IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2020-485-129
CIV-2020-485-342
CIV-2020-485-361
[2021] NZHC 654

UNDER	the Judicial Review Procedure Act 2016
AND	Part 30 of the High Court Rules
BETWEEN	MERCURY NZ LIMITED AND OTHERS Applicants
AND	THE WAITANGI TRIBUNAL AND OTHERS Respondents

Hearing: 27 October 2020 – 3 November 2020

Appearances: J E Hodder QC, L L Fraser and R M A Jones for Mercury NZ Ltd
M R Heron QC, C D Tyson, P H Higbee and H Graham for Crown
M G Colson, E J Watt and M R van Alphen Fyfe for Ngāti Kahungunu Ki Wairarapa Tāmaki Nui-Ā-Rua Settlement Trust
P J Radich QC, M K Mahuika and T N Hauraki for Wairarapa Moana Ki Pouākani Inc
F B Barton, S A McClean and A L Clark-Tahana for Raukawa Settlement Trust

Judgment: 30 March 2021

JUDGMENT OF COOKE J

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INTRODUCTION

[1] The Waitangi Tribunal plays an important role in New Zealand's constitutional arrangements. Its primary role is to inquire into claims of breach of the Treaty of Waitangi and to make recommendations in relation to such breaches under s 6(3) of the Treaty of Waitangi Act 1975 (the TOW Act). Through this avenue the Crown's obligations as a Treaty partner, and its responsibilities for past breaches, are monitored. The decisions of the Tribunal are fundamental for the Treaty settlement process.

[2] In 1988 a significant change was made to the Tribunal's jurisdiction. The fourth Labour Government had commenced a process of disposing of Crown assets to new established entities, partly in order to raise funds through the subsequent privatisation of those entities. Under this policy the assets were transferred to newly established state-owned enterprises established under the State-Owned Enterprises Act 1986 (the SOE Act). That included lands that were potentially subject to claims for Treaty breaches. The position was protected in relation to lands already subject to claims lodged before the SOE Act was passed, but at that stage many anticipated claims had not yet even been lodged.[1] In the landmark Court of Appeal decision *New Zealand Maori Council v Attorney-General* (the *Lands* case), the Court prevented the transfer of assets from the Crown to state-owned enterprises from continuing until a process to prevent the prejudice arising from this transfer was found.[2]

[3] As a consequence, and following negotiations, s 8A was added to the TOW Act. This gave the Tribunal an adjudicative function in relation to lands so transferred to state-owned enterprises. A further but closely related issue also arose in relation to Crown forestry lands and s 8HB was added to extend that jurisdiction to cover those lands as well. In essence, these provisions empower the Tribunal to order that the lands transferred to state-owned enterprises be returned to Māori ownership – a process referred to as "resumption". A fuller description of the background can be found in the decision of the Supreme Court in *Haronga v Waitangi Tribunal*.[3]

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1 State-Owned Enterprises Act 1986, s 27.

2 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

3 *Haronga v Waitangi Tribunal & Others* [2011] NZSC 53, [2012] 2 NZLR 53.

[4] Notwithstanding that the legislative amendments were made in 1988 and 1989, and contrary to the apparent expectation that claims for resumption would be addressed promptly after these provisions were enacted, the Tribunal's resumption jurisdiction has hardly ever been exercised. There are various reasons for this, including the time required to properly investigate and then fully inquire into the many claims for Treaty breaches that have been filed, but also the Crown's preference to resolve breaches found to exist by negotiation and subsequent Treaty settlements. The Tribunal itself appears to have had a role in giving preference to the Treaty settlement process rather than the exercise of the resumption powers. In *Haronga v Waitangi Tribunal & Others* for instance, the Supreme Court held that the Tribunal had acted unlawfully in not addressing a claim for an urgent resumption hearing, and it ordered that the application for urgency be granted.[4] As a consequence there has only been one Tribunal decision where resumption has been ordered. This related to land in the Tūrangi township.[5] The resumption powers have been considered in other Tribunal reports particularly by the Muriwhenua Land Tribunal in 1998, but no further resumption decisions have been made.[6] The Tribunal's resumption powers have largely been simmering below the surface.

[5] Similarly, there have been no cases before the Courts where the meaning and effect of the mechanisms introduced following the *Lands* case have been directly in issue. I believe I am well placed to observe that it has taken a generation for this to occur. This case is accordingly important, and will likely proceed further on appeal.

Factual Background

[6] The proceedings involve interrelated judicial review challenges to a preliminary determination of the Tribunal in which it proposes to exercise the resumption power in relation to two significant areas of land.[7] They arise from its findings of Treaty breaches set out in a 2010 report concerning the Wairarapa – the

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4 *Haronga v Waitangi Tribunal & Others,* above n 3.

5 Waitangi Tribunal*, Tūrangi Township Remedies Report* (Wai 84, 1995).

6 Waitangi Tribunal *Muriwhenua Claims: Determination of preliminary issues* (Wai 45. 1998).

7 Waitangi Tribunal, *Determinations of the Tribunal Preliminary to Interim Recommendations Under Sections 8B and 8HC of the Treaty of Waitangi Act 1975* (Wai 863, 2020) [Preliminary Determination].

Wairarapa ki Tararua Report of 2010 (the Wai 863 Report).[8] By a decision dated 24 March 2020 the Tribunal has issued a preliminary determination on resumption applications made to it. It contemplates that two areas of land be returned to Ngāti Kahungunu ownership:

(a) "The Pouākani lands" – 787 acres of land located in the central North Island. This land is notable for at least three reasons. First, it is not within the traditional rohe of Ngāti Kahungunu, but is in the traditional rohe of other iwi, namely Raukawa and Ngāti Tūwharetoa. Secondly the land is part of the Maraetai Power Station complex forming part of the wider Waikato River Hydroelectric Power Scheme, owned and operated by Mercury NZ Limited (Mercury). Thirdly, the value of the land the Tribunal proposes be returned to Ngāti Kahungunu is in excess of $600 million.

(b) "The Ngāumu Forest" — certain licensed Crown forest land within the Wairarapa, formerly owned by and within the traditional rohe of Ngāti Kahungunu. This land is utilised for commercial forestry. The economic value of this land, when contained with the statutory compensation associated with its return, is some $200 million.

[7] There were a series of Treaty breaches found by the Tribunal associated with the Pouākani lands.[9] Some of the most significant breaches are associated with the Wairarapa lakes – Lake Wairarapa and Lake Ōnoke (also known as Lake Ferry). Wairarapa Māori used the lakes as a food source associated with their naturally forming wetland characteristics. This was a consequence of the fact that Lake Ōnoke did not drain into the ocean so that the areas around the lake flooded until the waters seasonally overflowed. The European settlers wanted the land around the lakes to be used for farmland, however and they achieved this by digging a channel for Lake Ōnoke to drain into Palliser Bay, an activity that continues to this day. This significantly disrupted the traditional food gathering activities of Māori, but facilitated arable farming by the settlers on the land around the lakes. The illegitimate

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8 Waitangi Tribunal *Wairarapa ki Tararua Report* (Wai 863, 2010).

9 *Wairarapa ki Tararua Report*, above n 8, vol 2 at ch 7.

maintenance of the channel became an ongoing issue, involving petitions to Parliament, inquiries and proceedings before the courts. But the settlers effectively prevailed. Ultimately Wairarapa Māori agreed with the Crown to transfer title in the lakes to the Crown. One of the promises made by the Crown in return was to provide the Māori owners with alternative land of value in the Wairarapa. That never happened. Ultimately after further delays the Crown transferred to Wairarapa Māori the lands around Pouākani. Not only were these lands not within Ngāti Kahungunu's traditional area, but they were in the traditional areas of other iwi. Moreover, the land was inaccessible and essentially useless. The Crown later identified parts of this land as suitable for hydro-electric power generation. They started developing the land for that purpose without any consent from the Māori landowners. Ultimately Prime Minister Peter Fraser became aware of this and 787 acres of the land originally granted was compulsorily acquired. The compulsory acquisition compensation was then not only delayed, but it was discounted because of the betterment associated with the development of the land for hydro-electric power generation.

[8] The Tribunal also identified a series of Treaty breaches associated with the Ngāumu Forest.[10] This is within the traditional areas of Wairarapa Māori. The relevant Treaty breaches included those relating to the Crown's purchasing policies and purposes followed between 1853 and 1865, and what is known as the McLean purchases. The Crown acquired land by processes that the Tribunal described as involving manifold breaches of the Treaty. For example, the Crown made leasing of land illegal so that Māori had no alternative to sell if they wanted the benefits of settlement. The Crown then adopted practices that were inconsistent with free transfer. It did not conduct any proper investigation before embarking upon purchases, but rather approached favoured rangatira to obtain consent to a sale from them alone. This was a deliberate strategy. The findings of the Tribunal in the Wai 863 Report are not specific to the Ngāumu Forest, but the practices in breach of the Treaty were held to have been relevant to the Crown's acquisition of title to that land.[11]

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[10] Preliminary Determination at [114]. The breaches are addressed in a number of chapters of the *Wairarapa ki Tararua Report*, above n 8, including at ch 2 and 3A.

[11] At [114] – [115].

[9] I will address some of the relevant factual matters further when considering the relevant judicial review challenges, but the above summary provides a sufficient introduction to these challenges.

The Issues

[10] In addressing the judicial review claims I will consider the relevant questions issue by issue. That is because there are common grounds of challenge which can be properly addressed in that way. By way of summary this judgment addresses the following key issues:

(a) Whether judicial review of the preliminary determination is available at all. Wairarapa Moana ki Pouākani Incorporation (Wairarapa Moana)[12] and Ngāti Kahungunu ki Wairarapa Tāmaki Nui-ā-Rua Settlement Trust (the Settlement Trust)[13] are the respondents opposing the judicial review claims. They contend that the preliminary determination of the Tribunal is not judicially reviewable. Only a final decision of the Tribunal can, or should be subject to judicial review. A decision of a preliminary kind should not be so challenged.

(b) Mercury NZ Ltd ("Mercury") challenges the decision of the Tribunal excluding it from being a party able to be heard in relation to the resumption applications relating to the Pouākani lands.

(c) The Crown, Mercury and the Raukawa Settlement Trust (Raukawa)[14] all contend that the Tribunal has misinterpreted the resumption powers in the TOW Act. They say that there needs to be a much closer nexus between a well-founded claim and the land sought to be returned than applied by the Tribunal. They argue that the power is intended to be

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12 Wairarapa Moana is an incorporated entity representing the descendants of the Māori landowners of the Pouākani lands. They can be seen as a subset, or separate grouping of Ngāti Kahungunu.

13 This is the pre-settlement trust authorised to represent a large number of the claims before the Tribunal, and to negotiate settlement of those claims with the Crown. It is a body that can be seen to best represent Ngāti Kahungunu as whole.

14 Raukawa is a post-Treaty settlement trust representing the Raukawa iwi. It challenges the decision in relation to the Pouākani lands. In doing so its claims are supported by Te Kotahitanga o Ngāti Tūwharetoa (Ngāti Tūwharetoa).

used when there was a breach in the Crown's acquisition of that land. They say that the Tribunal misinterpreted the powers, and that the preliminary determination should be set aside. The Crown's argument in this respect also extends to the preliminary determination concerning the Ngāumu Forest.

(d) Raukawa, supported by the Crown and Mercury, say that the Tribunal also erred in ordering resumption of the Pouākani lands as they are in the traditional rohe of Raukawa and Ngāti Tūwharetoa and not within the traditional rohe of Ngāti Kahungunu. They say the Tribunal's proposed decision is accordingly unlawful as it is inconsistent with the Treaty and with tikanga.

(e) Finally, the Crown challenges a further aspect of the Tribunal's proposed decision in relation to the Ngāumu Forest. Much of the economic value of the resumption of Ngāumu Forest arises from the statutory compensation which accompanies the return of the land. Part of that compensation includes an award of interest, and as a consequence of a further decision of the Tribunal, interest is paid on what is effectively a penalty basis. The Crown says that the Tribunal misinterpreted and misapplied the relevant provisions, and that only an award of interest to maintain the real value of the compensation should apply.

[11] The above represents an over-simplification of the issues that arise. It does not reflect the sophistication and complexity of some of the issues and arguments. However, it is sufficient to understand the general matters that arise which I address below.

FIRST ISSUE: IS THE PRELIMINARY DETERMINATION SUBJECT TO JUDICIAL REVIEW?

[12] Wairarapa Moana and the Settlement Trust contend that the Tribunal's determination is only a preliminary indication of the Tribunal's approach which is

capable of change before its decisions are finalised, and that such preliminary indications are not subject to judicial review.

[13] In its conclusion, the Tribunal says:[15]

> This preliminary determination by no means disposes of all the important matters we must decide, however. Nor would we say it is necessarily final. It expresses our formed views on key aspects of the exercise of discretion in section 8A and 8HB, but it remains possible that we may decide that nevertheless we should not make interim recommendations in the form we currently intend. We have already discussed the situation concerning evidence and submissions on the operation requirements of the hydro-electrical system and Maraetai Dam…

[14] A series of further inquiries are also then listed. It is argued that although the Tribunal has set out its thinking on the relevant points in some detail, and whilst some of those views are expressed in apparently firm language, the Tribunal is nevertheless following an iterative process, and it has said that its initial thinking may be reconsidered, including after it accesses further evidence and submissions. It is accordingly argued that judicial review should not be permitted now, and that such challenges should only be addressed once the preliminary views have been finalised.

[15] Counsel referred to a number of decisions in which the Courts have concluded that attempted challenges to preliminary decisions should not be allowed. It is acknowledged that a "proposed exercise of a statutory power" is listed as one of the reviewable decisions in s 11 of the Judicial Review Procedure Act 2016.[16] But authorities suggest that some decisions prior to a final decision are outside that jurisdiction. For example, in *Marlborough Aquaculture Ltd v Chief Executive of Ministry of Fisheries*, the High Court concluded that an interim decision was not reviewable.[17] Ronald Young J held:

> [15] I acknowledge also that there may be situations where because the procedure of decision-making has seriously gone off the rails at an early stage in the process it is essential that the Court quashed the decision. This will particularly be the case where no form of further consultation with the aggrieved party can cure the defect. An obvious example is overt bias by a decision-maker. If established at a preliminary stage it will probably be fatal to all subsequent decision-making.

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15 Preliminary Determination at [316].

16 Judicial Review Procedure Act 2016, s 11(1).

17 *Marlborough Aquaculture Ltd v Chief Executive of Ministry of Fisheries* [2003] NZAR 362.

> [16] … The essence seems to be that if the interim decision is to be the final decision, i.e. it is the decision that is to be the ultimate decision, then it will be reviewable. If, however, the interim decision is clearly not final and is subject to change if those affected can convince the decision-maker that it is in error, then it seems that it will not be the "proposed decision".

[16] In *Zhao v New Zealand Law Society* Kōs J held that when processes leading to a final decision are not completed review will remain discretionary and will be exceptional.[18] Similarly, in *Singh v Chief Executive Ministry of Business*, *Innovation and Employment*, the Court of Appeal also described review of preliminary decisions as "exceptional",[19] and in *A Lawyer v New Zealand Law Society*, Thomas J said there was a high bar before judicial review would be allowed of such preliminary decisions.[20] This was identified as arising only in exceptional cases where a decision-maker had gone seriously off the rails.[21]

[17] In the present case Mr Radich QC for Wairarapa Moana emphasised the passages of the Tribunal's preliminary determination that clearly indicated that its views were preliminary only, and subject to the potential for change. He argued that this was not a proposed decision as contemplated by s 11 of the Judicial Review Procedure Act. The Tribunal had merely provided preliminary conclusions upon which further submissions and evidence will be directed. Even if technically reviewable under s 11, the Court should decline to entertain judicial review at this stage given the practical implications, or at the very least the Court should show considerable deference to the views expressed by the Tribunal.

Assessment

[18] I do not agree with the arguments advanced by Wairarapa Moana and the Settlement Trust. In my view the preliminary decision is susceptible to judicial review, and the judicial review claims should be substantively addressed.[22]

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18 *Zhao v New Zealand Law Society* [2012] NZHC 2169, [2012] NZAR 894 at [66]–[67].

19 *Singh v Chief Executive Ministry of Business*, *Innovation and Employment* [2014] NZCA 220, [2014] 3 NZLR 23 at [40].

20 *A Lawyer v New Zealand Law Society* [2019] NZHC 1961 at [117].

21 At [117], citing *Marlborough Aquaculture Ltd v Chief Executive of Ministry of Fisheries*, above n 17, at [15].

22 I note that the Tribunal expressly stated at [9] of the Preliminary Determination that it was not making an interim recommendation in accordance with ss 8B and 8HB of the TOW Act. Under those provisions a formal interim recommendation triggers specific statutory steps within time frames. There appeared to be general agreement that these steps should not yet be triggered.

[19] First, I do not accept that the concept of a "proposed … exercise of a statutory power" in s 11 of the Judicial Review Procedure Act is intended to cover only proposed decisions of a particular type.[23] I disagree with earlier authority to the extent that is suggested. The judicial review jurisdiction of the Court is fundamental. It has origins outside the legislation regulating its procedure. It should not be restricted on the basis of a technical reading of that legislation to cover only certain kinds of decisions. It is for the Court itself to control the scope of the jurisdiction.

[20] The Court does so by exercising its discretion. At its heart judicial review is a discretionary remedy. There may well be good reason not to consider the potential grant of the remedy when there are further steps to be taken in relation to a proposed decision, such that it is in the interests of justice to await finalisation before a challenge is considered. As the Court of Appeal said in *Singh v Chief Executive of Business, Innovation and Employment*, the real question is whether there is sufficient basis for the Court to invoke its "undoubted jurisdiction" under s 11.[24] It listed considerations that may guide a court in deciding whether to entertain review.[25] The Court then said:

> [39] Where matters have reached only a preliminary stage and the powers exercised to that point are unlikely to be influential in the final decision, the Court will not usually intervene by way of judicial review. There are sound policy reasons why that should be so. Where an investigation is merely at the information gathering stage, and the party under investigations has adequate opportunity to address issues raised for his or her response, it is most unlikely that the subject's rights will be adversely affected. Moreover, where there are adequate opportunities for appeal or review of any decision ultimately reached, it is not in the public interest that those responsible for conducting preliminary investigations should be put to the time and trouble of responding to applications for review. Similarly, the courts should not generally be troubled with judicial review applications in such circumstances.
>
> [40] That said, we accept there may be cases where the Court's intervention by way of judicial review may be justified. Cases of this type are likely to be exceptional but where it is demonstrated that an error of law or process has occurred which is likely to have a material influence on the final decision, the Court may be prepared to intervene. The cases we have discussed are illustrative of situations falling into this category.

Whether it is an "interim recommendation" for the purposes of those provisions is a separate question from whether the Court should entertain judicial review of the Preliminary Determination.

23 The provision is in materially the same terms as its predecessor – s 4(1) of the Judicature Amendment Act 1972.

24 *Singh v Chief Executive Ministry of Business, Innovation and Employment*, above n 19, at [31].

25 At [38].

[21] Whether it is appropriate to intervene at a preliminary stage will depend on the circumstances of the case. I do not understand this passage to suggest that an applicant will need to demonstrate exceptional circumstances before the Court will grant a judicial review remedy. Rather the Court was predicting that cases where review of preliminary decisions prior to a final decision was permitted would likely be out of the ordinary.

[22] In exercising the discretion here there are a number of related reasons which lead me to conclude that review should be granted.

[23] First, unlike *Singh, Zhao* and *A Lawyer* the preliminary decision here is being provided by the body which makes the final decision. Moreover, there is no right of appeal against its final decision. Any challenge to the final decision will itself be by way of judicial review.

[24] Secondly, whilst the Tribunal has clearly indicated that its views are preliminary only, and that their views may change, it has nevertheless reached firm conclusions. For example, in its overall conclusions the Tribunal says:

> 215 We have decided that there is proportionality between the prejudice suffered by Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua and the value of the subject land in Ngāumu Forest and at Pouākani. We therefore consider that we should make binding recommendations for the return to them of all the land titles comprised in the subject land, which we list below. We have also decided that we should make binding recommendations for the payment of compensation in accordance with Schedule 1 of the Crown Forest Assets Act 1989. Schedule 1 prescribes three options for the calculation of compensation, and applicants have yet to specify which of these they elect. We make determinations relevant to this in section VIII.

[25] It is true that the Tribunal has indicated that it will receive further evidence and submissions.[26] But it has conducted a very detailed analysis of the legal questions that are subject to this judicial review challenge, and of the facts relating to those legal challenges. It is a 105 page decision signed and dated by the three Tribunal members setting out its "formed views". It has clearly set out its interpretation of the ss 8A and 8HB of the TOW Act. Its view of the law is not a preliminary one. It is a concluded view following detailed analysis. In addition the key facts associated with the exercise

[26] Preliminary Determination, at [216].

of the resumption power have already been found. The relevant Treaty breaches are set out in the Wai 863 Report. Further findings have then been made for the purposes of it addressing whether it should order resumption in relation to the lands. It is not suggested there are additional factual inquiries that are required in order to make decisions on those key matters.

[26] The Tribunal has indicated where additional matters need to be considered. For example, it has explained that the question of operational matters concerning the Maraetai Power Station will need to be addressed. When doing so it has said:[27]

> … we were not persuaded that further evidence must precede this preliminary determination. Indeed, we thought it would be helpful to outline our intentions so that operational implications could be better assessed.

[27] These additional factual matters do not relate to the key findings of fact and law that inform the Tribunal's proposed decision. They concern additional matters that need to be addressed for the decisions to be finalised.

[28] More generally this is a comprehensive, closely analysed decision setting out what the Tribunal proposes to do. It has released the proposed decisions in order to focus the parties' attention on the evidence and submissions that will assist it in finalising the decisions. It is helpful to all involved to have such a preliminary determination. The parties now know where they stand, and they have been able to consider their positions and their options. The Tribunal would likely have anticipated the prospect that its preliminary determination could be subject to judicial review.[28]

[29] I nevertheless agree that practical considerations might still suggest that judicial review at this stage should not be granted. If the Court entertains judicial review now there is a prospect for a delay in the ultimate decisions being made by the Tribunal. It is highly likely, irrespective of the outcome of the decision in this Court, that appeals will be pursued before the Court of Appeal and potentially the Supreme Court. Those steps will take time, and this may interfere with the progress of the

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27 At [17].

28 At [7]; the Tribunal referred to judicial review proceedings that had already been filed by Mercury in related to its exclusion from the process, indicating that there was plenty of time to hear from Mercury before the release of the final determination if its judicial review proceedings were to be successful.

Tribunal's work. There is even a risk of further prolonging the disputes, as there is a possibility of judicial review going through the appeal system not only at the preliminary determination stage, but also again following a final determination. Awaiting a final determination would also allow all matters relevant to the judicial review claims to be addressed by this Court, and subsequently on appeal.

[30] Notwithstanding those factors, a decision not to address the judicial review challenges at this point would be decidedly unhelpful. As the Tribunal itself has noted there is no direct authority on the meaning of the relevant legislative provisions, and the arguments that have now been advanced by the parties are critical to the outcome of the applications, and resumption claims more generally. If the Court were to agree with the Tribunal's approach, then the door would be open for it to deal with these claims, and any other resumption claims with a clearer understanding of the proper approach to the relevant provisions, and any legal limits on its powers. And if the Court concludes that the Tribunal is following an erroneous approach it would be better for that to be said now, rather than having the parties go through further procedures before an ultimate determination.

[31] One of the key reasons why the release of the preliminary determination was helpful is precisely because it allowed any judicial review claims to be advanced. The reasons that caused the Tribunal to release a preliminary determination provide equivalent justification for the Court to consider judicial review of that determination at this stage. Moreover, having now heard the claims it seems to me that it would be most unhelpful for the Court not to provide its conclusions, even allowing for the fact that the Court of Appeal or Supreme Court may say that this Court's views are erroneous.

[32] For these reasons I reject the argument that the Court should not address the judicial review claims, and I proceed to do so.

SECOND ISSUE: DID MERCURY HAVE THE RIGHT TO PARTICIPATE IN THE RESUMPTION HEARINGS?

[33] Mercury challenges the decision of the Tribunal declining it any right to participate in the resumption hearings. In a procedural direction dated 2 March 2020,

Judge Wainwright recorded that Mercury "is not an entity that is entitled to appear or be heard in relation to the applications before the Wai 863 Wairarapa te Tararua Tribunal under s 8C of the Treaty of Waitangi Act 1975". This direction was then effectively adopted in the course of the preliminary determination.[29]

[34] Section 8C of the TOW Act provides:

> **8C Right to be heard on question in relation to land transferred to or vested in State enterprise**
>
> (1) Where, in the course of any inquiry into a claim submitted to the Tribunal under section 6, any question arises in relation to any land or interest in land to which section 8A applies, the only persons entitled to appear and be heard on that question shall be—
>
> (a) the claimant:
>
> (b) the Minister of Maori Affairs:
>
> (c) any other Minister of the Crown who notifies the Tribunal in writing that he or she wishes to appear and be heard:
>
> (d) any Maori who satisfies the Tribunal that he or she, or any group of Maori of which he or she is a member, has an interest in the inquiry apart from any interest in common with the public.
>
> (2) Notwithstanding anything in clause 7 of Schedule 2 or in section 4A of the Commissions of Inquiry Act 1908 (as applied by clause 8 of Schedule 2), no person other than a person designated in paragraph (a) or paragraph (b) or paragraph (c) or paragraph (d) of subsection (1) shall be entitled to appear and be heard on a question to which subsection (1) applies.
>
> (3) Nothing in subsection (2) affects the right of any person designated in paragraph (a) or paragraph (b) or paragraph (c) or paragraph (d) of subsection (1) to appear, with the leave of the Tribunal, by—
>
> (a) a barrister or solicitor of the High Court; or
>
> (b) any other agent or representative authorised in writing.

[35] In advancing the challenge Mr Hodder QC referred to the fundamental right to be heard arising as part of the rights of natural justice. In light of the fundamental nature of this right he argued that s 8C should not be interpreted to completely exclude an ability to participate as a matter of natural justice. Section 8C(1) merely specified

[29] At [7].

who was "entitled" to appear. The fact that Mercury was not entitled to be heard as of right did not mean that the Tribunal could not allow it to participate in a more confined way with leave – that is that s 8C was not "an exhaustive list of those able to be heard".[30]

[36] Mr Hodder relied on the decision of the High Court and *Raukawa Settlement Trust v Waitangi Tribunal*.[31] Here Raukawa successfully challenged the Tribunal's previous decision excluding Raukawa from participating in the resumption hearings. The Court found that the Tribunal had misinterpreted the provisions of the legislation enshrining Raukawa's Treaty settlements when doing so and it set aside the Tribunal's decision. The Court also upheld Raukawa's associated argument that there were rights of participation as a matter of natural justice not referred to in the TOW Act. Grice J held:[32]

> [77] If I am wrong in my conclusion that the Tribunal has erred in quashing its decision, I am of the view that nevertheless Ruakawa may well retain the right to be heard on the basis of its common law rights.
>
> …
>
> [80] Section 8C of the 1975 Act may be seen as a recognition by Parliament that natural justice should apply in the present circumstances. It does not purport to enact a complete code of procedure or to cover the whole field of natural justice, which would not be easy in a statute of this kind.

[37] Mr Hodder also referred to the observations of Robertson J in *Te Heu Heu & Tūwharetoa Maori Trust Board v Attorney-General* who said "Section 8C makes it clear that any third party who has taken land subject to a memorial is not entitled to be heard by the tribunal except by leave".[33]

[38] Mercury accepts that it may not have the full suite of rights to participate in the resumption hearings, but given the very significant impact of the proposed decision on it, and the desirability of it being able to put forward evidence and submission relating to the impacts upon it in its own terms, it says it should have been given right to be heard.

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[30] *Mercury NZ Ltd v Waitangi Tribunal* [2020] NZHC 589 at [19] per Simon France J.
[31] *Raukawa Settlement Trust v Waitangi Tribunal*[2019] NZHC 383, [2019] 3 NZLR 722.
[32] Footnotes omitted.
[33] *Te Heu Heu & Tūwharetoa Maori Trust Board v Attorney-General* [1999] 1 NZLR 98 at [115].

Assessment

[39] The right to be heard is a fundamental requirement of natural justice. The rights of natural justice are affirmed by s 27 in the New Zealand Bill of Rights Act 1990. The rights of natural justice are an aspect of the individual rights that underpin legitimate democratic government, the separation of powers, and the rule of law.

[40] But there is another fundamental principle — the supreme authority of Parliament to enact laws. It is recognised that in exercising that authority, Parliament will sometimes enact legislation that is inconsistent with fundamental rights. The function of the Courts remains to give effect to Parliament's intent when exercising its interpretative role. The Court presumes that Parliament did not intend to legislate inconsistently with fundamental rights, and it approaches the interpretive task on that basis.[34] That interpretive approach is similar to that mandated by s 6 of the New Zealand Bill of Rights Act. But subject only to the possibility of certain extreme situations, the Court still interprets the legislation to give effect to Parliament's intent. Furthermore, and notwithstanding the presumption that Parliament would not have intended to legislate inconsistently with fundamental rights, the Courts should adopt the normal purposive, and not obstructive, interpretation of its enactments.

[41] It is plain that Mercury's rights of natural justice are engaged in the present case. The proposed decision of the Tribunal has a significant impact on it.[35] But notwithstanding this, and the presumption referred to above, it appears clear that Parliament expressly intended that bodies in the position of Mercury were not to be heard on resumption applications.

[42] First, the text of the enactment is plain in its terms. Section 8C(1) may use the theoretically ambiguous word "entitle", but s 8C(2) expressly says that no other person other than those listed shall be entitled to be heard on the question identified in s 8C(1). It then regulates what leave could be exercised by the Tribunal in s 8C(3), and the leave only relates to those who qualify to be heard under s 8C(1). There is no

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34 See, for example, *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [293] per Elias CJ.

35 I note that there is an expectation that Mercury will secure compensation under the Public Works Act 1981 for the loss of the land, and that operations will continue with the land in new ownership.

ambiguity about "entitle" when read in the section as a whole. It is regulating who can and who cannot participate.

[43] Section 8C was inserted into the TOW Act by the Treaty of Waitangi (State Enterprises) Act 1988. That Act has a lengthy preamble which can be taken to identify its purposes. It materially provides:[36]

> (g) it is essential, in order to protect the position of Maori claimants and to ensure compliance with section 9 of the State-Owned Enterprises Act 1986, that there be safeguards—
>
> (i) including power for the Waitangi Tribunal to make a binding recommendation for the return to Maori ownership of any land or interests in land transferred to State enterprises under that Act; and
>
> (ii) requiring the Waitangi Tribunal to hear any claim relating to any such land or interests in land as if it or they had not been so transferred; and
>
> (iii) *precluding State enterprises and their successors in title from being heard by the Waitangi Tribunal* on claims relating to land or interests in land so transferred; … (emphasis added)

[44] The suggestion that s 8C should be read down, and that the reference to "entitled" should not be taken to prevent the Tribunal from exercising a discretion to allow such bodies to participate would be inconsistent with preamble (g)(iii). It is clear that when identifying the "*only* persons entitled to appear and be heard" (emphasis added) in s 8C(1) it was giving effect to the decision to "precluding" the state enterprises and their successors from being heard. To adopt any alternative interpretation would involve the Court not giving effect to the clearly expressed intention of Parliament.

[45] I do not read Grice J in *Raukawa Settlement Trust* as suggesting that there is a common law entitlement to be heard outside of s 8C. In that case, Raukawa met the requirements of s 8C(1). It was the Tribunal's interpretation of the Raukawa settlement legislation that had led the Tribunal to the view it could be excluded. The point being made by Grice J was that s 8C did not purport to codify or provide the entire content of the natural justice rights arising from a party falling within s 8C(1).

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[36] Treaty of Waitangi (State Enterprises) Act 1988, preamble.

The full extent of those rights could be found in the common law. She was not addressing the position of a party plainly excluded by s 8C. Indeed, at one point she appeared to expressly note that Mercury had no right to be heard.[37] Even if that is not the correct interpretation of her judgment, the point that Mercury seeks to raise was not being squarely addressed, such that I do not accept that the judgment provides support for Mercury's argument. I agree that the observations of Robertson J in *Te Heu Heu & Tūwharetoa Maori Trust Board* can be seen as supporting Mercury's argument. But he was not directly addressing the argument Mercury advances, and the obiter observation about the meaning and effect of s 8C needs to be understood in that context. He referred to the grant of leave, but it is clear that the leave contemplated by s 8C(3) is not a qualification on s 8C(1).

[46] For these reasons I do not uphold Mercury's challenge. I conclude that the Tribunal was right to say that Mercury has no right to be heard on the resumption applications.

[47] I note that this may not be the end of Mercury's natural justice rights. When fundamental rights are truncated by statutory provisions, the residual rights of the affected person should be fully emphasised.[38] Mercury has a right to challenge decisions of the Tribunal by way of judicial review, as it does in the present proceedings, and such rights should not be limited. When the Crown appears before the Tribunal there could be no legitimate limitation on it presenting submissions and evidence from Mercury's perspective. It can call witnesses from Mercury. It might even be arguable that the Crown itself has an obligation to put Mercury's position squarely before the Tribunal. Given the truncation of fundamental rights that would also be of assistance to the Tribunal. I note Grice J's observations that such indirect input would be unappealing to the excluded party.[39] But it is better than the alternative.

[48] For these reasons Mercury's challenge to the Tribunal's decision excluding it from participation is dismissed.

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[37] *Ruakawa Settlement Trust v Waitangi Tribunal*, above n 31, at [65].
[38] *Sullivan v Ministry of Fisheries* [2002] 3 NZLR 721 (CA) at [62].
[39] *Ruakawa Settlement Trust v Waitangi Tribunal*, above n 31, at [71].

ISSUE THREE: DID THE TRIBUNAL MISINTERPRET THE RESUMPTION POWERS?

[49] The Crown, Mercury and Raukawa all challenge the preliminary determination on the basis that the Tribunal has misinterpreted the resumption powers. In particular they argue the requirement that the well-founded claim relates to land that should be returned to Māori ownership effectively means that the claim needs to be about the loss of Māori ownership of that land. It is argued that the Tribunal erred in law in interpreting the powers to bestow a broader jurisdiction to provide a remedy for other claims.

[50] Section 8A provides:

> **8A Recommendations in respect of land transferred to or vested in State enterprise**
>
> …
>
> (2) Subject to section 8B, where a claim submitted to the Tribunal under section 6 relates in whole or in part to land or an interest in land to which this section applies, the Tribunal may,—
>
> (a) if it finds—
>
> (i) that the claim is well-founded; and
>
> (ii) that the action to be taken under section 6(3) to compensate for or remove the prejudice caused by the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission that was inconsistent with the principles of the Treaty, should include the return to Maori ownership of the whole or part of that land or of that interest in land,—
>
> include in its recommendation under section 6(3), a recommendation that that land or that part of that land or that interest in land be returned to Maori ownership (which recommendation shall be on such terms and conditions as the Tribunal considers appropriate and shall identify the Maori or group of Maori to whom that land or that part of that land or that interest in land is to be returned); or
>
> (b) if it finds—
>
> (i) that the claim is well-founded; but
>
> (ii) that a recommendation for return to Maori ownership is not required, in respect of that land or any part of

that land or that interest in land, by paragraph (a)(ii),—

recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land or that interest in land be no longer subject to resumption under section 27B of the State-Owned Enterprises Act 1986 or section 569 of the Education and Training Act 2020; or

(c) if it finds that the claim is not well-founded, recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land or that interest in land be no longer subject to resumption under section 27B of the State-Owned Enterprises Act 1986 or section 569 of the Education and Training Act 2020.

(3) In deciding whether to recommend the return to Maori ownership of any land or interest in land to which this section applies, the Tribunal shall not have regard to any changes that, since immediately before the date of the transfer of the land or interest in land from the Crown to a State enterprise, or an institution within the meaning of section 10(1) of the Education and Training Act 2020, have taken place in—

(a) the condition of the land or of the land in which the interest exists and any improvements to it; or

(b) its ownership or possession or any other interests in it.

(4) Nothing in subsection (2) prevents the Tribunal making in respect of any claim that relates in whole or in part to any land or interest in land to which this section applies any other recommendation under subsection (3) or subsection (4) of section 6.

(5) Notwithstanding section 24(4) of the State-Owned Enterprises Act 1986, on the making of a recommendation for the return of any land or interest in land to Maori ownership under subsection (2), sections 40 and 41 of the Public Works Act 1981 shall cease to apply in relation to that land or that interest in land.

…

[51] And s 8HB similarly provides:

8HB Recommendations of Tribunal in respect of Crown forest land

(1) Subject to section 8HC, where a claim submitted to the Tribunal under section 6 relates to licensed land the Tribunal may,—

(a) if it finds—

(i) that the claim is well-founded; and

(ii) that the action to be taken under section 6(3) to compensate for or remove the prejudice caused by the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission that was inconsistent with the principles of the Treaty of Waitangi, should include the return to Maori ownership of the whole or part of that land,—

include in its recommendation under section 6(3) a recommendation that the land or that part of that land be returned to Maori ownership (which recommendation shall be on such terms and conditions as the Tribunal considers appropriate and shall identify the Maori or group of Maori to whom that land or that part of that land is to be returned); or

(b) if it finds—

(i) that the claim is well-founded; but

(ii) that a recommendation for return to Maori ownership is not required, in respect of that land or any part of that land by paragraph (a)(ii),—

recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land not be liable to return to Maori ownership; or

(c) if it finds that the claim is not well-founded, recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land not be liable to return to Maori ownership.

(2) In deciding whether to recommend the return to Maori ownership of any licensed land, the Tribunal shall not have regard to any changes that have taken place in—

(a) the condition of the land and any improvements to it; or

(b) its ownership or possession or any other interests in it—

that have occurred after or by virtue of the granting of any Crown forestry licence in respect of that land.

(3) Nothing in subsection (1) prevents the Tribunal making in respect of any claim that relates in whole or in part to licensed land any other recommendation under subsection (3) or subsection (4) of section 6; except that in making any other recommendation the Tribunal may take into account payments made, or to be made, by the Crown by way of compensation in relation to the land pursuant to section 36 and Schedule 1 of the Crown Forest Assets Act 1989.

> (4) On the making of a recommendation for the return of any land to Maori ownership under subsection (1), sections 40 to 42 of the Public Works Act 1981 shall cease to apply in relation to that land.

The Tribunal's approach

[52] The Tribunal analysed the requirement that the well-founded claim "relates to" land covered by these provisions in detail. It referred to what had been said in previous court decisions, and previous decisions of the Tribunal, noting that it was "not a well-travelled route".[40] It referred to previous dicta to the effect that legislation concerning the Treaty should not receive a narrow interpretation. It concluded that the provisions gave a broad jurisdiction to provide a remedy for the adverse consequences of all land-based claims, whether or not the well-founded claims concerned the land in question. It summarised its views in the following way:

> 120. 'Relates to' in sections 8A and 8HB are words that connote a general connection. That is how they have usually been construed, and we see nothing in either Act that calls for a narrower construction.
>
> 121. We look also to the fact that this legislation is remedial in nature, a context that calls for a large and liberal rather than narrow and restrictive approach. Judicial opinion on interpretation of statutes in the Treaty context is to the same effect, with the descriptors 'broad and unquibbling' having particular resonance. The circumstances of litigation and settlement that gave rise to these statutes and their powers to return land to Māori also make appropriate a looser construction of 'relates to'.
>
> 122. We consider that the well-founded claims concerning the Crown's acts, omissions, practices, and policies concerning Māori land that led to Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua becoming virtually landless relate to the subject land both at Ngāumu and Pouākani. At Pouākani, there is also a well-founded claim that relates specifically to the subject land.
>
> 123. Accordingly, it is our view that we may make binding recommendations to compensate generally for the prejudice arising from tribal land loss, and also for the prejudice arising from Wai 85, a claim that relates specifically to the subject land. In Section IV we address … whether we 'should' exercise our discretion to return the subject land to Māori ownership, and in Section VI we address to whom we should recommend the return of land.

[53] It later said:

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40 Preliminary Determination at [68].

> 129. In Section II 'Relates to' we said that the connection between well-founded claims and the subject land can be broad and indirect. We considered that, theoretically, any well-founded claim could relate to the subject land. However, we have decided to rely on those well-founded claims that concern the Crown's acts and omissions in relation to Māori land.

[54] Mr Colson argued that paragraph [129] was only making a theoretical point about the scope of the power. I do not accept that. The Tribunal was explaining the implications of the interpretation it was adopting.

[55] In considering the Pouākani lands the Tribunal had made a finding that the Crown acquired title to the lands in breach of the principles of the Treaty. But the Tribunal looked to the other claims to justify the proposed resumption order. The Tribunal held in relation to the resumptions application by Wairarapa Moana:

> 278. … We do not consider we should recommend the return to them of the 787 acres however, because the value of that land and the assets located there is not proportionate to the prejudice they suffered as shareholders in 1949. The present-day value of those acres and assets is, however, proportionate to the much greater prejudice that Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua suffered from the whole continuum of wrongdoing on the part of the Crown concerning Wairarapa Moana, the land around the lake, the way the leaders of the day were treated, the failed Commission of Inquiry, the unfairness of the bureaucratic process, the loss of the best mahinga kai in that part of the motu, and most especially the loss of mana that all of this occasioned. Nor is the prejudice that we take into account limited to Crown breaches concerning Wairarapa Moana. All the land-related breaches of the Crown relate to these 787 acres. This kind and level of prejudice is that experienced as hapū and as iwi. Its nature and scale is different from the infringement of private property rights experienced by Māori shareholders in land when a compulsory acquisition of 787 acres was conducted poorly – even when the guilty party was the Crown, which owes them special Treaty duties.

[56] Similarly, the Tribunal held that the well-founded claims associated with the Crown acquiring the Ngāumu Forest land did not justify an order of resumption to the hapū from which it was taken, Ngāi Tūmapūhia-ā-Rangi. The economic value of the return of the Ngāumu Forest land was assessed at little over $200 million[41] The Tribunal held:

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[41] See Preliminary Determination at [164]; the market value of the interest in the forest was $11,650,000 accumulated rentals $12,158,830, together with the compensation in accordance with sch 1 of $182-$183 million.

> 283 We have also determined that we should not recommend the return of land to Ngāi Tūmapūhia-ā-Rangi. While it would be possible to find proportionality between the prejudice that Ngāi Tūmapūhia experienced and return to them of part of the land, it is not possible to return land under the Crown Forest Assets Act 1989 without the associated compensation. It is to the wider breaches of the Crown we must look to find proportionality between prejudice and the value of the land together with associated compensation.

[57] In other words the economic value of the award was much greater than what was necessary to remedy the claims in relation to any breach arising from the Crown acquiring that title from the hapū. The greater value of the remedy was justified by the other claims for Treaty breaches arising for Ngāti Kahungunu more broadly.

Arguments

[58] I will not lengthen this judgment by a complete record of all the arguments advanced by the parties, but will seek to capture the essence of them.[42]

[59] Mr Heron QC for the Crown argued that the Tribunal erred by considering Treaty breaches other than those arising from the particular claims concerning the Pouākani lands and the Ngāumu Forest. The Tribunal could not make binding recommendations to compensate generally for total tribal land loss. The sections existed to protect individual claims over the lands transferred to SOEs or used for forestry licence purposes. A nexus was required between the relevant claims and the land in issue. The sections did not exist to provide a substitute or alternative financial remedy for general Treaty breaches, but to provide a specific remedy for specific lands. The Tribunal was acting as a "clearing house" in relation to the land subject to resumption. The remedy then granted must be reasonable and affordable. The Tribunal's alternative approach led to the illogical result that the circumstances of the Crown's acquisition of the land could be immaterial to the Tribunal's decision.

[60] Similar arguments were advanced by Mercury and Raukawa. They argued that the sections did not permit an order for return of land to claimants who lack a tikanga based connection to it. It was not a narrow construction to say that there was a

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[42] That is so for all of the summaries of the arguments in this judgment.

requirement for a causal relationship between the claim and the land in question. To adopt a restorative approach for broader breaches was inconsistent with the provisions.

[61] The Settlement Trust and Wairarapa Moana supported the reasoning of the Tribunal. The provisions needed to be interpreted through a Treaty lens. The scheme enacted also needed to be considered in the context of the agreements that underlay it, and the "scheme of safeguards" the Court of Appeal had contemplated in the *Lands* case. A narrow interpretation of Treaty legislation should not be adopted, particularly of provisions directed to remedying breaches of the Treaty.

[62] The approach adopted by the Tribunal had been the consequence of a careful consideration in a series of Tribunal decisions. This involved a liberal interpretation of the words "relates to". Parliament had deliberately decided to not enact more precise requirements, and the Tribunal was a specialist body authorised to make the more general assessments contemplated. The background material demonstrates that both the Crown and Māori saw that "land in lieu" was part of the aim of the provisions. Not all land claims would meet the required threshold for the general relationship between the claim and the land identified by the Tribunal, and the Tribunal also needed to assess whether the land "should" be returned. As an expert body the Tribunal was to make the assessment and decide whether resumption was a proportionate response to remedy the Treaty breaches. Ultimately the importance of the "relate to" requirement was associated with considering whether resumption was such a proportionate response.

[63] Moreover here there were specific breaches in relation to the Crown's acquisition of title for both the Pouākani lands and the Ngāumu Forest. To then say that the Tribunal could not take into account the additional and closely related breaches of the Treaty when deciding whether the resumption remedy should be granted would not be consistent with the remedial jurisdiction contemplated by the provisions.

Standard or intensity of review

[64] Before addressing the arguments I briefly address the question of the standard or intensity of judicial review given that this was raised in the submissions for the parties.

[65] For the reasons that I outlined in *New Zealand Council of Licensed Firearm Owners Inc v Minister of Police* and *Patterson v District Court, Hutt Valley*, I do not find a separate assessment of the standard, or intensity of judicial review to be helpful.[43] Indeed in my view such concepts can be misleading, or at least a distraction. What I said in those two judgments can be taken as being repeated here.

[66] The point is illustrated in the present case. There are factors that could be raised that suggest that the Court should not scrutinise the decision of the Tribunal intensely. It is a highly specialised body with considerable expertise. Its function is to consider the Treaty and the breaches of it and this subject matter involves questions of evaluation, and of judgment. That is so even when the Tribunal is exercising an adjudicative jurisdiction to remedy breaches. On the other hand there are also intensity of review factors suggesting the Court should scrutinise the decision carefully. Here the Tribunal is exercising an adjudicative function with very significant potential implications for the affected bodies – including the transfer of land assets and associated compensation worth some $800 million. There is no right of appeal against the decision, but only a right of judicial review.

[67] I do not find either lines of analysis of assistance. I see them as somewhat abstract points that are not related to the more specific questions that the judicial review challenges raise. The function of the Court in judicial review is to consider whether decisions are made lawfully. In this context this means the Court considers whether the Tribunal correctly interpreted its statutory powers, that it took into account the considerations Parliament intended and ignored those that are irrelevant. The discretion given to a relevant body may include matters of judgment and evaluation on the proper interpretation of the provisions. Where that is so it is not the function of the Court to question the views properly formed by the decision maker. Its function is only to review whether the decisions have been lawfully made. The intensity with which it engages in that task should not change. Neither does the standard of review alter – the Court reviews whether the decision has been made in accordance with law. I have explained these views in more detail in the two judgments referred to above. I approach the challenges here on that basis.

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[43] *New Zealand Council of Licensed Firearm Owners Inc v Minister of Police* [2020] NZHC 1456 at [80]–[85]; *Patterson v District Court, Hutt Valley* [2020] NZHC 259 at [14]–[16].

Assessment

[68] I accept the arguments for the applicants that the Tribunal has misinterpreted the resumption powers in ss 8A and 8HB. In particular I agree that on their proper interpretation the provisions require the well-founded claims to concern the land sought to be returned, and that they contemplate situations where the lands were acquired by the Crown from Māori in breach of Treaty principles.

[69] I accept without hesitation that the provisions should receive a broad and unquibbling interpretation.[44] The dicta along these lines strike me as a manifestation of the requirement that the text of an enactment should be interpreted in light of its purpose.[45] It can be presumed that Parliament intended to give full effect to the principles of the Treaty when enacting Treaty-related provisions, particularly provisions intended to remedy Treaty breaches. The ultimate question is what the particular purpose of these provisions is in light of that presumption.

[70] One begins with the text of the enactment. On its natural reading the requirement that the claims "relates to" the land means that the claims *concern* that land. Moreover, the fact that the enactment directs the "return" of the land would suggest that the claim concerning the land would be about the circumstances under which the land left the possession of Māori, thus providing the justification for the land to be returned. The requirement that the claim be "well-founded" essentially means that the Tribunal is upholding the claim giving rise to the remedy of return of the land. The three concepts – "well-founded" claims, "relates to", and "return" – are inherently interlinked.

[71] The remedy of return is also claim specific. The provisions apply when "a claim" has been submitted to the Tribunal, there are findings by the Tribunal that "the claim is well-founded", with the Tribunal then empowered to take action to "compensate for or remove the prejudice cause by … the act or omission that was inconsistent with the principles of the Treaty" by the "return to Māori ownership" of the land.[46] The Tribunal can either direct the land be returned after conducting its

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44 *Mahuta Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513 at 518 per Cooke P.
45 Interpretation Act 1999, s 5.
46 Treaty of Waitangi Act 1975, s 8A.

assessment, or conclude that the land "be no longer subject to resumption".[47] The land specific claim process is further reflected in the 90 day period contemplated by s 8B. The singular includes the plural, and that the provisions can properly be applied to a series of claims in relation to the land. But it is nevertheless a specific and particular exercise involving claims concerning specific lands.

[72] Notwithstanding that it was the focus of much of the argument, and also the analysis in previous Tribunal reports, I do not agree that the true scope of the provisions turns on the literal interpretation of the words that have been concentrated upon. I do not agree that the words "relates to" mean something substantially different from "in respect of" as the Tribunal held, and as the Muriwhenua Land Tribunal said.[48] There are various verbal formulations that could have been used: "relates to", "in respect of", "concerning," "over" or even just "about". All these phrases have somewhat elastic meanings that depend on the circumstances of their use to gain any more precise content. It is the circumstances of their use in these provisions in light of the other words of the sections and the purpose of the provisions as a whole that is decisive in my view.

[73] The second aspect in the interpretation exercise involves considering the text in light of its purpose. This will include the presumption that Parliament would have intended to give full effect to the principles of the Treaty when enacting these provisions.

[74] Counsel for the parties took me to a number of documents surrounding the *Lands* case, the negotiations following it, the agreements that were reached, and the materials surrounding the enactment of these provisions. This material is helpful in understanding the general context of the amendments, although in the end the Court is seeking to interpret legislation, and there may be a need to place some limit on the extent of the inquiry. That is particularly so when it may be unclear whether particular issues referred to during negotiations were carried through into the legislation. The meaning of an enactment should be apparent on the face of the record even allowing

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47 Thus the Tribunal performs a "clearing house" function, to use the expression referred to in some of the background legislative materials.

48 See Preliminary Determination, at [86].

for a full appreciation of context and legislative purpose. Here much of the relevant background is expressly summarised in the preamble in the Treaty of Waitangi (State Enterprises) Act 1988 which introduced s8A. All of the paragraphs of that preamble are relevant but in particular paragraph (g) provides:

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

[75] This expressly contemplates that the claim will relate to the land that has been transferred to the state enterprise, and not other lands as the Tribunal held.

[76] The Crown forestry assets provisions, including s 8HA, were brought within the regime by the Crown Forests Assets Act 1989. That Act referred to the agreement between the Crown and Māori dated 20 July 1989 which led to its enactment. This agreement annexed a list of the main principles for the parties, and in particular:[49]

> Māori Principles
>
> (i) uphold the articles of the Treaty of Waitangi and the protections in current legislation;
>
> (ii) minimise the alienation of property which rightly belongs to Māori;
>
> (iii) optimise the economic position of Māori.

[77] This refers to property which "rightly belongs to Māori." This again supports the view that the remedy involves the return of land that was wrongly taken from the Māori owners by the Crown.

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49 Clause 15 and the Annex.

[78] Both amending Acts refer to the Treaty. The preamble to the 1988 Act refers to the principles of the Treaty as referred to in s 9 of the SOE Act, and the 1989 Act also refers to protecting Treaty claims. This assists in understanding what is meant by "claims relating to land or interests in land" as referred to in (g)(i), (ii) and (iii), and then ss 8A and 8HA. As Mr Barton submitted one must always look to the Treaty. The Treaty recognises, and then specifically protects the special relationship between Māori and their customary lands. The English text of the second article of the Treaty provides:

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

[79] The key Treaty principle is the right of the Tribes to "full exclusive and undisturbed possession of their lands" unless they freely agree to alienate them to the Crown. Claims relating to lands would most naturally be referring to breaches of this Treaty obligation.

[80] As indicated, a key feature of ss 8A and 8HA is that they involve the "return to Māori ownership" of the land in question. The land must have previously been in that ownership. That is also implicit in the concept of "resumption" — a concept referred to by the provisions introduced into the SOE Act 1986. The provisions can be thought of as involving Māori resuming the full exclusive and undisturbed possession of the lands that are the subject matter of the claims – to use the more contemporary expression, to restore the exercise of full mana whenua. This is a significant indicator that the well-founded claim would concern that land, and the circumstances under which it is no longer in the ownership of Māori. That is that the land was acquired by the Crown in a manner which breached the principles in Article 2 of the Treaty. The relevant purpose would be to allow the rights over that land to be restored — to use the Māori text, to restore "te tino rangatiratanga o o ratou wenua". The purposive approach suggests that the jurisdiction exists in relation to lands that are no longer in

Māori ownership because of a breach of the Treaty, and which should be returned to Māori to allow the guaranteed right of rangatiratanga or mana whenua over that land to be resumed.

[81] The Tribunal's approach means that the well-founded claim does not need to involve breaches associated with the loss of ownership/rangatiratanga over the land in question. Resumption could be ordered even where there is no criticism of the manner in which the Crown acquired title (ie the Crown acquired title in the manner contemplated by Article 2 of the Treaty). That seems to me to involve an interpretation dislocated from the Treaty and the special relationship between Māori and the land that is at the heart of these provisions.

[82] The respondents relied on the references in the *Lands* case to obtaining "land in lieu" for Treaty breaches.[50] This is also referred to in the exchanges between the Crown and Māori representatives that led up to the enactment of the provisions. But the provisions do not establish a land in lieu jurisdiction. The Tribunal cannot order that land that has never been owned by Māori should be transferred to Māori under the resumption powers. That is so even if that land were seen to provide the best remedy for the breach. For example, the best remedy for the Crown's breaches in failing to provide other land in the Wairarapa following its promise to do so when acquiring title to the Wairarapa lakes might well have been to identify such land in the Wairarapa under the ownerships of a former SOE (or the Crown) and order that it be transferred as the remedy. The Crown's broken promises would then be fulfilled. Indeed in the Wai 863 report the Tribunal recommended the return of title to the lake beds, and the gift of any land in Crown ownership adjacent to the lakes or in this vicinity as the appropriate remedies. [51] The Tribunal cannot do this on its approach unless the land in question was previously in Māori ownership.[52] Approached in that way, the fact that the land was formally in Māori ownership becomes, to use the Tribunal's own words, a matter of "happenstance".[53]

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50 *Lands* case*,* above n 2, at p 684 per Richardson J.
51 *Wairarapa ki Tararua Report* above n 8, VIII at [15.9.3].
52 Presumably even Māori ownership by a different iwi.
53 Preliminary Determination at [315].

[83] I accept that it is important to recognise that these provisions were inserted to reflect agreements between Crown and Māori that can be expected to involve elements of compromise. So, there may not have been complete coherence in terms of underlying principles. The interpretive task should not seek to artificially bestow a neatness that is not there. But it is partly for that reason that I do not interpret the provisions as creating a "land in lieu" jurisdiction.

[84] In *Haronga v Waitangi Tribunal* the Supreme Court summarised the importance of the forestry agreement between the Crown and Māori, and the background generally, in the following way:[54]

> [88] The obligation to consider any recommendations it thought fit to make after a finding of prejudice resulting from Treaty breach here fell to be fulfilled by the Tribunal in the context of Crown forest assets and the special provisions under the heading "Recommendations in relation to Crown forest land". Under them, the Tribunal has the effective responsibility of ordering resumption, where it considers that course appropriate, because the Crown must comply with its recommendations in relation to such land, after a 90-day pause to enable other resolution by agreement. As Baragwanath J remarked in *Attorney-General v Mair*, the result of the 1989 amendments in relation to Crown forest land was to confer upon a claimant with a sound case for the exercise of the judgment of the Tribunal an outcome which, "while expressed as recommendatory, [is] ultimately adjudicatory". That view is consistent with the legislative history referred to above. As the long title to the Crown Forest Assets Act makes clear, the legislative package enacted in 1989 envisaged that "successful claims" under the Treaty of Waitangi Act would result in "the transfer of Crown forest land to Māori ownership and for payment by the Crown to Māori of compensation". The agreement of 20 July 1989, which preceded the legislation and which is referred to at [70]-[73] above, identified a principle of significance to Māori as being to "minimise the alienation of property which rightly belongs to Māori". The jurisdiction to order resumption in respect of licensed Crown forest land, conferred on the Tribunal by the 1989 Act, was part of the negotiated solution reached between the Crown and Māori in their agreement, under which both parties gained something of value. It must be understood in that context.

[85] This description appears consistent with the view that I take of the provisions. The provisions concern the return of lands that rightly belong to Māori.

[86] I agree with the Tribunal's view that the provisions are clearly remedial. But it is a particular type of remedy in relation to specific claims and particular land. It can be thought of as a restitution remedy. Another analogy is that the Tribunal is

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[54] *Haronga v Waitangi Tribunal*, above n 3, footnotes omitted.

empowered to provide a remedy by way of specific performance — specifically performing the Crown's obligation to return land that it has acquired inconsistently with the principles of the Treaty.[55]

[87] I also agree that the further aspects of the remedial jurisdiction should not be interpreted narrowly. Contrary to the Crown's submissions, it would be permissible for the Tribunal to take into account other breaches when deciding at the further stage of the determination whether the land "should" be returned. For Pouākani there was particular reason to look beyond the breach by which title was acquired by the Crown. That is because there were a series of closely interlinked Treaty breaches. Wairarapa Moana represents the successors of those who originally held legal title to lakes Wairarapa and Ōnoke. The Crown's conduct that gave rise to it acquiring title to the lakes and their surroundings was held to be a breach. There were then further breaches arising out of the Crown's failure to honour its promise to provide the owners with alternative land in the Wairarapa in connection with it acquiring title. There were yet further breaches arising from the Crown providing the largely valueless and inaccessible lands in the central North Island instead. The Crown continued to breach its obligations by starting to develop some of these lands for the power scheme without any consent from the landowners, and then by compulsorily acquiring that land for inadequate consideration. It is a remarkable story of injustice.[56] I accept Mr Radich's argument that these are closely interrelated breaches, and that it is not inappropriate for the Tribunal to consider them when exercising its jurisdiction. It is, as he argued, a trail of tears.[57] Those other breaches are permissible considerations under s 8A(2)(a)(ii) and s 8HB(1)(a)(ii) when the Tribunal considers whether the land should be returned.

[88] But I do not accept that the resumption power is available to provide the remedy for those other breaches, or the wider land-based Treaty breaches suffered by Ngāti Kahungunu. The essence of the resumption jurisdiction is specific, and focuses

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55 See *Te Heu Heu & Tūwharetoa Maori Trust Board v Attorney-General*, above n 33, at [107]; the Crown's "duty to redress past wrongs" was articulated at one of the principles of the Treaty.

56 See *Wairarapa ki Tararua Report*, above n 8, vol 2 at [7.1]; as the Tribunal said "… so much of what took place now seems barely credible, so manifestly unfair was it to tangata whenua of the region – who by contrast seem to have conducted themselves throughout with remarkable restraint, dignity and honour."

57 *McGirt v Oklahoma* (2020) 591 US 1 per Gorsuch J.

on the Treaty breach associated with the loss of the mana whenua over the land in question, and the appropriateness of return of the land given that breach. A striking feature of the Tribunal's approach is that it does not require there to be any well-founded claims about the land sought to be returned at all. The resumption can be provided as a remedy for Treaty breaches concerning other lands. As it happened, for Pouākani and potentially also the Ngaumu Forest, there are breaches in relation to the Crown's acquisition of those lands. But on the Tribunal's approach that is not a requirement. Indeed, on that approach there would really be no need for the qualifying breaches to even concern land. The lands subject to resumption become a "land bank" – a source of land to be used to remedy the Crown's Treaty breaches more generally. I see that interpretation as inconsistent with the text and purpose of the provisions.

[89] I should make it clear that, whilst I have concluded that restoring full mana whenua over land is a key purpose of the provisions, I also conclude the lands at Pouākani are technically eligible to be considered under s 8A. Although this was the purpose of the provisions, and whilst Ngāti Kahungunu have no mana whenua over these lands, the claims nevertheless qualify for consideration as a matter of plain wording. The land was previously in Māori ownership and accordingly can be "returned". There is a qualifying claim concerning the circumstances under which the Crown took title from the Māori landowners. But it seems to me that the lack of mana whenua is a very important consideration when the exercise of the power is considered.[58]

The implications of the broader interpretation

[90] In my view the inquiry the Tribunal engaged in as a consequence of its interpretation illustrates the error in approach. That is because the Tribunal undertook a more wide-ranging analysis than Parliament would have contemplated.

[91] The Tribunal assessed the impacts of the Crown's Treaty breaches on Ngāti Kahungunu overall.[59] It then considered whether to order resumption to remedy these impacts adopting a restorative approach. When doing so the Tribunal indicated that it

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58 Moreover the further issue concerning tikanga and the Treaty – issue four below – may prevent resumption of this land being granted to Ngāti Kahungunu.

59 Preliminary Determination at [196]–[203].

remained of the view "that the level of Treaty settlements is a legitimate part of our inquiry to the extent that we want to know how much a restorative approach might cost".[60] It then concluded that the level of previous Treaty settlements for other iwi had not restored the position of Māori. The Tribunal relied on a speech by Dr Don Brash on Waitangi Day in 2018 as an evidential source for this conclusion.[61] There may also have been more direct evidence, such as statistical evidence, for the point it was making. The Tribunal referred to economic evidence when quantifying the economic value of the resumption orders it was contemplating. It then explained:

> 202. Creating enterprises that provide good jobs also seems to be an indispensable part of changing a population's socio-economic profile. For cultural reasons, the jobs would ideally be close to home. Another focus will be re-establishing marae, making them centres of cultural life that enable whanaunga to support each other in regaining traditional knowledge, knowing tikanga and speaking te reo Māori. Also vital is to grow their heft in the wider community so that their cultural preferences carried weight in local decision-making. Something like partnership might then emerge. Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua would see their mana tūpuna, mana motuhake, mana Māori restored. There would be true settlement – ea – upon the land. He ao anō tērā.
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> 203. Could the return of the land titles in Ngāumu and Pouākani achieve all that? The truth of the matter is that we do not know – and, we think, cannot know – for certain. We heard evidence of how, internationally, an increase in wealth does not necessarily turn the tide for indigenous peoples. There are of course many, many variables at play. Whether the determination and talent of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua would be enough to overcome the obstacles to regional economic development and inter-generational socio-economic deprivation simply remains to be seen. We can say, though, that without significant funds at their disposal, it is much less likely and probably impossible. The purchase of any appreciable quantity of land would alone cost many, many millions. We are certain that bringing about the combination of elements required to re-establish mana could not be achieved quickly or cheaply. Inter-generational social deprivation, if it can be repaired, will require many inputs and most of them are not free.

[92] This line of inquiry by the Tribunal seems to me to go beyond the adjudicative role given by Parliament. The Tribunal's function was not to conduct an inquiry into the overall impact of all the Treaty breaches on Ngāti Kahungunu peoples, and then order the return of lands having a high enough value to potentially assist in remedying the undoubtedly profound economic, social and cultural damage caused. The jurisdiction in question was intended to be more specific.

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60 At [157].
61 At [158]–[161].

[93] Ultimately, the Tribunal's approach means that the resumption remedy can be granted even when the claimant has little or no association with the relevant land. Its approach is based on the economic value of that land and associated compensation, assessed by the Tribunal here to be at least $800 million.[62] The Tribunal has found that Ngāti Kahungunu do not have a relationship of tangata whenua to the Pouākani lands,[63] and that it is only "the happenstance that compulsorily-acquired land at Pouākani is valuable" that gave rise to it being an appropriate remedy.[64] The land is being treated as equivalent to $800 million in a bank account for the purposes of assessing the appropriateness of return as a remedy. In my view this illustrates the error in approach.

[94] It follows from the above that the applicants' judicial review challenge based on error of law succeed. The decision in this respect should be set aside and remitted to the Tribunal. Given that there are well-founded claims associated with the Crown's acquisition for the Pouākani lands and potentially also the Ngāumu Forest, reconsideration is the appropriate remedy. The Tribunal's preliminary views at [268] and [283] of its preliminary determination will remain relevant to whether resumption is appropriate to remedy those breaches. In addition, the fact that Ngāti Kahungunu has no mana whenua over the Pouākani lands is highly relevant. Those are matters for the Tribunal to reconsider. The limits upon reconsideration are also subject to the findings on the other judicial review claims set out below.

ISSUE FOUR: IS THE DETERMINATION INCONSISTENT WITH TIKANGA AND THE TREATY?

[95] Raukawa, acting on its own behalf and on behalf of Ngāti Tūwharetoa challenges the preliminary determination on the basis that the Tribunal erred in finding that the Pouākani lands lying within their traditional rohe could be returned to Ngāti Kahungunu who has no customary association with this area. They say that this decision is unlawful as being inconsistent with tikanga and involves a further contemporary breach of the Treaty. They are joined in those submissions by the Crown and by Mercury.

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62 At [183].
63 At [258].
64 At [315].

[96] The Tribunal considered these questions in some detail.[65] It recorded that it had already found that the Crown had breached the Treaty when granting Wairarapa Māori land at Pouākani, and that the Crown had said that return would cause a fresh grievance.[66] It also said that the wide discretion in ss 8A and 8H(b) "… also allows us to ensure that Tikanga Māori is properly incorporated in our decision making".[67] In relation to land-based tikanga, it noted:[68]

> … there is a particular Tikanga dimension to the fact that the Māori lands over at Pouākani are not tangata whenua there but rather are interlopers in other tribes' rohe.

[97] The Tribunal then held:[69]

> We understand the tikanga-based argument of Raukawa and Ngāti Tūwharetoa. We absolutely see how the original grant to Wairarapa Māori, and the ongoing presence of the Wairarapa Moana ki Pouākani Incorporation in their rohe, is a thorn in their side and the effects do not diminish with time. However, we can state quite categorically our strong view that ownership of land at Pouākani does not give Wairarapa Māori the status of tangata whenua there: it never can and never will. They are, like Pākehā landowners in the district, manuhiri (visitors) in tikanga terms.
>
> However, we are not disposed to let the mana whenua arguments influence us against exercising our discretion in favour of recommending the return of the subject land at Pouākani to and Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua …

[98] It then set out a series of reasons why the mana whenua arguments did not so influence it, which were in summary that:[70]

(a) The wider land had been occupied by Wairarapa Māori for some 100 years and the 787 acres was now owned by Mercury, so that occupation in accordance with tikanga had long been in abeyance.

(b) The land being returned was only a small part of the total block and Wairarapa Māori would remain owners of the larger part of the land.

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65 Preliminary Determination at [223]–[261].
66 At [248].
67 At [238].
68 At [245].
69 At [258]–[259].
70 At [259].

(c) Wairarapa Māori never sought to have had land in another tribe's rohe granted to them and to now deny them the s 8A remedy on that basis would be to further prejudice them.

(d) The Tribunal could not return the land to Raukawa or Ngāti Tūwharetoa.

(e) The recipient entity might be able to resolve issues with Raukawa and Ngāti Tūwharetoa and thereby move to a state of "ea".

[99] The Tribunal also referred to the preamble to the TOW Act, and to the Tribunal making recommendations relating to the "practical application" of the principles of the Tribunal. It then said:[71]

> The situation concerning the land at Pouākani is *sui generis* – that is, standalone and unique – in almost every conceivable way. In excluding mana whenua groups from benefit, we are complying with the law. In deciding to return land to Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua in an area outside their rohe, we are exercising judgement in a tikanga-compromised world to achieve what we believe is the best outcome under the circumstances.

Arguments

[100] Raukawa argued that the Tribunal was obliged to exercise its statutory powers in accordance with tikanga and that it had failed to do so. This was an error of law. Furthermore, the Tribunal was obliged to uphold the principles of the Treaty in its decisions. Its functions were grounded in provisions of the Treaty. Such principles were relevant to whether the claim that was well founded related to the land, but also applied to the discretion exercised by the Tribunal in deciding whether the land "should" be returned. Raukawa argued that there was no doubt that Wairarapa Māori were deserving of compensation, but to use the land within the takiwā of Raukawa and Ngāti Tūwharetoa to do so was not appropriate. It would create a fresh grievance, and a fresh breach of the Treaty. The Raukawa Claims Settlement Act 2014 did not preclude the identification of a fresh Treaty breach and the Tribunal was forcing the Crown to breach the Treaty of Waitangi by ordering resumption. That was a fatal error

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71 At [261].

in the decision-making process. The Crown and Mercury advanced similar submissions.

[101] The Settlement Trust and Wairarapa Moana supported the reasoning of the Tribunal. They emphasised that tikanga had occupied an essential part of the Tribunal's analysis. That included references to tikanga principles such as "ea" (which contemplates restoration) and "modern-day muru" (that is that Ngāti Kahungunu was taking land from the Crown to compensate for the prejudice caused). The Tribunal had also plainly taken into account mana whenua issues in reaching its decision. The Act did not expressly stipulate what the mandatory considerations were and the Tribunal as an expert body was expected to identify and apply them. It had considered mana whenua and tikanga in detail including by convening a conference with tikanga experts. It evaluated the matters raised by Raukawa in light of the claims before it, the legislative and tikanga context, and the Tribunal's statutory purpose. The Tribunal members had particular expertise in matters of tikanga. Moreover, the Treaty claims of Raukawa and Ngāti Tūwharetoa had been settled and compensation paid by the Crown. It was an over statement to say the return of the memorialised land would create a new grievance. This was particularly so given that Wairarapa Moana presently occupied the wider areas at Pouākani, and this was not an outcome arising from the Tribunal decision.

Assessment

[102] In my view, the statutory provisions to be applied by the Tribunal do not give it a discretion to make decisions that are inconsistent with tikanga, or which would involve a contemporary breach of the principles of the Treaty.

[103] It is now well accepted that tikanga Māori is part of New Zealand's common law.[72] There is a degree of ambiguity, however, in describing it as "part of" the common law. It has previously been identified as a source for the development of the common law. This is uncontroversial as the courts frequently looks to customs, practices, and contemporary societal attitudes when the common law is developed.

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[72] *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] and [164]; *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

But tikanga can be a little more than that. In some situations, tikanga will *be* the law, rather than merely being a source of it. There will be situations, perhaps particularly when the relevant Māori participants agree upon the tikanga to be applied where a court or tribunal will be applying that tikanga to resolve the matters within its jurisdiction.[73] To state the obvious the relevance and significance of tikanga will be highly contextual.

[104] The present matter involves the exercise of statutory powers by the Tribunal under the TOW Act. The key question is how tikanga principles affect the exercise of those powers. The Tribunal has effectively treated them as an important relevant consideration, but it has decided that in the exercise of its statutory powers it has a discretion to depart from tikanga.[74] I disagree. In my view, this is one of the situations where as a matter of interpretation of the statute the Tribunal does not have a discretion to make decisions that are inconsistent with tikanga. Neither does it have a discretion to direct remedies that are inconsistent with the principles of the Treaty. This is one of the situations where both tikanga principles, and the principles of the Treaty are essentially binding. In this context, tikanga forms a key part of the law to be applied rather than merely being a relevant consideration.

[105] It is clear from the findings that the Tribunal's determinations did not fully comply with tikanga. Tikanga arguments relating to mana whenua were raised by Ngāti Kahungunu before the Tribunal. Expert evidence was received from a number of witnesses, including Sir Tipene O'Reagan, Professor Jacinta Ruru, and Ms Mihiata Pirini. In particular:

(a) Ngāti Kahungunu advanced an argument that it had acquired mana whenua based on "tomo" – broadly, strategic marriage used to forge alliances. That is through intermarriage Ngāti Kahungunu obtained mana whenua interests over the lands at Pouākani. Mr Barton referred to the evidence relating to that argument, and why it did not lead to the principle of tomo applying given the marriages in question. Sir Tipene O'Reagan gave evidence that tomo could not lead to a customary connection to the Pouākani lands by Ngāti Kahungunu.

73 See *Ngawaea v Ngāti Rehua-Ngātiwai ki Aotea Trust Board* [2021] NZHC 291 at [58].
74 Preliminary Determination at [259]–[261].

(b) Similarly, Sir Kim Workman, one of those closely associated with Wairarapa Moana advanced a concept of "whāngai whenua" – that is by analogy of the practice of whāngai of children, the land at Pouākani can now be treated as connected to Ngāti Kahungunu because they, in a sense, took care/custody. The evidence presented by Raukawa's experts was that "whāngai whenua" was not a tikanga concept.

[106] The Tribunal's preliminary determination is silent on both the above issues. But it can be taken that the Tribunal did not accept the tomo or whāngai whenua arguments given the conclusions that it reached and the reasoning it adopted.

[107] The Tribunal held that it was not granting mana whenua to Wairarapa Māori and that it could not do so.[75] It also considered a range of tikanga concepts such as whakatika, utu, ea and muru.[76] But its ultimate conclusion was not consistent with the tikanga in relation to mana whenua. It explained that it needed to apply practical considerations, "exercising judgment in a tikanga-compromised world".[77] But as Professor Ruru and Ms Pirini say in their affidavit, there is no such thing as compromised tikanga.[78] Or as Sir Tipene O'Regan puts it in his affidavit, transferring the land to another iwi does not respect mana whenua and would amount to a further hara.[79]

[108] As I have said, the statutory powers given to the Tribunal do not give it that discretion. The position would be different if the Tribunal had considered that its proposed decision was consistent with tikanga – for example if the other principles (such as ea) prevailed over those of mana whenua as a matter of tikanga, or if the tomo or whāngai whenua arguments had been accepted. But that is not the position. The Tribunal said that it was not disposed to let the "mana whenua arguments" influence it against exercising its discretion. So the statutory discretion was being exercised *notwithstanding* the tikanga relating to the land.

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75 At [258].
76 At [223]–[236].
77 At [261].
78 At [77]. See their affidavit generally, including at [94] – [96]. This evidence and that of Sir Tipene filed in support of the claims was not contested or challenged.
79 At [44]–[57].

[109] I should make it clear that I am not disagreeing with the Tribunal's conclusions on what the tikanga is. The Tribunal has obvious expertise in those matters.[80] My conclusions proceed on the basis of the tikanga principles identified by the Tribunal, and are limited to assessing the relevance of these principles as a matter of statutory interpretation.

[110] The Tribunal is a statutory body created by the TOW Act. It has the functions described in s 5, which include the "… exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them".[81] The TOW Act is itself an Act "to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi" through the Tribunal performing its functions.[82] And as the Tribunal itself observed the preamble records that the recommendation on claims relate to "the practical application of the principles of the Treaty" and to decide "its meaning and effect and whether certain matters are inconsistent with those principles".[83]

[111] It seems to me that tikanga Māori is an important aspect of the principles of the Treaty. The Māori text speaks of the Queen protecting "te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa." That is chiefly authority over lands and other taonga. That carries with it the relevant tikanga in relation to those lands. This is less clear in the English version, albeit that the guaranteed exclusive and undisturbed possession of lands would naturally include the customs that were associated with the lands.

[112] The conclusions I have reached on this point become closely related to the first ground of challenge. The key purpose of the provisions is to restore the ability of Māori to exercise full mana whenua over lands which have come into Crown ownership in a manner that was inconsistent with Treaty principles. These Treaty and tikanga principles also then apply to the Tribunal's exercise of its power to remedy the relevant breach.

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80 See also *Ngawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board* [2021] NZHC 291 at [2].
81 Treaty of Waitangi Act 1975, s 5(2).
82 Title.
83 Preamble.

[113] There is a second related aspect of this argument. I accept Mr Barton's submission that the proposed resumption orders would give rise to a fresh breach of the Treaty. The Tribunal has already held that the original grant of land to Wairapara Māori which was "not their ancestral land but the ancestral land of others not of their iwi or even their waka" is part of the conduct that the Tribunal held "grievously breached the Crown's obligations to act towards its Treaty partner with the utmost good faith, and so as to actively protect their interests".[84]

[114] It is obviously also a Treaty breach for the iwi who did hold mana whenua over those lands: Raukawa and Ngāti Tūwharetoa. That is so to even now. The Tribunal is an independent statutory body established by an Act of Parliament. It must itself comply with the principles of the Treaty. The observance and confirmation of the principles of the Treaty are the very reason for its existence. For that reason, the statutory functions and powers given to it do not give the Tribunal a discretion to make decisions that are not consistent with those principles.

[115] To decide that ancestral lands in the rohe of one iwi should be transferred to another iwi who has no such connection as part of a Treaty remedy is not consistent with the principles of the Treaty. Raukawa and Ngāti Tūwharetoa have themselves reached Treaty settlements that prevent those iwi obtaining legal title to those lands. But this does not eliminate their ancestral association. They remain part of the lands over which Raukawa and Ngāti Tūwharetoa have mana whenua. The fires may not burn as brightly, but they still burn.[85]

[116] That is not to say that the Crown breaches the Treaty when it sells land that it holds within the traditional rohe of an iwi. It may be that it can do so without such a breach as a consequence of a Treaty settlement. But it is another thing to transfer ownership of that land to another iwi as part of the remedy for a Treaty grievance. If that iwi has no customary association with that land there is also no question of managing overlapping mana whenua claims. In my view this amounts to a further

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84 *Wairarapa ki Tararua Report*, above n 8 at [7.11.3].

85 See the tikanga based factors referred to in clause 4(2) of Schedule 2 of the Central North Island Forests Land Collections Settlement Act 2008 agreed to by a number of iwi to identify the mana whenua interests each might have over certain lands.

breach of the Treaty, and again the Tribunal does not have statutory power to direct such conduct.

[117] It follows from the above that I need not address the additional arguments that have been advanced on the basis of failures to consider mandatory relevant considerations. The central point is that the Tribunal did not have a discretion to make resumption orders that are inconsistent with tikanga, or inconsistent with the principles of the Treaty. Its preliminary determination is therefore unlawful. The applicants' challenges on this ground are also upheld.

[118] It may also assist if I directly address the relationship between this ground of challenge and the first ground of challenge in relation to Pouākani lands. In accordance with my findings on the first ground of challenge, the fact that Ngāti Kahungunu has no mana whenua over the land is very significant, but not fatal to the claim for resumption.[86] But the fact that other iwi have mana whenua over that land will likely be.

ISSUE FIVE: INTEREST ON STATUTORY COMPENSATION

[119] The final issue relates to a further proposed decision of the Tribunal set out in its preliminary determination applying solely to the Ngāumu Forest lands. The issue arises under the Crown Forest Assets Act 1999 (the CFA Act).

[120] Under s 36 of the CFA Act, the Crown is obliged to pay compensation to the person to whom forestry land is returned. The compensation is calculated in accordance with Schedule 1. Under Schedule 1, the recipient can nominate compensation on the basis of one of the paragraphs in cl 3. Under cl 2(a) the recipient then gets five per cent of that amount, together with any additional amount the Tribunal recommends under cl 2(b). There are then additional calculations to be performed depending on the option chosen, and to award interest on this amount.

[121] As the Tribunal noted, the cl 3 nomination has not yet been made. Ngati Tumapuhia-a-Rangi had indicated that cl 3(c) was their preferred approach. But

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86 See [89] above.

the Tribunal noted that the recipient entity of the resumption order had not been finalised, so matters were still some way down the track. The Tribunal nevertheless said it would decide two of the aspects of the calculation "in order to assist in the choice between the options in clause 3."[87]

[122] The Crown challenges the preliminary decisions then made by the Tribunal. The decisions are made under the following provisions of the Schedule:

> 5 For the purposes of clause 3(c), the return on the proceeds received by the Crown shall be—
>
> (a) such amount as is necessary to maintain the real value of those proceeds during either—
>
> (i) in the case where the claim was filed before the transfer occurred, a period of not more than 4 years from the date of transfer of the Crown forestry assets; or
>
> (ii) in the case where the claim was filed after the date of transfer of the Crown forestry assets, the period from the date of transfer of the Crown forestry assets to the date of expiration of 4 years after the claim was filed; and
>
> (b) in respect of any period after the period described in subparagraph (i) or subparagraph (ii) of paragraph (a) (as extended under clause 6), equivalent to the return on 1 year New Zealand Government stock measured on a rolling annual basis, plus an additional margin of 4% per annum.
>
> For the purposes of this clause, a claim shall be deemed to be filed on such date as is certified by the Registrar of the Tribunal.
>
> 6 The period of 4 years referred to in clause 5 may be extended by the Tribunal where the Tribunal is satisfied—
>
> (a) that a claimant with adequate resources has wilfully delayed proceedings in respect of a claim; or
>
> (b) the Crown is prevented, by reasons beyond its control, from carrying out any relevant obligation under the agreement made on 20 July 1989 between the Crown, the New Zealand Maori Council, and the Federation of Maori Authorities Incorporated.

[123] The agreement of 20 July 1989 dealt with a number of matters concerning forestry lands, but relevantly provides:

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87 Preliminary Determination at [302].

> 6. The Crown and Maori agree that they will jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations within the shortest possible period.
>
> 7. If the Waitangi Tribunal recommends that land is no longer subject to resumption, the Crown's ownership and related rights are confirmed.
>
> 8. If the Waitangi Tribunal recommends the return of land to Maori ownership the Crown will transfer the land to the successful claimant together with the Crown's rights and obligations in respect of the land …

The clause then goes on to set out the compensation running with the land.

[124] The Crown argued that it had done its best in seeking to progress matters, but that the scheduling of the Tribunal's work and the interruptions caused by ongoing litigation had caused delays out of its control. It argued that the four-year period should be extended.

[125] The Tribunal rejected the Crown's argument in brief reasoning. It said:

> [308] The Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua Settlement Trust countered this, saying:
>
> > 386. In fact, the Crown has taken steps to frustrate claimants' ability to have their claims processes within the shortest reasonable period. Mr Fraser agreed that generally the Crown will not continue to negotiate with groups where they begin to litigate against the Crown, including through bringing resumption applications.
> >
> > 387. It is apparent that the Crown made a policy decision to push claimants toward negotiated resolution of claims. That was the Crown's choice. It was in a way the Crown's gamble: that it could negotiate settlements before a successful resumption application. The compensation has become substantial in the time since, but the Crown would have been aware of that.
>
> [309] We agree with these submissions. The Crown has been in charge of the whole Treaty settlement process. In a number of cases, it has settled with parties without waiting for the Tribunal to conduct an inquiry. Moreover, the funding of the Tribunal was in the Crown's hands. Had the Crown wanted the inquiry process to go faster, it could have resourced the Tribunal accordingly. Therefore, we do not accept that there were reasons beyond the Crown's control that led to delay.
>
> [310] We find that the reasons for extending the four-year period in clause 6 do not apply here. The effect of this decision is for the higher interest rate prescribed in clause 5(b) to commence from 28 October 1992 – four years after 1988, when the claim was filed.

Arguments

[126] The Crown argued that the Tribunal had erred in applying the provision in a number of ways.

[127] First it was argued that the relevant obligation under the agreement was to apply a best endeavours standard and that there was no discernible evaluation by the Tribunal against that standard, including in relation to the extensive research and enquiry necessary to assess the claims, the enquiry process then followed by the Tribunal, the Crown's endeavours to negotiate settlement, and the fact that no party had sought resumption until the Wai 429 resumption application over the Ngāumu Forest made on 30 July 2018. Furthermore the Settlement Trust had opposed resumption until 19 November 2018, and only then sought resumption on a precautionary basis. This was not considered by the Tribunal.

[128] The Crown also argued that a number of adverse findings were made by the Tribunal which were not supported by the evidence that was filed. In that context, in relation to the Tribunal's approach more broadly, Mr Heron argued that the Tribunal's reasoning was inadequate given the implications of its findings in terms of the level of the compensation to be provided.[88]

[129] For the Settlement Trust Mr Colson argued that cl 6(b) set a very high threshold, and that the onus was on the Crown to show that it was established. The Crown's evidence provided to the Tribunal had failed to meet that standard, and the Crown had done nothing to demonstrate material that would satisfy the test contemplated by cl 6(b). There was no failure to consider relevant considerations and neither was the test misstated. The adverse findings made by the Tribunal were open given the material it had been provided.

[130] Furthermore, Mr Colson argued that to qualify under cl 6(b), the Crown would first need to show a breach of the agreement – that is that it had failed to use its best

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[88] It is not entirely clear what the financial consequences of this decision are as there are a number of variables, but I was taken to evidence provided by the Crown that suggested it might be as much as $230 million.

endeavours. It would then need to show that that failure was due to circumstances beyond its control. The Crown had clearly failed to prove either matter.

Assessment

[131] I accept the Crown's submission that the Tribunal's approach does not involve a full consideration of the relevant matters. There is insufficient identification of the relevant obligation of the Crown under the provisions, or consideration of the factors that would then be relevant to that obligation. Moreover, the factors that have been addressed concern the Crown's settlement policies, and not the delays in the claims being determined by the Tribunal which is the focus of cl 6(b).

[132] It was first important to identify the relevant meaning and effect of cl 6(b), and the Crown's obligations under the agreement. That involved a combined question of statutory and contractual interpretation. Of itself this is not a straightforward matter. There are three conclusions I have reached on interpretation questions that are of significance:

(a) First cl 6(b) refers to "any *relevant* obligations" (emphasis added) under the agreement. The agreement involved obligations applicable to all claims by Māori concerning forestry lands. But the calculation of interest under Schedule 1 concerns the specific claim in question. To be relevant, the Crown's obligation would need to be specific to the claims to forestry land in question, that is the claims advanced on behalf of Ngāti Kahungunu. The required analysis accordingly involved the delays arising from the determination of Ngāti Kahungunu's claims by the Tribunal, and the reasons for them.

(b) Secondly, the relevant standard to be applied in relation to the Crown's conduct seems to me that it use its best endeavours to have Ngāti Kahungunu claims in relation to forestry land determined promptly by the Tribunal. Clause 6(b) then adds a gloss to the application of the "best endeavours" standard. What has prevented the claims being determined promptly (ie within the shortest reasonable period) must arise from factors beyond the Crown's control.

(c) Thirdly, the relevant obligations need to concern the Tribunal's decisions on Ngāti Kahungunu's claims to the land in question. The subject matter of the agreement and cl 6 is the Tribunal processes, not the Treaty settlement processes. The policies applied to Treaty settlement processes are not themselves relevant unless they relate to the determination of the claims by the Tribunal, and the delay to such determinations.

[133] I do not accept Mr Colson's argument that under cl 6(b) the Crown first needed to demonstrate that it had breached its obligations to use its best endeavours, and then demonstrate that this breach was beyond its control. Almost by definition that would not be able to be demonstrated. That approach deprives the section of its intended meaning. What the Crown would need to demonstrate is that notwithstanding its best endeavours, and for reasons beyond its control, Ngāti Kahungunu's claims before the Tribunal concerning this land were not progressed within the shortest reasonable period.

[134] The Tribunal did not assess and then apply this interpretation. For two related reasons I also conclude that the approach of the Tribunal in relation to that obligation was erroneous.

Claim Specific Assessment

[135] First, the relevant obligations of the Crown concerned the claims advanced to the Tribunal by Ngāti Kahungunu, and the specific reasons for delay in the determination of the claims for resumption. What was necessary was an analysis of the chronology of events in relation to those claims and the reasons why they were not determined more promptly. For example it would be relevant that the Settlement Trust did not pursue the resumption application itself until late in the chronology of events. Similarly the hapū that had earlier pursued the claim – Ngai Tumapuhia-a-Rangi – was held not to be entitled to have the land returned to them, and Ngāti Kahungunu had initially opposed its application. These circumstances would be relevant to assessing

whether the claims were determined within the shortest reasonable period and whether the delay arose from matters within the Crown's control.[89]

[136] The required analysis would need to consider the period when the claims of Treaty breaches were inquired into resulting in the 2010 report, and then the delay before the resumption applications were addressed. In that context it is relevant that one of the main differences between the majority and minority judgments in *Haronga v Waitangi Tribunal and Ors* is that the majority concluded that an application for resumption engaged a duty to inquire into that claim that was different from what might be required for the normal claim inquiry processes.[90] The Supreme Court also suggested that the Tribunal had itself potentially adopted practices concerning such applications that had the effect of deferring prompt determination of resumption applications. Such practices may also be relevant to considering whether Ngāti Kahungunu's claims for resumption had not been determined within the shortest reasonable period because of matters outside the Crown's control.

[137] In any event, the key point is that the Tribunal has not engaged in the necessary claims specific assessment as contemplated by cl 6(b).

Tribunal rather than Treaty settlement processes

[138] The second error was that the reasons the Tribunal did provide focused on the Crown's Treaty settlement policies and not its conduct in relation to the claims before the Tribunal.

[139] The Tribunal referred to the Crown's policy to encourage iwi to engage in settlement discussions rather than engage in litigation before the Courts or resumption applications before the Tribunal. The adoption of that policy does not demonstrate that the Crown breached a relevant obligation under the agreement. The relevant

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89 It may also be relevant that the Tribunal's recommendations in the 2010 Wai 863 report concerning the breaches that are now the foundation for the claim for resumption did not include consideration of resumption. That does not mean that resumption cannot be considered or granted, but the fact that the Tribunal itself did not recommend this remedy at that time may be relevant to assessing whether the delay in having the Tribunal address that remedy occurred for reasons within the Crown's control, or other reasons: *Wairarapa ki Tararua Report*, above n 8, vol 3 at ch 15.

90 *Haronga v Waitangi Tribunal* above n 3, at [84]–[89] and [132]–[143].

obligations under the agreement needed to concern the determination of the claims before the Tribunal.

[140] It is relevant that the obligations in the agreement are joint obligations. If an iwi agrees with the Crown to engage in settlement discussions instead of pursuing a resumption application it is difficult to see why that involves the Crown not using its best endeavours to have the claims that are not being advanced determined by the Tribunal. Here the Settlement Trust initially opposed the resumption application until very late in the processes. I was advised it has a Treaty settlement that is all but complete. The relevant iwi is entitled to make a decision on where its interests are best advanced. It may decide that pursuit of the resumption application before the Tribunal is not the best way forward. The relevant obligations of the Crown would only likely be engaged if the resumption path was pursued.

[141] For the same reasons it is difficult to see why the fact that the Crown has settled with other iwi without waiting for the Tribunal to conduct an inquiry was relevant as the Tribunal held. The fact that it has done so does not mean it has failed to use best endeavours to see that Ngāti Kahungunu claims were addressed by the Tribunal within the shortest reasonable period. The additional finding that the Crown has been in charge of the whole settlement process is too general a point to have material impact on the decision at hand. The relevant obligations of the Crown needed to relate to the Tribunal's determination of the Ngāti Kahungunu claims for resumption. They do not relate to the settlement policies generally before and after any such determinations. The finding that the Crown was in charge of funding the Tribunal and could have given it more resources to make the inquiry process go faster is also only made in a general way. To be relevant it would first be necessary to see what had caused this specific delay in relation to the determination of Ngāti Kahungunu's claims and then identify that a funding failure rather than some other factors (such as the decision by Ngāti Kahungunu not to pursue resumption, but rather pursue a settlement) had been the cause of the delay.

[142] The heart of the difficulty in interpreting, and then applying the relevant obligations under the agreement and cl 6 is that it is apparent that at the time of the entry of the agreement and the enactment of the legislation the parties perceived that

all relevant claims concerning forestry lands could be properly addressed and determined within a four year period. That has been shown to be hopelessly optimistic. Even the time necessary to properly enquire into the extensive Treaty breaches around the country, including breaches in relation to forestry land, has involved much more extensive processes than appears to have been contemplated. The Tribunal's 2010 report into the claims relating to the Wairarapa shows the full extent of the investigations required, and the formulation of a report that properly deals with those issues.

[143] Considered in light of their purpose, the provisions that allowed the claimants to receive more than the amount to maintain the real value of the claim - that is effectively penalty interest – was to ensure that the Crown properly co-operated with the claimants to get the claims they wished to pursue determined promptly. But the delays here may not be due to any Crown failure. It may simply be due to the fact that the extent and complexity of the Treaty claim processes was far greater than the parties contemplated in 1989.

[144] In any event the focus of the Tribunal's reasoning appears to be the Crown's Treaty settlement policies. The suggestion is those policies involved illegitimate pressure which forced iwi (including Ngāti Kahungunu) away from pursuing resumption. But such strategies do not demonstrate breach of a relevant obligation. A relevant obligation would only have been breached if the Crown's breach of the agreement resulted in the Tribunal not determining the claims more promptly. It has not been argued that these policies involved a breach of a good faith obligation under the agreement. As I have said, a relevant breach of the terms of the agreement relied upon would require a more specific assessment of the chronology of events in connection with the Tribunal dealing with those claims, and the reasons for the delays.

[145] There is considerable force in Mr Colson's argument that what the Crown put forward to the Tribunal, both in terms of evidence and argument, did not allow the Tribunal to properly assess what cl 6(b) required it to assess. But the Tribunal has still erred. Moreover, this was only a preliminary determination to guide the parties on the way forward. There was little clarity on what the relevant obligations under the agreement, and what the effect of cl 6(b) were. The Crown had also said that it did

not rely on cl 6(a), which might have suggested that any implicit delays arising from Ngāti Kahungunu's approach were not relevant. In any event, these matters have now been argued before this Court and I accept that the Tribunal has not assessed the question in the manner required by the clause. The assessment will now allow the clause to be applied as intended.

[146] For these reasons I uphold the Crown's challenge to this aspect of the Tribunal's decision.

CONCLUSION AND RELIEF

[147] For the reasons addressed above, I have concluded that some of the challenges advanced by the applicants should be upheld. By way of summary my conclusions are:

(a) The preliminary determination is reviewable, and review should be granted notwithstanding that this is not a final decision of the Tribunal.

(b) Mercury's challenge that it was wrongly excluded as a participant before the Tribunal is dismissed. This is plainly the effect of the provisions of the Act.

(c) The applicants' challenge based on the Tribunal's alleged misinterpretation of the required connection between the well-founded claim and the land in question is upheld. The well-founded claim must concern the land sought to be returned, and provide the foundation for its return. This contemplates a breach of Treaty principles in the Crown's acquisition of that land.

(d) The applicants' challenge on the basis that the Tribunal erred by reaching a decision inconsistent with tikanga and the principles of the Treaty is upheld. Directing the land be transferred to an iwi that has no mana whenua in the land conflicts with the rights of the iwi that do, and this is inconsistent with tikanga and the principles of the Treaty. The

Tribunal does not have a statutory discretion to override tikanga and the principles of the Treaty.

(e) The Crown's challenge to the determination in relation to the interest payable on the compensation associated with forestry lands is also upheld. The Tribunal did not address the claim specific factors that were relevant, and its decision was based on criticisms of the Crown's Treaty settlement policies which were not.

[148] As already indicated, the appropriate relief to be granted for the judicial review claims that have been upheld involves setting aside the preliminary determination and directing that the Tribunal reconsider the claims made to it in light of this judgment. For the avoidance of doubt, that does not necessitate the Tribunal reconsidering and reissuing a preliminary determination. Whether it releases a further preliminary determination or proceeds to deal with the claims in another way is a matter for it to determine.

[149] I do not know if there are any issues in relation to costs that the Court will need to consider. If there are, the parties can either seek a telephone conference in the first instance, or those seeking costs may file memoranda (no more than 10 pages each plus a schedule) which can be responded to by those opposing costs within 15 working days (no more than 10 pages each plus a schedule).

Cooke J

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