IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 93/2021
[2022] NZSC 142

BETWEEN	WAIRARAPA MOANA KI POUĀKANI INCORPORATION Appellant
AND	MERCURY NZ LIMITED First Respondent
	WAITANGI TRIBUNAL Second Respondent
	ATTORNEY-GENERAL Third Respondent
	NGĀTI KAHUNGUNU KI WAIRARAPA TĀMAKI NUI-Ā-RUA SETTLEMENT TRUST Fourth Respondent
	RAUKAWA SETTLEMENT TRUST Fifth Respondent
	TE KOTAHITANGA O NGĀTI TŪWHARETOA Sixth Respondent
	POUĀKANI CLAIMS TRUST Seventh Respondent
	RYSHELL GRIGGS AND MARK CHAMBERLAIN (ON BEHALF OF NGĀI TŪMAPŪHIA-Ā-RANGI HAPŪ) Eighth Respondents
	THE TRUSTEES OF THE RANGITĀNE TŪ MAI RĀ TRUST Ninth Respondent

SC 127/2021

BETWEEN	RYSHELL GRIGGS AND MARK CHAMBERLAIN (ON BEHALF OF NGĀI TŪMAPŪHIA-Ā-RANGI HAPŪ) Appellants
AND	WAITANGI TRIBUNAL First Respondent
	ATTORNEY-GENERAL Second Respondent
	MERCURY NZ LIMITED Third Respondent
	WAIRARAPA MOANA KI POUĀKANI INCORPORATION Fourth Respondent
	NGĀTI KAHUNGUNU KI WAIRARAPA TĀMAKI NUI-Ā-RUA SETTLEMENT TRUST Fifth Respondent
	TAKERE LEACH ON BEHALF OF TE HIKA O PĀPĀUMA Sixth Respondent
	HAAMI TE WHAITI ON BEHALF OF NGĀTI HINEWAKA Seventh Respondent
	KINGI WINIATA SMILER Eighth Respondent
	THE TRUSTEES OF THE RANGITĀNE TŪ MAI RĀ TRUST Ninth Respondent
	RAUKAWA SETTLEMENT TRUST Tenth Respondent
	TE KOTAHITANGA O NGĀTI TŪWHARETOA Eleventh Respondent
	POUĀKANI CLAIMS TRUST Twelfth Respondent

Hearing:	9–10 February 2022
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Williams JJ
Counsel:	P J Radich KC, M K Mahuika and T N Hauraki for Wairarapa Moana ki Pouākani Inc J E Hodder KC, L L Fraser and K C Grant for Mercury NZ Ltd M R Heron KC, C D Tyson and H P Graham for Attorney-General M G Colson KC and M R G van Alphen Fyfe for Ngāti Kahungunu ki Wairarapa Tāmaki Nui-ā-Rua Settlement Trust C F Finlayson KC, F B Barton and A L Clark-Tahana for Raukawa Settlement Trust P V Cornegé, F E Geiringer, and A S Castle for Ms Griggs and Mr Chamberlain No appearances for: Waitangi Tribunal Te Kotahitanga o Ngāti Tūwharetoa Pouākani Claims Trust The Trustees of the Rangitāne Tū Mai Rā Trust Takere Leach on behalf of Te Hika O Pāpāuma Haami Te Whaiti on behalf of Ngāti Hinewaka Kingi Winiata Smiler
Judgment:	7 December 2022

JUDGMENT OF THE COURT

A **The appeal by Wairarapa Moana ki Pouākani Inc in SC 93/2021 is allowed in part. The High Court's ruling that the Waitangi Tribunal has no power to recommend resumption in favour of a claimant without mana whenua is set aside. The appeal is otherwise dismissed.**

B **The appeal by Ryshell Griggs and Mark Chamberlain in SC 127/2021 and the cross-appeal by Mercury NZ Limited in SC 93/2021 are dismissed.**

C **Issues as to costs may be dealt with by memoranda if they are not otherwise agreed. Memoranda will be no longer than five pages and must be filed and served within 20 working days.**

REASONS

WINKELMANN CJ, GLAZEBROOK AND WILLIAMS JJ
(Given by Williams J)

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Introduction

[1] These two appeals and one cross-appeal raise important issues for the application of the Waitangi Tribunal's "resumption" jurisdiction.[1]

[2] In 2010, the Waitangi Tribunal delivered its three-volume Wai 863 report into the historical claims of Ngāti Kahungunu and Rangitāne of the Wairarapa region (the Wai 863 report).[2] The Tribunal largely upheld those claims. Rangitāne has since settled.[3] What became the Ngāti Kahungunu ki Wairarapa Tāmaki Nui-ā-Rua Settlement Trust (Ngāti Kahungunu Settlement Trust) claimed a mandate to represent all of Ngāti Kahungunu ki Wairarapa, engaged in negotiations with the Crown on their behalf, and eventually reached a settlement (in fact, two settlements, as we come to). But at the same time, two Ngāti Kahungunu ki Wairarapa-related entities applied to the Tribunal for resumption of certain land in which they claimed a particular interest.

[3] First, Wairarapa Moana ki Pouākani Inc (Wairarapa Moana) sought resumption of 787 acres located in the Central North Island on the southwest bank of the Waikato river that formerly comprised part of the much larger Pouākani No 2 block (**the Pouākani land**). Wairarapa Moana is a Māori incorporation operated under Part 13 of Te Ture Whenua Maori Act 1993.

[4] The Pouākani land is the site of the Maraetai Power Station, now owned and operated by Mercury NZ Ltd (Mercury). As at October 2018, it was valued at more

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1 Resumption is the term used to describe the Waitangi Tribunal's power to, effectively, direct the return of certain categories of land subject to Treaty of Waitangi claims. Those categories are current or former state-owned enterprise land, Crown forest land and land belonging to tertiary education institutions. See below at n 16.

2 Waitangi Tribunal *The Wairarapa ki Tararua Report* (Wai 863, 2010) [Wai 863 Report].

3 See below at n 33.

than $600 million. The Pouākani land is not within the rohe of Ngāti Kahungunu ki Wairarapa. Rather it is in the rohe of Raukawa and Ngāti Tūwharetoa. It was held by hapū of those iwi until the late 19th century when the Crown acquired it. In 1916, the Crown agreed with the traditional owners of Lake Wairarapa and Lake Ōnoke in southern Wairarapa to exchange title to those lakes for what became the Pouākani No 2 block. Wairarapa Moana owns what now remains of that block on behalf of its Ngāti Kahungunu shareholders.

[5] The result of this complexity is that Wairarapa Moana's application is opposed by Raukawa (whose position is supported by Ngāti Tūwharetoa),[4] Mercury and the Crown.

[6] Second, Ryshell Griggs and Mark Chamberlain sought resumption of 10,313.8 hectares of Crown forest licence land located in coastal Wairarapa (**the Ngāumu forest**). They applied on behalf of Ngāi Tūmapūhia-ā-Rangi, a hapū of Ngāti Kahungunu with traditional rights (*take tipuna*)[5] in the Ngāumu forest (for ease of reference we refer to the applicants as Ngāi Tūmapūhia-ā-Rangi). The estimated potential value of the Ngāumu forest including compensation payable under the Crown Forest Assets Act 1989 is of the order of $290 million. The Crown opposed that application.

[7] In response to the applications by Wairarapa Moana and Ngāi Tūmapūhia-ā-Rangi, and to protect its position, the Ngāti Kahungunu Settlement Trust filed cross-applications for resumption.

[8] On 2 March 2020, and in response to Mercury's application to adduce evidence and make submissions on the possible resumption of the Pouākani land, the Tribunal

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4 In this context Raukawa is represented by the Raukawa Settlement Trust and Ngāti Tūwharetoa by Te Kotahitanga o Ngāti Tūwharetoa. A further element of complexity is that by joint memorandum dated 19 March 2020, the Pouākani Claims Trust advised that it now supports Wairarapa Moana's application. The Trust was established following the settlement in 1999 of claims by descendants of the original Raukawa and Ngāti Tūwharetoa customary owners of the larger Pouākani block: see Pouakani Claims Settlement Act 2000).

5 See below at n 96.

determined that it was precluded from hearing from Mercury by s 8C of the Treaty of Waitangi Act 1975.[6]

[9] On 24 March 2020, the Tribunal delivered certain "preliminary determinations" on the substantive resumption applications.[7] These determinations were issued as part of a continuing "iterative process" of engagement with claimants, the Crown and other affected parties. The Tribunal indicated that it was minded to grant resumption of the Pouākani land and the Ngāumu forest but not to either Wairarapa Moana or Ngāi Tūmapūhia-ā-Rangi. The Tribunal considered the Treaty-breaching prejudice suffered by these smaller claimant groups was insufficient to justify resumption and would result in unfairness to other claimants who would not benefit. Rather, prejudice suffered on an iwi-wide scale and in relation to the entire tribal estate, would provide the justification. Identifying a recipient capable of bearing that wider Ngāti Kahungunu ki Wairarapa mandate would be a matter for further hearings and consideration, although the Tribunal did not discount the possibility that the Ngāti Kahungunu Settlement Trust may eventually be found to be an appropriate recipient.

[10] Mercury then sought judicial review of the Tribunal's standing determination, and the Crown and Raukawa (the last-mentioned again supported by Ngāti Tūwharetoa) sought judicial review of the Tribunal's preliminary determinations. As we come to, the High Court dismissed Mercury's challenge but granted the applications by the Crown and Raukawa and referred the determinations back to the Tribunal for reconsideration.[8] This Court then granted the appellants' applications for leave to appeal directly to this Court and Mercury's application for leave to cross-appeal on the standing question.[9] Raukawa opposes Wairarapa Moana's appeal. The Ngāti Kahungunu Settlement Trust meanwhile takes a neutral position in

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6 Waitangi Tribunal *Memorandum-Directions of Judge C M Wainwright Concerning Application to be Heard from Mercury NZ Limited* (Wai 863, 2020).

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

8 *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 (Cooke J) [HC judgment] at [6(a)].

9 *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2021] NZSC 134; and *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2021] NZSC 183.

relation to the appeals, but (pending implementation of its settlement with the Crown) the Trust's cross-applications remain on foot.

The issues in this Court

[11] In broad terms, the issues arising in these appeals and our responses to them may be summarised as follows:

(a) Does the Tribunal's determination (albeit preliminary) that Wairarapa Moana is not a suitable recipient for resumption of the Pouākani land, render its appeal moot? (The mootness issue.)

We have found that the Tribunal's preliminary determination as to the suitability of Wairarapa Moana as a recipient of the Pouākani land was not final and may be revisited in the Tribunal's ongoing iterative process. The appeal is therefore not moot.

(b) Does the fact that Ngāti Kahungunu ki Wairarapa lacks mana whenua in relation to the Pouākani land count decisively against resumption in favour of any Ngāti Kahungunu interests, however configured? (The mana whenua issue.)

We have found that although mana whenua is a very important principle of tikanga, Ngāti Kahungunu's lack of it at Pouākani is not inherently disqualifying.

(c) What historical Treaty prejudice is relevant to the exercise of the Tribunal's resumption jurisdiction? (The relevant prejudice issue.)

Because this issue was not the subject of appeal (or at least was not directly so), we have made no final determination on it, but in light of the potential importance of the issue for future resumption cases and the narrower construction of the relevant provision which is favoured by William Young J, we consider it appropriate to comment, albeit preliminarily. We have identified certain matters of background and

procedure in relation to historical Treaty claims generally that may not have been brought to the High Court's attention.

(d) Did the Tribunal take into account all relevant matters when it determined (for the purposes of the Crown's interest liability) that the post-1992 delay in resolving the Ngāumu forest claim was entirely attributable to the Crown? (The Crown's interest liability issue.)

We have found, consistently with the High Court's view, that the Tribunal did not consider all relevant matters.

(e) Did the Tribunal correctly apply s 8C of the Treaty of Waitangi Act when it refused to hear from Mercury in the Pouākani land application? (The standing issue.)

We have found, consistently with the High Court's view, that Mercury does not have standing in the Waitangi Tribunal.

[12] These issues raise complex questions of fact and law. A reasonable appreciation of the context in which they arise is required. We therefore set out the various relevant layers of background and we must (unfortunately) do so at some length. We first discuss the statutory context and background to the resumption regime. Second, we summarise the Tribunal's 2010 historical findings in relation to the Ngāti Kahungunu ki Wairarapa claims. Third, we describe the negotiations that followed between the Crown and what became the Ngāti Kahungunu Settlement Trust. These led to a settlement this year, albeit one that is disputed by the appellants. Fourth, we summarise relevant details of the Tribunal's preliminary determinations in relation to the resumption applications.

[13] We make a general comment that, in the dissenting reasons of William Young J, he characterises our reasons in a number of different ways. While we have responded to some of these, our failure to respond to the others should not be taken as an indication that we accept his characterisation. Our reasons should be read in their own terms and mean what they say.

Statutory context and background to the resumption regime

[14] Section 5(1) of the Treaty of Waitangi Act lists the functions of the Tribunal. The relevant function is contained in s 5(1)(a) and is stated in general terms:

> … to inquire into and make recommendations upon, in accordance with this Act, any claim submitted to the Tribunal under section 6:
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> …

The other functions referred to in s 5 relate to the Tribunal's power to exclude resumable land from liability to resumption and its advisory role to Parliament in relation to the Treaty-consistency of any Bill before the House.

[15] Insofar as historical claims such as those the subject of these proceedings are concerned, s 6 relevantly provides:

> **6 Jurisdiction of Tribunal to consider claims**
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> (1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—
>
> (a) by ... any Act (whether or not still in force), passed at any time on or after 6 February 1840; or
>
> ...
>
> (c) by any policy or practice (whether or not still in force) adopted by or on behalf of the Crown …; or
>
> (d) by any act done or omitted at any time on or after 6 February 1840 …,—
>
> and that the ordinance or Act … or the policy or practice, or the act or omission, was … inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.
>
> …
>
> (3) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

[16] The Tribunal's jurisdiction in relation to historical Treaty claims is unique in New Zealand's legal and constitutional framework. It inquires into the

Treaty-consistency of actions and policies of the Crown and Acts of the legislature, as well as failures to act, develop policy or enact legislation — all from 1840. Its yardstick is the "principles" of the Treaty — an acknowledgement that the texts in Māori and English "differ", and that the Treaty must speak relevantly in today's world.[10] It is a standing Commission of Inquiry with the power to undertake or commission its own research and to adopt "such aspects of te kawa o te marae" in its procedures as it thinks appropriate.[11] It comprises judges of the Māori Land Court and up to 20 other members.[12] Membership composition is intended to be both knowledgeable in the matters that come before it and reflective of the "partnership between the 2 parties to the Treaty".[13]

[17] Historical claims are complex. They relate to whole districts and cover a century and a half of interaction between Māori and the Crown. No less complex is the requirement to engage with contemporary claimant communities, often at different stages of readiness and recovery. These realities call for deep expertise and a willingness to be flexible.

[18] As the Wai 863 report demonstrates, the Tribunal takes a district-by-district approach. That is, it consolidates the multiple claims of iwi, hapū, whānau and individuals in a particular district into a single historical inquiry and receives evidence and submissions from claimants and the Crown in a staged process of hearings over the course of a year or (usually) more. It then reports its findings about the history of engagement between iwi and hapū and the Crown and settlers in the district. In the introduction to its Wai 863 report, the Wairarapa Tribunal put it this way:[14]

> In the Wairarapa ki Tararua inquiry district, there was a transition over a remarkably short period from Māori being the people with authority over their whole physical environment (volume I: *The People and the Land*), to a situation in the present where they own very little land and exercise virtually no authority over the circumstances that define their lives and environment (volume III: *Powerlessness and Displacement*). In between were several decades that we chronicle in volume II: *The Struggle for Control*.

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10 Treaty of Waitangi Act 1975, preamble. The Tribunal is encouraged to make recommendations that facilitate the "practical application" of Treaty principles.

11 Schedule 2 cls 5(9), 5A and 8.

12 Section 4.

13 Section 4(2A)(a).

14 Wai 863 Report, above n 2, at xlix–l.

[19] This process of seeking reconciliation through evidential inquiry supported by expert membership and inquisitorial procedures all explain why the Tribunal's remedial powers are generally recommendatory.

[20] There are partial exceptions to this in relation to Crown forest, tertiary education and state-owned enterprise land. These resulted from litigation between the Crown and Māori over the impact on Treaty claims of a proposal in 1986 to transfer certain Crown lands to independent state-owned enterprises. Section 9 of the State-Owned Enterprises Act 1986 (the 1986 Act) was engaged. It provides:

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

[21] In *New Zealand Maori Council v Attorney-General* (the *Lands* case), the Court of Appeal declared that:[15]

> … the transfer of assets to State enterprises without establishing any system to consider in relation to particular assets or particular categories of assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful.

[22] As a result of that judgment and further negotiations between the parties, an agreement was reached, and the 1986 Act and the Treaty of Waitangi Act were amended to provide for a system of memorialising land transferred to state enterprises and for the Tribunal to have the power to compel the Crown (by binding "recommendation") to resume ownership of such land for return to Māori. As noted, this power is generally referred to as the Tribunal's resumption power.[16] This Court in *Haronga v Waitangi Tribunal* described the resumption power vested in the Tribunal as "adjudicatory".[17]

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15 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 666 per Cooke P (the *Lands* case).

16 Treaty of Waitangi (State Enterprises) Act 1988 introduced ss 8A–8H of the Treaty of Waitangi Act and ss 27–27D of the State-Owned Enterprises Act 1986 Act [the 1986 Act] to give effect to the agreement reached. Section 27C(1) of the 1986 Act refers to the Crown obligation to resume the land pursuant to the Public Works Act 1981 for the purpose of return to claimants. We discuss the amendments in relation to Crown forest lands in the context of our discussion of the Ngāumu forest land application.

17 *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 at [88] per Elias CJ, Blanchard, Tipping and McGrath JJ.

[23] We will return below to other provisions enacted following the *Lands* case where relevant to the Mercury appeal and *New Zealand Maori Council v Attorney-General* (the *Forests* case)[18] where relevant to the Ngāumu forest, but for present purposes s 8A(2) and (3) of the Treaty of Waitangi Act provide the relevant power:

> (2) … where a claim submitted to the Tribunal under section 6 relates in whole or in part to [memorialised] land or an interest in [such] land … the Tribunal may,—
>
> (a) if it finds—
>
> (i) that the claim is well-founded; and
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> (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
>
> …
>
> (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.
>
> …

[18] *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA).

[24] In summary, the Tribunal's resumption power is triggered if the Tribunal is satisfied that it has before it a well-founded claim that relates in whole or in part to land for which resumption is sought, and that compensation for, or removal of, the prejudice should include return of that land to Māori ownership (whether in whole or in part). In making its assessment, the Tribunal must ignore any improvements and alienations effected after the land is transferred to the state enterprise.

Waitangi Tribunal findings and Crown concessions on the Wairarapa historical claims

General findings (also of relevance to Ngāumu forest)

[25] We turn now to sketch out in general terms the essential thrust of the Tribunal's findings in its Wai 863 report in relation to the Wairarapa historical claims. These provide the factual foundation for the resumption applications and the settlement.

[26] The Tribunal found that Crown's native land purchasing policy and practice during the early colonial period (that is prior to removal in 1865 of the Crown monopsony[19]) was inconsistent with Treaty principles. It also found the Crown, in breach of the Treaty, failed to ensure the lands reserved for Māori from Crown purchases were sufficient to enable effective iwi participation in the new post-sale colonial economy. Further, the Crown's ongoing acquisition of such reserves, even after they had been set aside for hapū, was in breach of the Treaty. The Tribunal also found that the Crown breached the Treaty and the relevant contractual obligations contained in the purchase deeds in its interpretation and management of a fund established pursuant to those deeds to comprise five per cent of receipts from the on-sale of certain Wairarapa Māori land for the benefit of Māori. Overall, the Tribunal found that the Crown's policies in relation to land purchasing, native land title, and land development were the primary cause of the subsequent and current state of relative landlessness of Wairarapa iwi.

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19 Native Lands Act 1865, s 47.

[27] Although the Tribunal did not refer specifically to the Ngāumu forest (which of course did not exist at the time the land was acquired), these findings related also to the lands underlying what is now Ngāumu forest.[20]

[28] The Tribunal recorded that during the course of hearings, the Crown conceded that its policies and practices in relation to the setting aside and acquisition of native reserves, the administration of the five percent fund and the Crown's role in the resulting landlessness of Wairarapa iwi breached Treaty principles.

Pouākani land findings

[29] The history of the Pouākani land is complex, although, as will become clear, it does fit within the Tribunal's general findings about the Crown's native land acquisition policies and practices outlined above. But first it is necessary to sketch out the Tribunal's Pouākani findings because these demonstrate how it came to be that Wairarapa Māori own Māori freehold land on the banks of the Waikato river, over 400 kilometres from their traditional home.

[30] From the 1850s, land in the vicinity of Lakes Wairarapa and Ōnoke (in southern Wairarapa) was acquired by the Crown for Pākehā settlers, but the lakes themselves and some adjoining land initially remained in Māori ownership. In its natural state, Lake Ōnoke was separated from the sea by a narrow spit for a part of each year. With the spit intact and acting as a natural dam, water levels in the two lakes would rise by up to four metres, transforming them into a single expanse of water (hence "Wairarapa Moana") and increasing the area of land under water from 24,000 to 52,500 acres. According to the Tribunal, this build up of flood waters tended to last for around six months.[21] The pressure of the accumulated water would eventually force a channel in the spit allowing the lakes to drain into Palliser Bay. The actual timing of these events varied according to rainfall and wind direction.[22] But the spit tended to open during the autumn rains and so triggered the eel migration (tuna heke) to the sea. Then, the channel would slowly close up again, setting the scene for the

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20 See generally Wai 863 Report, above n 2, at chs 3A–3D and the maps of Crown purchases and native reserves between 1853–1865 at 129, 154 and 155.

21 Wai 863 Report, above n 2, at 654.

22 *Te Maari v Matthews* (1893) 12 NZLR 13 (CA) at 16.

cycle to repeat. For the Māori owners, the lakes were a very valuable fishery in a general sense, but it was the culmination of this cycle in the tuna heke through the open channel that made the lakes "the single most valuable natural resource in the Wairarapa district".[23]

[31] As the land in the vicinity of the lakes came to be farmed intensively, disputes developed. Some of these disputes related to the delineation of the borders of the lakes (which defined how much land remained in Māori ownership). More significantly for the purposes of this judgment, the settlers wished to maintain a permanent channel to provide drainage from Lake Ōnoke to the sea; this to prevent seasonal inundation of what settlers, by then, saw as their land. The permanent opening of the channel was opposed by Wairarapa Māori because of the adverse impacts it would have on their fishery and other food gathering resources. The associated controversies resulted in petitions to Parliament, a Commission of Inquiry[24] and proceedings before the courts.[25]

[32] In 1883, the Native Land Court awarded title in the lakes to 139 owners belonging to various Rangitāne and Ngāti Kahungunu hapū with customary rights.[26] The legal issue as to the entitlement to drain Lake Ōnoke was settled in 1893, when the Court of Appeal held (by a majority) that under the Public Works Act 1882 and the River Boards Act Amendment Act 1888, the South Wairarapa River Board had delegated power from the Wairarapa South County Council to maintain a permanent channel in the spit.[27] Counsel for the Māori appellants in that case presented a reasonably elaborate argument as to the effect of the Treaty of Waitangi and extant Māori fishing rights on the construction of the relevant empowering legislation. But

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23 Wai 863 Report, above n 2, at 649.

24 A report was presented to the Governor: Alexander Mackay "Claims of Natives to Wairarapa Lakes and Adjacent Lands" [1891] II AJHR G4.

25 See, for example, *Te Maari*, above n 22.

26 See "Claims of Natives to Wairarapa Lakes and Adjacent Lands", above n 24, at 60. See also Wai 863 Report, above n 2, at 653, where the Tribunal identifies the hapū which generally had rights in the area around the lakes as "Ngāi Te Aomataura, Ngāti Te Aokino, Ngāti Pakuahi, Ngāi Tūkoko, Ngāti Te Whakamana, Ngāti Rākaiwhakairi (Rākaiwakairi), Ngāti Komuka, Ngāti Hinetauira, Ngāti Rangitawhanga, Ngāti Te Hangarākau, Ngāi Tūtemiha, and Ngāti Rangiakau". See further Te Whatahoro's evidence to the "Claims of Natives to Wairarapa Lakes and Adjacent Lands"1891 Commission, above n 24, which listed hapū and their respective rangatira that owned land and fishing rights in the lake.

27 *Te Maari*, above n 22.

this aspect of the case was only mentioned briefly in the judgment, which instead focused almost exclusively on the statutory scheme.

[33] In 1896, the Crown and the traditional owners resolved the dispute. Ownership of the lakes and some adjoining land was transferred to the Crown which, in return, paid over a monetary sum, and agreed to make ample reserves for the benefit of the Māori owners. The Māori text of the deed said that the Crown would reserve (rahui tia) suitable land or places (etahi waahi to tika) for the former owners of the lakes for their wellbeing (oranga) in the district or area (tenei takiwa) when land deemed appropriate for the purpose by the Crown came into its ownership.[28] That never happened.[29] Instead, and after a 20-year delay, the Crown agreed to transfer 30,486 acres of (what was, by then) Crown land at Pouākani to the former owners of the lakes or their successors. In 1916, the Native Land Court vested what became the Pouākani No 2 block in 230 Wairarapa Māori. The shareholders of Wairarapa Moana are the descendants of these owners.

[34] The Pouākani land is in the rohe of Raukawa and Ngāti Tūwharetoa. The circumstances in which it had been earlier acquired by the Crown from its Raukawa and Ngāti Tūwharetoa owners are discussed in the 1993 Pouākani Report of the Waitangi Tribunal,[30] and in the judgment of this Court in *Paki v Attorney-General (No 2)*.[31] (For completeness, we note that the Tribunal found those circumstances were also attended by breaches of the Treaty).

[35] In any event, in 1916, when Wairarapa Māori received title, there was no practical access to the 30,486 acres. This only changed in the mid-1940s when the

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28 Wai 863 Report, above n 2, at 667. As recorded by the Waitangi Tribunal, the Māori text for this section of the agreement read (emphasis added):

> … kaati ka ata rahui tia etahi waahi to tika hei oranga mo nga Maori whai tak? ni aua moana i roto i nga whenua e tai mai ana kite ringaringa o? karauna i raro i taua ota whakawhiti a etahi atu whenua maori ranei e tika mai ana ki ti kawanatanga *i roto i tenei takiwa*.

The phrase italicised means "within this district". It is a description of the land the Crown promises to provide under the agreement. The Waitangi Tribunal interpreted this to mean in the environs of the lake. Curiously, there is no equivalent in the English text. These matters are discussed by the Tribunal at 673–675.

29 The Tribunal found that this failure breached the Treaty causing Wairarapa Māori prejudice: at 709–710 and 716–717.

30 Waitangi Tribunal *The Pouakani Report* (Wai 33, 1993).

31 *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67.

Government required a part of Pouākani No 2 block to facilitate construction of the Maraetai dam and a township at Mangakino to house construction workers. Work on this project was carried out from early 1943 for some 55 months before the owners were finally notified in the latter part of 1947, this despite the fact it was located on their land.

[36] In 1949, the Crown compulsorily acquired 787 acres of the larger Pouākani No 2 block for what became the Maraetai Power Station complex. As well, an additional area of 684 acres required for the Mangakino township was compulsorily leased from the owners at a rental set by the Māori Land Court. In its 2010 Report, the Tribunal concluded that the Crown had breached Treaty principles in relation to the original lakes-for-land exchange, the compulsory acquisition of the Pouākani land and the associated Mangakino leases.

[37] The Tribunal recorded the Crown's concessions in relation to Pouākani, offered during the course of hearings, as follows:[32]

> The Crown acknowledges that its accumulated acts and omissions in relation to the Lakes agreement constitute a breach of the Treaty and its principles. It also acknowledges that its failure to inform Māori and discuss the proposed taking of Pouākani prior to the Crown's entry on to the land and the construction of a number of structures on that land constitutes another breach.

Settlement negotiations follow, then stall, then resume again

Negotiations

[38] Once the Tribunal reported on the Wairarapa historical claims, what later became the Ngāti Kahungunu Settlement Trust was established to advance discussions with the Crown over settlement of the Kahungunu-related claims. In November 2012, the Crown accepted the mandate of that Trust to settle the Ngāti Kahungunu ki Wairarapa claims on behalf of all Ngāti Kahungunu claimants.[33] The Crown and the Ngāti Kahungunu Settlement Trust reached an agreement in principle on 7 May 2016 and initialled a formal deed of settlement on 22 March 2018. The deed was then

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32 Wai 863 Report, above n 2, at 1057 (footnote omitted).

33 Rangitāne negotiated and settled separately, ratifying a deed of settlement with the Crown by iwi wide vote in August 2016. Settlement legislation was enacted a year later: Rangitāne Tū Mai Rā (Wairarapa Tamaki nui-ā-Rua) Claims Settlement Act 2017.

ratified by vote of the registered beneficiaries of the Trust in a process undertaken between September and November 2018.[34]

[39] The settlement was valued at $93 million and included 70 per cent of Ngāumu Forest (the other 30 per cent had been included in the Rangitāne settlement). No Pouākani land was included by way of relief in the settlement. It was further agreed that the jurisdiction of the Tribunal to consider the extant resumption applications would be removed by legislation.

Resumption applications and preliminary determinations

[40] Meanwhile, Wairarapa Moana had been trying since 2015 to convince the Crown to negotiate with it separately over the Pouākani claim. But the Crown considered the appropriate mandate lay with the Ngāti Kahungunu Settlement Trust, not Wairarapa Moana, and would not engage. On 10 February 2017, Wairarapa Moana applied for resumption of the Pouākani land pursuant to s 8A of the Treaty of Waitangi Act. On 24 March 2018 (two days after the Crown and the Ngāti Kahungunu Settlement Trust initialled the settlement deed), Wairarapa Moana held a special general meeting at which the shareholders in attendance voted down a proposed resolution to withdraw the incorporation's resumption application.[35]

[41] On 30 July 2018, Ms Griggs and Mr Chamberlain applied pursuant to s 8HB of the Treaty of Waitangi Act, for binding recommendations in relation to Ngāumu Forest. They did so on behalf of Ngāi Tūmapūhia-ā-Rangi, a hapū of Ngāti Kahungunu with customary rights in the Ngāumu forest land. There is no suggestion that Ms Griggs and Mr Chamberlain do not speak for the hapū.

[42] In response to these developments, the Crown advised the Ngāti Kahungunu Settlement Trust that it would not finally sign and implement the Deed of Settlement while the resumption applications remained on foot. The Ngāti Kahungunu Settlement Trust, wishing to protect its position, then made what were described as

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[34] There are about 8565 registered beneficiaries of the Ngāti Kahungunu Settlement Trust: Preliminary Determinations, above n 7, at [294]. 33 per cent of beneficiaries voted, and of those, 72 per cent were in favour.

[35] 81.71 per cent of the shareholders' in attendance voted down the proposed resolution.

"defensive" resumption applications mirroring those of Wairarapa Moana and Ngāi Tūmapūhia-ā-Rangi.

[43] The Tribunal commenced hearings in relation to the resumption applications in May 2019 and issued its preliminary determinations in March 2020. As noted, the Tribunal indicated resumption would be a likely outcome of its ongoing iterative process, but appropriate recipients had yet to be identified. These determinations have led to the current judicial review proceedings.

New settlement with Ngāti Kahungunu Settlement Trust

[44] Following delivery of the subsequent High Court decision at the end of March 2021, the Crown and the Ngāti Kahungunu Settlement Trust re-engaged. A new deed of settlement was negotiated. It involved an increase in quantum from $93 million to $115 million and the offer of a further $5 million for enhancement of the lakes environment. The deed was ratified by Settlement Trust beneficiaries in a vote.[36] The position with respect to the Pouākani land and Ngāumu forest remained unchanged. The deed purports to settle all claims of Ngāti Kahungunu ki Wairarapa, including those of Wairarapa Moana and Ngāi Tūmapūhia-ā-Rangi, and accepts that the Tribunal's jurisdiction to entertain the resumption applications will be removed. Relevant Ministers and trustees signed the new deed on 29 October 2021.[37]

Claim settlement Bill

[45] Ratifying settlement legislation was introduced in the House on 4 February 2022. The legislation, if enacted would put an end to these proceedings. In light of this we address two issues for the purposes of clarification only.

[46] The first is this. At an earlier stage in this process, Mercury submitted in opposition to Wairarapa Moana's application for leave to appeal directly to this Court,

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[36] 31 per cent of the Ngāti Kahungunu Settlement Trust members voted, with 68 per cent in favour of the settlement; see Waitangi Tribunal *Decision on Application for an Urgent Hearing* (Wai 3058 and Wai 429, October 2021) at [12(h)]. The Waitangi Tribunal found that this "ratification" was not, in fact, sufficient ratification: Waitangi Tribunal *Decision of the Tribunal* (Wai 3058, Wai 429 and Wai 3068, November 2021) at [148]. This is, of course, not before us.

[37] The Waitangi Tribunal found that the Settlement Trust had no mandate for the claimants in Wai 429 (Ngāi Tūmapūhia-ā-Rangi) and Wai 3058/85 (Wairarapa Moana): *Decision of the Tribunal*, above n 36. This is also not before us.

that the application itself demonstrated this proceeding was, in substance, an attempt to interfere inappropriately in Parliamentary proceedings. We disagreed. Elias CJ's discussion in *Ngāti Whātua Ōrākei Trust v Attorney-General* of the 1976 decision of Beattie J in *Fitzgerald v Muldoon*, demonstrates why.[38] As Elias CJ noted, the plaintiff sought injunctions and mandamus against the Prime Minister whose purported suspension of payments to the New Zealand superannuation fund was argued to be unlawful. An application for priority fixture was made to ensure the matter could be heard before Parliament's next sitting. The Crown opposed on the basis that retrospective legislation would be introduced into the House to deal with the issue. The Crown argued that the plaintiff was simply trying to "beat Parliament to the draw".[39] Beattie J granted the priority fixture. He considered that the proceedings were brought to require the Prime Minister to comply with existing legislation. The plaintiff was entitled to have his case heard with expedition. After discussing that decision, Elias CJ said this:

> [119] I do not think the circumstance that the plaintiff in *Fitzgerald v Muldoon* sought to uphold statutory obligations is reason not to apply the same approach. Until Parliament changes the law, the courts must be open to citizens who seek to have their existing legal interests and rights determined. The rights recognised in s 27 of the New Zealand Bill of Rights Act 1990 to natural justice and to bring proceedings against the Crown on equal terms would not otherwise be fulfilled. Parliamentary freedom of debate and in its proceedings is unaffected by the judicial responsibility to hear and determine rights and interests protected by law.

[47] Second, these appeals do not put the claims settlement Bill in issue in any way. Rather, they raise orthodox claims of statutory or other right: the right to have extant applications for resumption determined according to law, and the related right to test the implications of tikanga considerations in that context. They therefore involve no conflict with the terms of s 11 of the Parliamentary Privilege Act 2014, nor any breach of the common law principle of non-interference.[40] A passage from the Court of Appeal decision in *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd v*

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38 See *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [117]–[118] per Elias CJ.

39 At [117] referring to the comments of Beattie J in *Fitzgerald v Muldoon* SC Wellington A118/76, 19 May 1976 at 3.

40 See *Ngāti Whātua Ōrākei Trust*, above n 38, at [46]; and *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd v Attorney-General* [2020] NZCA 2, [2020] 3 NZLR 1 at [33]–[35]. See also *Willow Wren Canal Carrying Co Ltd v British Transport Commission* [1956] 1 WLR 213 (CCA) at 215–216. Note also *Fitzgerald v Muldoon*, above n 39.

Attorney-General, delivered sometime after this Court's decision in *Ngāti Whātua Ōrākei Trust*, captures the essential points:[41]

> [33] ... the reasoning of both the majority and Elias CJ in *Ngāti Whātua* is consistent with the proposition that the courts may make declarations of existing right, interest or entitlement whether or not there is a bill before the House which may affect them in some way. Such relief is not "in relation to parliamentary proceedings", in the sense provided for by ... the Parliamentary Privilege Act. It does not amount to an interference by the courts in Parliament's "proper sphere of influence and privileges" because such declarations would be about existing rights, interests or entitlements, and not what Parliament may be proposing to do in relation to them. The terms of s 4(1)(b) of the Parliamentary Privilege Act are apposite here. Comity is a principle of "*mutual* respect and restraint" between the legislative and judicial branches as to their respective constitutional functions. It is the function of courts to adjudicate on rights and entitlements.
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> [34] In very different circumstances, the English courts have adopted a similar approach. For example, in *Willow Wren Canal Carrying Co Ltd v British Transport Commission*, the English High Court refused to stay a proceeding commenced by a canal barge company against the canal owner, despite the fact that there was a bill before the House relieving the owner of the very duties upon which the plaintiff based its suit. The canal owner argued that even if the injunction sought were granted, the Judge would be required to suspend it until the legislative process had taken its course. Upjohn J said this:
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> > A preliminary objection is taken to [the defendant's application for stay], which is fatal to that application; and it is that, sitting in this court, it is my duty to see that litigants have their cases tried, as they are entitled to, and that I cannot take into account the possible effect of some Bill now before Parliament which, if passed into law in its present form, may have some effect upon the rights of the parties. That seems to me to be a correct formulation of the law. This court is not concerned with what Parliament may think it wise to do in relation to the rights of parties, but the plaintiffs are entitled to come to this court and say, "In the normal course of events our action will very soon be ripe for hearing. We desire that the court should hear it."
> >
> > Of course, if subsequently to that Parliament in its wisdom by some enactment affects the rights of the parties even to the extent of modifying or abrogating the effects of any judgment which the plaintiffs may be fortunate enough to obtain, no one doubts the right and power of Parliament to do so. But it is plain that it is not right for this court either now or at the hearing to take into account the possible effect of some Bill at present before Parliament which, so far as this Court is concerned, may never be passed into law at all, or, if passed into law, may ultimately contain provisions which do not affect the rights of the parties before the court at all. In other words, it is a matter of speculation on which this court will not embark as to whether a Bill at present before Parliament will be passed into law in its present form.
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> [35] The Judge went on to note that "[a]uthority is not wanting for that proposition".

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41 *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd*, above n 40 (footnotes omitted).

The Waitangi Tribunal's preliminary determinations

[48] We return now to address the Tribunal's substantive preliminary determinations of 24 March 2020 in a little more detail and with particular reference to the issues arising in these appeals.

[49] Between May and December 2019, the Tribunal heard evidence and submissions in what it described as an iterative process for determining whether to recommend the return of the Pouākani and Ngāumu forest land. The Tribunal explained what it meant by this:[42]

> Google informs us that an iterative process is one that 'should come closer to the desired result as the number of iterations increases'. The term is usually used in a mathematical context, but we can usefully borrow it to describe a means of allowing interactions between parties and the tribunal about the tribunal's proposals for the implementation of its binding recommendations to arrive at an ultimate result that is not only legal/tika but also understood, accepted, and practical.

[50] Incorporated in this is the idea that as the process continues, some possible outcomes fall away so as to provide scope for greater focus on those that remain.

[51] Importantly, for the issues arising in this appeal, the Tribunal determined that the prejudice suffered by Ngāti Kahungunu ki Wairarapa as a result of the Crown's Treaty breaches justified the making of binding recommendations in relation both to the Pouākani land and the Ngāumu forest land.[43]

Pouākani land determinations

[52] In relation to the Pouākani land specifically:

(a) The Tribunal considered that Treaty breaches in relation to the subject land were not sufficient to justify resumption of land and fixtures worth more than $600 million. But, in the Tribunal's view, it was also entitled to factor into its assessment two additional sources of Treaty prejudice: first, the prejudice arising from the Crown's acquisition of

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42 Waitangi Tribunal *Memorandum-Directions Setting Out Matters That Parties Should Take Into Account In Preparing Closing Submissions* (Wai 863, 29 August 2019) at [41].

43 Preliminary Determinations, above n 7, at [122]–[123] and [215].

Wairarapa Moana, and second, the wider tribal narrative of dispossession and landlessness affecting all Ngāti Kahungunu ki Wairarapa, whether or not it related to Pouākani or the lakes. On this broader approach, resumption was proportionate to the prejudice.[44]

(b) The Tribunal felt that the scheme of s 8A of the Treaty of Waitangi Act mandated this approach. In particular, the requirements of s 8A(2) could be satisfied because the wider Ngāti Kahungunu ki Wairarapa claims of Crown driven landlessness did relate "in whole or in part" to the Pouākani land,[45] and vesting such land in a tribally mandated body did involve "return [of the land] to Maori ownership" as required by that section.[46] Further, the Treaty context required the Tribunal to construe the statutory language in a "broad and unquibbling" way, while the negotiated background to the enactment suggested a "looser construction" was appropriate.[47]

(c) Since, the Tribunal then considered, the justification for resumption includes losses on a tribal scale, the appropriate recipient should carry a tribal mandate. Wairarapa Moana shareholders, by contrast, had only "private rights".[48] Further, their shares were unequal. For both reasons, Wairarapa Moana shares ought not to form the basis for Treaty-based compensation.[49] It followed that Wairarapa Moana was not an appropriate recipient.[50]

(d) Finally, the fact that Raukawa and Ngāti Tūwharetoa held mana whenua over the Pouākani land did not, in the Tribunal's view, preclude a recommendation for resumption in favour of Ngāti Kahungunu.[51] There were other relevant tikanga that favoured resumption including

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44 At [278].
45 At [122].
46 At [266].
47 At [121], referring to *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) at 518.
48 Preliminary Determinations, above n 7, at [278].
49 At [278]–[279].
50 At [282].
51 At [259].

> hara, muru, utu and ea. Instead, judgement fell to be exercised in a "tikanga-compromised world" in which the best had to be made of the sui generis circumstances of this case.[52] Relevant factors included that the Tribunal could not recommend resumption to mana whenua iwi — all of whose claims had already been settled — and that Ngāti Kahungunu had no option 100 years ago but to take the land on offer.[53]

Ngāumu forest determinations

[53] In relation to the Ngāumu forest land, the preliminary determinations addressed two discrete issues: the appropriateness of awarding the land to a hapū, rather than the wider iwi (albeit, a hapū with primary rights in the land); and the appropriate approach to calculating the interest component of monetary compensation that must accompany resumption of Crown forest land.

[54] On the hapū recipient question, the Tribunal took a similar approach to that taken in relation to Pouākani. First, the wider Ngāti Kahungunu claims did "relate to" Ngāumu forest in a general sense.[54] Second, the Tribunal accepted that returning the land to Ngāi Tūmapūhia-ā-Rangi might be proportionate, but since any return would also, and automatically, involve the payment of significant monetary compensation, this would only be proportionate if the recipient represented those who had been subjected to Treaty-based prejudice on a wider scale.[55] The Tribunal noted, in any event, that other hapū also had interests in Ngāumu forest.[56]

[55] As to the calculation of interest, the question was when the Crown became liable to pay interest on compensation payable under the Crown Forest Assets Act. That Act (which we discuss in detail below) provides a minimum four-year interest holiday from the date on which the relevant claim was filed.[57] In the case of the Ngāumu forest, that four-year period ended in October 1992. The interest holiday

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52 At [261].
53 At [237]–[243] and [259]–[261].
54 At [115].
55 At [283].
56 At [287]. Other primary interests are with Ngāti Hinewaka and Te Hika o Pāpāuma.
57 Crown Forest Assets Act, sch 1 cls 5–6.

may, however, be extended if delay in resolving the claim was not within the Crown's control. The Tribunal found that delay in relation to return of the Ngāumu forest (30 years) was attributable entirely to the Crown. Its reasons were put in the following terms:[58]

> 306. The Crown made no suggestion of claimant delay. However, it submitted it was prevented, by reasons beyond its control, from carrying out some of its obligations under the Forestry Agreement. One obligation is to use 'best endeavours' to enable the Waitangi Tribunal to identify and process all claims, and participate in relevant Tribunal processes concerning the licensed lands. Here, the Crown submitted it has done its best but the scheduling of the Tribunal's work and interruptions caused by ongoing litigation have been beyond its control.
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> 307. For this reason, the Crown argued that the Tribunal should extend the four-year period when determining how compensation should be calculated, and said there are 'no grounds to penalise the Crown for the time the litigation has taken.'
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> 308. The Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua Settlement Trust countered this, saying:
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> > 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.
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> 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.
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> 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 28 October 1988, when the claim was filed.

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58 Preliminary Determinations, above n 7 (footnotes omitted).

The status of these 'preliminary' determinations

[56] The Tribunal concluded its preliminary determinations by making two potentially significant points. First, that there were further determinations to be made before the terms of any formal interim recommendations could be finalised. And second, that the determinations it had made were not necessarily final either:[59]

> 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.

[57] Further submissions would be sought in due course on a number of matters including the appropriate recipient entity on behalf of Ngāti Kahungunu ki Wairarapa for the Pouākani land and the Ngāumu forest land,[60] and the compensation issues arising from sch 1 of the Crown Forests Assets Act in relation to the Ngāumu forest land.[61]

Issue one: the mootness issue

[58] For the Crown, Mr Heron KC argued that the Tribunal had already rejected Wairarapa Moana's application on its merits and determined that return of the land would be disproportionate to the incorporation's claims and the prejudice it suffered. That meant that Wairarapa Moana's appeal was effectively moot.

[59] We do not agree for three reasons. First, the Tribunal was clear that all of its determinations were preliminary and subject to review should the circumstances require.[62] Second, the legislation does not actually require an application.[63] Third, and perhaps most importantly, the High Court's view was that the Tribunal impermissibly broadened the scope of qualifying Treaty prejudice. That finding has

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59 At [316].
60 The Tribunal indicated that this could be the Ngāti Kahungunu Settlement Trust: Preliminary Determinations, above n 7, at [295]–[296].
61 At [316].
62 See above at [56]–[57].
63 *Haronga*, above n 17, at [137(a)] per William Young J.

not been appealed.[64] Relevant prejudice is now somewhat more restricted in scope to the loss of the Wairarapa lakes, the Pouākani land swap and the compulsory acquisition of the Maraetai development site. On any view, this is a fundamentally different basis for decision than the iwi-wide approach preferred by the Tribunal. The Tribunal has not yet considered whether, despite its earlier view, resumption might still be a proportionate response to this somewhat narrower class of prejudice. Nor has it considered the downstream question of which group would best represent the descendants of those who suffered that more-specific prejudice. The Tribunal is bound therefore to consider the applications afresh. The application therefore remains on foot.

Issue two: the mana whenua issue

The High Court's approach

[60] The starting point in the High Court's view, is that the Tribunal is bound by tikanga and Treaty principles. The effect is that mana whenua will be fundamentally important in resumption applications. This, in turn means, firstly, that the resumption power exists primarily as a remedy for the Treaty-breaching loss of mana whenua over the land in question:[65]

> The essence of the resumption jurisdiction is specific, and focuses 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 second implication is that, even if non-mana whenua claimants are technically eligible to obtain resumption, they are unlikely to succeed if mana whenua is held by another iwi:[66]

> In accordance with my findings on the first ground of challenge [the meaning of "relates … to" in s 8A], the fact that Ngāti Kahungunu has no mana whenua

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64 We are not to be taken as necessarily accepting that this narrowing is the correct approach: see our discussion below at [98]–[100].

65 HC judgment, above n 8, at [88].

66 At [118] (footnote omitted). While not strictly relevant, the second conclusion tends to suggest the High Court may have been operating under a misunderstanding of the true position. It seems to imply that there is land in New Zealand not subject to the mana whenua of an iwi or hapū. This land, in the High Court's view, could be eligible for resumption by non-mana whenua. This suggestion proceeds on a false premise. There is no land in New Zealand in respect of which there is not at least one iwi or hapū that claims mana whenua over it. There are many areas where multiple iwi or hapū claim mana whenua: see Elizabeth Toomey (ed) *New Zealand Land Law*

> over the land is very significant, but not fatal to the claim for resumption. But the fact that other iwi have mana whenua over that land will likely be.

[61] In relation to the Pouākani land specifically, the High Court therefore concluded that:[67]

> 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 positions of the parties

[62] Wairarapa Moana's challenge to the judgment of High Court is twofold:

(a) it maintains that "return to Maori ownership" in s 8A is not confined to the return of land to mana whenua iwi only; and

(b) it says the Tribunal's approach to tikanga was correct and the High Court's approach was both wrong and an usurpation of the Tribunal's function.

[63] Wairarapa Moana did not engage with the wider "land bank" issues dealt with by the High Court; this no doubt on the basis that, however viewed, its claims of prejudice in relation to loss of the Pouākani land are unquestionably specific to that land.

[64] The Crown's position is that:

(a) The High Court was correct to say that mana whenua was a highly relevant consideration for the Tribunal in determining a resumption application; and

(b) tikanga was at least a very weighty consideration, and rightly so regarded by the High Court; and the Judge had not substituted his view of tikanga for that of the Tribunal.

(5th ed, Thomson Reuters, Wellington, 2017) at 4 and 443–445; and Richard Boast and others *Maori Land Law* (Butterworths, Wellington, 1999) at 48–49.

67 HC judgment, above n 8, at [147(d)].

[65] Raukawa maintains that the expressions "resumption" and "return to Maori" in s 8A mean resumption is only available to claimants with a mana whenua connection to the land. It also argues that the Tribunal may not act inconsistently with tikanga and that "return of the land" to Ngāti Kahungunu or Wairarapa Moana would be inconsistent with both tikanga and the principles of the Treaty, and in particular, the Crown's obligations to Raukawa and Ngāti Tūwharetoa.

[66] Mercury takes broadly the same approach as the Crown and generally supports the approach taken by the High Court. It argues that "return to Maori ownership" is confined to return to the group who hold rangatiratanga and mana whenua over the land to be resumed (and to this extent, disagreed with the view of the High Court that, on the statutory language, the land is eligible to be considered for return). It supports the approach of the High Court in relation to mana whenua and its conclusion that return of the land to Ngāti Kahungunu would breach tikanga and the principles of the Treaty.

[67] Ngāi Tūmapūhia-ā-Rangi, for whom this issue is also of some relevance, supports the approach of the High Court. More particularly, its position is that it is not open to the Tribunal to recommend resumption of land taken from one claimant to meet the claims of other claimants in respect of different losses. It also broadly supported the approach of the High Court that the Tribunal must comply with tikanga and may not make decisions which, if implemented, would breach the principles of the Treaty, although it did note that it is open to question whether the Judge was right as to what this meant in relation to the resumption of the Pouākani land.

[68] The Ngāti Kahungunu Settlement Trust appeared but, as we presaged, made no submissions.

Setting mana whenua in the wider context of tikanga and its evolution

[69] As we come to in relation to issue three, the High Court accepted that, in the particular circumstances of this claim, the history of the acquisition of the Wairarapa lakes and the land exchange also "related to" the Pouākani land for the purposes of

s 8A.[68] In other words, the relevant prejudice for resumption purposes was not just the compulsory acquisition in 1949. This finding might still have provided real support for the resumption applications by Ngāti Kahungunu interests, but the Court's further finding on the priority of mana whenua meant the lakes context was likely to count for little in the end. This is because, the (almost) insurmountable difficulty confronting the Ngāti Kahungunu applications was that tikanga and Treaty principles bind the Tribunal in the exercise of all its functions.[69] It followed that a recommendation, against opposition from mana whenua, that land be returned to non-mana whenua iwi or hapū would breach both the Treaty and tikanga and therefore "likely" be "fatal".[70]

[70] Applying these principles to this case, the High Court held that the Tribunal had unlawfully sacrificed mana whenua to promote other (non-tikanga) considerations it felt were more compelling: the historical Treaty breaches borne by Wairarapa Moana, the hapū of the Wairarapa lakes and wider Ngāti Kahungunu in relation to their Wairarapa lands.[71]

[71] There was, to be fair, a deal of evidence before the Tribunal and the High Court in relation to the pre-existing mana whenua of the iwi who owned the Pouākani land before the Crown acquired and transferred it to Wairarapa Moana. In the Tribunal, Raukawa relied on the tikanga evidence of Paraone Gloyne and Nigel Te Hiko. Mr Gloyne referred to a haka he wrote in 2016 protesting at the continued insult of an outside iwi having land and a marae within Raukawa rohe. He resented the fact that Wairarapa Moana obtained the Pouākani lands by the pen not the patu. Mr Te Hiko identified the historic sources of Raukawa mana whenua and acknowledged that the mana whenua of his iwi is, in places, shared with Ngāti Tūwharetoa. But he rejected suggestions by Wairarapa Moana witnesses that intermarriages between Ngāti Kahungunu and Raukawa created a kind of substitute mana whenua in favour of Wairarapa Moana.

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68 See below at [97].
69 HC judgment, above n 8, at [102] and [104].
70 At [116]–[118].
71 See [91]–[94], [107]–[108] and [117].

[72] In the High Court, Raukawa filed affidavits by Professor Jacinta Ruru and Ms Mihiata Pirini (jointly) and by Sir Tipene O'Regan. Professor Ruru and Ms Pirini are legal academics with particular expertise in indigenous rights law. They considered that, contrary to the view expressed by the Tribunal,[72] there is no such thing as a tikanga-compromised world in which tikanga's requirements may be passed over. Tikanga must be applied fully and in accordance with its terms. Sir Tipene O'Regan also rejected any suggestion that the shareholders of Wairarapa Moana might, over time, have obtained mana whenua or tikanga-based rights in Pouākani. But he fairly, with respect, acknowledged that the situation faced by Raukawa and Wairarapa Moana is akin to that of non-tribal urban marae in the South Island: accommodations are reached, and must be reached, and a modus vivendi eventually found.

[73] We accept that Parliament cannot have intended that the Tribunal be empowered to breach the principles of the Treaty. It follows that tikanga will, at the least, be a very important consideration in the exercise of the Tribunal's discretion. Further, we readily acknowledge the concerns expressed by tikanga practitioners and legal experts about the need to protect tikanga generally, and particularly mana whenua, when it must interact with State law, especially that related to Treaty settlements. And we completely understand why unconditional return of the Pouākani land to Wairarapa Moana would be seen by Raukawa as compounding their historical grievances in relation to that land.[73]

[74] All that said, we take the view that in tikanga, as in law, context is everything. It is dangerous to apply tikanga principles, even important ones, as if they are rules that exclude regard to context. The following four factors suggest to us that in this

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72 See Preliminary Determinations, above n 7, at [261].

73 See Raukawa Claims Settlement Act 2014, ss 8(9) and 9(11).

case, a rigid approach to the priority of mana whenua (if that is what the Judge intended in the second conclusion cited above at [60]) cannot be justified.[74]

[75] First, mana whenua refers to traditional authority (mana) over a landscape (whenua). It is the right to speak for the land and for the people of it.[75] There is no doubt that mana whenua is a very important principle of tikanga, not lightly to be overridden.[76] Wairarapa Moana quite properly accepted this in submissions before us. So we agree with the view expressed by William Young J that the paradigm resumption candidate is one involving return of land to its former customary owners.[77] But customary ownership and mana whenua are not necessarily synonymous. There are in fact many examples where mana whenua was held by one community and resource rights within the same area were held by another.[78] But setting that point to one side, it does not follow that the paradigm case is the only path to resumption. The text and

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74 We note in that respect that despite the apparently firm conclusions expressed at [117]–[118] of the HC judgment, above n 8, the Judge did make the following comment earlier in the judgment at [89] (footnote omitted):

> 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.

75 See *Kamo v Minister of Conservation* [2020] NZCA 1, [2020] 2 NZLR 746 at [29]. For a discussion of the different conceptions of mana whenua see Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 178.

76 Although, there is a school of thought that mana whenua was a 19th century adaptation rendered necessary by the introduction in 1840 of the common law's distinction between imperium and dominium: see discussion in *Te Mātāpunenga* about mana whenua, above n 75, at 187–204; and in Waitangi Tribunal *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wai 64, 2001) at 28–29. There may well be some merit in that view. If correct, it serves to confirm that tikanga is no more static than any other system of law. It is certainly the position that as *take tipuna*, or ancestral right-based 'titles' held by hapū communities, were progressively extinguished, the importance in tikanga terms of the authority-centred mana whenua held by supervening iwi collectives became more important.

77 See William Young J's reasons below at [173].

78 For example, Ngāti Hauā at Tauranga (see Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wai 215, 2004) at 40–41) and Tūhoe at Ōhiwa Harbour (see Waitangi Tribunal *The Ngati Awa Raupatu Report* (Wai 46, 1999) at 134–135 and 148). See also the general discussion in *Te Mātāpunenga*, above n 75, at 199–204 and the discussion in Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2018) at 53–54.

principles of the Treaty do not refer only to customary rights and their restoration. They also refer, for example, to the protection of equal rights.

[76] Second, even within its own tikanga framework, mana whenua is neither immutable nor incapable of adaptation to new circumstances. Every system of law recognises that core principles, applied to real life, will have exceptions and adaptations. Indeed, as the mātanga (experts) noted in the course of the tikanga wānanga held by the Tribunal prior to completion of its preliminary report, tikanga is a principles-based system of law that is highly sensitive to context and sceptical of unbending rules.[79] This is not a matter of compromising tikanga, but of *applying* it to context.

[77] Relatedly, the Tribunal did not refuse to apply tikanga in its assessment.[80] Rather, it concluded that mana whenua need not be the controlling tikanga because other tikanga principles were also in play. These included principles such as hara, utu, ea and mana. Taken together, they reflect the importance of acknowledging wrongdoing and restoring balance in a way that affirms mana.[81] We come back to this last aspect below when we discuss tikanga-based processes.

[78] Third, throughout the colonial period and during the current period of Treaty settlements, tikanga has adapted to new circumstances — sometimes willingly and sometimes out of reluctant necessity. In the colonial period, hapū engaged in pre-1840 land transactions with early settlers across what may be described as a cultural and legal divide;[82] from 1840 to 1865, accommodations between multiple hapū and iwi were brokered to facilitate Crown purchases and attract settlers;[83] and after 1865, multiple hapū co-ordinated their efforts and resolved their disputes outside the Native Land Court before asking the Court to affirm their agreements through

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79 See discussion in Waitangi Tribunal *Tikanga of redress transcript* (Wai 863, 2019).

80 If that is what the High Court suggests (see HC judgment, above n 8, at [108]), then it is wrong.

81 Preliminary Determinations, above n 7, at [237]:

> There must be delivery from the historical hara (transgressions, violations) that Ngāti Kahungunu ki Wairarapa Tāmaki nui-Ā-Rua have suffered from Crown policies and actions through the decades. We must do our best to exercise our discretion in sections 8A and 8HB to assist the claimants to find ea. Ea incorporates elements of restored relationships and balance (whanaungatanga), or reciprocity and payment for harm (utu), of recognising and restoring Māori authority and prestige (mana), all in accordance with what is tika (appropriate and correct) and affirming tapu (protection).

82 See Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at ch 3.

83 See Waitangi Tribunal *The Mohaka ki Ahuriri Report* (Wai 201, 2004) at chs 4–5.

consent awards.[84] Tikanga consistently framed Māori responses to these wholly novel situations.

[79] In contemporary times, the West Auckland-based Te Whānau o Waipareira Trust brought a claim to the Waitangi Tribunal in the 1990s arguing that urban Māori collectives now enjoyed certain Article Two Treaty rights. Notable for the fact that Professor Sir Hugh Kawharu of Ngāti Whātua Ōrākei was a senior member of that Tribunal panel, the claim was upheld.[85] Around the same time, contestation over the allocation of Māori commercial fishing quota raised unique debates about whether distribution should be based on iwi coastline (mana moana) or population (mana tangata), and (separately) whether urban Māori collectives such as Waipareira, among others, had their own rights to quota. These were difficult and controversial issues for Te Ao Māori to work through, but in the litigation and negotiations that ensued, recourse was had to tikanga as an adaptable framework for resolution.[86]

[80] The current controversy over the land at Pouākani might be viewed as a continuation of this ongoing process of adaptation.

[81] Fourth, the transfer of land from mana whenua to non-mana whenua is well known to tikanga. 'Tuku whenua' (the term for such transfers) were traditionally made to compensate for serious wrongdoing, acknowledge a significant benefit or service, cement an important alliance, incorporate the donee into the host community, or just for aroha.[87]

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84 See, for example, Waitangi Tribunal *The Hauraki Report* (Wai 686, 2006) at 696; and Waitangi Tribunal *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) at 450–451.

85 Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998).

86 *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 (CA); and Māori Fisheries Act 2004.

87 *Te Mātāpunenga*, above n 75, at 441–447; Norman Smith *Maori Land Law* (AH & AW Reed, Wellington, 1960) at 102–106; and *Muriwhenua Land Report*, above n 82, at 24–25.

[82] But the Pouākani case is almost unprecedented. The Tribunal was required to apply tikanga to a situation that would never arise in a purely tikanga world. That is because:

(a) Wairarapa Moana were allocated former Crown land they (originally) did not want, precisely because they had no mana whenua there;[88]

(b) Raukawa and Ngāti Tūwharetoa hapū did not own the land at the time — the Crown had already acquired it through purchase and in lieu of unpaid survey liens — and they have now settled all of their Treaty claims including those relating to Pouākani;[89] and

(c) the "well founded claim" for which compensation is sought by Wairarapa Moana was not based on a hara perpetrated by mana whenua (as might have been the case in a tuku whenua), but by the Crown in acquiring the land from mana whenua and then on-transferring it.

An additional factor perhaps, is that a resumption application is the only procedure by which Ngāti Kahungunu (however configured) can seek to obtain redress that does not rely on Crown consent and ratifying legislation.[90]

[83] All things considered, and as many tikanga practitioners would no doubt acknowledge, this resumption application raises difficult problems needing to be approached with care because there are multiple Crown Treaty breaches and competing tikanga principles affecting both sets of Māori interests. Tikanga practitioners might also acknowledge that a tikanga-consistent response would require consideration of multiple factors. And they would certainly know that resolution requires a good deal more kōrero between the protagonists.

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88 Ngāti Kahungunu ki Wairarapa had wanted exchange land in Wairarapa: Wai 863 Report, above n 2, at 677.

89 Pouakani Claims Settlement Act; Raukawa Claims Settlement Act; and Ngāti Tūwharetoa Claims Settlement Act 2018.

90 A point also made in *Haronga*, above n 17, at [76] per Elias CJ, Blanchard, Tipping and McGrath JJ in relation to Crown forests.

[84] To sum up to this point, we agree with the High Court Judge's view that mana whenua is a very important principle of tikanga entitled to be treated with great respect by the Tribunal in its work. But, as noted, there are other principles of tikanga too, and sometimes context may require mana whenua to give way, in whole or in part. Unlike the High Court, we do not consider this to be a bright line, black and white case. It too inhabits the grey area between cultural and legal worlds, requiring understanding and the ability to comprehend nuance. The Tribunal is uniquely placed to undertake that evaluation because its members include mātanga and because it is required to deal with these matters regularly. As the High Court Judge acknowledged, it has the necessary expertise.[91] In addition, it has worked with Ngāti Kahungunu communities, including the Wairarapa lakes hapū, for 15 years and knows its people and internal structures well. And it knows the Raukawa and Ngāti Tūwharetoa communities from whom it has heard evidence and received submissions.

[85] By positing the counterfactual of mana whenua support for resumption, William Young J argues the High Court cannot have meant that granting resumption to non-mana whenua will always breach tikanga and the Treaty. On our view, an error in the High Court judgment is that it plainly does mean that. Further, as we say at [11](b), [84] and below at [160], mana whenua is not the only relevant tikanga principle in play, and in any event, its potency will be context driven. In the Tribunal's iterative process, context will evolve. The courts must not pre-empt that. And they most certainly must not do so, in reliance on an incomplete understanding of tikanga in relation to whenua.

Engaging tikanga processes to resolve resumption applications

[86] The Tribunal well knows that tikanga is as much about right or tika processes as it is about tika outcomes, and that *whaka-ea* (the restoration of balance between disputants) is best achieved through tika processes.[92]

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91 HC judgment, above n 8, at [109].

92 Preliminary Determinations, above n 7, at [237]–[243]. See also the discussion in *Ellis v R* [2022] NZSC 114 at [253]–[256] per Williams J; see also [124]–[125] per Glazebrook J; and *Tikanga of redress transcript*, above n 79, at 22.

[87] The Treaty of Waitangi Act gives the Tribunal the flexibility to pursue tika process. Section 6(3) requires the Tribunal to have regard to "all the circumstances" of the case when deciding whether to make a recommendation to the Crown, and any such recommendation may be on general or specific terms.[93] Similarly under s 8A(2), any recommendation for return of former State enterprise land may be on "such terms and conditions as the Tribunal considers appropriate". Further, as noted, the Tribunal may regulate its procedure "as it sees fit" and may "have regard to and adopt such aspects of "te kawa o te marae" as it thinks appropriate to the case.[94]

[88] Raukawa, Ngāti Tūwharetoa and Wairarapa Moana all share two things in common. They have suffered wrongs in relation to Pouākani, and they will always be neighbours. This important reality was not lost on at least some of the protagonists in this case. Sir Tipene O'Regan (who has had some experience in these matters) noted in his affidavit on behalf of Raukawa:

> In my experience, like it or not, others are often placed in your rohe and all parties must learn to adapt and negotiate an agreed process. In my view this is a form of behaviour that is consistent with both tikaka [tikanga] and 'Kaupapa Tiriti' – the Principles of the Treaty.

[89] The Tribunal is engaged in an iterative process. Its options are not necessarily binary. It could, when the time is right, require mana whenua and relevant Ngāti Kahungunu interests, whether configured tribally or on a narrower basis, to seek whaka-ea through tika processes.

[90] For Raukawa, Mr Finlayson KC, accepted that such approach is at least theoretically possible. He cautioned though that to date, in Wairarapa Moana's case, its leadership had been reluctant to engage constructively. But the Ngāti Kahungunu Settlement Trust told the Tribunal it would work with Raukawa, recognising Raukawa's mana whenua at Pouākani and Wairarapa Moana's position may change.

[91] Of course, we must not be taken to be expressing any view at all as to whether this, or any other course, is appropriate in this case. And, if tikanga-based processes are pursued, it will be for the Tribunal alone to decide how any outcome may affect

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93 Treaty of Waitangi Act, s 6(4).
94 Schedule 2 cl 5(9)

the relevant application. We seek only to underscore the flexibility that is built into the resumption regime and to note that there is room for the utilisation of tikanga processes to promote outcomes that avoid the double injury risk that understandably troubles Raukawa so deeply.[95]

Mana whenua and the Ngāumu forest

[92] The High Court's discussion of resumption did not focus on the Ngāumu forest. Rather, the focus in the Ngāumu forest appeal was on the Tribunal's approach to the calculation of compensation under s 36 and sch 1 of the Crown Forest Assets Act. But mana whenua is still an issue.

[93] Ngāti Kahungunu and Ngāi Tūmapūhia-ā-Rangi both, in a sense, have traditional or customary interests in the Ngāumu forest. Ngāti Kahungunu is the iwi with overarching mana whenua in the district and Ngāi Tūmapūhia-ā-Rangi is the hapū with direct customary rights (*take tipuna*)[96] in at least part of the forest land.

[94] For present purposes, we simply note that the contest between wider Ngāti Kahungunu and Ngāi Tūmapūhia-ā-Rangi in relation to Ngāumu forest raises somewhat similar nexus issues to those in Pouākani. They are, admittedly, less stark because Ngāumu forest is at least within the rohe of Ngāti Kahungunu ki Wairarapa.[97] But, as we come to, on the strict interpretation of "relates to" favoured somewhat by the High Court and preferred by William Young J, it might be said those hapū that had *take tipuna* in the underlying land, suffered the greatest prejudice in the Crown's acquisition of it. That is because it was acquired by the Crown (largely between 1853 and 1865) from them. The wider Ngāti Kahungunu interest — mana whenua — is more in the nature of a political prerogative to speak with a tribal voice for the land.[98]

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95 We express no view on the impact of the Raukawa and Pouākani settlements on the range of possible outcomes such processes might produce.

96 Defined in *The Pouakani Report*, above n 30, at 14 as "an ancestral right derived from continuous occupation, particularly one which would be traced from an ancestral canoe". It was defined in *Maori Land Law* (1960), above n 87, at 98 (emphasis added) as "a claim by descent from an ancestor whose right was recognised, or, more correctly, in whom the *take* of the land at one time rested".

97 Indeed this dynamic is similar to that between Raukawa and Ngāti Tūwharetoa on one hand and the beneficiaries of the Pouākani Trust on the other. It is the latter who are the descendants of the hapū actually awarded title to Pouākani by the Native Land Court in 1891. See *The Pouakani Report*, above n 30, at 1 and 186–188; and Pouakani Claims Settlement Act, s 9.

98 See *Kamo v Minister of Conservation*, above n 75, at [29].

The Crown did not acquire the land from Ngāti Kahungunu because the iwi never "owned" or had *take tipuna* in it.[99] There was never a single Ngāti Kahungunu chief or set of chiefs who could represent Ngāti Kahungunu in order to treat with the Crown for the acquisition of all Wairarapa lands. The matrix of tikanga rights in whenua do not work like that. In most cases these decisions were made at the hapū level where *take tipuna* generally resided. The relationship between *take tipuna* and mana whenua is nuanced and sometimes case specific. As is the relationship between hapū and iwi, and their respective (but overlapping) rangatira. The Tribunal was cognisant of those nuances, having reflected on them in the Wai 863 report.[100] This perhaps highlights the danger in over-generalising about the nature and significance of mana whenua. Tikanga in relation to whenua is complex, as the Tribunal is well aware.[101]

Conclusions on mana whenua

[95] In conclusion, therefore, we reiterate the following points. Mana whenua is unquestionably important but it must be applied in context. One context is the tikanga framework itself. Other tikanga principles may also need to be considered. Further, tikanga adapts to circumstances as they arise. That is why it has proved to be so resilient. Finally, it is important to remember that tikanga speaks to process as well as substance. It is through *whaka-ea* as a process that the apparently irreconcilable may be reconciled. It follows that we are unable to agree with the High Court Judge's

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99 See above at [75] for a discussion about customary ownership.

100 For a general discussion of the relationship between iwi and their constituent hapū in Wairarapa, see Wai 863 Report, above n 2, at 3–8. As to the Wairarapa lakes specifically, see Wai 863 Report, above n 2, at 653 (footnotes omitted):

> The abundance of tuna made the lake mouth a perfect place to live, and many hapū had rights in the lakes and wetlands. According to Hoani Tunuiarangi, 'all the people fished together at the mouth of the lake, but it was a different matter in the creeks and rivers ; each hapū had their own rights to these places'. Hapū of Rangitāne and Ngāti Kahungunu occupying areas around the lakes included Ngāi Te Aomataura, Ngāti Te Aokino, Ngāti Pakuahi, Ngāi Tūkoko, Ngāti Te Whakamana, Ngāti Rākaiwhakairi (Rākaiwakairi), Ngāti Komuka, Ngāti Hinetauira, Ngāti Rangitawhanga, Ngāti Te Hangarākau, Ngāi Tūtemiha, and Ngāti Rangiakau. Hapū generally had rights in the area of the lake adjacent to the land they occupied.

101 In light of William Young J's comments at [171] and to avoid misunderstanding, our point here is not that hapū should generally be preferred in resumption applications. Still less do we wish to encourage the Tribunal to reopen issues in relation to Ngāumu forest that it may not wish to revisit. Rather, our point is a general but important one: Tikanga in relation to whenua is as complex as any other system of land law. Judges should avoid making broad unqualified statements about the place of principles such as mana whenua within tikanga whenua where complexities that may be relevant to the case have not been fully explored. This will be especially so when that very matter is before an expert Tribunal. Our comments about the need to consider the interests of right-holding hapū as well as the less direct interests of wider iwi will come as no surprise at all to the Tribunal. It routinely deals with these tensions. Indeed the Wairarapa Tribunal specifically addressed the issue in its analysis of the Ngāumu forest applications. .

conclusion that an applicant without mana whenua is likely to fail in an application for resumption. We do not yet know what might result from *whaka-ea* processes. Nor has there been a full assessment of the effect of other tikanga principles. These are matters for further consideration in the Tribunal's iterative process. It is too soon to predict a likely outcome.

Issue three: the relevant prejudice issue

[96] Although the mana whenua issue is at the centre of the appeals in relation to the Pouākani land, we will also comment briefly on the relevant prejudice issue for two reasons. First, because it is not at all clear that the High Court Judge treated relevant prejudice and mana whenua as strictly separate issues. They are to some extent intertwined in his reasons.[102] In fairness, it must be accepted that they are not entirely unrelated.[103] Secondly, and in any event, the relevant prejudice issue is the subject of some discussion in the dissenting judgment of William Young J.

High Court

[97] As presaged, the High Court accepted that, in the particular circumstances of this claim, if the land were otherwise eligible for resumption, the Tribunal could take into account not just the 1949 taking, but also the history of the acquisition of the lakes and the land exchange that followed. These matters were sufficiently "related to" the loss of the Pouākani land and its loss. In this respect, the Judge said:[104]

> 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. I accept Mr Radich's argument that these are

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102 See HC judgment, above n 8, at [79]–[80].
103 See, for example, the discussion above at [92]–[94] on mana whenua and Ngāumu forest.
104 HC judgment, above n 8, at [87] (footnotes omitted).

> 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. 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.

[98] But the Court rejected the Tribunal's finding that the Pouākani land could be used as a "land bank" to compensate Ngāti Kahungunu ki Wairarapa for all of the historical Treaty breaches and associated prejudice they have suffered since 1840:[105]

> 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.

[99] For this construction, the Court relied on three factors: first, the interlinked language employed in ss 8A and 8HB — "well-founded" claims, "relates … to" and "return"; second, the terms of the preamble to the Treaty of Waitangi (State Enterprises) Act 1988 and of the "Māori Principles" contained in the 1989 Crown Forest Assets agreement;[106] and third, the whenua-specific tino rangatiratanga (or tribal autonomy) guarantee in Article Two of the Treaty.[107] These factors all suggested, in the Judge's view, that in the usual run of cases, resumption was about facilitating the return to Māori of land which has itself been found by the Tribunal to have been acquired from their tīpuna in breach of Treaty principles, provided such return is, loosely speaking, a just or proportionate response to that specific breach, and bearing in mind the wider view of "related to" applied by the Judge in the unique circumstances of this case.

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105 At [88].

106 The 1989 Crown Forest Assets agreement led to the enactment of the Crown Forest Assets Act which we address in some detail in relation to the compensation issue. The Māori and Crown Principles annexed to the agreement are as follows:

Maori 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 Maori;

(iii) optimise the economic position of Maori.

Crown Principles:

(i) to safeguard the integrity of the sale by guaranteeing security of tenure to purchasers to avoid discounting and to encourage investment in the forestry industry

- security of tenure must involve purchasers having guaranteed access to wood and sufficient control over forest management to assure that wood supply;

(ii) honour the principles of the Treaty of Waitangi by adequately securing the position of claimants relying on the Treaty

- adequately securing the claimant's position must involve the ability to compensate for loss once the claim is successful.

107 HC judgment, above n 8, at [70]–[80].

A comment on the nature of historical Treaty claims

[100] Given their respective interests and positions, no party before us challenges that finding in the High Court, so we express no definitive view on its correctness. But we consider it relevant to note the following matters as they may not have been drawn to the High Court's attention. They at least suggest that the factual question of what claims (and therefore what prejudice) relate to what land is not as straightforward as might have been assumed:

(a) By the enactment of the resumption regime in 1988 (three years after the Tribunal was given retrospective jurisdiction),[108] historical Treaty claims were already routinely advanced tribally and on a thematic, rohe-wide basis. They included land and resource claims as well as claims about the loss of rangatiratanga or tribal autonomy. Themes in relation to land generally included matters such as loss of wāhi tapu, confiscation, early Crown purchase policies, Native Land Court processes, loss of promised reserves and so on.[109] Claims in relation to the loss of title to specific blocks were generally treated as particulars of the relevant theme.

(b) Native land legislation and colonial land acquisition policy in the latter half of the 19th and early 20th centuries were systemically inconsistent

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108 Treaty of Waitangi Amendment Act 1985, s 3(1).

109 See for example, the Ngāi Tahu claim lodged in 1986–1987 consolidated as the "Nine Tall Trees" or heads of claim covering most of the South Island (Waitangi Tribunal *The Ngai Tahu Report 1991* (Wai 27, 1991) at 3–5). See also the Muriwhenua claim originally lodged in 1985, and covering the rohe of the five northernmost iwi from the Maungataniwha range in the South to the Three Kings Islands in the North (Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988) and *Muriwhenua Land Report*, above n 82). The Muriwhenua claimants' successful application for interim recommendations in relation to Crown land transfers, triggered the *Lands* case litigation (see Interim Report to Minister of Maori Affairs on State Enterprises Bill, December 1986 reproduced in *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* at 289–291).
This thematic approach can also be seen in the claim examples provided by the appellant to the Court of Appeal in the *Lands* case, above n 15, at 674–676: for Ngāi Tahu, the Otākou block claim was one of the "nine tall trees" of the wider Ngāi Tahu claim. The Ngāti Tama example focused on the Taranaki confiscation theme which understandably dominated its claim. The Ngāti Whātua example related to Woodhill Forest which had been compulsorily acquired under the Public Works Act for sand dune reclamation but also contained extensive unprotected burials. It formed part of the wider Ngāti Whātua o Kaipara ki te Tonga claims subsequently lodged (Wai 312, later covered by Waitangi Tribunal report for Wai 674: Waitangi Tribunal *The Kaipara Report* (Wai 674, 2006)).

with Treaty principles. By 1988, if not before, this was known.[110] It is certainly accepted in modern Crown Treaty settlement policy, although the degree of resulting prejudice for particular iwi is always a context-specific assessment.[111] For example, blocks alienated following full tribal consent, on fair terms (for the day), and with ample reserves excluded from sale, might involve breaches only in terms of the impact of that alienation on overall tribal land retention over time. On the other hand (again by way of example only), specific blocks acquired piecemeal through the purchase of undivided individual interests without tribal oversight, or taken for survey costs or public works, often involved more serious land-specific breaches.[112]

(c) Since tribal claims challenged Crown action (etc) over the entire colonial period and across the whole tribal estate, most claims also alleged that the Crown had breached the Treaty principle of "active protection". This by failing overall, through law, policy and practice, to ensure iwi retained sufficient permanent land reserves for their continued sustenance in the new economic and political order.[113] Such

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110 See for example, Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987) at 38–48 in relation to Native Land laws and the Native Land Court; and Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985) at 14–32 in relation to the confiscation and loss of remaining reserves.

111 See Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua | Healing the past, building a future. A guide to Treaty of Waitangi Claims and Negotiations with the Crown* (online ed, 2018), commonly referred to as the "Red Book" at 10:

> There have been many criticisms of the effects of the Native land laws. These include: the interpretation of customary rights to land, the early limitation of the number of owners who could appeal on a title (together with their ability to act as absolute owners rather than trustees for tribal land), the costs of the process, and its tendency to promote excessive sales and the fragmentation of remaining Māori holdings. The court system has been criticised by claimants and some historians for undermining the social structure of Māori society. These and other criticisms may prove valid when considering the operations of the Native Land Court system in particular districts. The long-term results of the system are clear. By the end of the 19th century, many hapū were left with insufficient lands for their subsistence and future development. Between 1865 and 1899, 11 million acres of Māori land in the North Island had been purchased by the Crown and European settlers.
>
> ...
>
> The Crown acknowledges that the operation and impact of the Native land laws had a widespread and enduring impact upon Māori society. In cases where claimants can demonstrate a prejudicial impact in their rohe, the Crown will acknowledge, in the context of an agreed settlement, that it breached its responsibilities under the Treaty of Waitangi.

112 See for example the Waitangi Tribunal reports referred to above at n 84.

113 As to the Treaty principle of active protection, see the *Lands* case, above n 15. Further, one of the three illustrative claim examples identified by the plaintiffs in that case, and referred to in the judgments, was just such a claim: it alleged failure of the Crown to set aside sufficient reserves for hapū out of the 530,000 acre NZ Company Otākou purchase of 1844–1856. It must be assumed

claims necessarily applied to all unretained land within a tribal rohe irrespective of the mode of its loss. As the area of retained land diminished over time, active protection issues intensified. The Wairarapa claims filed in 1988 also contained these allegations of insufficient land-base.[114] As noted, the claims were conceded by the Crown and upheld by the Tribunal.[115]

(d) Even in 1988, the historical Treaty claims process did not usually involve block-by-block reviews of land sales or takings. It was, rather, a review of the process and effects of colonisation on a tribe or tribes in a particular district. It would have been completely impractical to adopt a purely transactional approach and, in any event, would likely have undermined the important social objective of the Treaty of Waitangi Act.

(e) The Tribunal's power to make recommendations to "compensate for or remove" Treaty-breaching prejudice, must be understood in light of that distinctive background.

The minority views on relevant prejudice

[101] In agreement with the Crown's submission to this Court, the approach preferred by William Young J is considerably narrower than the middle course adopted

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that this example was known to the drafters of the 1988 amendments to the Treaty of Waitangi Act.

114 In the original Wai 97 claim filed in 1988, Wairarapa Moana Trust, the proprietors of the Mangakino Township (now Wairarapa Moana), the proprietors of the Owāhanga Station and the Wairarapa Māori Executive Taiwhenua alleged:

> III Failure by the Crown, as a matter of policy or practice or by acts of omission or commission, whether or not under express statutory authority, to adhere to the principles of the Treaty of Waitangi by ensuring that Maori were not deprived of such lands and estates, forest and fisheries and other benefits as were necessary for the sustenance, support, welfare and enjoyment of life.
>
> IV Failure by the Crown, as a matter of policy or practice, or by acts of omission or commission, whether or not under express statutory authority, to preserve continued use and occupation by Maori of their lands and estates, forest and fisheries and other benefits, in particular by the introduction of numerous legislative provisions and the institution of the Native (Maori) Land Court, which have had the intent or effect of depriving Maori of their customary use, occupation and enjoyment of lands and estates forests and fisheries and other benefits.

See also the comprehensive amended statement of claim on behalf of Ngā Hapū Karanga in 2003 incorporating Wai 97, 744, 897, 939, 944 and 1022 and others.

115 See above at [28].

by the High Court. His view is that the resumption regime was designed only to remedy Treaty-breaching acquisition of the specific land.[116] This transaction-based approach would preclude consideration of any wider context. He reasons therefore that only the Crown's compulsory acquisition of the Pouākani land in 1949 is relevant to its resumption. By contrast, the High Court's approach, as noted, would also allow the lakes acquisition to be factored into the resumption assessment.

[102] We consider William Young J's approach to be incorrect. Partly because the context of Treaty claims processes just canvassed is inconsistent with that view, but also for the following additional reasons.

[103] First, as this Court held in *Haronga v Waitangi Tribunal*, the 1987 agreement[117] and its 1989 addition were the price for Māori consent to large scale transfer of land and rights out of Crown ownership.[118] There is nothing about the terms of those agreements that suggested the Tribunal's approach to its recommendatory power was intended to be so radically transformed when dealing with State owned enterprise and Crown forest land.[119] On the contrary, the fact that both regimes were folded directly into the Tribunal's s 6 powers suggests the reverse.[120] Had the parties to the 1987 agreement intended that resumption claims would be diverted to a track more akin to orthodox litigation, a completely separate statutory process would have been added to make that clear. Indeed, it may be assumed that any attempt to overlay on the Tribunal's thematic approach to historical claims a more transaction-based track for resumption claims would have met stiff resistance from the Māori negotiators.

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116 See Young J's reasons below at [187].

117 Referred to above at [22].

118 *Haronga*, above n 17, at [64] and [76] per Elias CJ, Blanchard, Tipping and McGrath JJ.

119 In this context, we disagree that principle (ii) of the "Maori Principles" (set out above n 106) supports the view taken by William Young J. This is made clear by the subsequent Deed of Clarification to the 1989 agreement (executed on 17 October 1989, three months after the agreement) which demonstrates that principle (ii) related to any remaining Māori customary land (that is land yet to be investigated by the Maori Land Court) within Crown forests. This approach also ignores the fact that principle (i) is to "uphold the articles of the Treaty of Waitangi" and principle (iii) is to "optimise the economic position of Maori". These are not principles that suggest a narrow view was being taken.

120 As we noted above at [14], s 5 of the Treaty of Waitangi Act sets out the functions of the Tribunal. Only s 5(1)(a) refers to the making of recommendations on any claim submitted under s 6. No functional distinction is drawn between claims in the Tribunal's general jurisdiction and those in relation to resumable lands. By contrast, s 5(1)(aa)–(ad) refer separately to the Tribunal's memorial clearing function in relation to State enterprise, Crown forest and tertiary education institution lands. This also suggests that the legislature did not intend that the Tribunal's process of inquiry into the circumstances of resumable land should be any different to that for other land.

[104] Second, key phrases in s 8A such as "relates … to" and "return" need not carry the meaning William Young J promotes, which in fairness he accepts. It is not necessary, in furtherance of the Act's purpose, to construe "relates to" as if it required the Tribunal to extract the transaction that extinguished Māori ownership of the land from its surrounding circumstances and historical context. In fact this would contravene the object of the Tribunal's historical inquiry process, which is to assess colonisation's mechanisms and effects against the principles of the Treaty. Similarly, there is no reason to interpret "return" as if only former customary owners qualify. Its ordinary meaning is plainly wider than that. It is unnecessary and, in our view inappropriate, in light of Treaty principles of active protection, partnership and remedial right, to read that language down. Just like those of other former colonies, our colonial history has its idiosyncrasies in which iwi or hapū, through no fault of their own, do not quite fit the expected paradigm. Pouākani is clearly one such example. We should presume that the architects of the Treaty of Waitangi Act intended its processes to be capable of accommodating such cases where justice and reconciliation required it. This would be consistent with the broad and unquibbling approach mandated by the Treaty itself.

[105] Third, William Young J's primary concern is that a broader reading of "related to" would lead to widespread resumption. The first point in response is that it has not, even though the resumption regime has been in place for 45 years as has the Tribunal's broad contextual approach to historical claims. But secondly, and more importantly, the task is to assess what Parliament intended from the words it used and the purpose it sought to achieve. Neither is lacking in clarity. The application of them in any particular case will depend on a full understanding of the facts and the nature of the relevant claims.

[106] Finally in respect of the reasons of O'Regan J, we make the following observations. It is apparent that, in respect of the relevant prejudice issue, the High Court may have misunderstood how Waitangi Tribunal inquiries into historical claims are conducted. Although not in direct issue in these appeals, it would, in our view, have been irresponsible to leave that potential misunderstanding unremarked upon given its relevance generally to the resumption regime. Should the matter be taken up in subsequent proceedings by other parties, we have made it clear that the

view we have expressed here is not final. And we have also made it clear that, for the purposes of these applications, the position as set out in the High Court is binding. We do not apprehend the Tribunal will have any difficulty in complying with that direction.

Issue four: the Crown's interest liability issue

[107] This issue relates to Ngāumu forest. The issue is whether the Crown can avail itself of an extended interest rate holiday on the compensation that must be paid if resumption is awarded. To assess this, it is necessary to summarise the background that led to creation of the special compensation scheme for Crown forest land.

[108] When, in December 1987, the Crown and the New Zealand Māori Council agreed upon the resumption procedure eventually enacted in ss 8A–8H of the Treaty of Waitangi Act and ss 27–27D of the 1986 Act, it was envisaged that the Crown's commercial forestry lands — including the trees growing on the land — would be transferred to a state enterprise. Had this occurred, claims in relation to those forestry lands would have been within the purview of those provisions. But, as it happened, there was a change of course by the Government. This was in two respects:

(a) the assets to be disposed of would be only the trees rather than the land on which they were growing; and

(b) these assets would not be transferred to a state enterprise, but directly to private purchasers.

[109] This change of direction resulted in further litigation and negotiations. The result was a second agreement dated 20 July 1989 between the Crown, the New Zealand Māori Council and the Federation of Māori Authorities which was later implemented by the Crown Forest Assets Act. The Act introduced two changes relevant to the Ngāumu forest appeal. First, it amended the Treaty of Waitangi Act by inserting ss 8HA–8HI. These provisions conferred on the Tribunal the same jurisdiction as that for state enterprises, to make binding recommendations for the return of Crown forest land. Section 8HB is in substantially identical terms to s 8A, which is why the earlier issues are also relevant for Ngāumu forest. Secondly, and

most relevantly, s 36 and sch 1 of the Crown Forest Assets Act provides its own scheme for the payment of compensation to claimants who obtain resumption of Crown forest land. This scheme was essentially designed to compensate for the loss of the associated tree crop which, by then, would already have been sold by the Crown. The focus of this issue is the requirements of that scheme.

The background to, and overview of, the legislative scheme

[110] The agreement of 20 July 1989 envisaged the sale by the Crown of Crown forestry licences: long term licences to use the forest land for forestry purposes. As consideration for these licences, private purchasers would pay both an initial capital sum and market-based fees (usually referred to as "rent" in the documents) for the land.

[111] The agreement provided for a compensation scheme, should the Tribunal recommend that licensed land be resumed:[121]

> 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 and in addition:
>
> a) compensate the successful claimant for the fact that the land being returned is subject to encumbrances, by payment of 5% of the sum calculated by one of the methods (at the option of the successful claimant) referred to in paragraph 9 and,
>
> b) further compensate the successful claimant by paying the balance of the total sum calculated in paragraph 8(a) above or such lesser proportion as the Tribunal may recommend.
>
> …
>
> 9. The methods of calculating the total sum on which compensation payable under paragraph 8 is based, are
>
> EITHER
>
> a) (i) the market value of the tree crop and associated assets assessed at the time resumption is recommended. The value is to be determined on the basis of a willing buyer / willing seller based on the projected harvesting pattern that a prudent forest owner would be expected to follow or;

[121] Emphasis added.

(ii) the market stumpage of wood harvested each year over the termination period. Market stumpage to be determined in accordance with normal forestry business practice;

OR

b) the sales proceeds received by the Crown, plus a return on those proceeds for the period between sale and resumption. The return shall be limited to maintaining the real value of the sale proceeds during a period of grace of four years from the time of sale where a claim has been filed prior to the sale occurring, or from the time a claim is filed if after the sale. *The period of grace may be extended beyond four years* where the Tribunal is satisfied that an adequately resourced claimant is wilfully delaying proceedings *or that for reasons beyond its control, the Crown is prevented from carrying out a relevant obligation under this agreement*. Where the period of grace has expired then the subsequent return shall be based on one year government stock rate measured on a rolling annual basis plus an additional margin of 4% to reflect a commercial return.

…

A claim shall be deemed to be filed when the Registrar of the Waitangi Tribunal notifies the claimant that the claim in appropriate form is filed.

[112] The agreement further provided for the establishment of what became the Crown Forestry Rental Trust which would receive "rentals" (strictly licence fee payments). Interest on the accumulated rentals would be applied by the Trust to assist eligible Māori claimants to prosecute their Crown forest claims. In practice, and as a consequence of the Tribunal's district-based approach, the Trust funded historical and other expert evidence for claims in the entire inquiry district within which the relevant forest was situated. The rentals themselves were to be accumulated and, where resumption was recommended, paid out to successful claimants.

[113] Clause 9(b) of the agreement is important. It refers to the consequences for the Crown's four-year interest holiday on compensation payments where "the Crown is prevented from carrying out a relevant obligation under this agreement". This is a reference back to cl 6 under which:

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 reasonable period.

[114] The Crown Forest Assets Act, which, as noted, gave effect to the agreement, provides for the sale by the Crown of its forestry assets (being the trees and not the land), with such sales to be permitted only in association with the grant of a Crown forestry licence to the purchaser.[122] Land subject to such a licence is "licensed land".[123] A licence confers on the licensee a long-term right to use the licensed land for forestry purposes in consideration for which the licensee must pay an annual licence fee calculated by reference to the market rate for the use of the land, assuming an unimproved state.

The legislative scheme as to compensation

[115] Section 36 of the Crown Forest Assets Act provides:

> **36 Return of Crown forest land to Maori ownership and payment of compensation**
>
> (1) Where any interim recommendation of the Waitangi Tribunal under the Treaty of Waitangi Act 1975 becomes a final recommendation under that Act and is a recommendation for the return to Maori ownership of any licensed land, the Crown shall—
>
> (a) return the land to Maori ownership in accordance with the recommendation subject to the relevant Crown forestry licence; and
>
> (b) pay compensation in accordance with Schedule 1.
>
> (2) Except as otherwise provided in this Act or any relevant Crown forestry licence, the return of any land to Maori ownership shall not affect any Crown forestry licence or the rights of the licensee or any other person under the licence.
>
> (3) Any money required to be paid as compensation pursuant to this section may be paid without further appropriation than this section.

[116] Schedule 1 is relevantly in these terms:[124]

> **Compensation payable to Maori**

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122 Crown Forests Assets Act, s 11.
123 Section 2(1).
124 Emphasis added.

1 Compensation payable under section 36 shall be payable to the Maori to whom ownership of the land concerned is transferred.

2 That compensation shall comprise—

(a) 5% of the specified amount calculated in accordance with clause 3 as compensation for the fact that the land is being returned subject to encumbrances; and

(b) as further compensation, the remaining portion of the specified amount calculated in accordance with clause 3 or such lesser amount as the Tribunal may recommend.

3 For the purposes of clause 2, the specified amount shall be whichever of the following is nominated by the person to whom the compensation is payable—

(a) the market value of the trees, being trees which the licensee is entitled to harvest under the Crown forestry licence, on the land to be returned assessed as at the time that the recommendation made by the Tribunal for the return of the land to Maori ownership becomes final under the Treaty of Waitangi Act 1975. The value is to be determined on the basis of a willing buyer and willing seller and on the projected harvesting pattern that a prudent forest owner would be expected to follow; or

(b) the market stumpage, determined in accordance with accepted forestry business practice, of wood harvested under the Crown forestry licence on the land to be returned to Maori ownership from the date that the recommendation of the Tribunal for the return of the land to Maori ownership becomes final under the Treaty of Waitangi Act 1975. If notice of termination of the Crown forestry licence as provided for under section 17(4) is not given at, or prior to, the date that the recommendation becomes final, the specified amount shall be limited to the value of wood harvested as if notice of termination had been given on that date; or

(c) the net proceeds received by the Crown from the transfer of the Crown forestry assets to which the land to be returned relates, plus a return on those proceeds for the period between transfer and the return of the land to Maori ownership.

…

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*.

…

The compensation issues that arise in relation to the Ngāumu forest

[117] As can be seen, sch 1 of the Crown Forest Assets Act provides for the calculation of a specified amount which sets the parameters for compensation associated with resumed Crown forest land. There are three bases for calculation of the specified amount:

(a) Clause 3(a): the market value of the trees;

(b) Clause 3(b): the market stumpage for trees harvested after the date of the final recommendation; or

(c) Clause 3(c): the net proceeds received by the Crown on the sale of the trees, plus a return on those proceeds between transfer and return to

Māori ownership. The rate of return is to be calculated in accordance with cls 5 and 6.

[118] Under cl 2, a successful applicant for resumption of the Ngāumu forest would be entitled as of right to five per cent of the sum selected under cl 3. But the Tribunal may order that up to 100 per cent be paid as "further compensation". The Tribunal has, of course, not got that far yet.

[119] The arguments addressed to us on this aspect of the case assume an election by the recipient entity of the option provided for in cl 3(c) (proceeds plus interest); and, in that event, the application of cl 5 (four-year interest holiday then penalty premium); and the interaction of that clause with cl 6(b) (effect of delay not within the Crown's control). Despite that, it is useful to put some values on the various bases on which compensation may be calculated to flesh out the context in which the arguments of the parties can be most completely assessed.[125]

[120] The market value of the trees as at 30 September 2018 was assessed at $74.1 million. Market stumpage, calculated forward over the remaining length of the licence (32 years as at 30 September 2018) was assessed at being $272.4 million.[126] This assessment is not particularly material for present purposes given:

(a) the practical requirement for comparison purposes to discount it to a present value (an exercise which has not been carried out); and

(b) the market stumpage figure can be expected to reduce as time goes by (as the period over which it is calculated diminishes).

[121] The starting point for the cl 3(c) calculation is the $29.6 million received by the Crown in October 1990 for the sale of the trees. Applying cls 3(c) and 5 of sch 1 without adjustment produces a specified amount of $253.6 million as at September 2018.

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[125] For consistency between dates, the figures we have chosen to use are based on the recommendation date being 30 September 2018. While newer calculations were available, they only updated the recommendation date for cl 3(c). These newer calculations are discussed at [122]. We have rounded all numbers to one decimal point.

[126] These figures should be regarded as indicative only.

[122] The $253.6 million can be compared with two other figures:

(a) Adjusting the $29.6 million received by Crown in October 1990 for inflation up to 30 September 2018 produces a figure of $51.2 million.[127]

(b) The indicative market value of the trees as at 30 September 2018 was $74.1 million.

The difference between the $253.6 million and the other two figures reflects the high interest rate built into the cl 3(c) calculation (four per cent over government stock rates) and the effect of compounding. This is further illustrated by calculations carried out in 2020 which projected an amount as at 31 August 2021 for the purposes of the hearing before the High Court. By this stage, the specified amount calculated under cl 3(c) on the same basis was over $292 million. This figure is continuing to increase.

The Tribunal and the High Court

[123] The Tribunal concluded that the relevant claim, Wai 97, was filed on 28 October 1988 and that the interest holiday would end on 28 October 1992.[128] The Tribunal found that the Crown had not, for reasons beyond its control, been prevented from resolving the claim. On the contrary, it found it was within the Crown's power to secure earlier resolution of the claim, but it had not.[129] There was therefore no reason to extend the interest holiday beyond 1992.

[124] The High Court considered that the Tribunal had failed to engage with the relevant considerations and so had erred.[130] First, any assessment of the Crown's performance had to be claim specific. A generalised conclusion that the Crown should have provided better funding to the Tribunal to speed resolutions, failed to engage with the facts that drove delay in the specific case. Second, it was not sufficient to blame delay on the Crown's overall policy of preferring negotiated settlements to resumption applications. Any assessment must relate to the way in which claims were addressed

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127 The updated calculations projected that this number could increase to $53.2 million by 31 August 2021.

128 See above at [55].

129 Preliminary Determinations, above n 7, at [305]–[310].

130 See discussion in HC judgment, above n 8, at [131]–[143].

in the Tribunal rather than Crown settlement policies. Third, the Tribunal must bear in mind that the 1989 agreement provided the parties would jointly use their best endeavours to resolve Crown forest claims within four years. In hindsight, and on any analysis, that target was hopelessly optimistic. The Tribunal too, had to engage with the realities of complex Treaty claims when making its assessment.

Submissions

[125] Ngāi Tūmapūhia-ā-Rangi submits:

(a) The High Court mischaracterised the statutory scheme, resulting in an incorrect interpretation of its effect. The money paid after the four-year grace period is not penalty interest, but rather return of sale proceeds. The Tribunal was correct to find that the four-year period should not be extended under the relevant considerations.

(b) The Tribunal wrongly conflated the question of whether to order resumption with the question of the nature and extent of compensation.

[126] The Crown submits the High Court correctly found that the Tribunal erred in law in not extending the grace period. The Tribunal had taken into account irrelevant considerations and failed properly to consider the obligations under the forestry agreement.

Our approach

[127] To recap, on return of licensed land to Māori ownership, the recipient receives:

(a) the land, which comes subject to the existing Crown forestry licence;

(b) the accumulated licence fees (rentals) for the licensed land, held by the Crown Forestry Rental Trust; and

(c) the right to any future rental payments.

In issue is what additional relief might be made available to the recipient in relation to the trees.

[128] Schedule 1 provides mechanisms for assessing the specified amount by reference to the market value of the forest (cl 3(a) and (b)) or the gain to the Crown (and thus corresponding loss to the recipient) associated with the sale of the forest to the licensee (cl 3(c)). Because the cl 3(a) and (b) calculations are made at the date the recommendation becomes final, there is no need for further adjustment for the time value of money. But if the recipient elects the cl 3(c) option, the starting point for the calculation will be the amount paid in the past — in this case, decades in the past — for the trees. Clauses 5 and 6 address the uplift required to allow for this.

[129] In providing for the calculation of the uplift in relation to the cl 3(c) specified amount calculation, the legislature appears to have had two purposes:

(a) To ensure that the uplift at least covers changes associated with the time value of money. This is provided for in cl 5(a).

(b) To incentivise the prompt resolution of claims by providing an appreciably enhanced uplift to start four years after the later of the sale of the assets or the filing of the claim. This is the effect of cl 5(b).

[130] At this point, we note an infelicity in the drafting. Under cl 6(b), the power to extend the four-year period is engaged if "the Crown is prevented, by reasons beyond its control, from carrying out any relevant obligation under the agreement made on 20 July 1989". The only relevant obligation of the Crown under the 20 July 1989 agreement is pursuant to cl 6 of that agreement which, despite the repetition, we set out again:

> 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 reasonable period.

Reasons beyond the control of a party may mean that best endeavours do not produce the desired result. But, as a matter of logic, they do not prevent the deployment of

best endeavours. There is thus a disconnect between the language of cl 6(b) of sch 1 which assumes a breach, albeit one excusable as caused by reasons beyond the control of the Crown, and cl 6 of the agreement which imposes an obligation which would not be breached if the failure to process claims promptly was for reasons beyond the control of the Crown.

[131] It is sensible then, to construe sch 1 cl 6(b) as engaged if the Crown has not been in breach of its best endeavours obligation. Looking at the 20 July 1989 agreement and sch 1 together, it is therefore legitimate to see cl 5(b) as having at least some of the characteristics of a penalty.

[132] As will be apparent, the Tribunal's processes in respect of the Ngāumu forest moved slowly. A number of claims were filed which, at least broadly, encompassed the forest, the first of which was in October 1988. And as noted, the Wai 863 Report made no specific findings in relation to the Ngāumu forest. An agreement in principle to settle Ngāti Kahungunu's claims was reached in 2016 and a Deed of Settlement between Ngāti Kahungunu and the Crown (subject to legislative sanction) was initialled in March 2018. Formal applications for resumption were not made until July 2018 (by Ngāi Tūmapūhia-ā-Rangi) and in November of that same year (by the Settlement Trust).

[133] The reasons given by the Tribunal in the preliminary determinations for concluding that the Crown was in breach of its best endeavours were:

(a) its adoption of a policy under which it would not negotiate with claimants who were litigating against it; and

(b) it should have provided more funding to the Tribunal so as to facilitate the earlier resolution of claims.

[134] On the High Court's approach, the Tribunal should have inquired into the reasons for any delay in relation to the resolution of the resumption applications rather than addressing — at best at a very high level of generality — what it saw as

deficiencies in the Crown's approach in identifying and settling claims for resumption of licensed land.

[135] The Tribunal's reasons were indeed at a high level of generality. They proceed on the basis that the Crown should have set about identifying all claims which might result in resumption of Crown forest land and funded the Tribunal to process such claims promptly. On this approach, it seems likely that the Crown would never be able to extend the period of grace in relation to resumption of Crown forest land.

[136] The level of generality meant the Tribunal gave no consideration to the reasonableness or otherwise of the Crown's overall approach to settlements, and to the Wairarapa settlements in particular. Nor did it factor in the delay effects (if any) of the Tribunal's own district inquiry procedures, an approach in which claimant community engagement and much of the evidential base was, we presume, funded by interest on the Ngāumu forest licence rentals. This in light of the Tribunal's firm view that it was only Treaty breaches on a district-wide scale that could justify resumption.

[137] In relation to the Tribunal's own funding, which was a particular focus, the Tribunal did not turn its mind to the counter-effect of other (reasonable) calls on public funding. These considerations are admittedly broad matters of impression, but this is a complex field with many moving parts. They are likely to be important considerations when assessing compliance with best endeavours obligations and what was within, or not within, the Crown's control.

[138] The Tribunal's approach also meant it did not engage with the fact that resumption of the Ngāumu forest was not sought, at least not in a formal application, until 2018.[131] Nor did it not turn its mind to the point at which resumption of the Ngāumu forest became a realistic possibility in light of reasonable capacity expectations of the Crown and Tribunal, the state of the evidence and the level of claimant community cohesion and capacity. Finally, the Tribunal had also to consider the relevance (if any) of the Ngāti Kahungunu Settlement Trust's apparent preference

[131] It might be said that such expectation was implicit given the Crown Forestry Rental Trust engagement in the inquiry and the fact that formal applications are not necessarily a requirement of s 8HB of the Treaty of Waitangi Act, but the Tribunal should have at least considered these questions.

to negotiate rather than press ahead with a resumption application. If, as the Tribunal indicated, it was not satisfied that the Trust (or indeed Ngāi Tūmapūhia-ā-Rangi) should be the recipient, how might that have affected its view of claimant capacity in terms of matters contributing to delay, but not within the Crown's control?

[139] Against this background, we agree with the High Court that the Tribunal's approach to the calculation of the specified amount was in error.

Issue five: the standing issue

The issue

[140] Mercury is the owner and operator of the Maraetai Power Station complex which forms part of an integrated system of power generating facilities on the Waikato River. It would plainly be affected by resumption of the Pouākani land and, after resumption was mooted, sought to be heard in opposition to the proposed resumption.

[141] There has been no dispute as to Mercury's right to be heard in the High Court on the judicial review proceedings associated with the resumption that were dealt with by the High Court. Nor is there any challenge to its entitlement to participate in the proceedings before us. What is in issue is whether it can be heard in the Tribunal in opposition to the proposed resumption. As we have noted, both the Tribunal and the High Court have ruled against Mercury.[132]

The legislative context

[142] Section 8C of the Treaty of Waitangi 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—

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[132] *Memorandum-Directions of Judge C M Wainwright Concerning Application to be Heard from Mercury NZ Limited*, above n 6, at [3]; and HC judgment, above n 8, at [46].

(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.

[143] This section was inserted in the Treaty of Waitangi Act by s 4 of the Treaty of Waitangi (State Enterprises) Act, the preamble to which, in part, provides:[133]

…

(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*;

…

[133] Emphasis added.

Mercury's argument

[144] Mercury's position is that in light of the fundamental nature of the right to the observance of the principles of natural justice, s 8C of the Treaty of Waitangi Act should not be interpreted to exclude an ability to participate by those not "entitled to appear and be heard". Section 8C(1) merely specifies who is entitled to appear. That Mercury is not entitled to be heard as a matter of right does not mean that the Tribunal cannot allow it to participate in a more confined way with leave.

[145] Mercury's argument addressed the powers of the Tribunal to hear evidence under cl 6 of sch 2 to the Treaty of Waitangi Act. This provides:

> **6 Evidence in proceedings before Tribunal**
>
> (1) The Tribunal may act on any testimony, sworn or unsworn, and may receive as evidence any statement, document, information, or matter which in the opinion of the Tribunal may assist it to deal effectually with the matters before it, whether the same would, apart from this section, be legally admissible evidence or not.
>
> …

[146] Mercury also relied on the legislative history of s 8C. In the legislative process, s 8C(4) was proposed in these terms:[134]

> Nothing in this section affects the right of the Tribunal to hear testimony from any person pursuant to clause 6 of the Second Schedule to this Act or affects in any other way the provisions of that clause.

The proposal for such a subsection was dropped as being unnecessary.[135]

[147] In the course of argument, Mercury suggested that it could proffer evidence to the Tribunal and that, in such event, any restriction on appearing and being heard in s 8C(1) meant only that it could not make submissions.

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134 Treaty of Waitangi (State Enterprises) Bill 1987 (27-2).

135 Supplementary Order Paper 1988 (48) Treaty of Waitangi (State Enterprises) Bill 1987 (27-2) (explanatory note).

The Tribunal and the High Court

[148] As earlier noted, Judge Wainwright, the presiding Judge in the Wairarapa claims, issued a procedural direction on 2 March 2020. In it, the Judge determined that Mercury "is not an entity that is entitled to appear or be heard in relation to the applications before the Wai 863 Wairarapa ki Tararua Tribunal under section 8C".[136] In response, Mercury filed a judicial review application against the procedural direction and sought interim orders in the High Court preventing the Tribunal from issuing its "First Determination" until Mercury's judicial review challenge was determined. This application was declined by the High Court.[137] The procedural direction was then effectively adopted by the Tribunal in the preliminary determinations.[138]

[149] The High Court recognised the fundamental principle of the right to the observance of the principles of natural justice, which, as he noted, is affirmed by s 27 in the New Zealand Bill of Rights Act 1990.[139] But he then went on to say:[140]

> [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. 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.

[150] He noted:[141]

> 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

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136 *Memorandum-Directions of Judge C M Wainwright Concerning Application to be Heard from Mercury NZ Limited*, above n 6, at [3].
137 *Mercury NZ Ltd v Waitangi Tribunal* [2020] NZHC 598 (Simon France J).
138 Preliminary Determinations, above n 7, at [7].
139 HC judgment, above n 8, at [39].
140 Footnote omitted.
141 At [42].

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

[151] He also drew on the preamble to the Treaty of Waitangi (State Enterprises) Act, the relevant part of which we have already set out:

> [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.

[152] After rejecting Mercury's challenge, he concluded on this aspect of the case in this way:[142]

> [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. 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 [in *Raukawa Settlement Trust v Waitangi Tribunal*[143]] that such indirect input would be unappealing to the excluded party. But it is better than the alternative.

Our approach

[153] Section 27(1) of the New Zealand Bill of Rights Act provides:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

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142 Footnote omitted.

143 *Raukawa Settlement Trust v Waitangi Tribunal* [2019] NZHC 383, [2019] 3 NZLR 722.

The proposed resumption of the Pouākani land affects the interests of Mercury,[144] and absent a statutory direction to the contrary, Mercury is entitled to be heard in opposition to it. As will be apparent, s 8C is said to be a statutory direction to the contrary. In determining whether this is so, we must interpret s 8C and, in doing so, apply s 6 of the New Zealand Bill of Rights Act. This provides:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[154] Section 8C(1) lists those who are entitled to be heard on a resumption application, and by way of emphasis, s 8C(2) provides explicitly that no other person is entitled to be heard. There is an element of ambiguity in the wording. It is possible to read these subsections as excluding any other absolute right to be heard but not participation by leave. This is the interpretation proffered by Mercury. It is likewise possible to construe the subsections as excluding any entitlement to be heard, whether, as a matter of right or by reason of leave having granted by the Tribunal. This is the approach favoured by the Tribunal and the High Court. Both meanings are available on the wording of s 8C. As well, there is the possible interpretation, that we have also briefly mentioned, that s 8C(1) and (2), when read, in conjunction with sch 2 cl 6 of the Treaty of Waitangi Act merely prevent Mercury making submissions and do not preclude an offer of evidence that the Tribunal may or may not accept.

[155] If s 8C(1) and (2) had stood alone, it would have been open to the Court to interpret them in the manner proposed by Mercury, that is as denying Mercury a right to be heard as a party but not excluding the power of the Tribunal to hear from Mercury, or at least, considering the evidence it proffered if it chose to do so. Such an interpretation is not inconsistent with the wording of s 8C. So construed, s 8C would result in a derogation from s 27(1) of the New Zealand Bill of Rights Act, albeit one that derogates less than the interpretation adopted by the Tribunal and the High Court.

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[144] Section 29 of the New Zealand Bill of Rights Act 1990 provides that the Act applies to legal persons, such as Mercury NZ Ltd, so far as practicable except where the provisions of the Act otherwise provide (which s 27 does not).

So if s 8C(1) and (2) stood alone, s 6 of the New Zealand Bill of Rights Act might well have required adoption of Mercury's approach.

[156] The difficulty for Mercury is that s 8C does not stand alone.

[157] Section 8C has a significant legislative history in terms of the negotiations which followed the *Lands* case. Nevertheless, reference to these negotiations is rendered unnecessary by the part of the preamble to the Treaty of Waitangi (State Enterprises) Act which we have set out. This preamble captures the purpose of s 8C which it records as "precluding State enterprises and their successors in title from being heard by the Waitangi Tribunal on [resumption] claims". In light of the preamble, construing s 8C as not precluding an entitlement to be heard with the permission of the Tribunal would be inconsistent with the legislative purpose.

[158] We accordingly conclude that the High Court was right on this issue.

Conclusions

[159] The High Court found in relation to the Pouākani land, that:[145]

> 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.

A preliminary determination to make such a direction would therefore be unlawful.

[160] We have found this to be an incorrect statement of the position in two relevant respects. First, whether mana whenua should prevail over other tikanga principles in the circumstances of these resumption applications is itself a tikanga question that has yet to be finally determined by the forum invested with the statutory responsibility, expertise and local knowledge to make that assessment. It does not follow from the importance of mana whenua that it is the only relevant tikanga principle or that it must be applied irrespective of context. Second, and in any event, it is too soon to know whether *ea* may be achieved between mana whenua and Ngāti Kahungunu (however configured) by other, tikanga-consistent means.

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145 HC judgment, above n 8, at [147(d)].

[161] There is no appeal against the High Court's finding that the relevant prejudice for the Pouākani resumption applications includes the acquisition of the Wairarapa lakes and the subsequent land exchange in Pouākani, but does not include wider iwi prejudice. That must therefore remain the basis upon which these applications are considered going forward. We have nonetheless made some comments on this approach both because it was not treated in the High Court as completely separate from the mana whenua issue and because William Young J accepted the Crown's submission that a narrower approach should have been taken. This may be an issue in future resumption cases.

[162] In relation to the Ngāumu forest, we agree with the High Court that the Tribunal failed to take account of relevant considerations when making its preliminary determination as to the Crown's interest liability under sch 1 of the Crown Forest Assets Act. And as to Mercury, we also agree that it lacks standing in the Tribunal in relation to the Pouākani resumption applications.

Result

[163] We have found that the High Court was wrong to hold, as it did at [147(d)], that an applicant's lack of mana whenua would prevent the Tribunal from granting resumption. The appeal by Wairarapa Moana in SC 93/2021 must therefore be allowed in part. The Tribunal must proceed with its iterative process on the basis that while mana whenua is a very important consideration under s 8A of the Treaty of Waitangi Act, an applicant's lack of mana whenua may not be disqualifying in light of other relevant tikanga principles. Such evaluation is a matter for the Tribunal.

[164] The appeal by Ngāi Tūmapūhia-ā-Rangi in SC 127/2021 and the cross-appeal by Mercury in SC 93/2021 are dismissed.

[165] Issues as to costs may be dealt with by memoranda if they are not otherwise agreed. Memoranda will be no longer than five pages and must be filed and served within 20 working days.

WILLIAM YOUNG J

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Summary of my position

[166] I agree with the reasons and conclusions of the majority in respect of compensation and whether Mercury NZ Ltd was entitled to be heard by the Waitangi Tribunal. I dissent, however, in relation to the proposed resumption of the 787 acres of land compulsorily acquired by the Crown and on which part of the Maraetai Power Station complex is situated (the Maraetai dam land).

[167] There are two bases for this dissent.

(a) I consider that no likely claimant could establish the necessary nexus between well-founded claims of prejudice caused by breaches of the principles of the Treaty of Waitangi and resumption of the Maraetai dam land.

(b) If a necessary nexus can be established (which is the view of the majority) and the resumption applications must be determined by the Tribunal on the basis of the High Court's judgment (including the High Court's conclusions on what has been called the land-banking issue), then I think that the appeal against the High Court's decision in relation to what the Court saw as the tikanga issue should be dismissed.

[168] As well, I am very conscious of the claims settlement Bill currently before Parliament. I see respect for the Parliamentary process as warranting a more than usually cautious approach to the offering of opinions on matters not directly in issue before us. Because this provides something of a context for my discussion of the two bases for my dissent which I have just outlined, I will address it first.

Respect for Parliamentary process

[169] At [47] of their reasons, the majority observe:[146]

> … these appeals do not put the claims settlement Bill in issue in any way. Rather, they raise orthodox claims of statutory or other right: the right to have extant applications for resumption determined according to law, and the related right to test the implications of tikanga considerations in that context. They therefore involve no conflict with the terms of s 11 of the Parliamentary Privilege Act 2014, nor any breach of the common law principle of non-interference.

[170] I disagree with first sentence of [47]; this because I think it plain that, in ordinary language at least, the majority reasons does "put the claims settlement Bill in issue". However, to the extent that this is simply by reason of this Court dealing with "the right to have extant applications for resumption determined according to law", it is unexceptionable. There are "extant applications for resumption" before the Tribunal and this Court is entitled to resolve existing controversies in relation to those applications. However, given the legislative process underway, I think that the Court should be cautious about expressing opinions on issues that were not in play in the litigation in the High Court.

[171] I see this need for caution as being of general application. There is, however, one aspect of the majority's reasons in relation to which it is of distinct relevance. This is at [92]–[94] in relation to the Ngāumu forest. The preference of the Tribunal for a Ngāti Kahungunu recipient of the forest was not put in issue in High Court. It is therefore not part of the appeal before us. Accordingly, there is no need for the majority to engage with this aspect of the resumption applications. Nor is such engagement fundamental to the reasoning of the majority on the issues that the Court, having granted leave, must now determine. Despite the qualified disclaimer in n 101,

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146 Footnote omitted.

the comment that it is Ngāi Tūmapūhia-ā-Rangi that has suffered "the greatest prejudice", is plainly an invitation to the Tribunal to reconsider its preference for a Ngāti Kahungunu recipient. My concern about these paragraphs is that they are: (a) likely to further complicate the political process in relation to the claims settlement Bill; but (b) unnecessary to the determination of the issues before the Court.

Absence of required nexus

[172] I consider that in two respects, Wairarapa Moana ki Pouākani Inc (Wairarapa Moana) cannot establish the nexus required to justify resumption of the Pouākani land and that the same applies in relation to any other likely claimant:

(a) Wairarapa Moana does not have the kind of customary relationship with the land that the legislative scheme contemplates; and

(b) resumption of the land would go well beyond what is required "to compensate for or remove the prejudice" caused by the Treaty breaches associated with its acquisition.

No customary relationship

[173] I accept that there is no express requirement in the legislation for a customary relationship between the land to be resumed and the group to whom it is to be returned, or for the well-founded claim to relate to the circumstances in which the land was acquired by the Crown from its customary owners. But that acknowledged, it is clear that the paradigm case the legislature had in mind when enacting the resumption regime as warranting resumption was the wrongful taking of land from customary owners to whom (or to whose representatives) it should be returned. Indeed, to my way of thinking, the expression "returned to Maori ownership"[147] presupposes a return to those who stand in the shoes of the customary owners from whom the land was acquired.

[174] I consider that the Crown Forest Assets Act 1989 can be treated as being in pari materia with the resumption provisions in issue in relation to this aspect of the case.

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147 Treaty of Waitangi Act 1975, s 8A(2).

That statute gave effect to an agreement of 20 July 1989 between the Crown, on the one hand, and the New Zealand Māori Council and the Federation of Māori Authorities Inc, on the other. Annexed to this agreement were lists of Māori and Crown principles. The Māori principles were expressed in these terms:

> Maori 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 Maori;
>
> (iii) optimise the economic position of Maori.

The reference to property "which rightly belongs to Maori" seems to me to be based on the premise that the land not to be alienated (and thus to be susceptible to resumption) had been acquired from Māori wrongfully and ought to be returned. In this context, I see this as a reference to acquisition from customary owners.

Resumption of the Maraetai dam land would go beyond what is required "to compensate for or remove the prejudice" caused by the Treaty breaches associated with its acquisition

[175] On the language of ss 6(3) and 8A(2) of the Treaty of Waitangi Act 1975, the "well-founded" claim that may result in resumption must be a claim that:

> (a) any Māori or "group of Maoris" have been "prejudicially affected" by, in this instance, actions of the Crown;[148] and
>
> (b) "relates … to" the land proposed for resumption.[149]

[176] There was no finding that the taking of the Maraetai dam land by the Crown was, in itself, a breach of Treaty principles. Rather, the claims found by the Tribunal to be well-founded were in respect of circumstances that were associated with that acquisition: the work on the land that occurred without notice to the owners before acquisition and the amount of compensation paid. In the absence of a finding that the compulsory acquisition of the Pouākani land was itself wrongful, it could not sensibly

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148 Section 6(1).
149 Section 8A(2).

be contended that the land "rightly belongs to Maori". Subject to that quite important reservation, however, I accept that the corollary of the conclusions of the Tribunal is that Wairarapa Moana has well-founded claims that relate to the Maraetai dam land.

[177] A pre-requisite to a binding recommendation that the land be "returned to Maori ownership" is a finding by the Tribunal that:[150]

> … the action to be taken under section 6(3) to compensate for or remove the prejudice caused by … 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 …

[178] If the only well-founded claims of Wairarapa Moana that relate to the Maraetai dam land are those associated with how it was compulsorily acquired, resumption of that land, worth $600 million in 2018, would go far beyond what is necessary to compensate for, or remove, the prejudice caused by the relevant acts or omission that were inconsistent with the principles of the Treaty. This is substantially why the Tribunal rejected the Wairarapa Moana claim for resumption.

[179] As the majority explain, the Tribunal took a broader approach in relation to the application by the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust (the Settlement Trust). On this approach, the wider Ngāti Kahungunu ki Wairarapa (Ngāti Kahungunu) claims of breaches of Treaty principles resulting in tribal landlessness related in whole or in part to the Pouākani land and thus the Maraetai dam land. It is this approach that, not entirely happily in my view, has been referred to as "land-banking".

[180] On the approach adopted by the High Court, the disproportionality between prejudice associated with the compulsory acquisition of the Maraetai dam land and the value of that land is not controlling. This is because the Pouākani lands came to be vested in the customary owners of Lakes Ōnoke and Wairarapa as an attempt by the Crown to compensate them for what happened in Wairarapa in relation to those lakes.

[181] In relation to the Settlement Trust resumption application, the High Court rejected the land-banking approach of the Tribunal. This is because the Judge saw that

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150 Section 8A(2)(a)(ii).

its corollary was that land could be resumed despite having been acquired by the Crown in circumstances in which no breaches of Treaty principles correlated to the acquisition of the land:[151]

> 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 Pouakani 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.

[182] I think that the same applies to the High Court's willingness to treat what happened in relation to the lakes in Wairarapa as relevant to Wairarapa Moana's application for resumption. This is because the approach of the High Court treats Wairarapa Moana's claim for resumption as substantially premised on Crown breaches in relation to Lakes Ōnoke and Wairarapa. Such a claim relevantly "relates to" the Maraetai dam land on the High Court's approach because of the narrative connection. On the logic of this approach, the Maraetai dam land would be susceptible to resumption irrespective of whether its compulsory acquisition was itself a breach of Treaty principles. This is because even if that acquisition had been, in itself, entirely compliant with Treaty principles, the narrative connection relied on by the High Court would be unaffected and the claims in relation to the lakes would still relate to the Maraetai dam land.

[183] The comments of the majority at [101]–[105] suggest, I accept by implication, that there is no need for a claimant for resumption to show a breach of Treaty principles in relation to the acquisition from Maori of the land to be resumed. This proceeds on the basis that Crown purchasing practices in the late 19th and early 20th century were in breach of Treaty principles and there was, more generally, a breach of the duty of "active protection". The clear implication of this is that breaches of Treaty principles in relation generally to land acquisition policies and active protection can be said to "relate to" any land acquired by the Crown and which are still held either by a

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[151] *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 (Cooke J) [HC judgment] at [88].

state-owned enterprise or tertiary education institution or as a Crown forest, irrespective of whether that particular acquisition was in breach of Treaty principles. This was effectively the approach taken by the Tribunal in relation to the Settlement Trust application.

[184] I have two concerns about this.

[185] The first is that the approach of the majority creates unnecessary complications. Its effect is to require the Tribunal to deal with the resumption application based on a legal approach that the majority suggests is wrong. This puts the Tribunal in a difficult position. Under the approach of the High Court, it must deal with the resumption claims on the basis that the High Court's approach to land-banking is correct, a view that, appreciably, although not necessarily fatally, weakens the argument for a Ngāti Kahungunu recipient. I see this as likely to cause further litigation that will be unnecessarily complicated, for instance perhaps by issues as to whether the conclusion of the High Court as to land-banking and the approach of the majority (that it must be complied with even though it is perhaps, or probably, wrong) creates an issue estoppel against Ngāti Kahungunu.

[186] Further, and more importantly, the implications of the approach of the majority are very considerable; this because on the basis of what is proposed, and leaving aside the effect of settlements, most and perhaps all land, that that is subject to resumption regimes. I do not accept that this was intended by the legislature when those regimes were put in place. The majority play down the significance of this by noting that resumption regimes have not, to date, resulted in widespread resumption. What this overlooks is that until the present dispute it has not, at least as far as I am aware, ever been suggested that land acquired by the Crown in conformity with Treaty principles is susceptible to resumption. The suggestion that such land may be resumed is a radical departure from the past and likely to have very substantial consequences.

[187] I prefer to adopt what I regard as a more natural meaning of the phrase "relates to". On this approach:

(a) the well-founded claim must address prejudice to Māori in relation to the land to be resumed resulting from the breach of Treaty principles in respect of its acquisition from its customary owners (this for reasons already discussed); and

(b) return of the land to Māori ownership is an appropriate remedy "to compensate for or remove the prejudice" caused by the acts or omission of the Crown associated with that acquisition.

The mana whenua/tikanga issue

Overview

[188] The resumption applications by the Settlement Trust and Wairarapa Moana as advanced to the Tribunal were premised on proposals as to the recipient entity. In each case, this was to be the applicant (that is either the Settlement Trust or Wairarapa Moana). The resumption proposals did not include and were opposed by Raukawa and Ngāti Tūwharetoa.

[189] At the stage that proceedings before the Waitangi Tribunal had reached when the application for review was lodged, there was, in a practical sense at least, no extant claim before the Tribunal by Wairarapa Moana or any associated entity for resumption of the Maraetai dam land. Had the process not been interrupted by the judicial review proceedings in the High Court, the Tribunal would have continued its iterative process by seeking to identify a Ngāti Kahungunu-associated entity to be the recipient of the Maraetai dam land.

[190] Based on the High Court's approach, the resumption proposals of both the Settlement Trust and Wairarapa Moana would face substantial, probably insurmountable, difficulties. This is because as put forward, neither resumption proposal would, on the approach of the High Court, be tikanga compliant.

[191] I see the conclusions of the High Court on this issue as specific to the resumption proposals before the High Court, a conclusion that I think can be validated in the following way. Let us assume for the moment that the applications by Wairarapa Moana and the Settlement Trust had the support of mana whenua. Had this been so, the judgment of the High Court would, of course, have been very different. Indeed, I think it inconceivable that the High Court would have concluded that resumption in favour of Wairarapa Moana or a Ngāti Kahungunu entity would have been contrary to tikanga, if supported by mana whenua.

[192] An aspect of the majority's reasons that puzzles me is that they do not address specifically whether resumption in favour of either Wairarapa Moana or a Ngāti Kahungunu entity without participation by, and contrary to the will of, Raukawa and Ngāti Tūwharetoa would be contrary to tikanga. This, after all, is the key issue that was argued before us.

The approach of the Tribunal

[193] In its preliminary determinations, the Tribunal reviewed the mana whenua and tikanga arguments and went on:[152]

> 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 Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua.

[194] As the majority note, the Tribunal observed:[153]

> 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.

[195] The passage I have put in italics suggests to me that at least some "important matters" had been disposed of. These include the claim by Wairarapa Moana (and that of Ngāi Tūmapūhia-ā-Rangi in relation to the Ngāumu forest for that matter), and

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152 Waitangi Tribunal *Determinations of the Tribunal Preliminary to Interim Recommendations Under Section 8B and 8HC of the Treaty of Waitangi Act 1975* (Wai 863, 2020) at [259].

153 At [316] (emphasis added).

significantly, the mana whenua and tikanga objections to resumptions in favour of a Ngāti Kahungunu entity. It is true that none of this precluded further applications or refinements of existing applications and I accept that on the approach adopted by the Tribunal, there was nothing in the nature of a res judicata. It is, however, of significance because it helps to identify what was in issue before the High Court.

The approach of the High Court

[196] At issue in the High Court proceedings were the proposed resumption of the Maraetai dam land by either Wairarapa Moana or a Ngāti Kahungunu entity. Both resumption proposals still envisaged resumption that would not include, and was contrary to the wishes of, Raukawa and Ngāti Tūwharetoa.

[197] Ngāi Tūmapūhia-ā-Rangi's claim to the Ngāumu forest was not itself the subject of the litigation.

[198] On the approach of the High Court, a Ngāti Kahungunu claim for resumption would, on reconsideration by the Tribunal, face substantial difficulties as it was premised on the "land-banking" approach rejected by the High Court. If that claim were to fall away, this would leave at least potential scope for Wairarapa Moana to revive its claim for resumption. As well, the reasons given by the High Court would provide some assistance for Wairarapa Moana on the proportionality issue as the High Court considered that, in this regard, the history in relation to the Wairarapa lakes and the associated land exchange could be brought into account in favour of Wairarapa Moana alongside any prejudice associated with the compulsory acquisition.[154] However, on the High Court's approach to tikanga, the resumption proposals advanced by Wairarapa Moana and the Settlement Trust would almost certainly be rejected.

[199] The High Court's decision, however, left the applications by Wairarapa Moana and the Settlement Trust alive. They were to be reconsidered by the Tribunal. If the High Court was of the view that tikanga absolutely precluded resumption in favour of a non-mana whenua entity, there was no point in directing reconsideration. There is no indication in the judgment that resumption in favour of Wairarapa Moana or a

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154 HC judgment, above n 151, at [87].

Ngāti Kahungunu entity, if supported by mana whenua, would have been contrary to tikanga. This is a point that was not addressed by the Judge. Given that the only resumption proposals before him envisaged resumption in favour of non-mana whenua entities over the opposition of mana whenua, it seems to me that the sensible, not to mention conventional, approach is to construe the judgment as dealing with the controversy actually before the Court — that is whether unconditional resumption in favour on a non-mana whenua entity, without including, and over the opposition of, mana whenua would breach tikanga.

[200] Importantly, there is nothing in the High Court's judgment or its directions which would preclude amendment of those applications as to recipient entity, their reinforcement by mana whenua support or the Tribunal adopting any appropriate process to resolve, if resolution is possible, the tikanga obstacle to resumption.

The approach adopted by the majority

[201] The reasons of the majority give some indications as to how the applications by Wairarapa Moana and the Settlement Trust might be able to be dealt with on the reference back to the Tribunal. I do not take issue with those indications.

Ought the appeal to this aspect of the High Court's judgment be allowed or dismissed

[202] As I have noted, the majority do not directly engage with the conclusion of the High Court that the resumption proposals then on the table in the litigation before the High Court (either to Wairarapa Moana or a Ngāti Kahungunu entity and to the exclusion of Raukawa and Ngāti Tūwharetoa) faced the tikanga issues that the Court discussed. As I have also noted, I am puzzled by this. This, after all, was the key issue before us on this aspect of the case and it was to this issue that the parties addressed their arguments.

[203] If the majority are of the view that resumption in favour of Wairarapa Moana or a Ngāti Kahungunu entity to the exclusion, and contrary to the will, of Raukawa and Ngāti Tūwharetoa would be consistent with tikanga, then the appeal should obviously be allowed. But there is no substantive indication in their reasons as to what their view on this issue is. Rather they decide the case on the basis that the High Court

absolutely ruled out resumption (even if supported by mana whenua) in favour of a non-mana whenua party. As I have explained, I do not see this as contextual or realistic view of what the High Court decided.

[204] As it happens, there is nothing in the views expressed by the majority that cuts across the directions given by the High Court. In other words, had the judgment of the High Court not been challenged, there was nothing in it to preclude either revised applications for resumption by Wairarapa Moana, the Settlement Trust or other Ngāti Kahungunu entity or the adoption by the Tribunal of any process that it saw as appropriate to deal with the outstanding tikanga issues.

[205] On the basis of my view as to what the High Court actually decided and the non-engagement by majority with the correctness of that approach, I see the logic of their approach as being that the appeal should be dismissed.

O'REGAN J

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[206] I will address the issues identified in the majority reasons, using the same numbering system. I also adopt the definitions from those reasons.

[207] I agree with the majority reasons on issues four and five. In relation to issue one, I agree Wairarapa Moana's appeal is not moot, but I see the issue somewhat differently from the majority. I largely agree with the majority on the aspects of issue two (the mana whenua issue) that arise for resolution in the appeal. I express no view on the additional material about this issue included in the majority reasons. I do not consider the Court should engage with issue three (the relevant prejudice issue).

Issue one: the mootness issue

[208] Wairarapa Moana's application to the Waitangi Tribunal for binding recommendations was based entirely on the Treaty breaches relating to the acquisition of the Pouākani land in the 1940s. The expert evidence it adduced before the Tribunal was directed at quantifying the losses from the events related to the Pouākani land.

[209] The Tribunal said it considered it should not recommend the resumption of, and return to Wairarapa Moana of, the Pouākani land because the value of the land and the assets located on it was not proportionate to the prejudice suffered by the owners of the Pouākani land in 1949.[155]

[210] So, Wairarapa Moana's continuing interest in the proceedings is based on its intended re-litigation of the Tribunal's assessment of the proportionality of resumption as a remedy for breaches relating to the Pouākani land. Unless it can persuade the Tribunal to reverse its finding that the return of the Pouākani land to Wairarapa Moana is not proportionate to the prejudice, the mana whenua and tikanga issues that were the focus of the appeal to this Court will be moot. Wairarapa Moana's resumption application does not rely on events involving Lakes Ōnoke and Wairarapa and its counsel told us it intends to continue to pursue its resumption claim (based on the Treaty breaches at Pouākani only) on the same basis when the proceeding reverts to the Tribunal.[156]

[211] It is true that the basis for the Tribunal's finding that resumption and return to Ngāti Kahungunu is appropriate has been undermined by the High Court Judge's finding on the relevant prejudice issue, which has not been challenged in this Court. But the Tribunal's finding was that resumption and return of the Pouākani land to

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155 Waitangi Tribunal *Determinations of the Tribunal Preliminary to Interim Recommendations Under Section 8B and 8HC of the Treaty of Waitangi Act 1975* (Wai 863, 2020) [Preliminary Determinations] at [278]–[280]. The Tribunal did not make a provisional determination on a suitable recipient entity. Rather, it said the subject land should not be returned to any entity that is, or which represents, less than the "whole tribe" of Ngāti Kahungunu: at [266] of the Preliminary Determinations.

156 At the hearing, counsel were asked about Wairarapa Moana's limiting of its claim in that way, despite the High Court Judge's observation that it was open to the Tribunal to take into account events relating to the Lakes: *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 (Cooke J) [HC judgment] at [87]. Mr Radich KC and Mr Mahuika both confirmed that Wairarapa Moana intended to continue to pursue its case before the Tribunal on the same basis as it did at the preliminary determination stage.

Wairarapa Moana was disproportionate. As a matter of logic, it is hard to see why a change in the basis for Ngāti Kahungunu's separate resumption application affects the finding of disproportionality of Wairarapa Moana's application.

[212] One of the reasons given by the High Court Judge for deciding to allow the judicial review application to proceed despite the preliminary nature of the Tribunal's decision was that the Tribunal had reached "firm conclusions".[157] I agree. So it may be that Wairarapa Moana will face an uphill battle to persuade the Tribunal to change its "firm conclusion" on that issue.

[213] Having said that, I agree the Wairarapa Moana claim is not moot. While the Tribunal seems to have effectively ruled out Wairarapa Moana's resumption application on the basis of disproportionality, there is no legal impediment to the Tribunal changing its mind on that issue. Nor is there anything preventing Wairarapa Moana from changing its position and arguing that the Treaty breaches relating to the Lakes should be taken into account in considering its resumption application.

Issue two: the mana whenua issue

[214] The mana whenua issue and the relevant prejudice issue overlap and there is a degree of artificiality about considering one without the other. Nevertheless, that is the basis on which the appeal came before us. As just mentioned, this issue will affect Wairarapa Moana's resumption application only if the Tribunal reverses its preliminary finding on disproportionality.

[215] I do not think there is any doubt that the High Court Judge was correct to say that mana whenua is a highly relevant consideration in the context of a resumption application. Even Wairarapa Moana accepts that the paradigm resumption case would involve the return of land to an entity with a mana whenua connection to it.

[216] The High Court Judge accepted that the Pouākani land was technically eligible to be resumed under s 8A of the Treaty of Waitangi Act 1975.[158] He qualified this by

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157 HC judgment, above n 156, at [24].
158 At [89].

saying that lack of mana whenua is "a very important consideration when the exercise of the [resumption] power is considered".[159] Again, I do not think it can be seriously argued that lack of mana whenua is not a very important consideration.[160]

[217] The Tribunal's position was that Wairarapa Māori did not and never would have the status of tangata whenua in relation to the land at Pouākani. They were, the Tribunal said, "like Pākehā landowners in the district, manuhiri (visitors) in tikanga terms".[161] That was an important finding on its part and was the basis for the High Court Judge's analysis. He said he deferred to the Tribunal's expertise on matters of tikanga.[162]

[218] Having found Wairarapa Māori did not have mana whenua, the Tribunal then continued:[163]

> 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 Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua.

[219] While the Tribunal may not have intended it, this could be read as an assertion that the Tribunal can put to one side mana whenua and make a resumption order without taking it into account.

[220] Counsel for Wairarapa Moana argued that the situation was equivalent to a case where there are overlapping interests in land subject to a resumption application. In *Haronga v Waitangi Tribunal*, a majority of this Court said that such overlapping interests cannot be used as a reason for the Tribunal to decline to determine resumption claims.[164] I do not see that as analogous to the present situation. What this Court was dealing with in the *Haronga* case was the situation where two parties are seeking resumption. It does not address the present situation where Wairarapa Moana, as the party seeking resumption, has no mana whenua and the resumption is resisted by

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159 At [89].
160 As the majority acknowledges above at [84].
161 Preliminary Determinations, above n 155, at [258]. The Tribunal also described them as "interlopers in other tribes' rohe": at [245].
162 HC judgment, above n 156, at [109].
163 Preliminary Determinations, above n 155, at [259].
164 *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 at [106] per Elias CJ, Blanchard, Tipping and McGrath JJ.

Raukawa, which does have mana whenua but which cannot make a claim in respect of the relevant land because it has settled its Treaty claims against the Crown.[165] It says nothing about the significance or otherwise of the resumption applicant having (or not having) mana whenua.

[221] I do not think that Wairarapa Moana's arguments in relation to mana whenua properly characterise what the High Court Judge decided. He did not decide that the statute required the return of land to mana whenua (at least, not in the present context: his finding in relation to the relevant prejudice issue had that effect, but that is not before us). In effect, Wairarapa Moana is isolating the mana whenua finding from the relevant prejudice finding, challenging the former and seeking to uphold the latter. In relation to mana whenua, the High Court Judge's findings were, as outlined before, that mana whenua was a very important consideration in the exercise of the power under s 8A. That is quite different from saying that s 8A does not permit the return of land to a party without mana whenua.

[222] The High Court Judge's concern with mana whenua related not to the breadth of the resumption power under s 8A, but rather to his conclusion that the Tribunal was required to apply tikanga and Treaty principles in exercising its functions. He saw the Tribunal's observation that it was not disposed to let mana whenua arguments influence it as effectively asserting that the Tribunal was not going to observe tikanga. He described this as the Tribunal exercising its discretion "*notwithstanding* the tikanga relating to the land".[166]

[223] The High Court Judge accepted that the position would be different if the Tribunal had considered that its proposed decision was consistent with tikanga, for example, if other principles such as ea prevailed over those of mana whenua as a matter of tikanga.[167] But he considered that was not the position. This was contested by Mr Mahuika for Wairarapa Moana. In fact the Tribunal observed that it was

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165 A point that was acknowledged by the Waitangi Tribunal: Preliminary Determinations, above n 155, at [259(d)]. The same applies to Ngāti Tūwharetoa. It was not represented at the hearing before us but we were told it supports the position of Raukawa. See Raukawa Claims Settlement Act 2014; and Ngāti Tūwharetoa Claims Settlement Act 2018.

166 HC judgment, above n 156, at [108] (emphasis in original).

167 At [108].

required to do its best in exercising its discretion under s 8A to assist the claimants to reach ea.[168]

[224] I accept that as the expert body, the Tribunal was entitled to place other aspects of tikanga ahead of mana whenua in the unusual circumstances before it. Despite the choice of words in its finding that it would not allow mana whenua to "influence" it, I think the better interpretation of the Tribunal's decision is that it did take mana whenua into account, but decided that other concepts of tikanga were more important in this case. The extensive reasons the Tribunal gave for not letting mana whenua arguments influence its decision show that it did consider mana whenua arguments but found they were not controlling.

[225] Raukawa argued that the Tribunal did not take into account the impact on Raukawa. It argued that requiring the Crown to transfer land over which Raukawa has mana whenua to another iwi or hapū would necessitate the Crown going back on the commitments it made to Raukawa in the Raukawa settlement, conflicts with the Crown's obligation of active protection of Raukawa and could amount to a fresh breach of the Treaty in relation to Raukawa. Wairarapa Moana did not engage with these submissions in much depth, but the Tribunal will need to do so when it reconsiders its preliminary determinations.

[226] I do not express a view on the majority's observations about engaging tikanga processes to resolve resumption applications.[169] The majority discusses possible outcomes predicated on the possibility of some accommodation between Wairarapa Moana and/or Ngāti Kahungunu and mana whenua. In the Tribunal, the High Court and this Court, Wairarapa Moana has taken a strong adversarial stance against Raukawa, even to the extent of having it excluded as a party before the Tribunal.[170] At the hearing before us, Mr Finlayson KC for Raukawa described Wairarapa Moana's approach as going out of its way to "freeze Raukawa out". Wairarapa Moana argued strongly before the Tribunal that it did, in fact, have a mana

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168 Preliminary Determinations, above n 155, at [237].

169 Above at [86]–[91].

170 Waitangi Tribunal *Decision of the Tribunal on Entitlement of Settled Parties to Participate* (Wai 863, 2018). This decision was reversed by the High Court in a judicial review proceeding commenced by Raukawa: see *Raukawa Settlement Trust v Waitangi Tribunal* [2019] NZHC 383, [2019] 3 NZLR 722.

whenua connection to the Pouākani land. The evidence before both the Tribunal and the High Court contradicted that and Wairarapa Moana does not now challenge the Tribunal's finding described above at [217].

[227] In these circumstances, I prefer to address the judicial review issues arising from the case actually before us and not venture a view on a case that has not yet, and may never, come to pass. A number of possibilities for changes in position of the parties exist and I would leave it to the Tribunal to address them if and when they actually arise.

Issue three: the relevant prejudice issue

[228] As noted by the majority, Wairarapa Moana's argument avoided the relevant prejudice issue. No doubt Wairarapa Moana saw the High Court's finding on that issue as helpful to it because it assists its argument that the Tribunal should reconsider its conclusion that the appropriate party to receive the Pouākani land on resumption was an entity representing all of Ngāti Kahungunu, not Wairarapa Moana. However, as mentioned earlier, that would assist Wairarapa Moana only if the Tribunal were to reverse its earlier conclusion that Wairarapa Moana's claims in relation to the Pouākani land were such that resumption and return of the Pouākani land to Wairarapa Moana would be disproportionate.

[229] I do not think that the majority's analysis of the relevant prejudice issue could be interpreted as anything other than an indication that they consider the High Court decision on the relevant prejudice issue wrong.[171] I do not consider that appropriate in circumstances where those who would have argued in favour of the upholding of the High Court decision if called upon to do so did not have the chance to make submissions on the issue.

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[171] See the majority reasons above at [96]–[100].

Issue four: interest liability and issue five: standing

[230] As indicated earlier, I agree with the majority reasons on these issues.

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