this judgment, and the plaintiff's memorandum is to be filed within five working days thereafter.

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Paul Davison J