THE HAURAKI SETTLEMENT OVERLAPPING CLAIMS INQUIRY REPORT

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Kneebone whānau

SIR JOHN KNEEBONE CMG

Matariki tāpuapua, Matariki whananaunga kore, Matariki tohu mate.
Tērā a Pohutukawa e hao nei, e tō nei i te tini ki te pō.
Haere, wheturangitia atu rā e te mātanga, te hautipua a Tupuānuku.
Kia hono atu koe ki te kāhui whetū hōu e pīataata mai nā,
e whakanikoniko i te waka o Taramainuku.
Whatungarongaro te tangata, toitū te whenua, toitū te kupu.
Ko ō kupu, e John, e toitū nei.

Sir John Kneebone CMG, who passed away on 28 June 2020, was first appointed to the Tribunal in 1989 and was reappointed for a further three terms. Sir John served on several major inquiries into iwi and district claims, including Te Roroa, Rekohu (Chatham Islands), and Hauraki, whose report was released in 2006. He also sat in the urgent inquiry into the Kiwifruit Marketing Board and the Whanganui River inquiry, which released its landmark report in 1999.

Mārewa ake taku manu mātai ki Waihou, ki Piako
He pukenga wai, he pukenga tāngata,
He pukepuke whenua ka eke, ko Te Aroha ki uta, ko Moehau ki tai
He pukepuke moana ka eke, ko Tīkapa moana, ka tiu whakararo
Whakaangi kau atu kia aronui rā te ākau nui, te ākau roa
Te ākau kōpiko, kei te ūnga Māhuhu-ki-te-rangi
Kia topa tahi ko Tū-te-Mahurangi
Maioha rā ki Matakanakana, pōkare atu ki Hauturu
Taku manu tukutuku, tuku tāwhiri rā ki ngā ao o te rangi
Maiangi ai ko Aotea puea te tahatū o te rangi
Aotea utanga nui, Aotea taonga maha, Aotea whakahirahira
Anga atu ai koe ki te aukume o Ahuahu
Whakataha rā, nihinihi rā ko Harataunga, ko Te-Whanganui-ā-Hei
Whakaahu taitonga, ko Tūhua, tatū ki Matakana
Te aumihi ki Tauranga moana, ki Tauranga tangata
Tūpanapana koe ki ngā rua o Ngā Kurī-a-Whārei
Whana atu ki tuawhenua, te tūārangi ko Katikati kōwhā pipi,
Ka piki, ka rewa tarioi te paeroa i Kaimai
Te ia ki Ohinemuri, te whakaipurangi a Te Aroha
Auraki mai ai taku manu e, rarau
Tēnā te aute i whakatōkia ki te tara o te whare
ki Te Tara o Te Ika a Māui, he ika whenua tonu.
Koi ika kotikotia, koi ika haehaengia, koi ika pāwharangia
He mānia roa paiheretia rānei ki te whiri kahikatea.
Autaia a Tāne, Tāne te pūkenga, Tāne te wānanga, Tāne te waiora
Tāne te whakaputa ki te whai ao, ki te ao mārama e . . . hia!

Go forth my curious kite over the Waihou, and Piako rivers
An abundance of water, sustains an abundance of people
The land's rising contours can be traversed, from Te Aroha inland and Moehau to the sea
The sea's rising swells can be navigated, so rise up northward over the Hauraki gulf
As you glide effortlessly give consideration to the vast coastline
To the writhing shores, and to the landing place of Māhuhu-ki-te-rangi
From there you fly abreast of Tū-te-Mahurangi
Pay respect to Matakanakana then on over undulating waters to Hauturu island
My windborne bird, allow the spiralling updraughts to carry you to the clouds
Soar on toward Aotea island revealing itself at the horizon
An island, laden with resource, immense in value and significance
Move off in the direction of the current leading to Ahuahu island
Glide past and survey the coves of Harataunga and Te Whanganui-ā-Hei
Divert your flight further south to Tūhua island, reaching Matakana
Acknowledgement given to the sea of Tauranga, distinguishing the people of Tauranga
Twitch in the breeze above the ancient dwellings at Ngā Kurī-a-Whārei
Drive forward inland to the traditions of old at Katikati, bountiful with food,
Fly up and take pause to consider the slopes of the Kaimai range,
To the flow of Ohinemuri, to Te Aroha where moisture precipitates,
Come back my kite and return to land
To the house where the aute tree has been planted
To the prominent spine of Māui's fish, formed in this land
Not a fish chopped and cut apart, splayed open to the sun
Is it not like wide and uninterrupted plains bound together by the roots of kahikatea
The heights of Tāne, in skill, in knowledge, and in wellbeing
Tāne from whence our very existence is founded . . . indeed!

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Minister for Māori Crown Relations: Te Arawhiti

Parliament Buildings
WELLINGTON

16 December 2019

E mihi ana ki a koutou e ngā Minita e tū nei ki te kei o te waka

Enclosed is our report of the Hauraki Settlement Overlapping Claims Inquiry, which follows an urgent hearing held in Wellington in April 2019.

At the heart of this report are allegations by four claimant groups that the Crown breached the principles of the Treaty of Waitangi through the flawed overlapping claims policies, processes, and practices it adopted when negotiating collective and individual settlement deeds with Hauraki iwi. The claimants say, as a result, Hauraki iwi were incorrectly offered redress within the claimants' rohe. The claimants contend existing and potential settlements were thus undermined, their mana whenua and mana moana rights compromised, and their rangatiratanga and tikanga diminished.

The claimants are all large, mandated representative bodies that are (or have been) negotiating their own settlements with the Crown, often in parallel with the Hauraki negotiations. They include two Tauranga Moana iwi and Ngātiwai, whose respective experiences of the Hauraki settlement negotiations have much in common. The fourth claimant is Ngāti Porou ki Hauraki; once a member of the Hauraki collective, their experiences and consequent claims are somewhat different from the other groups. But they too consider that they

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MINISTRY OF JUSTICE
Tāhū o te Ture

have been prejudiced by Crown policies, processes, and practices and allege that they did not receive a fair redress offer from the Crown.

Throughout this inquiry, the claimants gave powerful evidence of being excluded or sidelined from negotiations over redress proposed to Hauraki. They told us of 'consultation' between parties that was cursory or came far too late; of repeated and ultimately fruitless requests for information that the Crown should have provided without being asked; of the Crown's indifference to the use of tikanga-based processes; of their dismay at discovering deeds containing redress that had not been through a proper overlapping engagement process; and of relationships that have been left in tatters. The prejudice they have experienced, the claimants say, is neither short-lived nor abstract: it is significant, lasting, and its day-to-day effects are already apparent.

For the most part, we agree. At a general level, we find the Crown's policies, processes, and practices for dealing with groups with overlapping interests during settlement negotiations are inadequate and inconsistent with its Treaty obligations, in many respects. The shortcomings of the *Red Book*, the only statement of Crown settlement policies and processes available to claimants, have been well-rehearsed in many Tribunal reports; we reiterate them here. Moreover, we find that the sometimes undocumented and often opaque practices the Crown adopts in circumstances that the *Red Book* does not address (and there are many) also breach Treaty principles and the Crown's duties and obligations.

As for the way the Crown applied those policies, processes, and practices when awarding redress in the Hauraki settlement negotiations, here too we identify deficiencies and Treaty breaches in respect of Tauranga Moana iwi and Ngātiwai. We consider their claims to be well-founded, and we make several recommendations, which we urge the Crown to act on without delay to remove the prejudice to these groups. In particular, we call for the Crown to actively demonstrate its commitment to tikanga when dealing with overlapping interests, including by facilitating the use of tikanga-based processes. While it is not the Crown's role to devise such processes itself, it needs to do much more to provide space for them to operate as a means of testing overlapping interests, resolving conflict, and repairing relationships. Regrettably, in this settlement, the Crown prioritised speed over due process. The Crown's response to a failure of tikanga process should not be binary; making unilateral decisions by itself is not the only option. As the full title of the *Red Book* itself acknowledges, 'Ka tika a muri, ka tika a mua – healing the past, building a future'; the Crown must now turn this admirable sentiment into practical action.

However, we do not find Ngāti Porou ki Hauraki's claim to be well-founded, for reasons we set out in chapter 6. As such, we make no recommendations in respect of this claim.

It is dispiriting to note that many of our findings and recommendations about the Crown's failure to properly deal with overlapping interests in settlement negotiations – especially those involving non-settling or already settled groups – echo those made in past Tribunal reports. It is equally dispiriting to note the Crown's persistent failure to act on those findings, some of which date back as far as 2003. If the Crown is to avoid continuous litigation, adverse Tribunal findings, and delays to its settlement programme, it is high time for it to act on those previous Tribunal recommendations as well as these ones.

That said, we would like to record our appreciation for the frank and fulsome evidence provided by Crown witnesses. These qualities have not always been to the fore in Tribunal inquiries, and the fact that they were displayed here gives us cause for optimism. We encourage the Crown to follow this approach in future inquiries.

Nāku noa, nā

Judge Miharo Armstrong
Presiding Officer

ABBREVIATIONS

app	appendix
CA	Court of Appeal
CFL	Crown forest land
ch	chapter
cl	clause
CNI	Central North Island
doc	document
DSP	deferred selection process
ed	edition, editor
fn	footnote
ltd	limited
memo	memorandum
MPI	Ministry for Primary Industries
n	note
no	number
NZLR	*New Zealand Law Reports*
NZDF	New Zealand Defence Force
NZTA	New Zealand Transport Authority
OIA	Official Information Act
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
pt	part
PSGE	post-settlement governance entity
RFR	right of first refusal
ROI	record of inquiry
RMC	regional management committees
s, ss	section, sections (of an Act of Parliament)
sec	section (of this report, a book, etc)
TMF	Tauranga Moana Framework
TMIC	Tauranga Moana Iwi Collective
v	and
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 2840 record of inquiry, a select index to which is reproduced in appendix II. A full copy of the index is available on request from the Waitangi Tribunal.

CHAPTER 1

INTRODUCTION TO THIS INQUIRY

1.1 Overview

This report addresses the claims of tangata whenua groups (iwi and hapū) who oppose the Hauraki deeds of settlement. On 2 August 2018, members of the Pare Hauraki Collective signed a collective deed of settlement with the Crown to settle different elements of its claims under the Treaty of Waitangi.[1] By the end of 2018, the individual iwi of Hauraki had mostly either initialled or signed their individual deeds of settlement with the Crown (see section 1.3 below).

As a result of these developments, several applications were filed seeking an urgent inquiry into the Crown's policies, processes, and conduct with respect to overlapping redress items included in the Pare Hauraki negotiations and deeds of settlement.[2]

The Waitangi Tribunal granted urgency to six of those applications. They were made by Ngāi Te Rangi, Ngāti Ranginui, Ngātiwai, Ngāti Manuhiri, Ngāti Porou ki Hauraki, and Waikato-Tainui.[3] On 4 April 2019, Waikato-Tainui formally withdrew its application for urgency, informing the Tribunal that they had reached an agreement with Marutūāhu on a new resolution process for settling the issues between them.[4] Similarly, Ngāti Manuhiri are currently in negotiations to resolve their concerns with the settlement. As the Tribunal does not wish to jeopardise the status of these ongoing negotiations, this report does not address the Hauraki (Ngāti Manuhiri) Claim (Wai 2678). The Tribunal grants leave for these Ngāti Manuhiri claimants to return if the outcome of their negotiations is unsatisfactory.

This report addresses the remaining four claims. The central allegation is that the Crown has breached the principles of the Treaty of Waitangi through its policies and processes, and as a result has incorrectly allocated redress to iwi of Hauraki.[5] Each claimant group argued that the contested redress would undermine either existing or potential settlements, and significantly affect the mana whenua and mana moana rights of the claimants.[6]

1. Memorandum 2.5.25, p 2
2. Ibid, pp 2–3
3. Ibid
4. Submission 3.1.266, p 2
5. Memorandum 2.5.25, p 2
6. Ibid, pp 3–9

While these claims relate to the collective and individual deeds of settlement of the Pare Hauraki iwi, we emphasise that these claims are not against Pare Hauraki, nor have we viewed the claims that way. This report squarely focuses on the policies, practices, acts, and omissions of the Crown.

1.2 The Parties and their Positions

1.2.1 The claimants

1.2.1.1 *The Ngāi Te Rangi claim (Wai 2616)*

The Ngāi Te Rangi claim (Wai 2616) was filed by Charlie Tawhiao (Chairman) on behalf of the Ngāi Te Rangi Settlement Trust on 14 March 2017.[7]

Ngāi Te Rangi, along with Ngāti Ranginui and Ngāti Pūkenga, are recognised as Tauranga Moana iwi. They represent tangata whenua who hold mana whenua and mana moana, and exercise rangatiratanga, over lands and waters within their rohe. They say their rohe extends from Ngā Kurī-a-Whārei in the north, inland to the Kaimai Ranges, south to the pae maunga of Pūwhenua, then to Ōtānewainuku, and to Wairākei. Ngāi Te Rangi claim that the three iwi have held mana and rangatiratanga without interruption since 1840 to today.[8] In light of this, the three iwi have collectivised and formed the Tauranga Moana Iwi Collective for the purposes of settling their historical claims where shared interests exist.[9]

The Ngāi Te Rangi claimants submit that the Crown has undermined their iwi's mana whenua, mana moana, rangatiratanga, and tikanga by granting Hauraki redress in the rohe of Ngāi Te Rangi.[10] Their claim alleges failures of Crown policy and practice that raise concerns about the transparency, fairness, and durability of relevant settlements.[11]

Ngāi Te Rangi oppose redress that is currently being offered to Hauraki iwi in Tauranga Moana. Specifically, they seek the removal of a clause providing for a fifth seat (to be held by Hauraki iwi) on the Tauranga Moana Framework governance group, and also take issue with previously negotiated redress items already allocated to Hauraki iwi.[12]

1.2.1.2 *The Ngāti Ranginui claim (Wai 2754)*

The Ngāti Ranginui claim (Wai 2754) was filed by Ronald Te Pio Kawe on 10 August 2018, on behalf of the Ngā Hapū o Ngāti Ranginui Settlement Trust. The Trust represents the Tauranga Moana iwi of Ngāti Ranginui.

Ngāti Ranginui say that their area of interest extends from Ngā Kurī-a-Whārei, northwest of Tauranga, inland to the summit of Mount Te Aroha, south-east along the Kaimai Range to Pūwhenua and south to the Mangōrewa River.[13]

7. Claim 1.1.1, p 2
8. Claim 1.1.1(a), p 5
9. Ibid
10. Ibid, p 4
11. Ibid
12. Ibid, pp 2–3
13. Claim 1.1.6, p 3

Among other matters, the Ngāti Ranginui claimants raise concerns with the Crown's inclusion of provisions relating to the Tauranga Moana Framework in the Pare Hauraki Collective redress deed, and the offer to Hauraki of a conservation management framework and a minerals relationship agreement.[14] The iwi asserted that the proposed redress undermines their mana and rangatiratanga; it also hinders any future tikanga-based resolution process and allows the Hauraki collective to determine the parameters of future negotiations on the Tauranga Moana Framework.[15]

1.2.1.3 *The Ngātiwai claim (Wai 2666)*

The Ngātiwai claim (Wai 2666) was brought by Haydn Thomas Edmonds, on behalf of the Ngātiwai Trust Board and the iwi of Ngātiwai, on 24 July 2017.[16]

The iwi of Ngātiwai comprises the related hapū, whānau, and individuals affiliated to the kāinga and marae of Ngātiwai.[17] Ngātiwai hapū include: Ngare Raumati, Ngāti Tautahi, Te Uri o Hikihiki, Te Whānau Whero-mata-mamoe, Te Āki Tai, Te Kainga Kuri, Ngāti Toki ki-te-moana, Te Whānau o Rangiwhaakahu, Ngāti Takapari, Ngāti Kororā, Te Waiariki, Te Patuharakeke, Ngāti Manuhiri, and Ngāti Rēhua.[18]

Ngātiwai say that their area of interest extends from Tāpeka Point in the Bay of Islands to Matakana in Mahurangi, encompassing the eastern seaboard and all offshore islands – including, but not only, Tawhiti Rahi and Aorangi (Poor Knights), Taranga and Marotere (Hen and Chickens Islands), Aotea (Great Barrier Island), and Hauturu (Little Barrier Island).[19] Ngātiwai claim that they exercised ahi kā, mana whenua, rangatiratanga, and kaitiakitanga within this rohe before 1840, and continue to do so.[20]

Ngātiwai oppose significant items of redress offered to the Hauraki collective in the Pare Hauraki and Marutūāhu collective redress deeds, and also redress offered in individual iwi settlements. These include the Ngāti Pāoa deed of settlement, Ngaati Whanaunga deed of settlement, Ngāti Maru deed of settlement, Ngāti Tamaterā deed of settlement, and Te Patukirikiri deed of settlement.[21]

The claimants allege the Crown's policies and actions during the overlapping redress process was inadequate. Further, they argue that the eventual redress offers will undermine iwi rangatiratanga and mana, create divisions between Ngātiwai and Hauraki iwi, and damage any partnership with the Crown.[22] They note that

14. Ibid, pp 3–4
15. Ibid, p 1
16. Ibid
17. Claim 1.1.3(a), p 1
18. Ibid, p 1
19. Ibid, p 3
20. Ibid
21. Ibid, pp 4–10
22. Ibid, pp 17–19, 40

they were not informed of many relevant actions, except the signing of the Pare Hauraki Collective redress deed.[23]

Ngāti Rēhua–Ngātiwai ki Aotea are the mandated body negotiating a settlement with the Crown concerning their interests on Aotea/Great Barrier Island. They initialled a deed of settlement with the Crown on 19 December 2016.[24] Ngātiwai support Ngāti Rēhua–Ngātiwai ki Aotea in their settlement negotiations with the Crown. However, Ngātiwai assert that they still maintain an interest on Aotea and should have been included in a proper overlapping claim process concerning redress offered to Hauraki on Aotea, and its surrounds.[25]

1.2.1.4 *Ngāti Porou ki Hauraki (Wai 2735)*

Ngāti Porou ki Hauraki (Wai 2735) are included in the Pare Hauraki Collective redress deed and are progressing their individual deed of settlement with the Crown.

Ngāti Porou ki Hauraki say that their area of interest extends from Katikati to Tairua, and from Whangapoua to Poihākena. However, they assert the iwi's key interests are situated on the Tai Tamahine coastline of the Hauraki district.[26]

Ngāti Porou ki Hauraki joined the Hauraki collective in 2010, reflecting the Crown's policy of negotiating with large natural groups and Ngāti Porou ki Hauraki's desire to progress their settlement negotiations.[27] However, they allege that the Crown's process suffered from procedural flaws and lacked elements of natural justice. They claim they were denied sufficient access to funding, research commissions, and to the Crown itself.[28] As a result, Ngāti Porou ki Hauraki submit, a two-tier settlement had been created in which they did not have an equal voice to the other Hauraki iwi.[29]

1.2.2 The Crown's position

The Crown acknowledge that each of the claimant iwi has a genuine sense of grievance.[30]

However, counsel argue that the Crown's duties do not prescribe outcomes and thus settlement outcomes are not evidence of any Treaty breach.[31] Counsel also submit that – given the complexities associated with the historical Treaty breaches, and the diversification of views concerning contemporary Māori rights that form

23. Memorandum 2.5.25, p 6
24. Ngāti Rēhua–Ngātiwai ki Aotea, Ngāti Rēhua–Ngātiwai ki Aotea Settlement Trust, and the Crown, 'Deed of Settlement of Historical Claims', initialled version, 19 December 2016
25. Ngāti Rēhua–Ngātiwai ki Aotea did not participate in this inquiry, but some of their member whanau did in an individual capacity as interested parties.
26. Claim 1.1.5, p 2
27. Ibid, pp 2–3
28. Ibid, p 4
29. Submission 3.3.12, p 11
30. Submission 3.3.26, p 11
31. Ibid, p 5

the context for the negotiations at issue in this inquiry – the Crown's actions 'in each case [were] more than reasonable'.[32] Specifically, the Crown argues that it made reasonably informed decisions against its own criteria, and that its decisions and actions complied with its duties – notwithstanding the challenges it faced.[33]

Counsel concede that the Crown indeed made mistakes throughout the negotiations. But it maintains it had then taken appropriate action:

> the Crown did (extensively) inform itself of respective rights and interests. The Crown did create the space for iwi-to-iwi engagement. The Crown did respect consequent agreements between iwi. The Crown did listen to arguments about why those agreements should not stand. The Crown did endeavour to work through the issues then arising. Yes, the Crown did make mistakes – and it then remedied them.[34]

1.2.3 The interested parties

1.2.3.1 *Pare Hauraki iwi*

In 2009, the 12 iwi of Hauraki formed the Pare Hauraki Collective for the purpose of negotiating a Treaty settlement.[35]

Those iwi are Hako, Ngāi Tai ki Tāmaki, Ngāti Hei, Ngāti Maru, Ngāti Pāoa, Ngāti Porou ki Hauraki, Ngāti Pūkenga, Ngāti Rāhiri Tumutumu, Ngāti Tamaterā, Ngāti Tara Tokanui, Ngaati Whanaunga, and Te Patukirikiri.[36] Together, they have a population of approximately 16,000 and an area of interest extending from the Mahurangi Coast to the western Bay of Plenty.[37]

1.2.3.2 *Other interested parties*

Those supporting the Pare Hauraki iwi position and who were granted full participation rights are:

- Ngāti Maru, Ngāti Tamaterā, Te Patukirikiri, Ngaati Whanaunga, and Ngāti Pāoa.[38]
- The trustees of the Ngāti Tara Tokanui Trust on behalf of Ngāti Tara Tokanui.[39]
- Jill Taylor and Nicki Scott on behalf of Ngāti Rāhiri Tumutumu.[40]

Others supporting the Pare Hauraki iwi position and who were granted a watching brief are the trustees of the Ngāti Pāoa Iwi Trust. [41]

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32. Ibid, p 6
33. Ibid, pp 7, 10
34. Ibid, p 10
35. Memorandum 2.5.25, p 2
36. Ibid
37. Hako, Ngāi Tai ki Tāmaki, Ngāti Hei, Ngāti Maru, Ngāti Paoa, Ngāti Porou ki Hauraki, Ngāti Pūkenga, Ngāti Rāhiri Tumutumu, Ngāti Tamaterā, Ngāti Tara Tokanui, Ngaati Whanaunga, Te Patukirikiri, and the Crown, 'Pare Hauraki Collective Redress Deed', 2 August 2018
38. Memoranda 3.1.1, 3.1.180, 3.1.198; memo 2.5.30, p 2
39. Memoranda 3.1.161, 3.1.183
40. Memorandum 3.1.179; see also memo 2.5.28, pp 6–7
41. Memoranda 3.1.213, 2.5.33

The remaining interested parties supported the various claimants' positions:

- Deane Adams on behalf of Ngāti Huarere ki Whangapoua.[42]
- Maatai Ariki Kauae Te Toki on behalf of Hako i te Rangi te Pupu o Hauraki.[43]
- Mapuna Turner on behalf of Ngāti Rahiri Tumutumu.[44]
- Ngāti Whātua Ōrākei.[45]
- The Raukawa Settlement Trust.[46]
- Mokoro Gillett on behalf of the Ngāti Hauā Iwi Trust.[47]
- Huhana Lyndon and others on behalf of Ngāti Rēhua, Ngātiwai, and Ngāpuhi whānau.[48]
- Phillip Wharekawa on behalf of Ngāi Tamawhariua and Te Whānau-a-Tauwhao.[49]
- Morehu McDonald and Hinengaru Thompson Rauwhero on behalf of Ngā Hapū o Ngāti Hinerangi and Ngāti Hinerangi Wai claimants.[50]
- Michael Beazley on behalf of Te Uri o Makinui/Ngāti Maraeariki and Ngāti Rongo ki Mahurangi.[51]
- Michael Beazley on behalf of Ngāti Rēhua – Ngātiwai ki Aotea.[52]
- Jocelyn Mikaere-Hollis on behalf of Te Tāwharau o Ngāti Pūkenga Trust, the post-settlement governance entity for Ngāti Pūkenga.[53]
- Kipouaka Pukekura-Marsden and John Ohia on behalf of Ngāti Pūkenga Iwi ki Tauranga Moana.[54]
- Arapeta Wikito Pomare Hamilton, Joyce Baker, and Deon Baker on behalf of the descendants of Pomare II and members of Ngāti Manu, Te Uri Karaka, Te Uri o Raewera, and Ngāpuhi ki Taumārere.[55]

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42. Memorandum 3.1.170
43. Memoranda 3.1.172–3.1.177
44. Memorandum 3.1.181
45. Memorandum 3.1.13
46. Memorandum 3.1.14
47. Memorandum 3.1.16
48. Memorandum 3.1.156; memo 3.1.185, pp 13–14
49. Memoranda 3.1.157–3.1.159
50. Memoranda 3.1.160, 3.1.182
51. Memorandum 3.1.187
52. Memorandum 3.1.188
53. Memoranda 3.1.167, 3.1.189. With kāinga located in Pakikaikutu (Whāngārei), Manaia (Coromandel), Tauranga and Maketū, Ngāti Pūkenga belong to both the Tauranga and the Hauraki collectives. After the Pare Hauraki Collective deed was initialled, some Ngāti Pūkenga groups (including Te Tāwharau o Ngāti Pūkenga Trust and Ngāti Pūkenga Iwi ki Tauranga Moana) raised concerns about redress situated within Tauranga Moana, sought a tikanga process to resolve overlapping redress issues, and chose not to sign the deed until that happened. Both the Trust and Ngāti Pūkenga Iwi ki Tauranga Moana were granted interested party status in this inquiry. See Areta Donna Gray to Tribunal, memorandum, 10 December 2018 (memo 3.1.189); Areta Donna Gray, brief of evidence, 13 March 2019 (doc A46); Kipouaka Pukekura-Marsden and John Ohia, memorandum, 7 December 2018 (memo 3.1.186); Ngāti Pūkenga Iwi ki Tauranga Moana, closing submissions, 5 June 2019 (submission 3.3.20).
54. Memorandum 3.1.186
55. Memorandum 3.1.217

- Kristan John MacDonald, Chris Reihana Koroheke, James Bernard Mackie, and Aperehama Edwards on behalf of themselves and Te Whanau a Rangiwhakaahu.[56]

1.3 The Pare Hauraki Settlement: Overview

This inquiry focuses on the events surrounding the signing of the Pare Hauraki iwi deeds of settlement.

The Pare Hauraki iwi hold individual mandates to negotiate the settlement of their claims and will also receive redress through collective redress deeds where shared interests may exist.[57]

On 1 October 2010, the Crown and the Pare Hauraki Collective signed a framework agreement that set out the process for ongoing negotiations leading to the settlement of shared claims and elements of a collective settlement.[58] This resulted in the signing of the iwi-specific agreement in principle equivalents on 22 July 2011.[59]

The Pare Hauraki Collective redress deed – initialled on 22 December 2016 and signed on 2 August 2018 – intends to provide cultural and commercial redress to the 12 iwi of Hauraki.[60] The Marutūāhu Iwi collective redress deed initialled on 27 July 2018 will similarly provide collective redress to five of those iwi: Ngāti Maru, Ngāti Pāoa, Ngāti Tamaterā, Ngaati Whanaunga, and Te Patukirikiri.[61]

These collective redress deeds do not settle historical claims. The historical claims of each iwi will be settled through their individual deeds of settlement.[62] To date, the following individual deeds have been initialled or signed:

Ngāti Pūkenga	7 April 2013 (signed); fifth Deed to Amend published 9 August 2017[63]
Ngāi Tai ki Tāmaki	7 November 2015 (signed)[64]
Ngāti Tara Tokanui	1 June 2017 (initialled)[65]
Ngāti Rāhiri Tumutumu	13 July 2017 (initialled)[66]

56. Memorandum 3.1.184; see also memo 2.5.28, p 7
57. Memorandum 2.5.25, p 2
58. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 13
59. Ibid
60. Memorandum 2.5.25, p 2
61. Ibid
62. Ibid
63. Ngāti Pūkenga, the trustees of Te Tāwharau o Ngāti Pūkenga Trust, and the Crown, 'Deed of Settlement of Historical Claims', 7 April 2013; the trustees of Te Tāwharau o Ngāti Pūkenga Trust and the Crown, 'Fifth (Consolidated) Deed to Amend Ngāti Pūkenga Deed of Settlement', 9 August 2017
64. Ngāi Tai ki Tāmaki, the trustees of the Ngāi Tai ki Tāmaki Trust, and the Crown, 'Deed of Settlement of Historical Claims', 7 November 2015
65. Ngāti Tara Tokanui, the trustees of the Ngāti Tara Tokanui Trust, and the Crown, 'Deed of Settlement of Historical Claims', initialled version [1 June 2017]
66. Ngāti Rāhiri Tumutumu, the trustees of the Ngāti Tumutumu Trust, and the Crown, 'Deed of Settlement of Historical Claims', initialled version [13 July 2017]

Ngāti Hei	17 August 2017 (signed)[67]
Ngaati Whanaunga	25 August 2017 (initialled)[68]
Ngāti Maru	8 September 2017 (initialled)[69]
Te Patukirikiri	8 September 2017 (initialled)[70]
Ngāti Tamaterā	20 September 2017 (initialled)[71]
Ngāti Pāoa	18 August 2018 (initialled)[72]

At the time of writing, Hako i te Rangi te Pupu o Hauraki and Ngāti Porou ki Hauraki have neither initialled nor signed individual deeds. Hako did sign a deed recording on-account arrangements with the Crown on 30 October 2014, while Ngāti Porou ki Hauraki signed an agreement in principle equivalent in July 2011.[73]

1.4 Summary of the Statement of Issues

On 18 January 2019, the Tribunal released the final statement of issues for this inquiry. It largely reflected the joint statement of issues submitted earlier by counsel for the claimants and the Crown, with some refinements:

Hauraki Overlapping Claims: Inquiry Tribunal Statement of Issues

1. What are the Crown's Treaty obligations under the Treaty of Waitangi/te Tiriti o Waitangi to each of the six claimants in the context of the Pare Hauraki negotiations?
2. What were the applicable Crown policies and practices with respect to overlapping claims/interests and overlapping claimants/groups in the context of Treaty settlement negotiations during the Pare Hauraki negotiations?
3. Are the Crown policies and practices in issue two consistent with the Crown's obligations under the Treaty of Waitangi/te Tiriti o Waitangi?
4. How has the Crown applied its overlapping claims policies and practices in the Pare Hauraki negotiations, including but not limited to:

67. Ngāti Hei, the trustees of the Hei o Wharekaho Settlement Trust, and the Crown, 'Deed of Settlement of Historical Claims', 17 August 2017

68. Ngaati Whanaunga, the trustees of the Ngaati Whanaunga Ruunanga Trust, and the Crown, 'Deed of Settlement of Historical Claims', initialled version, [25 August 2017]; submission 3.3.11(a), app 3

69. Ngāti Maru and the Crown, 'Deed of Settlement of Historical Claims', initialled version, [8 September 2017]; submission 3.3.11(a), app 3

70. Te Patukirikiri and the Crown, 'Deed of Settlement of Historical Claims', initialled version, [8 September 2017]; submission 3.3.11(a), app 3

71. Ngāti Tamaterā and the Crown, 'Deed of Settlement of Historical Claims', initialled version, [20 September 2017]; submission 3.3.11(a), app 3

72. Ngāti Pāoa, the trustees of the Ngāti Pāoa Iwi Trust, and the Crown, 'Deed of Settlement of Historical Claims', initialled version, [18 August 2018]; submission 3.3.11(a), app 3

73. The trustees of the Hako Tūpuna Trust and the Crown, 'Deed Recording On-Account Arrangements in Relation to the Hako Deed of Settlement', 30 October 2014; Ngāti Porou ki Hauraki and the Crown, 'Agreement in Principle Equivalent', July 2011

(a) what was the Crown's process for engagement with overlapping claimants/groups; and
(b) what was the nature of the Crown's engagement with overlapping claimants/groups?

5. Prior to making any offer of the contested redress items, what process did the Crown follow to inform itself of:
   (a) the interests of each of the iwi of Hauraki (including Ngāti Porou ki Hauraki);
   (b) the interests (including both customary rights and interests, and interests arising under any existing Treaty settlements) of each of the five claimants outside of the iwi of Hauraki;
   (c) the relativity of the interests of each of the iwi of Hauraki; and
   (d) the relativity of the interests of the five claimants outside of the iwi of Hauraki to the interests of the iwi of Hauraki (both collectively and individually) within those areas?
6. What steps did the Crown take subsequent to offering the contested cultural or commercial redress items to the iwi of Hauraki to:
   (a) inform itself of the respective and relative interests of the six claimants and the iwi of Hauraki (both collectively and individually);
   (b) alter any proposed redress to address any issues raised by the six claimants; and
   (c) otherwise address any issues raised by the six claimants?
7. Has the Crown, in relation to the Pare Hauraki negotiations, breached the principles of the Treaty of Waitangi/te Tiriti o Waitangi with respect to any of the six claimants and what (if any) prejudice has been caused to those claimants as a result?
8. What, if any, recommendations should the Tribunal make on how the Crown should address any breach and resulting prejudice?[74]

1.5 The Structure of this Report

This report examines the overlapping redress issues in the Pare Hauraki negotiations through two lenses. In chapter 3, we analyse the Crown's *generic* policies, processes, and practices for dealing with groups with overlapping interests, particularly the provision of settlement redress.

Our focus then shifts from the generic to the particular. Chapter 4 examines how the Crown's policies, processes, and practices were applied to each of the

74. Statement 1.4.1; memo 2.5.28. The notes to the statement of issues contain the following comments: '"Pare Hauraki negotiations" means the historical Treaty settlement negotiations between the iwi of Hauraki (both collectively and individually) and the Crown, including any collective and individual deeds of settlement. . . . In addition to these generic issues, by memorandum the parties have acknowledged and agreed that the nature of the Wai 2735 claim on behalf of Ngāti Porou ki Hauraki may raise certain additional and/or unique issues that may need to be addressed within the Wai 2840 Inquiry.'

Tauranga Moana iwi and Ngātiwai, and with what consequences (Ngāti Porou ki Hauraki is dealt with in a separate chapter). A chronological summary of each iwi's journey through the settlement negotiations is provided.

In chapter 5, we identify and analyse the key issues emerging from the individual iwi experiences; we also consider and make findings on the Treaty compliance of the Crown's actions. Chapter 6 examines and makes findings on the particular claims brought by Ngāti Porou ki Hauraki, whose experience of the Pare Hauraki negotiations was substantially different from that of other claimant iwi. For ease of reference, all our findings are summarised in a final chapter, where we also present our recommendations.

Before beginning our analysis of the evidence, though, we survey the broader Treaty context within which this inquiry is situated. Chapter 2 summarises the Treaty principles most relevant to the claims before us and notes previous Tribunal findings on the Crown's approach to overlapping interests and redress during the settlement process.

CHAPTER 2

THE TREATY CONTEXT

In the first part of this chapter, we identify the Treaty principles and duties relevant to this inquiry. The second part summarises previous Tribunal findings and recommendations on the Crown's policies and processes for dealing with overlapping redress.

2.1 Treaty Principles and Duties Relevant to Overlapping Interests

2.1.1 The principle of partnership

As the Tribunal has frequently stated, the essence of the Treaty partnership is 'the guarantee to Māori of the right to exercise tino rangatiratanga over all their taonga, in exchange for the Crown's right to exercise kāwanatanga'.[1] In this exchange, each party is constrained by the rights of the other, committing each to partnership.[2]

The Tribunal has noted that it is mana or authority that enables the exercise of tino rangatiratanga: 'Rangatiratanga signifies the mana of Maori not only to possess what they own but to manage and control it in accordance with their preferences. That is, in accordance with Maori customs and cultural preferences.'[3]

If the Crown is to work with Māori communities in a way that allows them to exercise tino rangatiratanga, it must therefore 'be able to identify and understand the customs and cultural preferences of those communities'. This requires the Crown to understand, respect, and engage with the tikanga of the various iwi and hapū it works with.[4]

The Tribunal has highlighted that this aspect of partnership – a sensitivity to tikanga – is particularly important to the work of Treaty settlements. In the Tāmaki Makaurau settlement report, the Tribunal emphasised that the Crown must 'be aware of, and comply with, tikanga Māori in [its] dealings with Māori', clarifying that this is an 'aspect of partnership under the Treaty'.[5] Similarly, in the

1. Waitangi Tribunal, *The Te Arawa Settlement Process Reports* (Wellington: Legislation Direct, 2007), pp 20–21
2. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, p 120
3. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 3, p 824
4. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 21
5. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p19

Te Arawa settlement report, the Tribunal determined that 'understanding and acknowledging the tikanga of various iwi and hapu is an important part of [the Office of Treaty Settlement's] obligation to cultivate the living partnership between the Crown and Maori'.[6]

The principle of partnership gives rise to the duty to act honourably and in utmost good faith. Referring to the settlement context, the Tribunal has highlighted that this duty requires the Crown to 'be fully informed before making material decisions affecting Māori'.[7] Only decisions that are fully informed can be sound, fair, protective of Māori interests, and thus worthy of the Treaty partnership.[8] To be fully informed, the Crown must have a sound understanding of 'the historical, political, and tikanga dimensions of mandate and overlapping [groups] and their interests'.[9] As described in the Ngāti Tūwharetoa ki Kawerau cross-claims report, the activity of settling requires a 'sophisticated understanding' of the Māori world in general, and of the groups affected in particular.[10] The Tribunal has acknowledged that this obligation, thus articulated, sets a very high standard for the Crown, but has emphasised it is 'appropriate, given what is at stake should those standards not be met'.[11]

The Tribunal has also found that where overlapping interests are concerned, the duty to act honourably and in good faith requires the Crown to facilitate between iwi or hapū if need be, to communicate readily with non-settling and already settled groups, to uphold any promises made (for example, to interact with non-settling groups and their information), to act in accordance with stated policy principles, and to involve iwi or hapū in its deliberations about their interests.[12]

The principle of partnership also gives rise to the duty to consult. This duty follows from the Crown's obligation to be fully informed about the groups affected by a settlement, and the nature and extent of their interests. To gain the necessary understanding, the Tribunal has said, the Crown must consult with the people concerned.[13]

In its Te Arawa settlement report, the Tribunal clarified that 'consultation', in the Treaty context, requires the Crown to engage in discussion with relevant groups before forming firm views of its own.[14] In the Tāmaki Makaurau settlement report, the Tribunal expressed a similar view, but noted that the Crown's duties to overlapping groups go beyond consultation; it must build relationships with them.[15] In both reports, the Tribunal emphasised that where overlapping interests are at

6. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 22
7. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 100
8. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, pp 26–27
9. Ibid, p 26
10. Waitangi Tribunal, *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-claim Report* (Wellington: Legislation Direct, 2003), p 61
11. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 27
12. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, pp 100–101
13. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, pp 29–30
14. Ibid, p 30
15. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, pp 18, 91, 109

stake, consultation must include kanohi ki te kanohi (face-to-face) hui with the groups concerned.

In the *Tāmaki Makaurau Settlement Process Report*, the Tribunal stated that the Crown had Treaty duties to 'form and tend relationships' with tangata whenua groups whose interests overlapped with those of the settling group.[16] We see this statement as articulating a duty to preserve and promote Crown–Māori relationships. This duty, too, flows from the principle of partnership.

2.1.2 The principle of active protection

We also consider the principle of active protection applies to this inquiry. This principle arises from the Treaty partnership, through the balancing of kāwanatanga and tino rangatiratanga. The Tribunal has previously noted the Crown's duty to actively protect Māori interests. This duty includes the Crown's obligation to actively protect Māori tino rangatiratanga.[17]

In the settlement context, the duty to protect all Māori interests includes the Crown's obligation to protect all parties affected by a settlement, not just the settling group. Reflecting on the Crown's duties when undertaking settlements, the Tribunal has clarified that the Crown has 'fiduciary duties to all Maori, including its duty of active protection where the Crown is obligated to protect Maori taonga, including tikanga and the customary processes that flow from this'.[18] It has said that this fiduciary duty is heightened with respect to parties who may be 'at risk of adverse effects from any redress offered', such as overlapping groups.[19]

Following on from the obligation to protect all parties, the Crown also has a duty to preserve or promote amicable tribal relationships, or whanaungatanga. In the Ngāti Awa settlement inquiry, the Tribunal found the Crown must 'be proactive in doing all it can' to ensure settlement processes do not damage relationships between or within iwi. The Tribunal said that where relationships have been damaged, the Crown must be proactive in repairing them; it must 'exercise an "honest broker" role as best it can to effect reconciliation . . . wherever the opportunity arises'.[20] This duty has been reiterated by the Tribunal in all subsequent reports on overlapping redress issues.[21]

Finally, the Crown has a duty to avoid creating fresh grievances. This duty expresses the Crown's obligation to conduct Treaty settlements in a way that does not create new grievances for non-settling groups and those already settled.[22]

16. Ibid, p 86
17. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 22
18. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 195
19. Ibid, p 28
20. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-claims Report* (Wellington: Legislation Direct, 2002), p 88
21. Waitangi Tribunal, *Ngāti Tūwharetoa ki Kawerau Settlement Cross-claim Report*, p 47; Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 201; Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 101
22. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 102

The Tribunal has previously determined that it is 'not consistent with the Treaty's spirit that the resolution of an unfair situation for one party creates an unfair situation for another'.[23] It has also made the point that if Treaty settlements are to be 'practical' – if they are to advance the Treaty partnership – they must remove existing prejudice and prevent similar prejudice from arising. That is to say, they must 'achiev[e] a reconciliation in fact'.[24]

2.1.3 The principle of equal treatment

The principle of equal treatment arises from article 3 of the Treaty, which guarantees all Māori the protection of the Crown. This principle requires the Crown to act fairly towards all Māori groups, without unduly advantaging one over the other.[25]

Flowing from this principle is the duty to act fairly and impartially. The Tribunal has stated that in its role as a Treaty partner, the Crown 'must act fairly and impartially towards all iwi, not giving an unfair advantage to one, especially in situations where inter-group rivalry is present'.[26]

It has also said that when dealing with overlapping interests in particular, the Crown must uphold its Treaty duties 'in a manner that is fair and impartial'. Again, the Crown 'must be an honest broker, and it must remain independent'.[27]

Commenting on what 'fairness' entails in the Treaty context, the Tribunal has clarified that 'the duty to act fairly . . . arises first and foremost from the Treaty relationship', and only secondarily from the standards of fairness required by administrative law. This means:

> officials in the Treaty sector must comply with the principles of natural justice. . . . But in addition, when acting on behalf of the Crown in the Treaty relationship, their focus must be on the quality of that relationship. This layer of obligation involves understanding, respecting and upholding Māori values and institutions.[28]

2.1.4 Summary

Having considered the claims before us, we regard the following Treaty principles as the most relevant to this inquiry:

- the principle of partnership, and the duties to:
  - act honourably and in utmost good faith;
  - consult;

23. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 27
24. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 315; *Tāmaki Makaurau Settlement Process Report*, p 102
25. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 73
26. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 101
27. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 64
28. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 17

- preserve Crown–Māori relations;
- the principle and duty of active protection for all, not just the settling group, and the further duties to:
  - preserve or promote whanaungatanga;
  - avoid creating fresh grievances; and
- the principle of equal treatment, and the duty to:
- act fairly and impartially.

2.2 Relevant Tribunal Findings and Recommendations

2.2.1 Early engagement and understanding all interests

A recurrent theme in Tribunal findings about overlapping redress items is that the Crown has not engaged early enough with all interested parties. The Tribunal has determined that, as a matter of fairness, interested parties should be included in negotiations early – well before an agreement in principle is reached.[29]

Three key findings have led the Tribunal to this view. First, the Tribunal has found that if the Crown engages with interested parties only after an agreement in principle has been reached, the Crown will inevitably be less receptive to their input, as it will have a vested interest in upholding the offer already negotiated with the settling group.[30] Second, the Tribunal has found that when the Crown has engaged with interested parties late, it has not allowed enough time for meaningful input from them. Further, the Crown is constrained in its ability to make changes in response to the information it receives.[31] Third, the Tribunal has found that late engagement with interested parties is destructive of the Treaty relationship. It restricts these groups' role in the process to that of objectors or antagonists, making it 'almost impossible' for them to build or maintain positive and trusting relationships with the Crown.[32]

Accordingly, the Tribunal has previously recommended the Crown engage with interested parties while developing redress offers.[33] Early consultation would enable interested parties' views to be fully understood and taken into account while redress offers are being developed. It would also result in more legitimate (less contentious) redress offers and constructively involve these groups in the negotiation process, as befits their status as Treaty partners.[34]

29. Waitangi Tribunal, *Ngāti Tūwharetoa ki Kawerau Settlement Cross-claim Report*, pp 57, 66; Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 30; Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 89

30. Waitangi Tribunal, *Ngāti Tūwharetoa ki Kawerau Settlement Cross-claim Report*, pp 58, 66; Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 68

31. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 68

32. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 92

33. Waitangi Tribunal, *Ngāti Tūwharetoa ki Kawerau Settlement Cross-claim Report*, pp 57, 69; Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 30; Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, pp 89, 109

34. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, pp 42, 89–90, 109

2.2.2 Sharing information

Another recurrent finding by the Tribunal is that the Crown has failed to adequately communicate with, and share information among, groups with overlapping interests.

In the Ngāti Awa inquiry, the Tribunal found that the Crown had not been clear or consistent in communicating its policy and processes, or the basis for its decisions on redress. Especially where overlapping interests are concerned, it is 'critical' the Crown communicate clearly, the Tribunal said, to ensure its decisions when offering redress are understood, 'even if not agreed with'.[35]

In other inquiries, the Tribunal has found that the Crown has either failed to share relevant information with interested parties[36] or has deliberately withheld negotiation information from them.[37] Commenting on these failures in the Tāmaki Makaurau inquiry, the Tribunal recommended the Crown apply an 'ethic of openness' to settlement negotiation, and follow the principle that 'if material is to be relied upon in settlement negotiations, it is available to all'.[38] It also recommended the Crown hold regular hui to update interested parties on the progress of negotiations.[39]

The Tribunal has also made recommendations about how the Crown should communicate with interested groups. In particular, it has emphasised the need for the Crown to engage with these groups kanohi ki te kanohi (face to face), as opposed to simply sending out letters.[40] The Tribunal has also stated that where customary interests are at stake, anything less than kanohi ki te kanohi interaction is 'culturally inappropriate', that is, disrespectful to the iwi or hapū concerned.[41]

2.2.3 Offering cultural redress

The Tribunal has previously emphasised that the Crown must be meticulous in its approach to awarding cultural redress in contested areas, much more so than when awarding commercial redress.[42] This finding acknowledges the important role that cultural sites play in supporting the mana and identity of iwi and hapū. The Tribunal has noted that when awarded as redress, such sites effectively confer tangata whenua status on the recipient group.[43]

As we have noted already, the Tribunal said in its Ngāti Tūwharetoa ki Kawerau

35. Waitangi Tribunal, *Ngāti Awa Settlement Cross-claims Report*, pp 86–87
36. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 88
37. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 68
38. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 109
39. Ibid, p 93
40. Waitangi Tribunal, *Te Arawa Settlement Process Reports* pp 31, 74; Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, pp 89–90
41. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, pp 89–90
42. Waitangi Tribunal, *Ngāti Tūwharetoa ki Kawerau Settlement Cross-claim Report*, p 60; Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 74
43. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 105

settlement report that when the Crown determines cultural redress, it must bring to bear a sophisticated understanding of both 'the historical context' and 'the Māori political context' of the relevant groups and areas of interest.[44] The Crown must 'be fully appraised of all competing Māori interests, the nature and extent of those interests, and how losing such sites or redress will impact on Māori in economic, social, and cultural terms'.[45] The duty to protect cultural interests demands nothing less.[46]

The Tribunal has also stated that understandings about cultural redress are particularly important to relationships: 'Arriving at understandings [with the settling group and interested parties] about cultural redress is possibly most critical for future relations'.[47]

2.2.4 Supporting a tikanga approach

The Tribunal has previously found that the Crown has not supported a tikanga approach to overlapping redress offers. In the Te Arawa settlement report, the Tribunal said that resolving overlapping interests through a customary process of decision-making by consensus would have taken longer than the process the Crown used, but would have achieved a more enduring result: 'a solution that the whole tribe, sub-tribe, or community will own as theirs'.[48]

The Tribunal has also found that the Crown should facilitate engagement between the parties when they are failing or struggling to engage productively with each other, including in situations where settling groups refuse to engage with the interested parties.[49]

In its Ngāti Tūwharetoa ki Kawerau settlement report, the Tribunal said the Crown should not move quickly to act as an 'arbiter' of whether objections to redress were valid:

> In the first instance at least, the Crown's role is one of facilitation and consultation rather than arbitration. Only after conciliatory measures [such as facilitated hui or mediation] have been honestly tried and failed, should the Crown feel justified in standing back and simply making decisions on the merits of cross-claimants' objections.[50]

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44. Waitangi Tribunal, *Ngāti Tūwharetoa ki Kawerau Settlement Cross-claim Report*, p 47
45. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, pp 29–30
46. Ibid, p 29
47. Waitangi Tribunal, *Ngāti Awa Settlement Report*, p 87
48. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 65
49. Waitangi Tribunal, *The Ngāti Maniapoto / Ngāti Tama Settlement Cross-claims Report* (Wellington: Legislation Direct, 2001), p 23; Waitangi Tribunal, *Ngāti Awa Settlement Cross-claims Report*, p 88; Waitangi Tribunal, *Ngāti Tūwharetoa ki Kawerau Settlement Cross-claim Report*, pp 63–64, 67; Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 75; Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, pp 90–91, 93–94
50. Waitangi Tribunal, *Ngāti Tūwharetoa ki Kawerau Settlement Cross-claim Report*, p 67

This is particularly important in the case of cultural redress, which involves matters of tribal mana and tapu.[51]

In several inquiries, the Tribunal has found that, in failing to support a tikanga approach, the Crown's actions contributed to a deterioration of relationships between groups and undermined its own Treaty relationship with interested groups.[52] The Tāmaki Makaurau report drew attention to the link between a tikanga approach and the preservation of relationships.[53] The Tribunal has previously acknowledged that preserving relationships in the settlement context is a difficult task, but has emphasised that the cost of failure justifies every effort in this area.[54]

2.2.5 Equal treatment / duty to protect all parties

The Tribunal has previously found that the Crown failed to treat interested parties equally with the group with whom it was negotiating, and failed to protect the interested parties' interests.[55] In two inquiries, it found the Crown was overly focused on expediting the settlement at hand, rather than playing an independent role to help resolve overlapping redress disputes.[56]

In the Tāmaki Makaurau report, for example, the Tribunal concluded that 'in focusing on its relationship with the [settling group], the Crown forgot that it has the same sort of obligations to all groups'. In neglecting its obligations to other groups, it had created fresh grievances for them.[57] Similarly, in the Ngāti Tūwharetoa ki Kawerau settlement inquiry, the Tribunal found the Crown had not granted cross claimants the 'high level of commitment' required to understand and deal with their points of view.[58] The Tribunal in the Te Arawa settlement inquiry found that when assessing overlapping interests, the Crown had relied chiefly on input from the settling group. In doing so, it had breached its duties to the interested parties and failed to remain independent.[59]

Commenting on such failings, the Tribunal has said that when the Crown pursues a Treaty settlement, it must be mindful – and accept – that its fiduciary obligations extend to all Māori who will be affected, not just the mandated group: the Crown has equally strong obligations to all groups involved.[60] As such, the

51. Waitangi Tribunal, *Ngāti Tūwharetoa ki Kawerau Settlement Cross-claim Report*, p 54
52. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 75; Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, pp 92, 101
53. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 92
54. Waitangi Tribunal, *Ngāti Awa Settlement Cross-claims Report*, p 88
55. Ibid, p 87; Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 75; Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 102
56. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 63; Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 102
57. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 102
58. Waitangi Tribunal, *Ngāti Tūwharetoa ki Kawerau Settlement Cross-claim Report*, p 67
59. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 64
60. Ibid, p 75; Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, p 102

Crown must strike a balance between the need to reach a deal and the duty to preserve relationships.[61] To focus purely on the former goal would be misguided, the Tribunal concluded in its Ngāti Awa settlement report, because 'a deal at all costs might well not be the kind of deal that will effect the long-term reconciliation of Crown and Māori that the settlements seek to achieve.'[62]

61. Waitangi Tribunal, *Ngāti Awa Settlement Cross-claims Report*, p 88
62. Ibid

CHAPTER 3

IS THE CROWN'S APPROACH TO OVERLAPPING SETTLEMENT REDRESS TREATY COMPLIANT?

This chapter examines the Crown policies, processes, and practices for dealing with overlapping redress proposals during settlement negotiations. We begin by summarising both the Crown's documented policies and processes, as published in the well-known *Red Book*, and evidence we heard from Crown witnesses about actual practice. The arguments of the Crown and the claimants / interested parties are then set out. The chapter concludes with our analysis, conclusions, and findings on the Treaty compliance of the Crown's overlapping redress policies and processes, both as they have been documented and as they were put into effect in the Pare Hauraki negotiations.

3.1 What are the Crown's Policies, Processes, and Practices?

3.1.1 The *Red Book*

Ka Tika a Muri, Ka Tika a Mua / Healing the Past, Building a Future,[1] commonly called the *Red Book* and subtitled *A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, is the only publicly available statement of the Crown's policies, processes, and practice.[2] First published in 1999, the latest version is dated June 2018.

An opening disclaimer emphasises the *Red Book*'s limitations: it 'provides general information only and readers should not act or rely on information in [it] without first discussing the detail with OTS.'[3] The Crown accepts no liability for inaccuracies, omissions, or changes to the policies or other matters it discusses.

The *Red Book*'s scope is wide, encompassing the history of Treaty settlements and the development of the policy framework, as well the negotiation process itself. It purports to set out the general guidelines the Crown follows when

1. In the Crown's document, the title appears with macrons: 'Ka tika ā muri, ka tika ā mua'. We have corrected this spelling throughout this report.
2. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna / Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 4th ed (Wellington: Office of Treaty Settlements, 2018). In subsequent footnotes, this is referred to as *Red Book* and all references are to the 2018 edition.
3. Ibid, p ii

resolving historical claims. Relevantly for this inquiry, these guidelines include the statements:

> Treaty settlements should not create further injustices . . . This includes [to] the claimant group seeking redress, other claimant groups and other New Zealanders generally.
>
> . . . . .
>
> As settlements are to be durable, they must be fair, achievable and remove the sense of grievance
>
> . . . . .
>
> The Crown must deal fairly and equitably with all claimant groups[4]

The *Red Book* describes addressing overlapping interests as 'a key issue' in settlement negotiations, especially in the North Island.[5] The 2018 edition devotes approximately two pages to the topic,[6] and additional information – including on redress options – appears elsewhere in the document. Key aspects of the Crown's approach include the following (unless stated otherwise, these points are drawn from the *Red Book*[7]):

- A group about to formally enter settlement negotiations with the Crown prepares a negotiating brief detailing the area under claim, sites and resources of cultural importance, the group's associations with them, and more. In it, the group must identify the interests it wants to promote through the negotiations,[8] and 'resolve any issues that arise because other claimant groups also have an interest in a site or area.'[9]
- In areas where there are overlapping interests, the Crown encourages claimant groups to discuss their interests with neighbouring groups early in the negotiation phase and work out a process for managing those interests. Developing such a process 'may be critical in ensuring a settlement is completed in a timely manner.'[10]
- The Crown can only provide redress to the claimant group if it is satisfied that any overlapping interests have been addressed.
- Once the Crown receives 'precise information about the importance of specific sites and other interests' of the settling group, concrete redress proposals

4. *Red Book*, pp 24–25
5. Ibid, p 53
6. Ibid, pp 53–54. The section, titled 'Overlapping Claims or Shared Interests', notes that such situations may also be described as 'cross claims' (p 53).
7. Ibid, p 52
8. See the *Red Book*, p 91, for an explanation of 'interests' in the context of negotiations. Explained as the 'desires, concerns and values that are important to each negotiating party,' interests are said to differ from negotiating positions. It is noted that the Crown and claimants may in fact have similar interests in a site, such as preserving ecological values.
9. Ibid, p 52
10. Ibid, p 49

begin to be formulated.[11] Both the settling group and the Crown identify any Crown properties or assets in the area that might be available as redress. The Crown also undertakes to inform other groups 'with a shared interest' in those potential redress items.[12]

- Where there are valid overlapping interests in a particular redress item, the Crown will only offer *exclusive* redress – redress that, if provided to one group, will be unavailable as redress for other groups – in specific circumstances and after weighing up multiple factors. Exclusive redress might be considered where a settling group is judged to have 'a strong enough association with a site to justify this approach', taking into account any information about overlapping groups' associations with that site. This approach is particularly applicable to wāhi tapu and other sites for which no alternatives are available.[13]
- The Crown may thus choose to offer *non-exclusive* redress instead, making it possible for more than one group to receive redress relating to a particular site. Non-exclusive redress can take several forms, including legal instruments such as statutory acknowledgements, deeds of recognition, or protocols with government departments. The Crown does not require the agreement of other groups when it offers non-exclusive redress to a settling group, but the *Red Book* notes that agreement is preferable.[14]
- Wherever possible, the Crown prefers that groups with overlapping interests settle disagreements over proposed redress among themselves. If they cannot, the Crown reserves the right to make its own decision on whether to offer the contested redress or not.[15] Here, the Crown will be guided by twin aims: 'to reach a fair and appropriate settlement with the claimant group in negotiations' and also 'to maintain, as far as possible, its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims.'[16]

The *Red Book* is explicit about the parameters of the Crown's role in dealing with overlapping interests. For example, it states that the Crown's role is not to determine or recognise iwi boundaries, nor is that the purpose of the settlement process. Neither can the Crown determine which group has the predominant

11. Ibid, p 53. The *Red Book* describes three broad forms of redress: recognition by the Crown of the wrongs caused to the claimant group (through a historical account, acknowledgements, and an apology); financial and commercial redress intended to help the claimant group build an economic base; and redress recognising the claimant group's spiritual, cultural, historical, or traditional associations with the natural environment, sites, and areas within their area of interest (cultural redress). Other redress options may be developed over time to meet particular interests or circumstances: see p 77.
12. Ibid, pp 53–54
13. Ibid, pp 54–55
14. Ibid, p 55
15. Transcript 4.1.1, p 277; *Red Book*, p 54
16. *Red Book*, p 54

interest in a general area; such matters can only be decided between the groups. The *Red Book* also makes it clear that the Crown can settle only the claims of the group with which it is negotiating, not others with overlapping interests. Such groups are however free to negotiate their own settlements.[17]

3.1.2 Ms Anderson's evidence

The *Red Book* contains few detailed policy statements or explanations of what the Crown does in practice when overlapping interests arise. However, Lillian Anderson, then acting chief executive of Te Arawhiti and former director of the Office of Treaty Settlements, supplied some useful supplementary information and commentary to this inquiry. In evidence, she too emphasised the *Red Book*'s role as a high-level guide; it expressed 'core policy ideals' and gave iwi 'an outline of the [negotiation] process', but was not meant to communicate 'the full content of the Crown's policies and procedures.'[18]

Ms Anderson referred us to the list of principles developed by the Crown to ensure Treaty settlements are fair, durable, final, and timely. These principles are set out in the *Red Book*, and include several which Ms Anderson considered particularly relevant to overlapping redress issues. In summary, they are:

- *good faith:* the negotiating process must be conducted in good faith and based on mutual trust and cooperation;
- *just redress:* redress should relate fundamentally to the nature and extent of breaches suffered, with existing settlements used as benchmarks for future settlements where appropriate;
- *fairness between claims:* 'like should be treated as like' so that similar claims receive a similar level of financial and commercial redress; and
- *transparency:* claimant groups must have sufficient information to enable them to understand the basis on which claims are settled.[19]

These principles, together with the principles of the Treaty of Waitangi, underpin the Crown's policy on overlapping interests, said Ms Anderson. She then set out the key elements of that policy, using terms that both echo and expand upon the *Red Book*:

> 25.1 the Crown encourages claimant groups to discuss their interests with neighbouring groups at an early stage in the negotiation process;
>
> 25.2 the Crown assists overlapping interests to be considered by providing information on proposed redress items to all groups with an interest in the location of the redress;
>
> 25.3 the overlapping claims or interests of other Māori groups (including settled groups) must be addressed to the satisfaction of the Crown before the Crown will conclude a settlement involving many of the sites or assets concerned;

17. *Red Book*, p 53
18. Transcript 4.1.1, p 424
19. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 4. These principles are also set out in the *Red Book*, p 25.

25.4 the Crown prefers that overlapping interests are addressed by agreement between overlapping groups;
25.5 in the absence of agreement between overlapping groups, the Crown is guided by 2 general principles in making a decision on a redress offer:
25.5.1 the Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations; and
25.5.2 the Crown's wish to maintain, as far as possible, its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims;
25.6 in developing and making decisions on redress offers the Crown also engages with and considers the interests of settled groups where those interests overlap with proposed redress.[20]

Ms Anderson emphasised that the Crown took a purposefully flexible approach to overlapping interests so that different negotiating contexts could be accommodated. In each settlement negotiation, 'a strategy for identifying and addressing overlapping claims' was normally agreed between the Crown and the settling group at the outset, then reviewed regularly throughout.[21] She confirmed in cross-examination that not all such strategies were necessarily written down, nor always communicated to groups with overlapping interests.[22]

As well as having the flexibility to accommodate bespoke, settlement-specific strategies, Ms Anderson said the Crown's actions reflected broader government priorities – for example, the 'Broadening the Reach of Historical Treaty of Waitangi Settlements' strategy adopted in October 2016. At that time, it was acknowledged that certain settlements had become 'stuck', Ms Anderson stated – some for up to ten years.[23] This strategy was classified as 'clearing the decks'; relevantly for this inquiry, it included the Hauraki negotiations. Through 'Broadening the Reach,' Ms Anderson said the Crown aimed 'to work to the best of its ability to move these groups towards their next settlement milestone'.[24]

Ms Anderson asserted that the need to satisfactorily address overlapping interests affected the entire negotiation process. Even at the earliest stages, when the claimant group was still choosing who would represent it in negotiations with the Crown, work to identify collective and overlapping interests could begin. A group's deed of mandate, which provides basic information about them and the area to which their interests relate, would often record 'areas in which there may be shared or overlapping interests with other groups'.[25] She confirmed that the Crown actively encouraged those entering negotiations to discuss shared or overlapping interests with neighbouring groups at an early stage. And, as negotiations progressed, the Crown itself would

20. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), pp 5–6
21. Ibid, p 8; transcript 4.1.1, p 250
22. Transcript 4.1.1, p 371
23. Ibid, p 297
24. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 12
25. Ibid, p 9

> see[k] information from, and consul[t] with, potential overlapping claimants directly at key points throughout the negotiations. These included the start of negotiations, once the Crown offer is accepted, and after the Agreement in Principle is signed, but also at later stages if that is necessary.[26]

The information that claimant groups and others with overlapping interests provided about the nature and extent of their interests helped the Crown identify possible redress sites and develop redress proposals, Ms Anderson explained. However, the Crown also based its proposals on evidence of customary interests and associations gathered from other sources – historical documents, Waitangi Tribunal reports and evidence, and independent historical research.

Once a claimant group accepted the Crown's initial redress offer – communicated via a letter 'outlining parameters of the Crown offer, including . . . the total monetary value of the financial and commercial redress to be provided', according to the *Red Book*[27] – the Crown would advise groups with overlapping interests on what had been proposed and request feedback, said Ms Anderson. The same would happen after the settling group signed its agreement in principle with the Crown. If a group with overlapping interests objected to the proposed redress;

> the Crown encourages this to be addressed through claimant group-led discussion. The form of this discussion, and tikanga to apply, is appropriately determined by the groups themselves. The Crown provides assistance if required, for example by providing information or logistical support. If resolution between groups is not forthcoming, the Crown will often propose facilitation.[28]

If matters could still not be resolved, the Crown considered it could not and should not 'force groups to work together to reach agreement.'[29] It would invite submissions from all groups involved, review the historical evidence about their customary associations, and commission more if necessary. Then, as stated in the *Red Book*, the Crown would make an independent decision on whether to maintain or withdraw the redress offer.[30] Ms Anderson said this avoided placing the settlement process 'in hiatus indefinitely due to stalemate' and unfairly denying the settling group of the benefits of settlement.[31]

Ms Anderson told the Tribunal that the Crown is always seeking to improve its approach to overlapping interests. In 2017, it began working with the Iwi Chairs Forum to 'co-construct a robust policy and process for resolving cross claim issues that incorporate tikanga Māori', a project involving Crown officials and supported by Ministers. Ms Anderson advised that there was already 'good alignment'

26. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 8
27. *Red Book*, p 29
28. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 10
29. Ibid
30. Ibid
31. Ibid

between the views of the Forum and Crown policy; possible enhancements included refining documentation 'to ensure practice clearly recognises the policy, including emphasising the importance of recognition of interests of both settled and non-settled groups in redress development, early engagement with overlapping groups, and support for iwi-led discussions to address overlapping interests.'[32]

Asked in cross-examination about what the Crown was doing to make its policies and processes on overlapping interests more Treaty compliant – as the Waitangi Tribunal called for in the *Tāmaki Makaurau Settlement Process Report* and elsewhere – Ms Anderson said the Crown had already updated 'key areas' in response to feedback from the Iwi Chairs Forum, 'and we're working with them now again to finalise some of those changes.'[33]

Finally, Ms Anderson observed that the task of working through overlapping interests was 'one of the most challenging aspects of the settlement process'. It highlighted the 'inherent tension between the Crown's objective to settle with groups without unfair delay so as not to deprive them of the benefits of settlement, while also building and maintaining relationships with all Māori and not adversely affecting other Māori interests and relationships.'[34]

3.2 The Crown's Position

In submissions, Crown counsel reiterated the limitations of the *Red Book*, stating it supplies 'general commentary' only and cannot be seen as 'a fulsome exposition of what the Crown does in order to determine redress in overlapping contexts.'[35] Further, counsel told us, the Crown's policy was expressed as much in its actions and decisions as within the covers of the *Red Book*. 'To focus upon what is or is not contained in written documentation such as the *Red Book* is to miss the point. What matters is what the Crown does or does not do.'[36]

The Crown further argued that it was 'simply not possible to promulgate [an overlapping interests] policy that countenances what it will take to discharge the Crown's duties in all instances.' The environment in which settlement decisions were made was 'consummately political', every settlement journey was different, and the Crown needed to be able to respond flexibly according to context, the Crown submitted.[37] It was thus unreasonable to expect the *Red Book* to set out a comprehensive statement of Crown policy applicable in all situations. All it could do was give guidance and general commentary, and 'purpor[t] to reflect the Crown's "policies and understandings at the time of publication" to the extent those policies and understandings are disclosed by decision-making that has

32. Ibid, p 11
33. Transcript 4.1.1, p 283
34. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), pp 10–11
35. Submission 3.3.26, p 32
36. Ibid, p 42
37. Ibid, pp 30–31

occurred up until that time,' Crown counsel submitted.[38] The *Red Book* could certainly not 'prescribe how the Crown will be Treaty compliant. . . . That is a matter for the Crown in light of what the Crown faces. The *Red Book* merely explains how the Crown generally acts. It is a red herring in the context of these claims.'[39]

3.3 The Claimants' and Interested Parties' Positions

How the claimant groups in this inquiry experienced the Crown's overlapping redress regime naturally differed according to their particular circumstances, the progress of their own settlement negotiations, and the extent and timing of their involvement in the Pare Hauraki negotiations. Their experiences and the specific claims they give rise to are analysed in more detail in the next chapter, which chronicles each iwi's settlement journey, and in chapter 5, which addresses the common issues arising from the application of the Crown's policies and processes.

For now, we focus on a central issue of concern to all claimants: were the Crown's policies, processes, and practices for dealing with overlapping interests in these settlement negotiations Treaty compliant?

The claimants' unanimous answer to this question is 'no'. Ngātiwai, for example, identified numerous areas in which the *Red Book*'s statements about the Crown's policy on overlapping interests fall short of Treaty compliance. In summary, they argued:

- The Crown says it 'encourages' claimant groups to begin discussing possible overlapping interests with neighbouring groups at an early stage.[40] However, in Ngātiwai's view, the Crown's duty to act in good faith and preserve iwi relations wherever possible is a proactive one requiring 'more than mere encouragement'.[41] The *Red Book* makes no reference to the Crown needing to engage early on, by means of hui, 'with all tangata whenua groups before entering into terms of negotiation with the settling group'[42]
- The *Red Book* fails to acknowledge that the Crown must properly address the interests of non-settling groups. If the Crown neglects to engage early with these groups, it 'risks breaching [its] obligation to act fairly and impartially', Ngātiwai asserts.[43]
- The *Red Book* does not reflect what the Tribunal has previously called a 'sophisticated understanding' of how Māori communities operate, particularly those affected by specific settlements.[44]
- The *Red Book* fails to recognise 'the Crown's fiduciary obligation to safeguard the interests of those who stand outside the negotiations'.[45]

38. Submission 3.3.26, pp 31–32
39. Ibid, p 32
40. *Red Book*, p 54
41. Submission 3.3.1, p 8
42. Ibid
43. Ibid
44. Ibid
45. Ibid

- An 'ethic of openness' should guide the Crown's policy on whether to withhold information about a settling party's interests from an overlapping group: the *Red Book* does not express this.[46]
- The *Red Book* does not require overlapping interests and redress issues to be addressed in accordance with tikanga, nor to go through a tikanga-based process. It reveals a lack of understanding that cultural redress issues go 'to the heart of tikanga'.[47] (It should be noted that the Crown's alleged failure to deal with overlapping redress conflicts under tikanga was emphasised by many other claimant groups too. Ngāi Te Rangi, for example, submitted it had repeatedly sought to resolve its redress disagreements with Hauraki through a process that would allow them 'to come together to discuss whakapapa, history, [and] the relative interests claimed, and see whether there was any opportunity to find a way forward.'[48] But the Crown had failed to 'provide space for tikanga to operate within the settlement process as an instrument for dispute resolution', Ngāi Te Rangi submitted; the combination of Crown actions and inactions had caused them prejudice.[49])
- The Tribunal has previously found that the Crown should make independent decisions about disputed redress only 'as a last resort after it is evident that attempts to reconcile the competing views have failed': the *Red Book* does not convey that.[50]

In the claimants' view, the *Red Book*'s deficiencies are compounded by the Crown's failure to update, amend, or enhance it despite repeated Tribunal recommendations and findings, notably in the *Tāmaki Makaurau Settlement Process Report* of 2007. There, the Tribunal recommended amending the *Red Book* so it more fully explained the Crown's overlapping interests policy and ensured the Crown's approach to non-settling groups and those already settled was both Treaty compliant and fair.[51] When cross-examined about the Crown's response to these recommendations, Ms Anderson described various internal changes to practices. But she confirmed that the *Red Book*'s wording on overlapping interests had not been amended since it was first published – despite the Tribunal's recommendations, despite significant changes in the settlement landscape, and despite the Crown having 'traversed' some 87 settlements since 1999.[52] This was 'a significant concession', submitted Ngāi Te Rangi.[53]

To the claimants, the *Red Book* is no red herring but the Crown's core policy document – an authoritative statement of how the Crown negotiates historical Treaty of Waitangi claims. Indeed, as counsel for the Te Tāwharau o Ngāti Pūkenga

46. Ibid
47. Ibid, p 9
48. Submission 3.3.7, p 11
49. Submission 3.3.13(a), p 5
50. Submission 3.3.1, p 9
51. Transcript 4.1.1, pp 283, 444; see Waitangi Tribunal, *The Te Arawa Settlement Process Reports* (Wellington: Legislation Direct, 2007), p 108
52. Transcript 4.1.1, pp 410–411, 248
53. Submission 3.3.13, p 25

Trust submitted, the *Red Book* is the *only* available statement of the Crown's policies and processes. It is thus 'reasonable' that they rely on it for information and measure the Treaty compliance of the Crown's actions against it.[54] The Trust characterised the Crown's efforts to downplay its status as an attempt to avoid accountability.[55]

For Ngāi Te Rangi too, the *Red Book* was 'the "go-to" document for claimants seeking to understand and be guided through the Crown's settlement process.'[56] For the Crown now to characterise it as a misleading distraction was concerning, counsel submitted. If the *Red Book* 'no longer serves the purpose for which it was implemented, then the claimants ought to have been informed so they were cognisant of the standards and principles that were to apply throughout negotiations.'[57]

Despite needing to rely on the *Red Book*, claimants described it as vague and lacking detail about how the Crown would address overlapping interests in practice.[58] It is especially unhelpful for groups outside of those with whom the Crown is settling, they submitted. Counsel for one of the interested parties, the Te Tāwharau o Ngāti Pūkenga Trust, referred to it as 'unclear and perhaps even designed in favour of the Crown to do as it pleases, to the detriment of the Claimants'.[59]

When Ngāi Te Rangi discovered at the last minute that the deed initialled by the Crown and the Hauraki collective in December 2016 listed redress items that had not been through an overlapping engagement process, they found that the *Red Book* offered 'no insight or process as to how overlapping redress items contained in the initialled deed could be addressed.'[60] In Ngāi Te Rangi's view, 'the detail involved in the practice of settling claims' was inaccessible to claimants and remained 'something that is internal to Te Arawhiti / OTS.'[61] Ms Anderson's acknowledgement, already noted, that strategies were not always written down and practices varied from settlement to settlement, seems to bear this out. For Ngāi Te Rangi, the gap between Crown policy – to the extent the *Red Book* articulates it – and practice was illustrated by 'the Crown's decision to depart from its own policy' when it offered redress to Hauraki iwi without first running overlapping engagement processes.[62]

Other claimants also identified a significant gulf between the Crown's stated policies and what it actually *did* when engaging with or consulting non-settling and already settled groups, sharing information about overlapping interests and

54. Submission 3.3.35, p 4
55. Ibid
56. Submission 3.3.13, p 25
57. Submission 3.3.33, p 7
58. Submission 3.3.7, p 5
59. Submission 3.3.35, p 4
60. Submission 3.3.7, p 10. Ngāi Te Rangi's comments echo the findings of the Tribunal's *Tāmaki Makaurau Settlement Process Report* on the *Red Book*'s treatment of contested cultural redress: Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 86.
61. Submission 3.3.13, pp 25–26
62. Ibid, p 24

proposed redress, resolving disputes, and more. Ngāti Ranginui submitted that the Crown's actions leading to the inclusion of the controversial clause 22 in the Pare Hauraki Collective deed (the clause preserving the right of Hauraki iwi to participate in the Tauranga Moana Framework: see appendix I) were 'piecemeal, a campaign of letter writing and without any regard for due process' that breached the Crown's Treaty obligations and would irreparably prejudice Ngāti Ranginui.[63]

Such ad hoc Crown practices and decision-making revealed a fundamental power imbalance in settlement negotiations, submitted counsel for Ngāi Te Rangi: 'the Crown makes the rules, knows the rules and applies the rules. The Crown is ultimately the decision-maker as to whether overlapping claims issues are resolved.'[64]

3.4 What the Tribunal Finds

In the Crown's view, '[w]hat matters is not the existence or content of any "policy" but what the Crown does.'[65] Counsel submitted that, in considering the Treaty compliance of the Crown's approach to overlapping interests in the Hauraki settlement, the Tribunal must thus examine the Crown's actions or inactions rather than the pages of the *Red Book*.[66]

We partly agree. We do need to examine the Crown's actions, and do so in subsequent chapters. But those actions cannot be divorced entirely from the documentation the Crown publishes – especially as the *Red Book* is the only publicly available document that can help overlapping groups understand what to expect of the Crown during negotiations. The *Red Book* is also the only Crown-created yardstick they can use to monitor the Crown's actions. For these reasons, the Treaty compliance of the Crown's policy, processes, and practices can – and should – be assessed against the *Red Book*.

From the evidence we heard, groups with overlapping interests are looking for a single, comprehensive, and definitive statement of the Crown's policies, processes, and practices. They will certainly not find that in the *Red Book*. We agree with the claimants that the *Red Book* is thus of limited benefit. As the Tribunal has found in other inquiries, we find that the document is vague, unhelpful, and inaccurate as a statement of Crown policy and practice. The Crown itself acknowledges that the *Red Book* offers general guidance only and is by no means fulsome or comprehensive. Yet 'fulsome' and 'comprehensive' is precisely what the claimants are entitled to expect.

According to the Crown, the *Red Book*'s generality allows the Crown the flexibility it needs to respond to the specific circumstances of each settlement negotiation. But the need for flexibility does not justify the lack of a comprehensive, publicly available statement of policy. Indeed, such a statement would also assist

63. Submission 3.3.4, p 7
64. Submission 3.3.13, p 26
65. Submission 3.3.26, p 31
66. Ibid, p 42

the Crown to operate consistently, and mitigate against any loss of institutional knowledge through changes in personnel.

Given the focus of our present inquiry, we are particularly concerned that the *Red Book* has not been amended in light of the very clear recommendations set out in the *Tāmaki Makaurau Settlement Process Report* more than twelve years ago. There, the Tribunal recommended that the *Red Book* explain more clearly how the Crown would manage its relationships with groups other than settling groups, and emphasised that the policies and practices set out in the *Red Book* must be Treaty compliant and fair. Those recommendations were specifically intended to prevent non-settling and already settled groups involved in future disputes about overlapping interests from being prejudiced by the Crown's actions. Yet as the *Red Book* has not been amended, the outcome for most of the claimants in this inquiry is exactly what the Tribunal sought to prevent in 2007.

Ms Anderson told us that the *Red Book* did not reflect some significant changes in practice that had happened on the ground. But this is precisely what concerns us: the Crown does not necessarily apply the principles, policies, and processes set out in the *Red Book*. Thus, the *Red Book* is misleading, at least by omission. Unable to rely on the *Red Book*, the claimants in this inquiry – and, we suspect, all non-settling and already settled groups with overlapping interests – found themselves subject to a mysterious and ever-changing pool of Crown practices, decisions, and personnel. These were, variously, at odds with the Crown's own stated policies, and/or inconsistent with Treaty principles and the Crown's corresponding duties.

For example, we heard compelling evidence of the Crown failing to engage with or consult non-settling groups sufficiently early in negotiations (as the *Red Book* exhorts). We also heard that the Crown failed to share information with non-settling groups about other groups' interests and proposed redress items, and did not respond adequately when non-settling groups expressed concern over redress proposals. Claimants also told us of the Crown having offered redress items without properly determining the extent of customary interests or associations, and more. That evidence will be discussed more fully in chapter 5, and specific findings made.

Of course, the Crown has multiple Treaty obligations it must take into account when undertaking settlement negotiations and, at times, these may come into conflict. For example, the Crown's duty to avoid unreasonably delaying settlement may clash with its obligation to avoid creating new grievances. Where such duties or obligations collide, we consider the Crown's over-arching duty must to be to avoid creating new grievances. This duty must be at the forefront of Crown policy, practice, acts, and omissions when the Crown finds itself in such circumstances.

This did not happen here. An absence of robust, well-documented policies and processes meant non-settling groups in particular did not know what they could expect of the Crown. Instead, the Crown adopted an array of ad hoc practices that were neither consistent with its own policies and principles nor Treaty compliant – including at one point a proposition that deeds be signed, then amended later if necessary. In the next chapters, we examine these matters in more detail, along with the consequences for the claimants.

CHAPTER 4

THE INDIVIDUAL IWI EXPERIENCE

In this chapter, we examine how the Crown's policies, processes, and practices affected groups with overlapping interests in the Hauraki settlement negotiations. We focus on the accounts of the Tauranga Moana iwi and Ngātiwai, which share many common strands. These commonalities are apparent in the chronology that concludes this chapter.

4.1 Ngāi Te Rangi's Experience

4.1.1 Introduction

Ngāi Te Rangi oppose the provision of settlement redress to Hauraki iwi in Tauranga Moana, which they say is the heart of Ngāi Te Rangi's rohe. The scale of the redress contested by Ngāi Te Rangi is significant, comprising some 54 individual items ranging from commercial properties, to rights over conservation areas and fisheries resources, to representation rights on the Tauranga Moana framework's governing body.[1]

Ngāi Te Rangi argue that the Crown provided this redress without having properly assessed the respective and relative interests of Tauranga and Hauraki iwi in Tauranga Moana. They allege that the resulting prejudice is such that all redress in Tauranga Moana must be removed from all Hauraki settlement deeds – both collective and individual – pending a proper process to determine respective iwi interests.[2] Ngāi Te Rangi have also withdrawn their support for previously agreed redress agreements, saying they resulted from a divisive process characterised by 'a lack of transparency and meaningful engagement [and] a failure to follow and complete overlapping claims processes'.[3] Ngāi Te Rangi have elected to put its own settlement on hold until their concerns about the Hauraki redress – and indeed all suggestions that Hauraki iwi hold 'rights akin to mana moana or mana whenua in Tauranga Moana' – are addressed.[4]

This chapter charts Ngāi Te Rangi's experience of the settlement redress process and how it led to the iwi's present claims. Importantly, Ngāi Te Rangi has

1. Submission 3.3.7(a), app A; claim 1.1.1, pp 2–3
2. Claim 1.1.1 (a), p 3
3. Submission 3.3.7, pp 21–22
4. Claim 1.1.1, p 3; doc A3 (Charlie Tawhiao, brief of evidence, 14 March 2017), p 2

participated in that process both on its own behalf and as one of three iwi comprising the Tauranga Moana Iwi Collective, formed in 2010 to negotiate collective redress they would share.[5] The two roles are deeply entwined: for example, the chair of the collective, Charlie Tawhiao, also chairs the Ngāi Te Rangi Settlement Trust, established in 2013 to receive and manage the iwi's settlement redress.[6] Ngāi Te Rangi's position on most issues raised in its claim are, to all intents and purposes, indistinguishable from those of the Tauranga collective, especially Ngāti Ranginui.

The following account is told in three phases, beginning with Ngāi Te Rangi's early dealings with the Crown and Hauraki iwi, and the redress agreements reached then. Next, the development of redress options associated with the Tauranga Moana framework is examined. Finally, this section describes the subsequent inclusion of additional redress items in the 2018 Hauraki collective deed.

4.1.2 Early redress negotiations

Throughout 2010 and 2011, the Crown was concurrently negotiating settlement redress with Hauraki iwi and Tauranga Moana iwi (individually, and through the Tauranga Moana Iwi Collective). All parties agreed that, as the Waitangi Tribunal found in its 2004 *Te Raupatu o Tauranga Moana* report, Tauranga Moana and Hauraki iwi did have some overlapping interests within the Tauranga Moana area, particularly in the Katikati and Te Puna blocks.[7] The parties now sought to clarify precisely where those and other potential overlaps existed, and to explore the redress options available.[8]

By December 2011, Tauranga iwi and the Crown had agreed on the need to undertake overlapping engagement processes for two potential redress items: cultural redress over public conservation lands, and the Athenree Crown Forest Licence land.[9] The Tauranga collective had already tried direct discussions with Hauraki over the forest but these had failed. Now the collective sought the Minister's assistance to determine how redress would be shared.[10]

Over the following months, the Crown continued gathering information about overlapping areas and potential redress sites. It followed the practices set out in the Red Book – it consulted Waitangi Tribunal reports and research, independent historical research, and information supplied by Tauranga and Hauraki iwi.[11] In May 2012, the Crown was able to give both iwi groups 'a preliminary summary' of their

5. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 13
6. Document A3 (Charlie Tawhiao, brief of evidence, 14 March 2017), p 1
7. Waitangi Tribunal, *Te Raupatu o Tauranga Moana* (Wellington: Legislation Direct, 2004), pp 40, 42–43; submission 3.3.13(a), p 6
8. Submission 3.3.13(a), pp 35–36
9. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), pp 13–14. These redress items were identified in the Statement of Position and Intent signed by the Crown and the Tauranga Moana Iwi Collective on 22 December 2011.
10. Document A40(a), p 40
11. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 9

respective associations with known overlapping areas, along with an indicative list of redress items and sites.[12] Both groups were invited to confirm that this information fairly represented their interests in the areas in question and to provide more details if they wished.

Soon after, the chair of the Tauranga Moana Iwi Collective advised the Crown that the Crown's summary incorrectly identified the collective's area of interest. However, the collective was willing to accept other elements of the summary: the proposed southern boundary of the area within which Hauraki iwi would be offered redress (subject to Katikati township and Matakana Island being excluded) and the Crown's interpretation of Tribunal findings on the Te Puna–Katikati blocks.[13] Several more months of engagement followed, with the apportionment of interests in the Athenree Forest – where Tauranga iwi had originally proposed a 50:50 split – and in the Te Puna–Katikati blocks proving especially contentious.[14] Where agreement could not be reached, more research was conducted and the Crown commissioned independent historical advice.[15]

At the same time, the Crown and the Tauranga collective were moving to finalise their deed of settlement. To ensure progress continued on this front, the collective told the Crown that – while it was concerned that the area in which Hauraki iwi could receive redress appeared to be expanding without 'any customary justification' – the collective was prepared to be 'pragmatic' about some disputed redress items.[16] In a letter to the Minister for Treaty of Waitangi Negotiations, Hon Christopher Finlayson, on 2 October 2012, the collective said it would support Crown proposals to offer the redress to Hauraki, subject to certain explicit conditions.[17] A few weeks later, the Minister made a final decision on apportioning the Athenree Forest; it would be split 60:40 in favour of Hauraki, an apportionment that reflected newly commissioned expert advice and other information provided by the parties and others.[18] According to Lillian Anderson of Te Arawhiti, at this point 'officials understood from the Tauranga and Hauraki iwi that they had "largely reached agreement" on all other overlapping claims matters'.[19]

12. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 16; doc A40(a), p 119. The sites in question are itemised in Office of Treaty Settlements to Hauraki collective, 26 April 2012, p 1 (doc A40(a), p 95), and Office of Treaty Settlements to Tauranga Moana Iwi Collective, 26 April 2012, pp 1–2 (doc A40(a), p 100).

13. Submission 3.3.13(a), pp 36–37; Tauranga Moana Iwi Collective to Patsy Reddy, 25 May 2012 (doc A40(a), pp 165–169)

14. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), pp 17–18; submission 3.3.13(a), p 37; Tauranga Moana Iwi Collective to Minister for Treaty of Waitangi Negotiations, 5 June 2011 (doc A40(a), p 40)

15. Submission 3.3.13(a), p 37

16. Document A40(a), p 292

17. Ibid, p 293

18. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 18; doc A40(a), pp 313–320. Hauraki had earlier sought a 70:30 split in their favour.

19. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 18

In November 2012, the Tauranga Moana Iwi Collective and the Crown signed their deed of settlement.[20] Just over a year later, Ngāi Te Rangi entered into its own individual deed of settlement with the Crown.[21] Meanwhile, the Crown continued to discuss remaining overlapping redress with the parties. By 2014, the Crown and the two iwi collectives had agreed on the following four redress items being offered to Hauraki after what was described as a 'difficult' overlapping engagement process: the Athenree Forest; a group of right-of-first-refusal properties in Tauranga Moana; another group of commercial properties in Tauranga Moana; and the Kaimai Statutory Acknowledgement.[22]

The parties differ in their understanding of these agreements. According to claimant counsel, Ngāi Te Rangi assented only reluctantly and conditionally in order to keep their own settlement prospects on track.[23] Their conditions, set out in a letter to the Minister on 2 October 2012, included Hauraki being offered no redress south of the Te Puna block. In this letter and elsewhere, the claimants expressed unease at the increasing extent of the redress being offered to Hauraki and the Crown's apparent reluctance to take account of the mana whenua of Tauranga iwi.[24] The proposals seemed to offer 'a significant gain to Hauraki with no balancing of the benefit for [the Tauranga Moana Iwi Collective]', they wrote.[25] According to Mr Tawhiao, Tauranga Moana iwi assented to the early redress items 'on the condition that we were not inadvertently undermining our own mana whenua so that was the condition we imposed. Whether that was made explicit or not, it was understood by us to be the case. We assumed we were dealing with iwi who thought likewise about mana whenua matters . . . [and] had a similar world view to ours.'[26]

Importantly, Ngāi Te Rangi submit that, at the time the initial redress items were offered to Hauraki, Ngāi Te Rangi understood the agreements 'would be the full redress sought by the Hauraki Collective in Tauranga Moana' and did not constitute an acknowledgement of Hauraki rights in these areas.[27] It was also Ngāi Te Rangi's understanding that no more redress would be offered 'without engagement and consent'.[28] In fact, though, they soon learned that more redress items were already being discussed between the Crown and Hauraki – including the possibility of Hauraki iwi participating in the Tauranga Moana Framework.

20. Submission 3.3.13(a), p 7
21. Claim 1.1.1, p 3
22. Submission 3.3.13(a), p 7; claim 1.1.1(a), p 3
23. Submission 3.3.13(a), p 7; claim 1.1.1(a), p 3
24. Tauranga Moana Iwi Collective to Minister for Treaty of Waitangi Negotiations, 2 October 2012 (doc A40(a), pp 292–293)
25. Ibid, p 292
26. Transcript 4.1.1, p 84
27. Claim 1.1.1(a), p 3
28. Document A62 (Charlie Tawhiao, brief of evidence, 29 March 2019), p 2

4.1.3 Redress and the Tauranga Moana Framework

For Tauranga Moana iwi, the ability to exercise tino rangatiratanga rights over the harbour and its catchment was a central aspiration from the very outset of negotiations. 'For us, it was always about the harbour first, the moana,' Mr Tawhiao told us.[29]

The Tauranga Moana Framework was developed between 2010 and 2012 as a co-governance mechanism for managing and protecting this taonga. The framework was regarded as an 'innovative piece of redress' benefiting both Treaty partners, the claimants recalled.[30] Its governance group was to comprise an equal number of iwi and Crown/local authority representatives. Initially, each of the three local iwi would hold seats on the governance group, with a nominee of the Tauranga Moana Iwi Collective holding the fourth. The group would have no regulatory power or functions but would be a source of advice and influence 'aimed at restoring, enhancing and protecting the health and wellbeing of Tauranga Moana and achieving sustainable management . . . for present and future generations.'[31]

The framework played no part in the Crown-Tauranga-Hauraki redress discussions until late 2012. The evidence shows that, before then, Hauraki iwi were certainly aware the framework was being developed as a redress item for the Tauranga collective but had raised no concerns.[32] Indeed, when the Crown updated the Hauraki collective about the state of its negotiations with Tauranga in March 2012, Hauraki had queried several redress items proposed for the Tauranga iwi – but not the framework.[33]

Things began to change in September that year when the Hauraki collective applied to the Waitangi Tribunal for an urgent hearing on the redress offered so far to the Tauranga collective. It withdrew the application a month later after 'intensive discussions' with the Crown which canvassed, among other matters, the Tauranga Moana Framework.[34] The outcome was a joint undertaking to the Tribunal on 24 October 2012 that the framework would not prevent Hauraki from negotiating its own co-governance arrangements with local government in their areas of customary interests; these arrangements would be 'no less favourable' than those offered to the Tauranga collective.[35] Ngāi Te Rangi were not party to this undertaking, although they acknowledge they were aware of it.[36]

29. Document A29 (Charlie Tawhiao, brief of evidence, 18 February 2019), p 4
30. Ibid
31. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 15
32. Submission 3.3.13(a), p 36
33. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 15; see also doc A40(a), p 91.
34. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), pp 18–19
35. Ibid, p 19
36. Ibid, pp 18–19; submission 3.3.33(a), p 26

From then on, the framework became a 'particular focus' of ongoing discussions between the Crown and the two collectives about their overlapping interests.[37] According to Ms Anderson, the Tauranga collective was offered the chance to hold direct discussions with Hauraki but declined, suggesting it was the Crown's responsibility to resolve overlapping interests and 'broker agreement' with Hauraki. She recalled all parties putting 'considerable resource' into resolving outstanding issues, with no fewer than twelve teleconferences during a two-month period in 2014.[38]

In July 2014, the Minister made a preliminary decision about how the interests of Hauraki iwi in Tauranga Moana would be recognised. A fifth iwi seat would be added to the framework's governance group, he advised. For now, this seat would allow Hauraki to be represented but it could also 'potentially accommodate the interests of other iwi' whose participation was merited.[39] The following month, Ngāi Te Rangi accepted the Minister's fifth-seat proposal. Again, they stated they did so reluctantly and conditionally.[40] Their conditions included that the new seat would become effective only once the Crown conducted 'an overlapping claims process, in which the Tauranga Moana iwi will be entitled to participate'. They also called for the seat to be filled only when the governance group was considering 'matters relating to the area in which other iwi share interests with the three Tauranga iwi' – which, in the case of Hauraki, 'would be limited to parts of the Katikati and Te Puna blocks, at the north-western end of Tauranga Moana'.[41]

However, according to the claimants, Hauraki iwi considered they should have the fifth seat without these conditions.[42] In late 2014, Hauraki iwi resumed their earlier urgency application to the Waitangi Tribunal, seeking to halt the Tauranga collective's deed of settlement, which they said would cause them significant and irreversible prejudice. The application was granted in August 2015, but Hauraki withdrew it when the Crown proposed removing the framework from the draft Tauranga deed, allowing the rest of the deed to be finalised. The Minister advised Tauranga Moana iwi that the framework – which he acknowledged was central to settling their historic claims – could be achieved later through separate legislation.[43]

Ngāi Te Rangi and the other Tauranga iwi reluctantly agreed and the framework was removed from the draft deed in November 2015,[44] subject to conditions – including that the framework become part of a tikanga-based process whereby the Crown and the Hauraki and Tauranga collectives would work together on

37. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 22
38. Ibid
39. Ibid, p 24
40. Tauranga Moana Iwi Collective to Minister for Treaty of Waitangi Negotiations, 23 August 2014 (doc A40(a), p 541)
41. Document A40(a), pp 541–542
42. Claim 1.1.1(a), p 19
43. Minister for Treaty of Waitangi Negotiations to Tauranga Moana Iwi Collective, 31 August 2015 (doc A40(a), p 584)
44. Submission 3.3.13(a), p 42

resolving overlapping redress disputes. The claimants say this and other conditions have never been fulfilled.[45] The Tauranga Moana Iwi Collective Redress Bill was introduced to Parliament on 3 November 2015 – without the framework.[46]

Meanwhile, drafting of collective and individual Hauraki deeds was progressing and Tauranga iwi were increasingly concerned to know more about the redress being discussed. In October 2016, the Crown gave them information from Hauraki which, in the Crown's view, showed Hauraki had sufficient interests in Tauranga Moana to hold a fifth seat on the framework's governance group.[47] In December 2016, with the Hauraki collective deed about to be initialled, the claimants learned that – even though the framework had been removed from the Tauranga collective deed – the Hauraki deed still 'preserve[d] the redress in the TMF for Hauraki iwi.'[48]

Inadvertently, the Crown sent the draft text in question – the so-called preservation clause – to the Tauranga collective just days before the Crown and Hauraki were due to initial both the Pare Hauraki Collective deed and the Marutūāhu deed on 22 December 2016.[49] We comment on that practice later. In cross-examination, Crown witness Leah Campbell (regional director, Te Waenga, for Te Arawhiti and formerly deputy director, negotiations, in the Office of Treaty Settlements) stated that the Crown had not intentionally provided the draft because Hauraki iwi had not given consent for it to do so; 'we don't provide deeds actually to any other parties until such time as they are initialled without the agreement of the settling group.'[50]

Having read the draft text, Ngāi Te Rangi immediately protested. In a strongly worded letter to the Minister on 21 December 2016, they said the draft deed contained 'completely inaccurate and unjustified' statements about the proposed framework redress.[51] Ngāi Te Rangi wanted reference to the fifth seat removed from the deed. Huhana Rolleston, giving evidence for Ngāi Te Rangi, said the seat was unwarranted because the knowledge and experience of local iwi had confirmed that 'Hauraki have never settled or exercised rangatiratanga in Tauranga Moana.'[52]

In response, the Crown emphasised that the provision of redress was 'not based on determining who has mana whenua, but on assessing the historical interests of the settling groups, groups yet to settle, groups with overlapping interests and all other relevant factors'.[53] On Ngāi Te Rangi's specific objections to the framework redress, the Crown advised it was working with the Hauraki collective to revise

45. Claim 1.1.1, p 19
46. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 28
47. Lillian Anderson, Office of Treaty Settlements, to Tauranga Moana iwi representatives, 21 October 2016 (doc A5(a), pp 214–217)
48. Document A48 (Leah Campbell, brief of evidence, 14 March 2019), p 44; doc A48(a), p 978
49. Document A48 (Leah Campbell, brief of evidence, 14 March 2019), p 44; doc A48(a), pp 976–979
50. Transcript 4.1.2, p 68
51. Document A48(a), p 981
52. Document A5 (Huhana Rolleston, brief of evidence, 14 March 2017), p 5
53. Minister for Treaty of Waitangi Negotiations to Ngāi Te Rangi Settlement Trust, 7 March 2017 (doc A48(a), pp 1067–1068)

the text – including allowing a two- to four-year period for Tauranga Moana and Hauraki iwi to work through issues concerning the governance and management of Tauranga Moana. In correspondence with Ngāi Te Rangi over the following months, the Crown repeatedly referred to this ongoing work,[54] but Ngāi Te Rangi and the other Tauranga iwi never saw any proposed rewording.

The Crown was adamant it would not remove the fifth-seat provision from the deed. This redress had been offered to Hauraki iwi 'on the basis of their interests and recognition of those interests by the Waitangi Tribunal [in 2004]'; the Crown said it was thus 'reasonable and appropriate' for it to take the Tribunal's view into account.[55]

4.1.4 Other redress in the Pare Hauraki Collective deed of settlement

While attempts to resolve the framework impasse were in train, the Crown and Hauraki were also discussing additional redress items in Tauranga Moana. Claimant evidence showed Ngāi Te Rangi and the Tauranga collective repeatedly requesting information from the Crown about what was being proposed. However, 'despite interactions, letters, and attempts to understand what was being negotiated between the Crown and Hauraki in their area, they were not able to get a clear picture of what was taking place'.[56]

The Crown's evidence revealed it was aware of Ngāi Te Rangi's mounting frustrations at this time, with one official saying she was aware the Tauranga iwi were 'desperate to receive the redress lists'; she added that she had not shared any actual wording but had 'simply told them that this is what we are doing'.[57] In July 2016, the Office of Treaty Settlements apologised for its inability 'to provide a thorough picture of Hauraki redress' so far; subsequently, it gave the Tauranga collective a 'high level summary' of what was being discussed. Officials assured Tauranga iwi that they would consult with them, and provide information and 'a proper opportunity to comment on Hauraki iwi redress in the Tauranga rohe' before anything was finalised.[58]

But it was not until 19 December 2016 that Ngāi Te Rangi finally received a list of 'proposed redress for Hauraki and overlapping claims consultation with Ngāi Te Rangi';[59] this was also when the text of the preservation clause was accidentally disclosed. According to Ngāi Te Rangi, the Crown described the provision of this information as 'a consultation process,' despite its declared intention to initial the Hauraki collective deed in just a few days' time.[60]

54. See, for example, Minister for Treaty of Waitangi Negotiations to Charlie Tawhiao, email, 14 March 2017 (doc A28(b), p 35); Leah Campbell to Charlie Tawhiao, email, 29 March 2017 (doc A28(b), p 42); Tessa Buchanan to Kimiora Rawiri, email, 13 June 2017 (doc A28(b), p 82).
55. Leah Campbell to Charlie Tawhiao, email, 7 March 2017 (doc A48(a), pp 1067–1070)
56. Submission 3.3.7, pp 8
57. Nashwa Boys to Leah Campbell, email, 16 December 2016 (doc A48(a), p 955); doc A48 (Leah Campbell, brief of evidence, 14 March 2019), pp 43–44
58. Document A5(a), p 224
59. Document A48(a), pp 960–967
60. Document A5(a), p 15

Mr Tawhiao immediately emailed the Minister, saying Ngāi Te Rangi was outraged not only by the redress itself

> but also that the Crown intends to move forward . . . when no engagement has occurred with us on such significant matters.
>
> There are key redress items that we are reviewing for the first time. . . . The Crown is disrespecting the mana of Ngāi Te Rangi and our tikanga by offering this redress, and furthermore refusing to provide us with sufficient time to receive, review and respond.[61]

Ngāi Te Rangi asked for the redress to be removed or initialling to be postponed. The same day, Ngāi Te Rangi's lawyers also sought more detail on redress items 'that we ought to have been made aware of and have the opportunity to comment on', including the coastal statutory acknowledgement which the iwi had 'never received and has not gone through a proper process.'[62]

However, the Crown maintained that all redress items listed in the table had undergone an overlapping engagement process in 2013–14, apart from the Ministry of Primary Industries Fisheries Protocol; it advised this outstanding item would thus remain 'square-bracketed' in the deed until an overlapping engagement process could be run in the New Year.[63] On the coastal statutory agreement specifically, officials told Ngāi Te Rangi's lawyers that the Crown had consulted Ngāi Te Rangi in 2013 but the iwi 'did not engage in this process'.[64]

More detailed Crown responses to Ngāi Te Rangi's objections followed in the ensuing weeks. Officials emphasised that the Crown had negotiated with both Ngāi Te Rangi and Hauraki in good faith throughout, although the negotiations 'ha[d] not been without issue or compromise'. However, resolving overlapping interests did not require the complete removal of disputes – only that the Crown be satisfied that 'the overlapping issues have been resolved to a point that the redress may proceed.'[65]

Meanwhile, as we have seen, the Crown and the Hauraki collective initialled the deed as planned on 22 December 2016. In addition to the four redress items that Ngāi Te Rangi had agreed to in 2012–14, the deed now included items that witness Huhana Rolleston said 'extend[ed] far beyond the Crown undertaking to Hauraki in 2012' – namely, that '[c]ultural redress will be provided to iwi of Hauraki within the Te Puna and Katikati Blocks, as agreed with the Crown.'[66] In her evidence, Ms Rolleston stated that Ngāi Te Rangi had advised the Crown in writing on 22

61. Charlie Tawhiao to Minister for Treaty of Waitangi Negotiations, email, 21 December 2016 (doc A5(a), p 250)
62. Spencer Webster to Nashwa Boys, email, 21 December 2016 (doc A5(a), p 251)
63. Nashwa Boys to Spencer Webster, email, 20 December 2016 (doc A5(a), p 252)
64. Nashwa Boys to Spencer Webster, email, 21 December 2016 (doc A5(a), p 251)
65. Leah Campbell to Charlie Tawhiao, email, 7 March 2017 (doc A48(a), p 1067)
66. Document A5 (Huhana Rolleston, brief of evidence, 14 March 2017), p 4

February 2017, that the additional items that particularly concerned them were as follows.[67]

- *Tauranga Moana:* As already noted, the 'preservation' clause explicitly recognised Hauraki interests in Tauranga Moana, 'particularly in Te Puna–Katikati'. Counsel told us the clause wrongly conflated the interests of *all* Hauraki iwi with those of Marutūāhu – the Hauraki iwi whose specific rights 'in the narrow Katikati block and in relatively limited portions of the Te Puna block' were acknowledged by the Tribunal in 2004.[68] Counsel also argued that this paved the way for Hauraki to negotiate separate cultural redress in relation to Tauranga Moana outside the framework, and possibly 'facilitate the provision of further cultural redress to Hauraki in Tauranga Moana'.[69] As we have described, the Crown's response was that the framework should be dropped from the Tauranga collective deed, pending more discussions.
- *The Pare Hauraki Conservation Framework:* Ngāi Te Rangi considered that the Pare Hauraki Conservation Framework gave Hauraki iwi scope for direct engagement and decision-making that would erode their own rangatiratanga. Moreover, it provided redress 'that not even TMIC were provided in their settlements. It is wrong for an iwi with no mana to have more rights in the rohe of an iwi who has mana.'[70] The Crown, though, said that the redress provided in the framework was primarily non-exclusive relationship redress, apart from certain co-governance and co-management provisions which applied only to specified areas.[71]
- *Ministry of Primary Industries Fisheries and Recognition Redress, Advisory Committee, and Quota Rights of First Refusal:* Ngāi Te Rangi said this redress – which had not been through an overlapping engagement process – effectively gave Hauraki the ability to influence fisheries matters in Tauranga Moana to a degree that impinged on their own mana moana.[72] Later, Ngāi Te Rangi told us that the Crown had subsequently taken steps to remove overlaps after the initialling. Thus these items were no longer classified as 'live' in the list of contested redress in Ngāi Te Rangi's closing submissions.[73]
- *The Pare Hauraki Redress Area:* In the deed, a map showed an area extending south of Te Aroha and Waiorooro where the claimants say 'Hauraki has never

67. Document A5 (Huhana Rolleston, brief of evidence, 14 March 2017), pp 4–10. In addition to the redress items summarised in our bulleted list, we note that Ngāi Te Rangi's opening submission, submission 3.3.7(a), included three coastal statutory acknowledgements among the contested redress items as well. However, these acknowledgements were not raised in Ngāi Te Rangi's 22 February 2017 advice to the Crown (doc A5(a), p 557) which Ms Rolleston referred to, nor were they specified in their closing submissions.

68. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, pp 199–200; submission 3.3.7, pp 22–23

69. Submission 3.3.7, p 23

70. Document A5 (Huhana Rolleston, brief of evidence, 14 March 2017), p 7

71. Leah Campbell to Charlie Tawhiao, email, 7 March 2017, p 2 (doc A48(a), p 1068)

72. Document A5 (Huhana Rolleston, brief of evidence, 14 March 2017), pp 7–8; submission 3.3.13(a), p 52

73. Submission 3.3.13, pp 58–60

held mana or exercised rangatiratanga'. Ngāi Te Rangi describe the map's inclusion as 'an extraordinary case of an iwi who are making unfounded claims to other iwi rohe (not isolated to Tauranga Moana) and using the settlement process to give legal effect to their claims', adding that the Crown 'should not enable this behaviour.[74] The Crown maintained that the map simply depicted the area within which the Hauraki collective's redress lay and '[did] not depict the tribal boundary of Hauraki'.[75]

- *The Pare Hauraki Collective Worldview Statement:* The statement incorporated the phrase 'mai Matakana ki Matakana'. Ngāi Te Rangi say they discovered this only when the initialled deed appeared on the Office of Treaty Settlements' website.[76] They say Hauraki have no interests on Matakana Island, so strongly object to it being used as an 'identity marker'.[77]
- *The Kaimai Statutory Acknowledgement and Statement of Association:* Ngāi Te Rangi said that, while the statutory acknowledgement had been part of the previous agreements, there had been no engagement with them about the statement of association.[78] They took issue with the statement's implication that Hauraki iwi hold mana whakahaere over Kaimai and its surrounds; they say there is no evidence showing Hauraki has or ever had this level of authority.[79] The Crown's response was that statutory acknowledgements are non-exclusive redress instruments that 'enhance a claimant group's ability to participate in specified Resource Management Act 1991 processes' and can be provided to more than one group in the same area.[80]

Ngāi Te Rangi's objections to the inclusion of these redress items in the Hauraki collective deed, and their dissatisfaction with the Crown's responses, prompted them to lodge the Waitangi Tribunal urgency application that led to this inquiry.[81] Not long after, in mid-2017, the Crown appointed an independent facilitator to help the parties work through their disagreements – something Ngāi Te Rangi sought in their urgency application. But, at the same time, the Crown wanted to get the Hauraki deed signed without delay.[82]

Ms Rolleston told us that, once Ngāi Te Rangi made their Waitangi Tribunal application in March 2017 and indicated they would withdraw from all previous Hauraki redress agreements unless the Crown addressed their concerns, 'it felt like our relationship with the Crown shifted'. From then on, she submitted, it seemed

74. Document A5 (Huhana Rolleston, brief of evidence, 14 March 2017), p 9
75. Leah Campbell to Charlie Tawhiao, email, 7 March 2017, p 3 (doc A48(a), p 1069)
76. Ngāi Te Rangi's position on provisions in the Pare Hauraki Collective redress deed, table, no date (doc A48(a), p 1095)
77. Document A5 (Huhana Rolleston, brief of evidence, 14 March 2017), p 9
78. Submission 3.3.13, pp 52–53
79. Document A5 (Huhana Rolleston, brief of evidence, 14 March 2017), pp 9–10
80. Office of Treaty Settlements to Charlie Tawhiao, email, 7 March 2017 (doc A48(a), p 1069)
81. Document A5 (Huhana Rolleston, brief of evidence, 14 March 2017), p 3
82. Document A48 (Leah Campbell, brief of evidence, 14 March 2019), pp 56–57

that the Crown started 'hiding more things from us and was reluctant to address our issues.'[83]

Over the following months, Ngāi Te Rangi's position on redress agreements also shifted. In its Tribunal claim, it sought the removal of redress solely from the Hauraki collective deed. On 24 April 2017, Mr Tawhiao advised the Crown that it now wanted all redress within Ngāi Te Rangi's rohe to be removed from the collective *and* individual Hauraki deeds 'until there has been a proper process for determining the interests claimed by Hauraki.'[84]

Ngāi Te Rangi's opposition to the redress for Hauraki extended to redress items that were the subject of earlier agreements. Ngāi Te Rangi told the Crown that they had agreed to these items only 'due to the pressures to achieve a timely Treaty settlement and with the expectation that there would be no further claims in our rohe.'[85] The claimants maintained that they did not accept, and had never accepted, that Hauraki had any rights to redress items such as a 60 per cent share in the Athenree Forest or properties in the Te Puna and Katikati blocks. According to Mr Tawhiao, they had given their agreement without realising 'where this was heading . . . [W]e agreed to the transfer of properties without taking account of the fact that those properties themselves would then be used as evidence of mana whenua.'[86]

The claimants also emphasised the provisional and conditional nature of the earlier agreements. Ngāi Te Rangi argued that they were now justified in withdrawing from them, because the Crown had itself breached aspects of the agreements and ignored their conditions – especially the 'core' condition that Hauraki would not be offered redress south of Te Puna. When the claimants had raised objections, they said that the Crown had ignored these too.[87]

The 'environment of uncertainty and mistrust' that Ms Rolleston said developed in 2017 was exacerbated by ongoing confusion over when the Hauraki collective deed would be finalised.[88] In early June 2017, Ngāi Te Rangi heard informally that the Crown and Hauraki would sign the deed on the 23rd of that month – information given more weight by a Facebook post announcing waiata and haka practices at Mātai Whetū Marae 'in preparation for the Hauraki Collective Deed signing.'[89] Alarmed that the signing would compromise their urgency application and 'entrench the prejudice we are suffering', Ngāi Te Rangi immediately sought confirmation from the Hauraki collective and the Crown. The Crown told them that a signing date had not yet been set.[90] However, Ms Rolleston said it later emerged that the proposal to sign on 23 June had come from the Office of Treaty

83. Document A28 (Huhana Rolleston, brief of evidence, 18 February 2018), p 4
84. Document A6(a), p 5
85. Ngāi Te Rangi Settlement Trust to [Office of Treaty Settlements], 22 February 2017 (doc A5(a), p 561)
86. Transcript 4.1.1, p 88
87. Document A28 (Huhana Rolleston, brief of evidence, 18 February 2019), p 30
88. Ibid, p 5
89. Document A6(a), pp 1–4
90. Ibid, pp 1–2

Settlements. At this point, she said, '[w]e came to realise that the Crown was never going to fully consider the issues and attempt to resolve them; rather, it was going to proceed with what they had provided to Hauraki, despite our objections.'[91]

In the event, the deed signing had to wait until after the 2017 general election and the appointment of a new Minister for Treaty of Waitangi Negotiations, Hon Andrew Little. He advised Ngāi Te Rangi that, like his predecessor, he supported using a tikanga-based process to resolve overlapping redress issues. In the case of the framework, he suggested such a process could even take place *after* the Pare Hauraki Collective deed was signed.[92] But he reiterated his determination to sign, despite the outstanding disagreements, and did so on 2 August 2018.

The clause preserving Hauraki's ability to participate in the framework through the fifth seat remained as clause 22 (see appendix I). So did many of the other contested redress items discussed above. At the time of our inquiry, Ngāi Te Rangi regard all but two of those items as 'live'. In addition, they also contest numerous redress items included in the individual deeds of the following Hauraki groups: Ngāti Tara Tokanui, Ngāi Tai ki Tāmaki, Ngāti Tamaterā, Ngaati Whanaunga, Ngāti Pāoa, Ngāti Hako, Ngāti Maru, Ngāti Rāhiri Tumutumu, and the Marutūāhu collective.[93]

4.2 Ngāti Ranginui's Experience

4.2.1 Introduction

Ngāti Ranginui signed an individual deed of settlement with the Crown in 2012. Their settlement redress is also contained in the Tauranga Moana Iwi collective deed, signed in 2015 (Ngāti Ranginui is a member of the collective alongside Ngāi Te Rangi and Ngāti Pūkenga).

Since Ngāti Ranginui signed their individual deed in 2012, the Ngāti Ranginui Settlement Trust (the Trust) has represented them in negotiations toward the collective settlement, and in efforts to resolve overlapping interests.

Like all Tauranga Moana iwi, Ngāti Ranginui consider the moana to be an 'integral part' of their identity.[94] Ngāti Ranginui's individual deed stipulates that the framework is a 'critical element' of their settlement, and that until it comes into effect, their settlement is incomplete.[95]

Ngāti Ranginui's claims in this inquiry thus centre on the Crown's handling of the framework. They are aggrieved for several reasons. Firstly, they object to decisions that have led to the long-term stalling (or 'parking') of the framework, leaving Ngāti Ranginui without redress in the moana.[96]

Secondly, they object to the inclusion in the Hauraki collective deed of clause 22

91. Document A28 (Huhana Rolleston, brief of evidence, 18 February 2019), p 5
92. Submission 3.3.13(a), p 9
93. See submission 3.3.7(a), pp 2–6, for full details of the contested redress items included in individual deeds. Most of the deeds have been initialled or signed.
94. Submission 3.3.10, p 8
95. Claim 1.1.6, p 9
96. Submission, 3.3.32, pp 5–6

(the so-called 'preservation' clause: see appendix I). Ngāti Ranginui say this clause does not merely preserve the ability of Hauraki iwi to sit on the Tauranga Moana governance group, as previously agreed, but grants them extensive rights over the framework and in Tauranga Moana that are incommensurate with their interests.[97]

Thirdly, Ngāti Ranginui say that, although the Tauranga collective agreed to add an extra (fifth) seat to the governance group, they did so 'reluctantly' and under the pressure of an 'ultimatum' from the Crown; their decision did not – and does not – reflect their actual view of Hauraki iwi interests in the moana.[98]

Finally, Ngāti Ranginui are unhappy that the Crown did not consult with them on its 2012 undertaking to Hauraki iwi that they would be able to negotiate 'no less favourable' future co-governance arrangements than Tauranga iwi when it came to the moana. This undertaking was later used by the Crown to justify critical changes to the framework – the addition of a fifth seat and, by extension, the provisions in clause 22 – that Tauranga Moana iwi say left them disenfranchised and undermined.

For Ngāti Ranginui, these events constitute 'a series of compromises which have prejudicially affected [their] own negotiations over the Moana'.[99]

We have already outlined the course of the framework negotiations – most of which involved all three Tauranga Moana iwi – in section 4.1. For this reason, our account of Ngāti Ranginui's experience focuses on aspects of the framework process which are not covered there. It also examines their experience of the broader overlapping redress process that led to the Hauraki deeds, and their objections to two particular redress items: the Pare Hauraki Conservation Framework and the minerals relationship agreement.

4.2.2 Ngāti Ranginui and the Tauranga Moana Framework

4.2.2.1 *The 2012 undertaking*

As outlined in section 4.1.3, in 2012 the Hauraki collective applied to the Waitangi Tribunal for an urgent hearing on redress in the Tauranga collective deed. The collective later withdrew the application, having reached an agreement with the Crown that in future, Hauraki iwi would be able to negotiate governance arrangements that were no less favourable than those available to Tauranga iwi. Like the other Tauranga iwi, Ngāti Ranginui were not consulted about this undertaking the Crown made with Hauraki.

4.2.2.2 *The fifth seat*

Ngāti Ranginui's grievances about the framework concern both the preservation clause – already discussed in relation to Ngāi Te Rangi, whose position Ngāti Ranginui essentially shares – and what they consider to have been an inadequate process of consultation on the fifth seat.

97. Submission 3.3.10, p 17
98. Ibid, pp 10–11; submission 3.3.32, p 5
99. Submission 3.3.10, p 2

Efforts to resolve overlapping interests between Hauraki and Tauranga iwi intensified in the second half of 2014, in the push to resolve outstanding issues so the Tauranga collective deed could be signed.[100]

Negotiations centred on how Hauraki iwi interests in Tauranga Moana could be appropriately recognised in the Tauranga collective deed. The option of adding a fifth seat to the Tauranga Moana governance group had been mooted for a while, and was the preferred option of Hauraki iwi. But the Tauranga collective was not in favour of it. It summarised its misgivings in a letter to the Minister on 29 July: 'We are mindful that Hauraki iwi do not have exclusive interests within the area over which the TMF will apply. Accordingly, we find it difficult to accept any option that would give Hauraki iwi a governance seat on the Tauranga Moana Governance Group.'[101]

They also noted that 'the area over which the Hauraki iwi claim interests is geographically small, relative to the broader area over which the TMF will apply'.[102] At this time, parties were proceeding on the basis that the extent of Hauraki interests were as the Waitangi Tribunal had found in 2004. The letter to the Minister discussed the Tauranga collective's preferred option, which it had previously raised: a Tauranga Moana Hauraki Group, which would act as a subcommittee of the governance group to deal with matters specific to Hauraki interest areas. The Tauranga collective also proposed an alternative option of 'parking' the area of shared interest between Tauranga and Hauraki iwi, for resolution after the deed had been signed.

On 30 July, Crown officials briefed the Minister on the options, including some proposed by Tauranga iwi, and recommended he create a fifth seat. Officials advised against the subcommittee option for several reasons, including that some stakeholders doubted its practicality and also that the Hauraki collective was strongly opposed – in fact, it was said to have prompted them to consider resuming their 2012 litigation against the Crown.[103] Officials also considered the subcommittee option 'to be the option least consistent with the 2012 undertaking the Crown made to the Waitangi Tribunal'.[104]

The next day, the Minister advised iwi of his preliminary decision to create a fifth seat. The Tauranga collective responded that they could not accept the decision, and pointed out that their alternative solution to 'park' the area of shared interest had been ignored ('Since we have not received any response to this suggestion, we assume that you do not accept it').[105]

The Crown then worked to advance the fifth-seat option at speed. The Crown's then chief negotiator met with Tauranga iwi representatives, drafted a proposal,

100. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 22
101. Document A35(a), p 65
102. Ibid
103. Sue van Daatselaar, 'Tauranga Moana Iwi Collective: Preliminary Decision on Overlapping Interests and the Tauranga Moana Framework', report to Minister for Treaty of Waitangi Negotiations, OTS 2014/2015–106, 30 July 2014, p 4 (doc A40(a), p 518)
104. Ibid, p 7 (p 521)
105. Document A35(a), p 69

and obtained their feedback (and that of Hauraki negotiators) between 5 and 7 August. According to the evidence, the Tauranga collective did 'not yet support the fifth seat option', representatives had 'not had time to secure any agreement to the drafting', and Ngāti Ranginui were 'not commenting on the drafting at this stage.'[106] Nonetheless, on 8 August, the chief negotiator phoned Tauranga iwi representatives to advise them that the Minister was expected to confirm a fifth seat.[107] The Minister indeed confirmed his decision on 11 August.

In her phone call to Tauranga iwi representatives, the chief negotiator also outlined what would likely happen if they rejected the fifth-seat proposal. According to her own account, she predicted that the Tauranga collective deed would stall, but when it did ultimately proceed, it would still include a fifth seat for Hauraki (and potentially other) iwi, with an interest area defined by the Crown. Alternatively, the deed would contain no framework at all; in that case, the framework might be transferred to the Hauraki deed.[108]

Ngāti Ranginui felt they had been issued with an 'ultimatum'.[109] Faced with the alternative of delaying their settlements, further undermining their voice within the framework or possibly forgoing the framework altogether, they 'reluctantly' accepted the fifth-seat proposal, subject to certain conditions.

In Ngāti Ranginui's view, the process leading to the addition of the fifth seat was rushed, biased, and lacked rigour: '[t]o claim that Ngāti Ranginui fully participated and agreed to the outcome of the process understates the reality, which was a fast tracked and pre-determined process.'[110]

4.2.2.3 *The Tauranga Moana Framework is parked*

In the following months, Tauranga iwi worked with the Crown to draft the fifth-seat provision. In September, Hauraki iwi were shown the draft provision and were unhappy with its terms. When they learned that the terms were final, they made an urgency application to the Waitangi Tribunal in December 2014. Hauraki iwi felt they would be prejudicially affected by clause 10.3 in particular, which provided a process for resolving disagreements about the participation of iwi with recognised interests. The Crown's legal advice suggested that the provision as drafted complied with the Crown's 2012 undertaking to Hauraki, and that the Tribunal would be unlikely to grant urgency.[111] However, the Tribunal did so on limited grounds in August 2015.[112]

106. Areta Gray to Patsy Reddy, email, 7 August 2014 (doc A40(a), p 533)
107. Patsy Reddy to Sue van Daatselaar and Benedict Taylor, email, 8 August 2014 (doc A40(a), p 536)
108. Document A40(a), p 536
109. Submission 3.3.32, p 5
110. Ibid, pp 4–5
111. Sue van Daatselaar and Glenn Webber, 'Tauranga Moana and Hauraki Negotiations: Redress Decisions and Next Steps', report to Minister for Treaty of Waitangi Negotiations, OTS 2014/2015–154, 12 September 2014, pp 2, 4 (doc A35(a), pp 75, 77)
112. Chief Judge Wilson Isaac, memorandum appointing panel to hear Wai 2357 and Wai 2358 claims, 3 April 2012 (Wai 2538 ROI, memo 2.5.15)

In response, the Minister proposed to remove the framework from the Tauranga Moana Iwi Collective Redress Bill as an 'interim measure' so that the deed could be finalised.[113] Tauranga iwi were disappointed, but agreed 'reluctantly'. They had again been forced to compromise on the framework in order to secure the progress of their collective and individual settlement. They told the Minister that if the issues were not resolved within six months, they would want to discuss ways to address the 'ongoing prejudice caused by such a delay'.[114]

In their submissions, the Crown characterised these decisions as autonomous and indicative of iwi being able to exercise tino rangatiratanga.[115] However, in Ngāti Ranginui's view, such decisions were the product of 'conditions [that] were created by the Crown – [our agreement] was a response to an ultimatum by the Crown'.[116]

After the framework was removed from the Tauranga collective deed, the Crown proposed a process for resolving the framework disagreements. By early 2017 however, despite numerous attempts by all parties, little progress had been made. In late February 2017, the Minister announced that the framework would be parked for a further two to four years.

4.2.3 Other redress in the Hauraki collective and individual deeds

In October 2012, the Hauraki collective chair, Paul Majurey, wrote to the Crown outlining agreements that he said had been reached between the Hauraki and Tauranga collectives on their overlapping interests. In his email, Mr Majurey said the two collectives had agreed on the areas of their respective exclusive conservation management plans.[117] Shortly after, on 2 November, the Tauranga collective deed was initialled.[118]

In October 2013, the Crown sought feedback from Ngāti Ranginui on redress proposed for Hauraki iwi, as set out in the 2010 Hauraki collective framework agreement and the 2011 Hauraki iwi agreement in principle equivalents.[119] These documents noted that conservation relationship redress would be negotiated 'in the Hauraki region', but did not specify where.[120] No maps were provided to Ngāti Ranginui, and the Crown undertook no further overlapping engagement processes on the conservation relationship redress until September 2017. In evidence, Ms Campbell said this was because the Hauraki and Tauranga collectives had agreed that their conservation framework areas would be abutting.[121]

113. Document A35(a), pp 104–107
114. Ibid, p 108
115. Submission 3.3.26, p 16
116. Submission 3.3.32, p 6
117. Document A48(a), pp 1748–1749; doc A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 19
118. Document A40, p 19
119. Document A48, p 95
120. Ibid
121. Ibid, pp 87–88

Ngāti Ranginui objected to several items of redress, and sought meetings with the relevant Hauraki iwi to discuss them.[122] By April 2014, the Crown considered that agreement had been reached on all but one redress item (the Waipapa River Scenic Reserve, proposed for transfer to Ngāti Maru and Ngāti Tamaterā).[123] Ngāti Ranginui contest this view, however, and say other redress remained unresolved at that time.[124] This conflict of views on how things stood in 2014 seems to have become evident to the parties only later, in 2016. At that point, Ngāti Ranginui advised the Crown that from late 2013 to 2014, their participation in the process had been impeded by the fact that the Crown's negotiator was using an out-of-date email address for the Trust.[125]

4.2.3.1 *The lead-up to the initialling of the Pare Hauraki Collective deed*

As negotiations toward the Hauraki collective deed progressed, Ngāti Ranginui became concerned that they had not had a proper opportunity to comment on overlapping redress before it was finalised. They had been trying to resolve their concerns for some time, but began 'intensive efforts' to do so in late 2016.[126]

On 19 December 2016, the Crown sent Ngāti Ranginui and other Tauranga Moana iwi a list of redress in the Hauraki deed that overlapped with their rohe, and indicated they would initial the deed in just three days' time. Ngāti Ranginui were disturbed by the lists. In his evidence, Te Pio Kawe described how some redress was 'unhelpfully' described in summary terms, 'without any detail regarding the nature (and extent) of the relevant redress items'.[127] In their response to the Crown, Ngāti Ranginui objected to any offers of redress within their rohe and conveyed 'serious concerns' about the impending initialling of the deed.[128] Their main concern was that they had not received all the information about, or been consulted on, all the redress proposed. Nor had they received a copy of the Hauraki deed, so were unable to 'confirm the aspects of it that will cause prejudice'.[129] Furthermore, the Crown had refused their requests to see maps of the interest area claimed by Hauraki iwi, and had failed to undertake an overlapping engagement process on Ministry of Primary Industries protocol redress in their rohe.[130]

The Crown responded, stating that 'the Trust [had been] consulted about all matters where there were overlaps in the Hauraki deed apart from the MPI Fisheries protocol', and that the Minister's decisions were final. It explained that consultation on the protocol redress was yet to occur. On the question of access

122. Ngāti Ranginui Settlement Trust to Minister for Treaty of Waitangi Negotiations, email, 15 November 2013 (doc A40(a), pp 463–468)
123. Document A40(a), p 487
124. Ngāti Ranginui Settlement Trust to Leah Campbell, email, 27 April 2017, p 1 (doc A35(a), p 172)
125. Ngāti Ranginui Settlement Trust to Leah Campbell, email, 15 March 2017, p 2 (doc A35(a), p 166)
126. Document A35 (Te Pio Kawe, affidavit, 18 February 2019), p 9
127. Ibid, pp 9–10
128. Document A35(a), p 127
129. Ibid
130. Ibid, pp 127–128

to the deed itself, the Crown advised that 'it is not the Crown's practice to show a deed (of settlement) to neighbouring iwi prior to initialling unless there are specific overlaps'.[131]

Ngāti Ranginui later countered that 'there are, in fact, specific overlaps between Ngāti Ranginui and Hauraki iwi', pointing to the Crown's engagement with Ngāti Ranginui on overlapping redress as proof.[132]

The Crown and Hauraki initialled the draft deed on 22 December 2016.

4.2.3.2 *After initialling*

Over the next few months, Ngāti Ranginui received six letters from the Crown seeking their feedback on specific redress offers to Hauraki iwi.[133] The redress items included the Hauraki fisheries right of first refusal area, a statutory acknowledgment, and Taonga Tūturu and primary industries protocols. Ngāti Ranginui opposed five of the offers, and part of the sixth.[134] At the same time, they were relaying more general concerns about the overlapping engagement process. Among other matters, Ngāti Ranginui criticised the Crown's 'piece-meal approach' to consultation, saying that receiving 'a number of separate letters from OTS . . . has made it relatively difficult for us to engage with our constituent hapū in order to prepare our response'.[135] It was also hard for the Trust 'to keep track of or have any visibility of the overall work plan', said Te Pio Kawe.[136] Ngāti Ranginui claimed these difficulties were compounded by the Crown's impractically tight timeframes for providing feedback – just two to three weeks.[137]

More broadly, Ngāti Ranginui considered the Crown was treating them and Hauraki iwi unequally; in their own negotiations, the Crown had insisted that 'redress subject to overlapping claims would not be included in a deed of settlement without . . . going through an overlapping claims process' – a rule they did not see being applied to Hauraki.[138]

From April 2017 to April 2018, Ngāti Ranginui and Crown officials corresponded often and met several times to try to resolve overlapping redress. Much of this activity focused on the Tauranga Moana Framework, but other redress was also at issue. During these discussions, Ngāti Ranginui reiterated their concerns about the Crown's process and, like other iwi, requested a tikanga process to resolve all outstanding overlapping redress.[139] The Crown was initially supportive of a tikanga

131. Ibid, p 130
132. Ibid, p 166
133. Ibid, pp 134–136, 139–145, 149–152, 158–164, 176–178
134. Ibid, pp 169–175
135. Ngāti Ranginui Settlement Trust to Leah Campbell, email, 15 March 2017, p 2 (doc A35(a), p 166)
136. Document A22 (Te Pio Kawe, brief of evidence, 9 August 2018), p 12
137. Ibid
138. Ngāti Ranginui Settlement Trust to Leah Campbell, email, 15 March 2017, pp 3–4 (doc A35(a), pp 167–168)
139. Document A64 (Te Pio Kawe, brief of evidence, 1 April 2019), p 11; doc A35(a), pp 195–196

process,[140] but in April 2018 – before any substantial tikanga process had taken place – the Minister advised his intention to sign the Hauraki deed.[141]

4.2.3.3 *The conservation framework area and minerals relationship agreement*

Six months earlier, in September 2017, the Crown had written to the Tauranga collective advising that the Crown and the Hauraki collective had agreed to revise the Hauraki 'conservation framework area (previously proposed to be the Pare Hauraki redress area)'. The Crown explained that the area would now be the same as the Pare Hauraki commercial right of first refusal area.[142] The Minister later told Ngāti Ranginui that the revised area 'significantly reduced the overlap' with Ngāti Ranginui's rohe.[143]

In her evidence, Ms Campbell said that the conservation framework area was revised because it had not been defined in the initialled deed; thus, the Crown had defaulted to the Pare Hauraki redress area. She also said that the revised area reflected the agreement reached between the Hauraki and Tauranga collectives in 2012 – that their respective 'conservation framework areas would abut'.[144]

It was not until May 2018 that Ngāti Ranginui were able to view relevant parts of the Hauraki collective deed, including the revised conservation framework area.[145] They were unhappy, saying the area 'unreasonably overlap[ped]' with their area of interest.[146] They advised the Minister that the area 'should cease at the Waiorooro Stream, which is an acknowledged boundary marker between the Hauraki iwi and . . . Ngāti Ranginui'.[147]

The Minister took Ngāti Ranginui's concerns on board. He agreed the deed should be amended to move the southern boundary of the conservation framework area north to the Waiorooro stream.[148]

The decision was short-lived. On 25 June, Crown officials met with Mr Majurey to tell him the Minister sought these and other changes as a condition of signing the deed.[149] But in a meeting with the Minister a week later, Mr Majurey opposed shifting the boundary of the conservation framework area to the Waiorooro Stream.[150]

After yet another meeting between Crown officials, Mr Majurey, and other Hauraki iwi representatives on 9 July, officials agreed the conservation framework

140. Document A35 (Te Pio Kawe, affidavit, 18 February 2019), p 15; Minister for Treaty of Waitangi Negotiations to Pare Hauraki Collective and Tauranga Moana Iwi Collective, email, 18 September 2017 (doc A35(a), p 194)
141. Document A35(a), pp 219–220
142. Ibid, pp 189–192
143. Ibid, p 213
144. Document A48 (Leah Campbell, brief of evidence, 14 March 2019), p 88
145. Document A35 (Te Pio Kawe, affidavit, 18 February 2019), p 15; doc A48(a), p 1897
146. Ngāti Ranginui Settlement Trust to Minister for Treaty of Waitangi Negotiations, 28 May 2018 (doc A35(a), p 223)
147. Ibid
148. Document A48 (Leah Campbell, brief of evidence, 14 March 2019), p 65
149. Ibid, p 65
150. Ibid, p 66

area would not be amended: the southern boundary would not be moved north to Waiorooro Stream. Officials argued that moving the boundary would be inconsistent with the 2012 agreement that the two collectives would have 'abutting conservation management plans'.[151] At this meeting, Crown officials and Hauraki representatives also agreed to amend another redress item, the Hauraki minerals relationship area, so it matched the conservation framework area.[152]

Ngāti Ranginui felt unjustly excluded from this decision-making process: 'there were no negotiations – there was no information provided to Ngāti Ranginui'. It seemed to them that 'Hauraki drew a line and the Crown accepted it'.[153]

On 26 July, the Minister acknowledged Ngāti Ranginui's request to shift the conservation framework area boundary north to the Waiorooro Stream, but did not explicitly state the outcome of the request. His letter simply advised that 'the deed will maintain the redress agreed between Hauraki and Tauranga Moana iwi in 2012–2014'. The Minister also noted that the minerals relationship agreement area would be revised.[154]

Ngāti Ranginui replied two days later. Among other matters, they sought clarity on the conservation framework area boundaries. They also pointed out that the Minister's letter was the first they had heard of the minerals relationship agreement redress: 'we have had no engagement to date with the Crown [on this redress], raising new concerns'.[155] The following day, the Minister advised Ngāti Ranginui that the conservation framework area had not been changed, for the reason that Hauraki and Tauranga iwi had previously agreed 'to have adjoining conservation areas'.[156] No mention was made of the minerals relationship agreement.

A day later, on 2 August 2018, the Minister and Hauraki iwi signed the Pare Hauraki deed. Ngāti Ranginui lodged an application to the Waitangi Tribunal for an urgent hearing later that month.

4.3 Ngātiwai's Experience

4.3.1 Introduction

In chapter 1, we noted that Ngātiwai oppose significant items of redress offered to the Hauraki collective in the Pare Hauraki and Marutūāhu collective redress deeds, as well as redress offered to individual Hauraki iwi. In this section, we look at Ngātiwai's experience of the Crown's settlement and overlapping redress process, which resulted in the iwi's present claims. We start with the signing of the Hauraki collective framework agreement in 2010 and examine the beginnings of the Crown's engagement with Ngātiwai about the redress offered to Hauraki that overlapped with their interests, ending in 2014. We next discuss Ngātiwai's experience of the engagement process in 2016. That year finished with the initialling of

151. Ibid, p 66
152. Ibid, p 66
153. Submission 3.3.32, p 14
154. Document A35(a), p 232
155. Ibid, pp 238–241
156. Ibid, p 242

the Pare Hauraki Collective redress deed. Finally, we describe the parties' engagement throughout 2017 and 2018, culminating in the signing of the Pare Hauraki Collective redress deed in August 2018.

4.3.2 Overlapping redress engagement process, 2010–14

In this period, settlement negotiations affecting Ngātiwai were proceeding on multiple fronts. On 1 October 2010, the Crown and Hauraki collective signed a framework agreement that included an agreement to consider amending place names of significance to Hauraki iwi. One of these was Great Barrier Island, which lies within the rohe of Ngātiwai.[157] In 2011, the Crown began negotiating with Hauraki iwi about potential redress for the settlement of their Treaty claims. On 26 January 2011, the Crown advised Ngātiwai that negotiations were underway with five Hauraki iwi: Ngāti Maru, Ngāti Pāoa, Ngāti Tamaterā, and Ngaati Whanaunga.[158] Later that year, on 22 July 2011, the Crown and another Hauraki iwi, Hako, signed an agreement in principle.[159]

In 2012, the New Zealand Geographic Board agreed to a Crown recommendation to change the name of Great Barrier to Aotea/Great Barrier Island, as sought by the Hauraki collective. Between 2012 and 2016, the Crown carried out an overlapping engagement process, consulting with other iwi about the recommended name change. Ngāti Rēhua – Ngātiwai ki Aotea – who, as we note in chapter 1, affiliate to Ngātiwai – were consulted with relatively early in the process and, while they supported a name change, they objected to it being included in the Pare Hauraki Collective settlement deed; they wanted it in their own deed.[160] During 2011 and 2012, though, the Crown did not engage with Ngātiwai.[161]

On 17 May 2013, Marutūāhu iwi and the Crown signed a record of agreement.[162] Claimant Haydn Edmonds maintained the Crown had not engaged with Ngātiwai prior to the signing, despite the agreement including an arrangement to explore the vesting of cultural redress properties within Ngātiwai's area of interest. These included properties at Mahurangi and within the Hauraki Gulf. The agreement also included a coastal statutory acknowledgement, a proposal to explore fisheries redress, and a statement that the parties would explore right of first refusal redress for the Marutūāhu iwi on Aotea/Great Barrier Island. According to the claimants, it would not be until August 2016 that Ngātiwai would receive the details of the proposed redress for Marutūāhu iwi on Aotea.[163]

Following the signing of the Marutūāhu record of agreement, Ngātiwai wrote to the then Minister for Treaty of Waitangi Negotiations, the Hon Christopher Finlayson, on 6 June 2013. They advised him that they wished to engage with

157. Document A48(b) (Leah Campbell, brief of evidence, 12 April 2019), p 15
158. Document A45(a), p 183
159. Submission 3.3.11(a), p 4
160. Document A48(b) (Leah Campbell, brief of evidence, 12 April 2019), pp 15–16
161. Submission 3.3.11(a), p 29
162. Document A8 (Haydn Edmonds, brief of evidence, July 2017), p 4; doc A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 30
163. Submission 3.3.11(a), p 33; doc A8, pp 4–5

Marutūāhu iwi, given the extent of their overlapping interests. They also informed the Minister that the documentation about the proposed redress did not 'clarify the nature and extent of the interest' or the exclusivity of any redress, and said that they were opposed to the transfer of certain assets.[164]

Ngātiwai met with the Crown negotiator on 4 October 2013. On the same day, the Crown wrote to all groups with overlapping interests, including Ngātiwai, requesting feedback on the Marutūāhu record of agreement signed a few months earlier.[165] This was followed up with an email on 18 October, attaching the draft boundary of the coastal statutory acknowledgement proposed for the Marutūāhu iwi.[166]

Still on 18 October, the Crown wrote to all groups with overlapping interests, including Ngātiwai, enclosing the proposed redress offers. The letter explained that the Marutūāhu iwi would be seeking to engage with them on the proposed redress package. The Crown wanted feedback from Ngātiwai (and other overlapping groups) on any engagement with Marutūāhu and identification of unresolved issues by 20 October 2013.[167] On page 56 is the one-pager Ngātiwai received, which the Crown negotiator described as 'detailing' the proposed redress.[168]

The Crown negotiator then arranged to meet with Ngātiwai representatives and the negotiator for Marutūāhu, Paul Majurey, on 31 October 2013. Claimant counsel described the meeting as a 'café "meet and greet", and the only meeting between Ngātiwai and the Marutūāhu negotiator throughout the entire overlapping claims process.'[169] Mr Edmonds explained that the meeting was merely introductory:

> I had one meeting with Mr Majurey in 2013 at a café in Warkworth . . . It was our first meet and greet. We did not discuss Marutūāhu's interests. We exchanged niceties and Mr Majurey outlined their intention to move towards a Treaty settlement. The meeting was brief and there was no discussion of overlapping areas or any detailed settlement issues. It was a first meet and greet only, nothing more.[170]

Later that day, Ngātiwai sent an email to the Crown confirming that they had met with the Marutūāhu and Crown negotiators. Ngātiwai said they were still concerned about statutory acknowledgements to Marutūāhu and what the significance of those acknowledgements would mean, especially to the relevant consent authorities. They again informed the Crown that 'the nature and extent of Marutūāhu's interests in the draft Record of Agreement is not clear'. They also stated that the proposed statutory acknowledgements in relation to Aotea went further than what the two groups had previously agreed to be Hauraki's

164. Document A45(a), p 190
165. Document A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 31; doc A45(a), pp 195–196
166. Document A45(a), pp 201–203
167. Ibid, pp 209–212
168. Ibid, p 212; doc A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 32
169. Submission 3.3.1, p 5
170. Document A60 (Haydn Edmonds, brief of evidence, 29 March 2019), p 4

Summary of Marutūāhu Iwi Collective Redress

Cultural redress vestings
Mahurangi Scenic Reserve, Marutūāhu PSGE to be administering body
2.5 ha from Motuora Island Recreation Reserve, terms and conditions to be agreed
A vesting of 0.5 ha from Tiritiri Matangi Scientific Reserve with Department of Conservation to retain full management and administration authority
2.37 ha from Motuihe Island Recreation Reserve, Marutūāhu PSGE to be administering body
Guardhouse building on Fort Takapuna Recreation Reserve
Blackett's Point: 97 Gladstone Road (site of the Fred Ambler lookout) and 110A Gladstone Road (small grassed bank)
Other cultural redress
Statutory acknowledgements to be agreed (but to include the NZTA land at Mechanics Bay and exploration for Fort Takapuna)
Coastal statutory acknowledgement
Agreement with NZTA about involvement in the Grafton Gully project
Cultural redress in respect of Tāmaki Block/Kohimarama being explored
Cultural redress in respect of Hamlins Hill (Mutukāroa) being explored
Commercial redress
Maramarua CFL (not including the Maungaroa Bush Covenant Area)
3 NZDF properties on Calliope Road and NZDF degaussing site (Whangaparaoa Peninsula)
Landbank properties (final list to be confirmed) – DSP where possible
4 NZDF North Shore housing blocks, subject to a short term leaseback to the NZDF
NZDF Tāmaki Leadership Centre (Whangaparaoa Peninsula), subject to long term leaseback to the NZDF
NZDF naval museum property at Torpedo Bay, jointly with Ngāi Tai ki Tāmaki, subject to long term leaseback to NZDF
DSP of Panmure Probation Centre and Boston Road Probation Centre for up to two years, subject to leaseback to the Department of Corrections
Potential DSP of specified list of Ministry of Education school sites (land only) for up to two years, subject to leaseback to the Ministry of Education
Deferred purchase of any NZTA land at Mechanics Bay that becomes surplus within 35 years of settlement date
Short-term deferred purchase of tennis court area and existing local purpose reserve at Blackett's Point (Gladstone Park), terms and conditions to be agreed, subject to agreement of Auckland Council
Shared RFR with Ngāti Whātua o Kaipara over specified properties
Exclusive RFR area in the Kaipara negotiation area
Shared RFR area in the Mahurangi negotiation area with Te Kawerau ā Maki and Te Rūnanga o Ngāti Whātua
RFR redress in respect of Aotea being explored

Summary of Marutūāhu iwi collective redress (doc A45(a), p 212)

commercial interests. Nor was any detail provided as to the extent of the fisheries management sustainability decisions, and Ngātiwai were 'unclear [as] to what extent any exclusivity is sought with respect to any redress'.[171]

The Crown responded the same day by email informing Ngātiwai that a statutory acknowledgement is non-exclusive and stating that the exclusive redress offered was for the transfer of specific pieces of land, including Mahurangi (8.12 hectares), Motuora Island (2.5 hectares) and the 'potential transfer of land on Kawau (up to one hectare at Schoolhouse Bay)'.[172]

In his evidence, the Crown negotiator, Michael Dreaver, said that the Crown did not hear back from Ngātiwai and was 'therefore of the impression all concerns of Ngātiwai in relation to the collective redress contained in the Marutūāhu iwi record of agreement had been addressed'.[173]

In November 2013, the Crown presented Marutūāhu with a redress proposal that included right of first refusal redress on Aotea, subject to the Crown resolving any overlapping interests between Marutūāhu and Ngāti Rēhua – Ngātiwai ki Aotea (hereafter 'Ngāti Rēhua'). The Minister wrote to Ngāti Rēhua encouraging them to engage with Marutūāhu iwi about any overlapping interests. The Minister did not write to Ngātiwai about the offers to Marutūāhu. Mr Dreaver explained that as the Crown had not received any further correspondence from Ngātiwai since the email on 31 October, 'I considered the matter was resolved to the satisfaction of the Crown'.[174]

In March 2014, Ngātiwai contacted the Crown requesting information about the redress being offered to Marutūāhu on Aotea. The Crown responded that it was discussing the matter with Ngāti Rēhua, whom the Crown considered represented Ngātiwai's interests on Aotea.[175] In response, Ngātiwai wrote to the Minister on 1 April 2014 advising him of the nature of the iwi's relationship with Ngāti Rēhua; they stated both Ngātiwai and Ngāti Rēhua had mana whenua on Aotea, and Ngātiwai supported Ngāti Rēhua's position. Ngātiwai continued to challenge any Marutūāhu claims over Aotea and north of Takatu Point on the mainland.[176]

In his reply, the Minister told Ngātiwai that the only redress offered to Marutūāhu iwi north of Takatu Point was a coastal statutory acknowledgement, reiterating previous advice that such redress was non-exclusive. The Minister also advised that the Crown recognised Ngāti Rēhua as a hapū of Ngātiwai and 'as kaitiaki and the resident group on Aotea' and welcomed Ngātiwai's ongoing engagement with Ngāti Rēhua.[177]

171. Document A45(a), pp 213–214
172. Ibid, p 216
173. Document A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 32
174. Ibid, p 33; doc A45(a), pp 294–295
175. Submission 3.3.11(a), p 31; doc A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 40; doc A45(a), p 474
176. Document A45(a), p 475
177. Ibid, p 278

From May to July, the Crown continued to engage only with Ngāti Rēhua about Aotea redress and on 18 July, the Minister wrote to Ngāti Rēhua advising them of his preliminary view about the redress to Marutūāhu iwi. He intended to maintain the right of first refusal redress on Aotea, in particular over conservation land, but to amend the proposal so that the redress would be offered only to Ngāti Maru, Ngāti Tamaterā, and Te Patukirikiri, not to the whole Marutūāhu collective.[178]

On 25 July 2014, Ngātiwai advised the Crown that they were unaware of the specific details about the redress being offered to individual iwi on Aotea and 'respectfully request[ed] that this information' be made available to them immediately for feedback. They referred to the Crown's policy preference for iwi with overlapping interests to engage directly and resolve issues themselves and noted the difficulty they had trying to meet with the Marutūāhu collective.[179] Ngātiwai did not receive an immediate reply to this letter and the Crown continued to deal with Ngāti Rēhua. On 4 August, the Minister wrote to Ngāti Rēhua setting out his final decision, which was the same as his preliminary decision.[180]

The Crown finally wrote back to Ngātiwai on 14 October. In the letter, officials advised Ngātiwai that they had not received any information that would make it appropriate for the Crown to deal with Ngātiwai about Aotea; officials said it would be helpful for Ngātiwai to 'outline what are the separate interests of Ngātiwai on Aotea.'[181]

In his evidence, Mr Dreaver stated that he had 'no record or recollection of a response from Ngātiwai at this time.'[182] However, the evidence shows that on 17 October 2014 Ngātiwai sent an Official Information Act request for information to help them understand why they had not been involved in the overlapping engagement process about interests on Aotea.[183] Ngātiwai received an acknowledgement on 14 November. In December, the Crown sent them redacted copies of briefing papers to the Minister on his preliminary decisions on overlapping interests (dated 14 November 2013), preliminary decision about Marutūāhu redress on Aotea (dated 24 June 2014) and final decision on Marutūāhu and Ngāti Rēhua overlapping interests at Aotea (dated 31 July 2014).[184]

4.3.3 The engagement process throughout 2016

We saw no further correspondence between the Crown and Ngātiwai throughout 2015. Crown witness, Leah Campbell, explained that, in December 2014, the Crown had paused the negotiations with the Marutūāhu collective and Hauraki iwi Ngāti Maru, Ngāti Tamaterā, and Te Patukirikiri. We were not provided with an explanation as to why negotiations had paused. Negotiations recommenced

178. Document A45(a), p 448
179. Ibid, p 481
180. Document A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 39; doc A45(a), p 461
181. Document A45(a), p 483
182. Document A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 41
183. Document A33(a), p 81
184. Ibid, pp 82–168

in early 2016.[185] During this time though, the deed of settlement with another Hauraki iwi, Ngāi Tai ki Tāmaki, was signed on 7 November 2015. Mr Edmonds claimed that the Crown first wrote to Ngātiwai about the Ngāi Tai ki Tamaki deed in June 2017, well after it had been signed.[186]

In April 2016, Ngātiwai wrote to the Crown supporting Ngāti Rēhua in their opposition to any redress offered to the Marutūāhu collective on Aotea.[187] The Crown then sent Ngātiwai information to start an overlapping engagement process about the redress being offered to Ngāti Rēhua. As Ngātiwai's counsel stated, in their summary of the Crown's engagement, 'The Crown dealt with Ngātiwai as though it had an "overlapping" claim with its own hapu.'[188]

During this 'engagement process', Ngātiwai continued to request – including through another Official Information Act request on 5 August 2016 – information on what redress the Minister had determined for Marutūāhu on Aotea. They also wanted the Crown to find out why the Marutūāhu iwi had failed to engage with Ngātiwai about the redress on Aotea.[189]

On 22 August 2016, Ms Campbell, as deputy director, negotiations and settlements, wrote to Ngātiwai outlining the redress proposed for Marutūāhu iwi. The letter stated that the Marutūāhu collective was no longer being offered redress on Aotea but individual iwi – namely Ngāti Maru, Ngāti Tamaterā, Ngaati Whanaunga, and Te Patukirikiri – were being offered iwi-specific redress on Aotea. The redress included shared right of first refusal over conservation land for commercial redress and the vesting of conservation land, as well as statutory acknowledgements for cultural redress. Ms Campbell requested feedback on the proposed redress by 5 September 2016.[190]

In response, Ngātiwai expressed their concern about the Crown's process:

> We are very disappointed that you have left it until now to provide us with an opportunity to respond to overlapping claims in respect of Aotea (Great Barrier Island). This has been a matter of some concern to us for a considerable period of time. We have documented evidence to show that we asked to be involved in these discussions long ago but were dismissed at that time. We would like you to . . . advise the Minister of this in your next briefing as it has not been for lack of willingness on our part to engage in these discussions.[191]

In September 2016, Ngātiwai wrote to the Crown with their preliminary response, objecting to the redress offered to individual Marutūāhu iwi within their rohe. Their letter stated that they could not give a definitive response until they

185. Document A48(b) (Leah Campbell, brief of evidence, 12 April 2019), p 25
186. Document A8 (Haydn Edmonds, affidavit, 21 July 2017), p 5
187. Document A33(a), p 169
188. Submission 3.3.11(a), p 33
189. Document A33(a), pp 196–197
190. Ibid, pp 204–208
191. Ibid, p 209

received full information about the redress being offered to other iwi on Aotea.[192] They also stated that they had concerns about other redress offered to Marutūāhu elsewhere:

> It is of concern to the Board to have learned through receipt of OIA material that the Crown has proposed, or possibly even approved, the transfer of land on Motuora lsland and Kawau Island' and Mahurangi to Marutūāhu . . . The Board is clear that the transfer of land parcels on these islands to Marutūāhu (Ngāti Pāoa), by way of vesting, RFR or otherwise, would be inappropriate and unacceptable, and would breach Ngātiwai, including Ngāti Manuhiri customary Treaty rights.[193]

Following this letter, Ngātiwai made another Official Information Act request on 18 October 2016 for information that the Marutūāhu iwi had supplied to support their claims for redress 'on and around Aotea.'[194] In response, the Crown provided two research documents as well as an assessment by an independent historian commissioned to research customary interests on Aotea, and an Office of Treaty Settlements internal draft memorandum titled 'Customary interests on Aotea (Great Barrier Island)' dated 22 January 2014.[195]

After receiving this information, Ngātiwai met with the Crown on 28 October 2016. At the meeting, Ngātiwai maintained strong opposition to any Marutūāhu iwi being given redress on Aotea beyond statutory acknowledgements.[196]

Ngātiwai followed up this meeting on 3 November 2016 with an email confirming the preliminary response they had made in September. They stated that they did not oppose coastal area statutory acknowledgements to specific Marutūāhu iwi 'as long as they can describe a customary relationship with the Mahurangi coastal marine area, as at and before 1840'. However, Ngātiwai opposed the proposed vesting of land on Motuora and Kawau Island and at Mahurangi.[197]

In her evidence, Ms Campbell referred to Mr Dreaver's account of the engagement process up to May 2014, where he said the Crown had not heard back from Ngātiwai after the Minister's letter in May 2014. She stated how it 'came as a surprise some 2½ years later, on 3 November 2016, to receive a letter from Ngātiwai advising of their objection to the proposed transfer of three properties to the Marutūāhu collective at Kawau Island Historic Reserve, Mahurangi Scenic Reserve, and Motuora Island Recreation Reserve'. According to Ms Campbell, 'This was the first substantive notice of objection to this redress, despite the earlier engagement in 2013'.'[198]

192. Document A48(a), pp 493–525
193. Ibid, pp 522–523
194. Document A33(a), p 264
195. Ibid, pp 271–289; submission 3.3.11(a), pp 34–35
196. Document A48(b) (Leah Campbell, brief of evidence, 12 April 2019), p 27
197. Ngātiwai Trust Board to Leah Campbell and Juliet Robinson, email, 3 November 2016 (doc A48(a), pp 442–446)
198. Document A48(b) (Leah Campbell, brief of evidence, 12 April 2019), pp 22–23

This statement cannot pass without comment. In our view, it would have been surprising if Ngātiwai had *not* been objecting, given their continued resistance to redress being offered in their rohe without full disclosure to them, and their persistent requests for information. The initial notification they received of the redress being offered at these locations was less than fulsome; it also came at a time when they were particularly concerned about offers being made on Aotea, on which they had not been consulted. As Ngātiwai's September 2014 letter noted, it was not until they had received more information through an Official Information Act request that they realised the extent of the redress being offered. The fact that the Crown may not have been aware earlier of their concerns, however, does not invalidate those concerns. The Crown is quick to make assumptions when it does not hear back immediately from iwi but the Crown itself has been shown to be slow to respond to requests from iwi.

Ms Campbell's statement also possibly reflects the Crown's lack of awareness of the number of requests for feedback that Ngātiwai was receiving from the Crown about the redress offers to different iwi. Ngātiwai's letter noted the difficulties of being engaged in multiple 'overlapping claims and engagement processes' with different teams from the Office of Treaty Settlements.[199] Another letter from Ngātiwai on 15 March 2017 showed a sample of the letters they had received from the Crown requesting feedback on different redress proposals:

22 November 2016:	Hako Treaty settlement negotiations with the Crown
13 January 2017:	Overlapping claims regarding the proposed protocol area map for the Taonga Tūturu and primary industries protocols [Feedback was sought by 19 January 2017.[200]]
18 January 2017:	Overlapping claims regarding the proposed area over which the Haruaki Collective Fisheries Quota right of first refusal redress applies [Feedback on this matter was due by 2 February 2017.[201]]
27 February 2017:	Overlapping claims for the Taonga Tūturu and primary industries protocol areas
1 March 2017:	Treaty settlement negotiations with Ngaati Whanaunga: Overlapping claims[202]

As claimant counsel told us, the Crown's process was 'dominated by letter writing. In the volumes of folders we have before us today are evidence of how proficient the Crown is at writing letters'.[203]

In any event and despite Ngātiwai's concerns and objections, the Minister wrote on 11 November 2016 confirming his preliminary decision about the commercial and cultural redress offers to Ngāti Maru, Ngāti Tamaterā, Ngaati Whanaunga, and

199. Document A48(a), p 442
200. Document A33(a), pp 319–323
201. Document A48(a), pp 309–311
202. Ibid, p 333
203. Transcript 4.1.1, p 113

Te Patukirikiri on Aotea. His letter acknowledged that Ngātiwai and Marutūāhu iwi had not met but he referred to Ngātiwai having discussed issues with the Ngāti Maru negotiator – the occasion that claimant counsel described as 'the one café meeting that had occurred in 2013'. The Minister also acknowledged that those discussions 'did not resolve any of the overlapping claims', which meant that he 'must make, on behalf of the Crown, a final determination on the redress the Crown will offer'.[204]

On 22 December 2016, the Crown and Hauraki iwi initialled the Pare Hauraki Collective redress deed.[205]

4.3.4 Events following initialling of the Pare Hauraki Collective redress deed

In December 2016, while finalising the Hauraki deed for initialling, the Crown had identified that it had not consulted with relevant iwi about some other proposed redress items – including rights-of-first-refusal for fisheries quota, and protocols with the Ministry of Culture and Heritage and Ministry of Primary Industries. The Crown decided that the area covered by the proposed fisheries rights-of-first-refusal deed had to be left out of the collective deed pending a consultation process.

As we describe above, several different Crown teams conducted consultation processes throughout 2017 with Ngātiwai and others, meaning the iwi was regularly dealing simultaneously with multiple Crown demands for information or feedback.[206] According to Mr Edmonds, the demands on Ngātiwai were exacerbated because the Crown did not provide 'an overall programme or timeline for the various Hauraki Settlements (ie the Marutūāhu Collective, the Hauraki collective and individual iwi settlements) so that the Trust Board has no visibility of the workplan or likely timeframe when its input will be required'. On the occasions when timelines were proposed, 'the Trust Board is given a couple of weeks to provide a response.'[207]

Ngātiwai and the Crown met on 31 January to discuss the Hauraki iwi protocol and fisheries proposals. Ngātiwai expressed surprise that they had not been engaged earlier on the proposed redress. They continued opposing redress offered to Hauraki on Aotea, and were particularly concerned about the area covered by the proposed fisheries rights-of-first-refusal deed. During the meeting, Ngātiwai also drew Crown officials' attention to the coastline arrangements that had been reached between iwi under the Māori Fisheries Act 2004.[208]

Ngātiwai followed up this meeting with a letter in March 2017. They noted that 'once again [Ngātiwai] finds itself in an unsatisfactory, last minute, reactive situation responding to the final stage of Treaty settlement for a number of neighbouring iwi'. In his evidence, Mr Edmonds described the effect of constantly

204. Document A48(a), p 678
205. Document A48(b) (Leah Campbell, brief of evidence, 12 April 2019), p 17
206. Ibid, pp 6–7, 17
207. Document A8 (Haydn Edmonds, affidavit, 21 July 2017), p 7
208. Document A48(a), pp 315–316, 332

being 'engaged so late in the process'. It 'has meant the Trust Board has been on the back foot and been given limited time to provide its position to the Crown and to attempt to influence the Crown's decisions.'[209]

Ngātiwai's letter also noted they were making their comments 'on the basis of the very limited information provided by [the Office of Treaty Settlements] and the total lack of information provided by the Hauraki iwi concerned.' Neither had any Hauraki iwi 'made any attempt to contact the Board to arrange engagement hui to discuss their redress.'[210]

In their claim, Ngātiwai had a particular grievance that the Crown had done little to facilitate kanohi ki te kanohi tikanga processes.[211] Claimant counsel submitted the only hui held was at the instigation of Ngātiwai, which occurred in May 2018.[212] Claimant Aperahama Edwards explained:

> We did not and have not had this opportunity to engage kanohi ki te kanohi other than with Hako. That engagement resulted in Hako not being able to explain their interests on Aotea to us. As a result Aotea is no longer included in the statement of association for Hako. The same tikanga based engagement should have happened with all other iwi of Hauraki who are receiving redress on Aotea.[213]

The Minister's reply to Ngātiwai's March 2017 letter informed them that his preliminary decision was that the Hauraki collective fisheries right-of-first-refusal area should be revised to reflect coastline entitlements agreed by iwi, under the Māori Fisheries Act 2004. Attached to his letter was a map showing the coastline over which those entitlements would apply.[214]

Ngātiwai acknowledged the revision. But they remained concerned that officials did not appear to fully understand the allocation model contained in the Māori Fisheries Act and were continuing to promote a non-exclusive coastline map for inclusion in the Hauraki collective settlement legislation. They also questioned how rights-of-first-refusal could be described as non-exclusive, as by their nature they gave the holder an entitlement before anyone else. They suggested the best solution was to remove the coastline map from the deed and ensure any text provided was consistent with the allocation method agreed under the Māori Fisheries Act.[215]

The Minister's final decision was conveyed to Ngātiwai on 13 July 2017.[216] His preliminary decision was unchanged, but the previous coastline map was replaced with another. The first map had shown a blue boundary outlining the length of the coastline. The latest map had no lines. Instead, two big red dots marked the

209. Document A8 (Haydn Edmonds, affidavit, 21 July 2017), p 5
210. Document A48(a), p 340
211. Claim 1.1.3(a), pp 18, 26
212. Submission 3.3.1, p 5
213. Document A61 (Aperahama Edwards, brief of evidence, 29 March 2019), pp 3–4
214. Document A48(a), pp 353–356
215. Ibid, pp 358, 363–365
216. Ibid, pp 433–436

northern and southern boundaries of the coastline – presumably to indicate that the area was non-exclusive.[217]

Throughout 2017, Ngātiwai repeatedly raised their concerns about the proposed redress and Marutūāhu's refusal to meet with them.[218] In August 2017, the Minister informed Ngātiwai that he considered the redress offered to Hauraki iwi on Aotea was 'reasonable and appropriate' and their concerns about redress at Mahurangi had been addressed.[219] By this time, Ngātiwai had applied to the Waitangi Tribunal for an urgent hearing into their concerns about the Hauraki redress.[220]

After the Minister's letter, the following individual deeds of settlement were initialled:

- Ngāti Pāoa, 18 August 2017;
- Ngaati Whanaunga, 25 August 2017;
- Ngāti Maru, 8 September 2017;
- Te Patukirikiri, 8 September 2017; and
- Ngāti Tamaterā, 20 September 2017.

Ngātiwai continued to raise their concerns with the Crown. In June 2018, Ngātiwai advised the new Minister for Treaty of Waitangi Negotiations, Hon Andrew Little, that, apart from Ngāti Hako and Ngāti Pāoa, the rest of the Hauraki iwi had ignored their requests for hui. They asked the Minister to take no further steps to finalise the settlements until 'an earnest attempt' had been made by the groups concerned 'to come to the "table" to address overlapping claims.'[221]

On 26 July 2018, the Minister advised Ngātiwai of his decision to sign the Pare Hauraki Collective redress deed. He noted their continued opposition to the fisheries rights-of-first-refusal deed but was unwilling to revisit the previous Minister's final decision made in July 2017.[222]

In another letter, on the same day, the Minister informed Ngātiwai that he had initialled the Marutūāhu Iwi collective redress deed. He advised that he considered the Crown had taken 'reasonable steps' to address overlapping interests. He was also 'aware that some iwi are unhappy with the outcome of overlapping claims decision' and that he was open to further discussion 'on these matters between iwi, including through a tikanga-based process' but this needed to be iwi led.[223] The deed was initialled on 27 July 2018.[224]

Six days later, on 2 August 2018, the Crown and the Hauraki collective signed the Pare Hauraki Collective redress deed.[225]

217. Document A48(a), p 432
218. Submission 3.3.11(a), pp 37–38
219. Document A33(a), pp 470–471
220. Claim 1.1.3
221. Document A48(a), p 449
222. Ibid, p 440
223. Ibid, p 464
224. Ngāti Maru, Ngāti Paoa, Ngāti Tamaterā, Ngaati Whanaunga, Te Patukirikiri, and the Crown,'Marutūāhu Iwi Collective Redress Deed', 27 July 2018
225. Hako, Ngāi Tai ki Tāmaki, Ngāti Hei, Ngāti Maru, Ngāti Paoa, Ngāti Porou ki Hauraki, Ngāti Pūkenga, Ngāti Rāhiri Tumutumu, Ngāti Tamaterā, Ngāti Tara Tokanui, Ngaati Whanaunga, Te Patukirikiri, and the Crown, 'Pare Hauraki Collective Redress Deed', 2 August 2018

4.4 Chronological Summary of the Individual Iwi Experience

Tauranga iwi		Ngātiwai
2010: The Crown begins working with the Tauranga Moana Iwi Collective, the body that the three iwi established to negotiate collective redress for their shared interests. *2010–12:* The Crown and the Tauranga collective develop the Tauranga Moana Framework. It includes cultural redress and provisions for co-governance/co-management and sets up the Tauranga Moana Governance Group. *2010–15:* The Crown settles historical claims with the individual Tauranga Moana iwi Ngāi Te Rangi, Ngāti Ranginui, and Ngāti Pūkenga. *1 October 2010:* The Crown signs a framework agreement with the Pare Hauraki Collective.	**2010**	*1 October 2010:* The Crown and the Pare Hauraki Collective sign a framework agreement, including agreement to consider amending place names significant to Hauraki iwi, such as Great Barrier Island.
22 December 2011: The Crown signs a statement of position and intent with the Tauranga collective summarising the status of the redress negotiations and outlining what has to occur for final agreement on collective redress.	**2011**	
2012: The Tauranga Moana Framework becomes a significant part of the discussions about the overlapping interests between the Crown and the Hauraki collective. *19 September 2012:* The Hauraki collective applies to the Waitangi Tribunal for an urgent hearing into the Crown's proposal to provide framework-related commitments to the Tauranga collective. The hearing is adjourned when the Crown and Hauraki agree that the framework would not prevent them negotiating 'no less favourable co-governance arrangements with local government in their areas of customary interests' than were provided to the Tauranga collective. *2 October 2012:* The Tauranga collective writes to the Minister raising concerns about the proposed redress offered to Hauraki but says it will conditionally support the proposals.	**2012**	*2012:* The New Zealand Geographic Board agrees to the Crown's proposal to change the name of Great Barrier to Aotea/Great Barrier Island, as sought by the Hauraki collective. *2 November 2012:* The Crown initials the Tauranga Moana Iwi collective redress deed.

Tauranga iwi		Ngātiwai
	2013	*2013–16:* Overlapping engagement processes are completed for Aotea/Great Barrier Island and other recommended name changes. The processes include Crown engagement with Ngāti Rēhua – Ngātiwai ki Aotea, who object to the island's name being changed through the Pare Hauraki Collective settlement deed. *17 May 2013:* Marutūāhu iwi sign a record of agreement. *6 June 2013:* Ngātiwai advise the Minister they wish to engage with Marutūāhu iwi, given the extent of their overlapping interests. *18 October 2013:* The Crown sends Ngātiwai information about the redress offered to Marutūāhu and seeks feedback. Ngātiwai expresses concern about the statutory acknowledgements, saying they go beyond what had already been agreed with Hauraki. The Crown confirms that the statutory acknowledgements are non-exclusive. *15 November 2013:* The Crown presents Marutūāhu with a redress proposal that includes Aotea, subject to the Crown resolving any overlapping interests between Marutūāhu and Ngāti Rēhua. On the same day, the Minister writes to Ngāti Rēhua advising that further engagement with Marutūāhu is needed over the redress on Aotea and expressing support for the island's name change.
	2014	*19 March 2014:* Ngātiwai advise the Crown of their concerns over the proposed redress on Aotea for Marutūāhu; the Crown responds that it is discussing the matter with Ngāti Rēhua, who it considers represent Ngātiwai's interests on Aotea. *1 April 2014:* Ngātiwai advises the Minister about its relationship with Ngāti Rēhua, saying both have mana whenua on Aotea. Ngātiwai also challenges Marutūāhu's interests in Aotea and some mainland sites. *May 2014:* The Crown continues to engage only with Ngāti Rēhua about the Aotea redress. *15 May 2014:* The Minister advises Ngātiwai that the Crown will continue engaging with Ngāti Rēhua, who it recognises as a hapū of Ngātiwai and as kaitiaki and the resident group on Aotea.

Tauranga iwi		Ngātiwai
July 2014: The Crown negotiates over Hauraki iwi participation in the framework and adds a fifth seat to the governance group. *23 August 2014:* The Tauranga collective gives qualified acceptance to the fifth seat.	**2014**	*25 July 2014:* Ngātiwai advise the Crown of their grave concerns about the lack of opportunities to meet with the Marutūāhu collective and the inadequate information they are receiving about the proposed Aotea redress. The correspondence continues. In October, the Crown asks Ngātiwai to formally outline their interests on Aotea, separate from Ngāti Rēhua's. *17 October 2014:* Ngātiwai make an Official Information Act request about their overlapping interests with Hauraki iwi on Aotea.
2015–16: Efforts to resolve framework-related matters, especially the fifth-seat proposal, are ongoing. Tauranga iwi request information from the Crown about the proposed redress currently under discussion with the Hauraki collective and individual iwi. *21 January 2015:* The Crown and the Tauranga collective sign the Tauranga collective deed. *6 August 2015:* The Waitangi Tribunal grants the Hauraki collective an urgent hearing into the framework provisions in the Tauranga collective deed. *31 August 2015:* The Minister proposes removing the framework so legislation enacting the Tauranga collective deed can proceed. *3 November 2015:* Legislation giving effect to the Tauranga collective redress, excluding the framework, is introduced to Parliament.	**2015**	
	2016	*2016:* The Crown begins an overlapping interest engagement process with Ngātiwai. *5 August 2016:* Ngātiwai make another Official Information Act request. The Crown sends Ngātiwai information about the redress proposed for Marutūāhu iwi. *20 September 2016:* Ngātiwai write to the Crown objecting to the redress offered to individual Marutūāhu iwi within their rohe. *18 October 2016:* Ngātiwai make another Official Information Act request for details of Marutūāhu's claims to Aotea redress. The Crown provides two research documents.

Tauranga iwi		Ngātiwai
3 November 2016: The Tauranga collective formally expresses concern to the Minister about the redress the Crown is offering Hauraki in their collective deed.	**2016**	*3 November 2016:* Ngātiwai write to the Crown objecting to Marutūāhu being offered specific redress items on Aotea and elsewhere. The Crown and Ngātiwai dispute the timing and nature of previous engagement over this redress. *11 November 2016:* The Minister writes to Ngātiwai confirming his preliminary decision on the cultural and commercial redress offered to individual Marutūāhu iwi on Aotea. *December 2016:* while readying the Hauraki collective deed for initialling, the Crown identifies that it has not consulted with relevant iwi about some other proposed redress items – including rights-of-first-refusal for fisheries quota and certain protocols. It determines that some items must be left out of the collective deed pending a consultation process, which several different Crown teams then conduct throughout 2017 with Ngātiwai and others.
22 December 2016: The Crown and Hauraki initial the Pare Hauraki Collective redress deed. It includes a 'preservation clause' retaining the fifth-seat proposal. The Tauranga collective learns of this only three days before the initialling.		*22 December 2016:* The Crown and Hauraki initial the Pare Hauraki Collective redress deed.
	2017	*January–July 2017:* Ngātiwai repeatedly raise concerns about the proposed redress and Marutūāhu's refusal to meet with them.
March 2017: Ngāi Te Rangi apply to the Waitangi Tribunal for an urgent hearing into their concerns about the Hauraki redress; Ngāti Ranginui lodges their claim in August 2018. Meanwhile, Tauranga iwi efforts to resolve redress disputes continue through a tikanga-based process.		*July 2017:* Ngātiwai apply to the Waitangi Tribunal for an urgent hearing into their concerns about Hauraki redress (the statement of claim is amended in December 2018).

Tauranga iwi		Ngātiwai
6 July 2018: The Minister informs Tauranga iwi that he intends signing the Pare Hauraki Collective redress deed.	**2018**	*26 July 2018:* The Minister informs Ngātiwai that he intends signing the Pare Hauraki Collective redress deed. He notes their continued opposition but says officials view the redress as reasonable and in accordance with coastline agreements reached between iwi, including Ngātiwai, under the Māori Fisheries Act 2004. *26 July 2018:* The Minister writes another letter to Ngātiwai advising them that he has initialled the Marutūāhu Iwi collective redress deed.*
2 August 2018: The Crown and the Hauraki collective sign the Pare Hauraki Collective deed.		*2 August 2018:* The Crown and the Hauraki collective sign the Pare Hauraki Collective deed.

* According to other Crown evidence (doc A48(b), p 23), the deed was in fact initialled on 27 July 2018.

CHAPTER 5

TRIBUNAL ANALYSIS AND FINDINGS ON CROWN POLICIES, PROCESSES, AND PRACTICES

5.1 Introduction

In this chapter, we consider and make findings on the central questions in this inquiry as they relate to Ngāti Ranginui, Ngāi Te Rangi, and Ngātiwai – namely, whether the Crown's policies, processes, and practices in respect of overlapping claims/redress were consistent with its Treaty obligations, and whether its application of those policies, processes, and practices in the Pare Hauraki negotiations was Treaty compliant.

We do so by examining the following themes, which emerged consistently and clearly from the claimant evidence and arguments:

- the adequacy of the Crown's consultation on proposed redress;
- the extent to which the Crown disclosed and shared information transparently;
- the Crown's understanding of customary interests;
- the effects of the Crown offering redress items in the rohe of other iwi;
- the use of tikanga-based processes to resolve conflict over redress;
- the extent to which the Crown protected all parties and maintained relationships;
- the effects of the Crown providing additional redress after initial agreements had been reached; and
- when redress was contested, the extent to which the Crown reconsidered redress proposals or proposed alternatives.

5.2 Consulting on Redress Proposals

5.2.1 The claimants' and interested parties' positions

The *Red Book* sets out the Crown's expectation that settling groups take responsibility for sharing information and discussing potential overlapping interests.[1] Ms Anderson also noted that as soon as the deed of mandate is advertised, the Crown begins encouraging the settling group to begin conversations with potential overlapping groups.[2]

1. *Red Book*, pp 52–54; doc A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 5
2. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 9

Crown counsel submitted that throughout the overlapping redress process, the Crown had 'acted in good faith'.[3] What good faith required was 'a properly informed decision, including consultation where appropriate in the circumstances'.[4] Quoting the *Forests* case, the Crown said that good faith may require consultation to be undertaken only 'on truly major issues'.[5]

However, the claimants argued that the Crown failed to consult in a timely and appropriate manner. Counsel for Ngātiwai submitted that the Crown had no upfront engagement process with Ngātiwai before offering redress to Hauraki. Moreover, Ngātiwai only had the opportunity to be involved much later than other groups with overlapping interests, particularly Ngāti Rēhua. Counsel also argued that the Crown would not consult over non-exclusive redress because it assumed such redress created no prejudice to Ngātiwai.[6]

Other claimants were similarly unhappy with the Crown's consultation processes. Counsel for Ngāi te Rangi submitted that the Crown did not engage with them and other Tauranga iwi on the Tauranga Moana Framework preservation clause before the Hauraki deed was drafted, initialled, and eventually signed.[7]

Ngāti Ranginui too argued that the Crown did not consult them about the preservation clause, nor the minerals relationship agreement even though the area it covers 'encroaches' into their rohe.[8] Ngāti Ranginui acknowledged that the Crown *did* consult with it on the conservation framework, but not until October 2013. This was well after the 2010 Hauraki collective framework agreement and the 2011 Hauraki iwi 'agreement in principle equivalents' had been signed; both included a provision regarding conservation relationship redress.[9]

The Ngāti Pūkenga Trust supported these arguments. They said that the Crown failed to provide an appropriate engagement/consultation process with Tauranga iwi when it offered Hauraki iwi additional redress extending south into Tauranga Moana, of which the claimants were previously unaware.[10]

5.2.2 The Crown's response

The Crown argued that it did not need to consult with overlapping groups on some of the issues raised by the claimants. For example, the Crown considered that it did not need to consult with Tauranga iwi about the framework's preservation clause because the clause 'did not confer redress but simply preserved agreed positions in an ongoing settlement process'.[11]

Likewise, the Crown submitted that it did not need to consult on the Hauraki worldview statement included in the Pare Hauraki Collective deed because the

3. Submission 3.3.26, p 112
4. Ibid, p 17
5. Ibid, p 21
6. Submission 3.3.11, pp 3, 4, 5
7. Submission 3.3.13, p 58
8. Submission 3.3.10, pp 4, 21
9. Ibid, p 20
10. Submission 3.3.24, pp 2, 5
11. Submission 3.3.26, p 146

statement was there solely 'to provide the context for Hauraki's agreement to the redress then set out in that deed' and was 'plainly not redress'.[12]

In another instance, the Crown accepted that, due to oversight, it had not engaged with Tauranga iwi on the area covered by the minerals relationship agreement – however, the Crown argued that it did not matter, because the outcome reached was reasonable.[13]

In the case of Ngātiwai, the Crown submitted that it could not be criticised for consulting with Ngāti Rēhua about redress on Aotea offered to the Marutūāhu iwi, rather than consulting Ngātiwai directly, 'given the Crown's genuine belief that it was consulting with all Ngātiwai interests, represented by Ngāti Rēhua-Ngātiwai ki Aotea'. Subsequently, it did consult with Ngātiwai.[14]

Counsel for the iwi of Hauraki and Ngāti Tara Tokanui supported the Crown's position on consultation, submitting that the Crown had done all that could be expected. They both referred to evidence showing the Crown actively encouraging face-to-face meetings between iwi, attempting different approaches or taking more time to find resolution when 'matters were complex or intractable' – even on occasions amending or withdrawing redress from the Pare Hauraki settlements.[15]

5.2.3 What the Tribunal finds

5.2.3.1 *Consultation and non-exclusive redress*

The Crown considers it needs to consult with groups with overlapping interests only over 'truly major issues'.[16] This is problematic: what constitutes a truly major issue may well differ between claimant groups, and between them and the Crown. We saw this in the case of Ngātiwai. Throughout 2013–14, they repeatedly requested an explanation of the nature and extent of Marutūāhu interests, in relation to the redress those iwi had been offered. Ngātiwai's requests were not answered satisfactorily by the Crown, seemingly on the basis that the redress in question – for example, the coastal statutory agreement – was non-exclusive and thus did not affect Ngātiwai's interests.[17] The *Red Book* states that 'the Crown does not require the agreement of other claimant groups when it is offering non-exclusive redress in areas with overlapping claims', although it describes such agreement as 'preferable'.[18]

We reject the Crown's argument that non-exclusive redress does not affect groups with overlapping interests. As we go on to discuss, and the evidence in this inquiry amply shows, groups can be profoundly affected by all forms of redress offered to others, whether exclusive or non-exclusive. In our view, non-exclusivity can never be an argument for a less robust consultation process.

12. Ibid, p 97
13. Ibid, pp 150–151
14. Submission 3.3.30, p 7
15. Submission 3.3.27, p 5; submission 3.3.17, pp 7–8
16. Submission 3.3.26, p 21
17. Submission 3.3.11, p 16; doc A33(a), p 73
18. *Red Book*, p 55

Moreover, the Crown's arguments that non-exclusive redress does not affect other parties is simply inconsistent with its actions throughout the Hauraki settlement negotiations, where it persistently refused to disclose to other groups the details of proposed redress. If the Crown genuinely believed the redress it was discussing with Hauraki did not affect other parties, why did it not seek confirmation or reassurance from those parties? Doing so would have been consistent with its obligation to avoid creating fresh grievances, even if inadvertently. Moreover, Hauraki's insistence that non-exclusive redress items *not* be disclosed to Tauranga iwi and Ngātiwai must surely have been a red flag to the Crown that those iwi might not have supported the Crown or Hauraki's position. We return to this below in our discussion of transparency.

5.2.3.2 *Crown consultation with Ngātiwai and Ngāti Rēhua*

We also have concerns about who the Crown chooses to consult with over redress, and when. This was again evident in the experience of Ngātiwai, whom the Crown consulted with early over some redress items. But when it came to redress being offered to Marutūāhu iwi on Aotea, because the Crown had decided to consult primarily with Ngāti Rēhua, Ngātiwai were not consulted until very late. As the Minister told the chair of the Ngātiwai Trust Board on 14 October 2014:

> The Crown considers it is appropriate to engage directly with Ngāti Rēhua and I have not received any information which would make it appropriate for the Crown to deal with Ngātiwai as well as Ngāti Rēhua in relation to this matter. It would assist the Crown if you would outline what are the separate interests of Ngātiwai on Aotea.[19]

Although the Crown did eventually begin a separate overlapping engagement process with Ngātiwai in 2016, this consultation came too late to be meaningful. In the same year, the Minister wrote to Ngātiwai confirming his decision about proposed redress to be offered to Marutūāhu, including that on Aotea.

In our view, the Crown should have been consulting with both Ngātiwai and Ngāti Rēhua from the start of negotiations. Both Ngātiwai and Ngāti Rēhua had recognised mandated negotiators.[20] Ngātiwai supported Ngāti Rēhua negotiating their historical claims separately with the Crown, but Ngātiwai also wanted to discuss with the Crown the proposed redress offered to Hauraki on Aotea. Raising concerns about redress offered to a neighbouring iwi, which came within Ngātiwai's rohe, is an entirely different issue to supporting the Ngāti Rēhua settlement. At the very least, the Crown should have begun consulting with Ngātiwai when it was approached by them. Instead, the Crown responded by requiring Ngātiwai to demonstrate it had separate interests from Ngāti Rēhua on Aotea. While Ngātiwai was able to do so, they should not have had to in order for their concerns about redress offered to Hauraki to be addressed.

19. Document A33(a), p 80
20. Document A45(a), pp 474–475

5.2.3.3 *The timeliness of Crown consultation*

This was a major concern for the Tauranga iwi in particular. In the months leading up to the Crown initialling the collective deed with Hauraki, Ngāi Te Rangi described repeatedly requesting information from the Crown about redress being proposed for Hauraki. A Crown witness confirmed this, saying she was made aware that they were 'desperate to receive the redress lists'.[21] But despite numerous attempts to understand what was being negotiated, claimant counsel says Ngāi Te Rangi was 'not able to get a clear picture of what was taking place'.[22] The Crown promised more consultation, information, and 'a proper opportunity to comment on Hauraki iwi redress in the Tauranga rohe' before anything was finalised, but it was only days before the initialling that Ngāi Te Rangi actually received a table showing proposed redress for Hauraki and overlapping claims consultation with Ngāi Te Rangi.[23] According to a Ngāi Te Rangi witness, the Crown referred to the provision of this information as 'a consultation process'.[24]

In our view, providing information of this kind when redress decisions have effectively already been made does not constitute consultation – and may in fact create further divisions and dissatisfaction. As the Tribunal stated in *The Tāmaki Makaurau Settlement Process Report*:

> Initiating face-to-face meetings only after the ingredients of a settlement . . . have been agreed is the worst way possible to establish a positive connection with other tangata whenua groups. As soon as there is a settlement on the table, those groups have something to object to, to react against . . .[25]

5.2.3.4 *Conclusion and findings*

The principle of partnership places on the Crown a clear duty to consult with groups that have overlapping interests, as does its duty to avoid creating fresh grievances with both settled or yet-to-settle groups. To be meaningful and constructive, and to ensure the Crown fully understands all parties' overlapping interests, that consultation must be timely, with all the appropriate people, and on all the issues that concern them.

We appreciate that settlement negotiations are complex, dynamic, and fluid. New issues, and new forms of redress, may arise at different stages during the course of settlement negotiations. However, when this occurs, the Crown must still engage in a meaningful consultation process with those groups who have overlapping interests. Late disclosure with hurried timeframes to respond, especially against the background of settlement deeds that are about to be initialled, is not a fulsome, robust consultation process. Brushing off concerns raised because the redress is non-exclusive, or because the Crown considered it did not have to

21. Document A48 (Leah Campbell, brief of evidence, 14 March 2019), p 43
22. Submission 3.3.7, pp 8, 9
23. Document A48(a), pp 960–967
24. Document A5(a), pp 228–229
25. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 92

talk to a particular group, was unjustified and only exacerbated the grievances the claimants now raise before us.

This is an occasion where avoiding creating fresh grievances should have outweighed any delay to the Hauraki settlement. Instead, the Crown prioritised advancing the Hauraki settlement at the expense of a proper consultation process with overlapping groups. Ironically, the Crown trying to advance the Hauraki settlement, and prevent further delay, has now resulted in significant delay as the claimants were left with no option other than to raise their grievances before this Tribunal. If the Crown had taken the time to conduct a proper and robust consultation process, that may have delayed progress of the settlement at the time, but it would have allowed the parties to address their concerns in a more meaningful way. In those circumstances, we consider it much less likely that the current claimants would be left with grievances to raise with the Tribunal, which in turn might have led to a more timely completion of the Hauraki settlement overall.

Thus, we find that the Crown breached its partnership obligation to Tauranga Moana iwi and Ngātiwai. It also breached its duty to consult by excluding Ngātiwai from discussions over Aotea until late in the negotiations, despite them having clearly expressed an interest very much earlier.

5.3 Transparency: Disclosing and Sharing Information

5.3.1 The claimants' and interested parties' positions

Transparency is one of the Crown's core negotiation principles. The *Red Book* states that 'it is important that claimant groups have sufficient information to enable them to understand the basis on which claims are settled.'[26] To assist in settling claims, the Crown says it will provide information on proposed redress items to all groups with shared interests in particular sites or properties.[27] But the claimants in this inquiry asserted that the Crown failed to do so.

Counsel for Ngāti Ranginui submitted that a key theme in this inquiry was the lack of information and transparency about the nature and extent of Pare Hauraki's interests in Tauranga Moana, despite repeated requests – particularly about the so-called preservation clause allowing Hauraki representation on the Tauranga Moana Framework governance group.[28]

Similarly, Ngāi Te Rangi said the process was not transparent and they were left in the dark regarding details of the Pare Hauraki Deed until just before it was initialled in 2016, when they were sent the draft by mistake.[29]

Counsel for Ngātiwai also described a lack of openness and transparency, as seen in the difficulties they encountered getting information about the nature of Hauraki interests and Crown decisions.[30] This culminated in them lodging Official

26. *Red Book*, p 25
27. Ibid, p 54
28. Submission 3.3.10, p 3
29. Submission 3.3.13(a), pp 35, 43
30. Submission 3.3.11, pp 3, 4

Information Act requests. According to counsel, Ngātiwai were only informed about the extent and the rationale for the redress being offered to Marutūāhu iwi through these requests.[31]

Te Tāwharau o Ngāti Pūkenga Trust supported these arguments, claiming that the Crown did not and would not provide information about additional redress items being offered to Hauraki. Counsel argued that considerable evidence had been provided showing the claimants' shared experiences of trying to engage and get adequate information from the Crown. Calling the engagement process 'one-sided to the detriment of the claimants',[32] counsel submitted that the Crown 'appeared to be deliberately concealing the full extent of the proposed redress to Hauraki iwi, perhaps hoping that it would go unnoticed by Tauranga Moana iwi'.[33]

5.3.2 The Crown's response

The *Red Book* says the material prepared for negotiations may contain information that the parties may not wish to share with others and for this reason, such material is usually kept confidential.[34] The Crown submitted that the usual practice in all negotiations is that draft settlement documentation is not released to third parties without the agreement of the negotiating group. Thus, for example, the Crown did not release the draft preservation clause to Tauranga iwi before the Hauraki deed was initialled because the Hauraki collective had not agreed to this step.[35]

Ms Anderson also noted that the Crown was mindful of issues of commercial sensitivity and the intellectual property rights of the settling group. If the negotiating group requested confidentiality, the Crown would honour this.[36]

The Crown also rejected Ngātiwai's claims that it did not provide information, that its processes lacked openness and transparency, and that Ngātiwai *had* to resort to making Official Information Act requests. Counsel submitted the Crown responded to every Ngātiwai request for information 'in a timely fashion'. Where it did not engage with Ngātiwai or disclose information, it acted 'in good faith based on its understanding of the situation at hand'.[37]

The Crown's actions were endorsed by Hauraki iwi. In submissions, counsel for Hauraki responded to the claimants' allegations that key documents had been withheld from Tauranga iwi during negotiation of the Pare Hauraki Collective deed by arguing that withholding information was appropriate. Counsel argued that challenging the withholding of information showed 'a fundamental misunderstanding of the Treaty settlement process' and that it was not uncommon for sensitive documents to be withheld from parties with overlapping interests. Counsel went on to list documents that the Hauraki collective was not shown before they were signed or initialled: the Tauranga Moana statement of position,

31. Submission 3.3.11, p 17
32. Submission 3.3.24, p 9
33. Ibid, p 10
34. *Red Book*, p 53
35. Submission 3.3.26, p 146
36. Transcript 4.1.1, p 288
37. Submission 3.3.30, pp 56, 60

the Tauranga Moana Iwi collective deed and the Tauranga Moana Iwi collective deed to amend (Tauranga Moana Framework).[38]

5.3.3 What the Tribunal finds

The evidence shows us the Crown's approach to disclosing and sharing information with parties with overlapping interests did not allow those parties to understand the basis on which redress was being offered.

In the case of the Tauranga iwi, this was particularly relevant to the controversial preservation clause giving Hauraki iwi a say in the Tauranga Moana Framework. The claimants provided evidence showing that the Crown failed to provide a copy of the preservation clause before initialling the Hauraki deed. This was despite repeated requests to the Crown for information about the Crown's understanding of the nature and extent of Hauraki's interests and how this would be recognised by settlement redress. Several requests were made to see the deeds, including the preservation clause, but the Crown maintained that it could not provide the proposed text for the Hauraki deeds because 'these are confidential to the negotiations'.[39] Although both Ngāi Te Rangi and Ngāti Ranginui did in fact see the draft clause before initialling, this was the result of a Crown error (in the case of Ngāi Te Rangi) and because a copy was provided to Ngāti Ranginui 'by a third party', and came only three days before the initialling.[40]

The Crown again declined to disclose draft text of the preservation clause in the leadup to the Pare Hauraki Collective deed being signed at the end of 2018. In May 2017, the Crown had told Ngāti Ranginui it was working with the Hauraki collective to revise the wording and would provide a copy to Ngāti Ranginui 'as soon as possible'. In fact, they did not receive the revised wording until one week before the Deed was to be signed on 2 August 2018.[41]

Counsel for Ngāti Ranginui submitted that the Crown had admitted that, in hindsight, consultation would have been preferable. Ngāti Ranginui's counsel argued:

> The Crown had the benefit of hindsight following their experience and learnings from other overlapping claims disputes such as the Tāmaki Makaurau Settlement Process Report where the Tribunal noted that it's too late to wait until after the redress has been agreed in principle with the settling group.[42]

The Crown denied that it 'strategically' withheld information for illegitimate purposes, as some claimants suggested.[43] Questioned about a December 2016 email

38. Submission 3.3.27, p 3
39. Leah Campbell to Ngāi Te Rangi Settlement Trust, 7 March 2017 (doc A48(a), p 1070)
40. Submission 3.3.10, p 15; doc A48 (Leah Campbell, brief of evidence, 14 March 2019), p 44; doc A48(a), pp 975–979
41. Submission 3.3.10, p 16
42. Ibid, pp 3, 15
43. Submission 3.3.26, p 112

chain where Crown officials discussed whether Tauranga iwi should be informed about the preservation clause only when the deed was actually initialled,[44] Crown witness Ms Campbell strongly denied that withholding the wording was an official Crown strategy. We accept this. However, we note that in the same email chain, officials were also aware that the Tauranga iwi were 'desperate to receive the redress lists'.[45] Moreover, this particular email chain does not show that the requested information was being withheld for the reason Ms Campbell and Crown counsel gave – namely, that Hauraki iwi had not given their consent for the Crown to disclose it.[46]

The withholding of documents relevant to the settlement of one iwi from another iwi with whom it shares overlapping interests is flawed Crown practice. In our view, it is not good enough for the Crown to say Hauraki did not wish the information to be shared with Tauranga iwi, especially as this was only one of the explanations the Crown provided for not disclosing information. As noted above, the Crown also told us that it did not need to consult Tauranga iwi about the preservation clause because it was not new, not exclusive, nor even actual redress, but 'simply preserved agreed positions'.

Our position is not new. The Tribunal has repeatedly urged the Crown to adopt an 'ethic of openness'.[47] The Crown must be well aware of the Tribunal's thinking on the matter.

The evidence demonstrates similar concerns being raised by Ngāi Te Rangi, Ngāti Ranginui, and Ngātiwai about the nature of Hauraki interests in the relevant areas where redress was being offered. The claimant groups wanted to understand the nature of those interests so that they could respond with their own kōrero and, in particular, comment on whether Hauraki had demonstrated a sufficient interest to justify the redress. Once again, this information was not always provided.[48] We consider it should have been.

We appreciate that iwi treat some traditional kōrero carefully. Such kōrero may be held by the keepers of traditional knowledge within the iwi, and often it is not shared publicly. However, if an iwi is relying on such kōrero to justify an offer of redress where there are overlapping interests, that iwi cannot expect that such information will not be disclosed to the overlapping groups. The Crown should make this known to all groups entering into settlement negotiations from the outset. As the Tribunal said in the Tāmaki Makaurau inquiry, if material is to be relied upon in settlement negotiations, it must be made available to all. This will allow overlapping groups to properly consider, and respond to, the nature of the claimed interest and whether it is sufficient to justify the redress offered.

44. Submission 3.3.13(a), p 43; doc A48(a), pp 955–956
45. Document A48(a), p 955
46. Transcript 4.1.2, p 68; submission 3.3.26, p 146
47. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report*, p 109
48. Transcript 4.1.1, pp 436–437; doc A40 (Lillian Anderson, brief of evidence, 14 March 2019), p 29

This will also mean that, if agreement is not reached with overlapping groups, the Crown will be better informed when deciding whether to maintain, or withdraw, the contested redress. We consider the Crown cannot circumvent such an open and transparent process by refusing to disclose such information on the basis that the settling group does not consent. If the settling group does not consent to the disclosure of such information, then it has not been tested. This means that the Crown is at such high risk of challenge if it takes the information into account when deciding whether to offer the redress in question, it ought not to do so.

The Crown can also take steps to protect the information – for example, by ensuring the information is only made available to select people (such as the mandated negotiators for the overlapping group or their tribal experts). The Crown might secure agreement from the overlapping group that the information will not be shared, will not be used for any other purpose, and/or will be destroyed or returned at the end of the overlapping claims process. There may well be other options, such as the parties coming together to discuss the nature of claimed interests, kanohi ki te kanohi, through a tikanga resolution process (we discuss this further below). Simply refusing to disclose the information is not a Treaty-compliant option.

As for Hauraki counsel's argument that key documents relating to Tauranga settlement redress were also withheld from the Pare Hauraki Collective before initialling or signing (or both), it is not clear from the evidence whether Hauraki requested these documents and was refused (as was the case for the Tauranga iwi). Even if the two situations were indeed the same, the Crown's failure to follow a transparent process in one negotiation cannot justify it repeating the error in another. The point is that the Crown should proactively disclose relevant information with all parties with overlapping interests during negotiations; Hauraki should not have had to ask for such information either.

We reject the Crown's assertion that Ngātiwai had no need to resort to Official Information Act requests because the Crown had in fact provided what they had asked for in a timely way. We reviewed some of the documentation that was provided, such as the Crown's letter of 18 October 2013 containing information about proposed redress offered to the Marutūāhu iwi collective. We consider it extremely summary, providing very little detail. When Ngātiwai asked for further information, what the Crown provided was still very summary – particularly on the statutory acknowledgments, which were of concern to Ngātiwai because they felt that the acknowledgements went further than what had already been agreed with Hauraki, and on exclusivity.[49]

In sum, the evidence shows that the Crown failed to follow its own processes for disclosing information (summarised in chapter 3 of this report). The strategies it adopted instead were not Treaty compliant. In failing to show readiness to communicate openly with Ngāti Ranginui, Ngāi Te Rangi, and Ngātiwai, and in failing to share information, we find that the Crown has breached:

49. Document A45(a), pp 209–212, 213–214, 216

- the principle of partnership and active protection;
- its duty to act honourably and in good faith to all iwi and not just the settling group;
- its obligation to protect or preserve amicable tribal relationships.

Unsurprisingly, the Crown's conduct has created fresh grievances, fractured relationships – perhaps causing entrenched divisions to a degree that undermines whanaungatanga – and caused further delays to the settlement process.

5.4 The Crown's Understanding of Customary Interests

5.4.1 The claimants' and interested parties' positions

The claimants submitted that the Crown failed to fully investigate or understand Hauraki iwi customary interests in their respective rohe – and, in some cases, the claimants' own customary interests. These failings affected who the Crown negotiated with, inter- and intra-iwi relationships, and the nature of the redress the Crown proposed.

Counsel for Ngātiwai submitted that the Crown failed to enquire into the layers of customary interests between Ngātiwai and Hauraki, and the rights associated with those interests. As described earlier, counsel argued the Crown repeatedly ignored their requests for an explanation of what it considered to be the basis of Hauraki's interests. Consequently, the redress offered to Hauraki was offensive to tikanga.[50] Counsel further submitted that the Crown failed to engage with Ngātiwai sufficiently to understand their customary interests and how whanaungatanga connected them with Ngāti Rēhua or Hauraki. Again, the claimants allege the Crown did not undertake any investigation into these layers of interests.[51]

Similarly, counsel for Ngāti Ranginui submitted that the iwi was never provided with information about the nature and extent of Pare Hauraki's interests in Tauranga Moana, despite persistent requests and despite knowing that the Crown had that information.[52]

Meanwhile, counsel for Ngāi te Rangi argued that the Crown relied on inappropriate and insufficient historical information when determining the relative interests of Hauraki and Tauranga iwi, thus entrenching issues and straining relationships.[53] Ngāi Te Rangi was supported by Ngāi Tamawhariua and Te Whānau-a-Tauwhao, who argued that Hauraki iwi were offered redress within their own traditional rohe where Hauraki have no traditional interests. Counsel submitted that no evidence of such interests, such as marae or urupā, was provided during the settlement negotiations or this inquiry.[54]

50. Submission 3.3.11, p 3
51. Ibid, p 15
52. Submission 3.3.10, pp 3, 18
53. Submission 3.3.13, pp 34–35, 52
54. Submission 3.3.19, pp 2–4

5.4.2 The Crown's response

Crown counsel defended the process it followed to inform itself of Hauraki's interests in Tauranga Moana. Counsel explained the Crown's purpose in negotiations is always to secure a settlement – not, as claimants allege, at all costs and as quickly as possible, but one that is 'robust and durable, and fair among iwi'.[55] Counsel argued that in terms of informing itself about respective interests and consulting with iwi about that information, the Crown needs to do only 'what is reasonable' in order to achieve its purpose. Counsel submitted that the relevant question for the Tribunal therefore 'is whether the Crown acted reasonably and in good faith in so informing itself, given its own motivations to settle.'[56]

5.4.3 What the Tribunal finds

During our inquiry, the Crown described the information it considered when reaching its views about Hauraki's interests in Tauranga Moana and in respect of Ngātiwai. That information included Native Land Court records, the findings and record of inquiry from the Waitangi Tribunal's Tauranga Moana District Inquiry (including evidence given by Hauraki participants), and specific research commissioned for the Treaty settlement process. The Crown said it also took account of 'rich' verbal and written information supplied by Hauraki iwi and their neighbours about their interests, including areas of shared interests.[57]

What concerns us, however, is how well the Crown communicated and shared this information about the respective groups' interests with the claimants. Ms Anderson stated that it was Crown practice to provide overlapping iwi with information setting out the nature and extent of the settling groups' interests that the Crown relied on when offering redress.[58] Yet, she elsewhere acknowledged instances where this did not happen. For example, despite repeated requests from Ngāti Ranginui for a map showing the area of interest claimed by Hauraki iwi, no map was ever provided.[59] We have already discussed Ngātiwai's repeated attempts to get from the Crown the information they sought about Marutūāhu's interests, among other matters.

In our view, the Crown's failure lay not so much in its efforts to establish Hauraki's customary interests, but the inadequate process it followed to test out its understanding of those interests with Tauranga iwi and Ngātiwai when developing redress proposals. What matters is following a robust and transparent process. If the process is flawed – or does not happen – then an appropriate outcome to the settlement negotiations is unlikely. Nor will a flawed process achieve the goal of a robust, durable, and fair settlement that the Crown insists is its objective. If the Crown follows a proper process, it may still reach the same outcome in terms of

55. Submission 3.3.26, p 22
56. Ibid, pp 22–23
57. Ibid, p 78; doc A45 (Michael Dreaver, brief of evidence, 8 March 2019), p 6
58. Transcript 4.1.1, p 436
59. Ibid, pp 393–394

the redress it offers. But in that case, the Crown cannot fairly be criticised, even if parties are unhappy with its decision.

5.5 The Effects of Offering Groups Redress Items in the Rohe of Other Iwi

5.5.1 The claimants' and interested parties' positions

Counsel for Ngāi te Rangi submitted that the contested redress the Crown offered to Hauraki iwi elevates the status of Hauraki iwi and affords them direct engagement and decision-making ability on matters relating to Tauranga Moana. Ngāi te Rangi claim that, by giving Hauraki iwi powers disproportionate to their interests in the rohe, the Crown has created a previously non-existent mana whenua association for Hauraki iwi through the settlement process. The cumulative effect, counsel argued, is 'to prejudice Ngāi Te Rangi's exercise of mana whenua and rangatiratanga.'[60]

Ngāti Ranginui likewise argued that the redress offered to Hauraki iwi, which encroaches on their own rohe, undermines their mana whenua and diminishes their rangatiratanga. On the preservation clause in the Tauranga Moana Framework specifically, counsel submitted that the clause 'confirms that all "Iwi of Hauraki" have interests in Tauranga Moana when that has not been established' and recognises that Hauraki's interests extend over all and not just part of the Tauranga Moana area.[61]

Counsel for Ngātiwai submitted that the redress offered to Hauraki was inconsistent with tikanga, and similarly argued that it confers on Hauraki an 'influence and status' that does not align with their interests and is an affront to Ngātiwai's mana.[62]

Tauranga iwi were supported by several of the interested parties. Ngāi Tamawhariua and Te Whānau-a-Tauwhao asserted that the redress provided to Hauraki undermines their own mana, rangatiratanga, and tikanga. Counsel for Ngāti Pūkenga iwi claimed that the redress granted to Hauraki effectively gives Hauraki mana whenua status in Tauranga Moana, when the only iwi with traditional mana whenua status are Ngāti Pūkenga, Ngāi Te Rangi and Ngāti Ranginui. For that reason, counsel told us that Ngāti Pūkenga opposed the redress and would not sign the Pare Hauraki Collective deed to which they are also a nominated party. Meanwhile, the Ngāti Pūkenga Trust claimed the Crown had failed to recognise that contested redress items might create customary interests and mana whenua rights for Hauraki iwi that had not existed previously and were inconsistent with both tikanga and the Treaty.[63]

60. Submission 3.3.13, pp 47, 67
61. Submission 3.3.10, pp 17, 22
62. Submission 3.3.11, p 4
63. Submission 3.3.19, p 4; submission 3.3.20, pp 2–3; submission 3.3.24, p 3

5.5.2 The Crown's response

The Crown rejected the claimants' argument that redress offered to Hauraki iwi elevated their status to a degree that was not commensurate with their interests. Responding specifically to Ngātiwai, Crown counsel submitted that 'Fears that allocation of redress to Hauraki iwi will be "objectively viewed" as giving them mana whenua are unfounded.'[64]

In response to Ngāi Te Rangi and Ngāti Ranginui submissions on the preservation clause, Crown counsel said the latter was wrong in claiming that the clause '"confirms" any interests of Hauraki . . . It does not confirm anything.'[65]

5.5.3 What the Tribunal finds

The Crown says that settlement redress is not intended as a reflection of mana whenua. As the Minister explained when confirming a redress decision to Ngātiwai in 2017:

> the Crown does not claim to have the right to determine mana whenua or mana moana and an offer of redress should not be seen as a signal the Crown is doing so. A redress offer is simply a recognition the Crown accepts a claimant group has a level of interest sufficient to warrant that redress.[66]

Yet, that is often precisely how redress is perceived: as an expression of a group's mana whenua status within the rohe in which the redress lies. According to Mr Tawhiao, this is 'naturally . . . an affront to those iwi who already hold mana whenua in that area'.[67] His views echoed those of another Ngāi Te Rangi claimant, Hauata Palmer, who stated before the Pare Hauraki Deed was signed that if it was 'finalised with redress that is in Tauranga Moana, the Crown is effectively saying that Hauraki have mana whenua, mana moana, and rangatiratanga in Tauranga Moana. That is just patently wrong, and it is simply not true.'[68]

Crown witnesses acknowledged that perceptions of mana whenua status could indeed be created by redress offers. In cross-examination, Ms Anderson agreed that while it might not be the Crown's intention, 'these areas of interest often take on a life' of their own and such perceptions can persist during and after settlement negotiations. Statutory acknowledgements, for example, could create the perception that an iwi that is not tangata whenua nonetheless has a certain standing in a particular area. Ms Anderson also conceded that such instruments could be used by iwi to gain and exercise influence.[69]

We heard evidence from claimants that this is already happening in respect of Hauraki's role in Tauranga Moana. Ngāi Te Rangi witness Huhana Rolleston told us that, as a result of the redress provided to Hauraki, local authorities had now

64. Submission 3.3.30, p 9
65. Submission 3.3.26, p 143
66. Document A33(a), pp 470–471
67. Transcript 4.1.1, p 48
68. Document A1 (Dr Hauata Palmer, brief of evidence, 14 March 2017), p 3
69. Transcript 4.1.1, pp 272, 416

begun including Hauraki iwi in their consent processes. Effectively, she asserted, Hauraki was using its redress 'to undermine our position as mana whenua'.[70]

In our view, the Crown needs to be aware of the practical effects of offering redress to groups in areas where strong interests are held by others. The Crown needs to pay particular attention to how it uses statements of associations and acknowledgments of interests, especially as the Tribunal has previously found (for example, in the Te Arawa Settlement report) that non-exclusive statutory acknowledgements can confer substantial benefits, including standing and status.[71] We support that earlier finding: when such redress is allocated, the effect can be that the recipient group is considered tangata whenua, with all the rights that status implies.

The Crown cannot distance itself from the practical consequences of providing such redress. Regardless of the Crown's intentions, and regardless of its assertion that it cannot be held responsible for the conduct of local authorities,[72] the Crown cannot ignore the practical consequences of its redress decisions and the actions of those carrying out statutory functions.

We reiterate our previous findings about the necessity for the Crown to engage in robust consultation and facilitate full information-sharing among parties before offering redress, exclusive or non-exclusive, given the magnitude of redress decisions for tangata whenua groups.

5.6 The Use of Tikanga-Based Processes to Resolve Conflict over Redress

5.6.1 The claimants' and interested parties' positions

All claimants submitted that the Crown showed little regard for tikanga and failed 'to provide space' for it to operate within the settlement process as an instrument for testing interests and resolving redress disputes.[73] Counsel for Ngāti Ranginui and Ngātiwai submitted that even on the occasions when iwi did undertake a tikanga process between themselves, and agreements were reached, the Crown ignored the results or was reluctant to let the process run its course.[74] Counsel for Ngātiwai submitted that Hauraki iwi had no incentive to engage with Ngātiwai in a tikanga-based process, as there were no consequences if they did not.[75]

Several interested parties also argued that a tikanga-based process should have been used to clarify Hauraki interests in Tauranga Moana and work through the impact of proposed redress in their area, well before any binding redress agreements were reached.[76]

70. Document A28 (Huhana Rolleston, brief of evidence, 18 February 2019), p 28
71. Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, pp 85–87
72. Submission 3.3.26, p 114
73. Submission 3.3.11, p 3; submission 3.3.13, p 5; submission 3.3.10, p 19
74. Submission 3.3.10, p 19; submission 3.3.11, p 15
75. Submission 3.3.11, p 3
76. Submission 3.3.19, p 5; submission 3.3.20, p 3; submission 3.3.24, pp 16–17

5.6.2 The Crown's response

The Crown responded to claimant concerns by emphasising the undesirability and unworkability of a compulsory tikanga-based process. It submitted that imposing such a process would put the Crown in breach of article 2 of the Treaty by undermining the rangatiratanga of iwi, and would also adversely affect Māori-Crown relations.[77]

Moreover, the Crown argued that a tikanga-based process was unlikely to be the panacea to all the problems the claimants identify. Counsel submitted that if, as part of a tikanga-based process, settled groups were required to agree to redress for iwi who are yet to settle, this would vest in the settled group 'a de facto power of veto . . . to the detriment of unsettled iwi'. In any event, the Crown did not consider that agreements reached through a tikanga process '(or, for that matter, any other process)' should be binding upon the Crown.[78]

Counsel for Hauraki iwi agreed with the Crown's argument that a tikanga process requiring overlapping groups to have a say in the redress offered to a settling group would effectively give them the power of veto.[79] Notwithstanding this objection, Hauraki acknowledged there was a place for tikanga processes in settlement negotiations and resolving redress disputes. Indeed, Hauraki iwi agreed to participate in such a process to resolve Tauranga Moana Framework redress issues, and a hui led by independent facilitator Ken Mair took place in August 2017. According to counsel, a follow-up hui was scheduled but then cancelled by Tauranga iwi.[80]

The Ngāti Tara Tokanui Trust also supported the Crown's arguments. It submitted that, in the negotiations it had been part of, all parties had engaged in a process that was consistent with 'tikanga in a modern context'. Tools such as telehui and email had been employed alongside face-to-face hui. Further, counsel argued that a compulsory process was neither needed nor desirable, as 'compelling others to engage in a discussion is not tika'. Counsel argued that the introduction of any mandatory Crown process would also threaten the principle of partnership and the autonomy of iwi.[81]

5.6.3 What the Tribunal finds

In our view, the claimants' evidence and submissions revealed that the Crown lacked understanding of the value of tikanga-based processes to the settlement negotiation process. The Crown also failed to properly encourage, support, and facilitate such a process. On the face of it, these values are encapsulated in the *Red Book*'s title 'Ka tika a muri, ka tika a mua'. Yet ironically, that document is essentially silent on the subject. It does not require overlapping interests or contested redress to be addressed through processes consistent with tikanga. And,

77. Submission 3.3.26, p 33
78. Ibid, p 35
79. Submission 3.3.27, p 3
80. Ibid, pp 15–16
81. Submission 3.3.17, pp 14–15

while it urges groups with overlapping interests to put in place their own processes for working through those interests, the *Red Book* does not require the Crown to actively support or monitor tikanga-based processes.[82]

Indeed, some claimants depicted the Crown's support for tikanga processes as lukewarm and subordinate to its settlement timetable. Claimant Haydn Edmonds described Ngātiwai's failed attempts to engage with Marutūāhu and the Crown in a tikanga-based process.[83] The iwi considered such a process would have helped them understand Marutūāhu interests in areas where redress was to be offered, while also helping the Crown better understand Ngātiwai's interests.[84] When Marutūāhu refused Ngātiwai's repeated requests to meet, Mr Edmonds said the Crown 'did nothing'.[85] In the event, Ngātiwai learned about the proposed redress only after the Crown and the Marutūāhu collective had signed a record of agreement. According to Mr Edmonds:

> If they have interests, we need to understand where those interests are and why. In my view, an upfront tikanga based process would have enabled those interests to be explained and known to Ngātiwai. Such a process may well have removed the concerns of Ngātiwai but it did not take place.[86]

Mr Edmonds also submitted that an open, upfront tikanga-based process would have allowed Ngātiwai to explain its own inter-tribal relationships and why the Crown needed to engage with it, and not just Ngāti Rēhua and Ngāti Manuhiri, about overlapping interests.[87] In the absence of such a process, the Crown went ahead with negotiations on the basis of a flawed assumption. This demonstrated the Crown's lack of understanding, Mr Edmonds claimed: 'As a matter of whakapapa, there are Ngātiwai uri who are not captured by the claimant definition for Ngāti Rēhua / Ngātiwai ki Aotea. The Crown would have known and understood this had it first engaged with all parties upfront.'[88]

Instead of facilitating the kanohi ki te kanohi tikanga process that Ngātiwai sought, Mr Edmonds alleged the Crown 'wrote us letters and then signed them off and said, "That's enough time"'. If the Crown did not receive what it considered a timely response, he said, the Crown made its own determinations on overlapping redress.[89] In his view, the Crown, by continuing with settlements without providing for a tikanga based process, 'is not acting in good faith or providing iwi with a level playing field for engagement.'[90]

82. *Red Book*, p 54
83. Document A60 (Haydn Edmonds, brief of evidence, 29 March 2019), p 4
84. Ibid, p 2
85. Ibid, p 6
86. Ibid, p 3
87. Ibid
88. Ibid, p 4
89. Transcript 4.1.1, p 159
90. Document A60 (Haydn Edmonds, brief of evidence, 29 March 2019), p 6

We agree. The Minister wrote to Ngātiwai on 11 November 2016 confirming his preliminary decision about the commercial and cultural redress offers to Ngāti Maru, Ngāti Tamaterā, Ngaati Whanaunga, and Te Patukirikiri on Aotea. His letter acknowledged that Ngātiwai and Marutūāhu iwi had not met, but he referred to Ngātiwai having discussed issues with the Ngāti Maru negotiator – the occasion that claimant counsel described as 'the one café meeting that had occurred in 2013'. The Minister also acknowledged that those discussions 'did not resolve any of the overlapping claims', which meant that he 'must make, on behalf of the Crown, a final determination on the redress the Crown will offer'.[91] On 22 December 2016, the Crown and Hauraki iwi initialled the Pare Hauraki Collective redress deed.[92]

The meeting with Ngāti Maru's negotiator was not a proper tikanga resolution process seeking to address the overlapping claim issues between the iwi. As Mr Edmonds said, it was a 'meet and greet'. Yet the Minister treated it as if the parties had met and discussed the issue but failed to reach agreement, leaving him with no option other than to make a decision on whether to offer redress. As discussed below, when the Crown makes a decision on contested redress, it should be as a last resort and only after the Crown has fully discharged its obligations through a full, proper, and robust overlapping claims process. That did not occur, and we consider the Crown failed in its duties here.

Mr Edmonds' evidence also showed that even on the occasions when the Crown did accommodate iwi-to-iwi tikanga-based engagement, its support for the process was limited and conditional. For example, in June 2018, Ngātiwai advised the Minister of 'positive developments' in discussions with Ngāti Hako and Ngāti Pāoa about overlapping claims, later asking the Crown to 'give that process a fair chance'.[93] The discussions continued but, in October, the Minister advised he was deferring negotiations with Ngāti Hako because of time pressures. According to the Crown, 'While respecting their desire to complete tikanga-based engagement with overlapping groups, he was concerned by the lack of certainty as to when those discussion would be complete.'[94]

We are also concerned by the Crown's response to Ngāti Ranginui's repeated requests during 2018 for a tikanga-based resolution process to be used to address the outstanding overlapping redress issues between Tauranga and Hauraki iwi, before the Hauraki collective deed was signed. The Crown said it supported such a process but did not want to delay signing the deed. It insisted a tikanga-based process could take place after the signing – despite Ngāti Ranginui's argument that signing the deed would undermine any subsequent tikanga-based process and make resolution much more difficult to achieve.[95] In our view, it is unreasonable for the Crown to delay a tikanga-based resolution process until after a deed is signed, unless all iwi affected freely agree and the Crown is willing to waive

91. Document A48(a), p 678; transcript 4.1.1, p 115
92. Document A48(b) (Leah Campbell, brief of evidence, 12 April 2019), p 17
93. Document A33(a), p 549
94. Document A48 (Leah Campbell, brief of evidence, 14 March 2019), p 36
95. Document A35(a), pp 217–233

its general policy that deeds are full and final settlements. Anything less is not credible.

In chapter 2, we referred to previous Tribunal statements about the value of engaging early when developing redress offers. We endorse these statements, and, further, we note that if this engagement takes the form of a tikanga-based process, a satisfactory outcome for all groups is even more likely. We accept that it is possible to change the terms of a deed of settlement after it is signed. However, as Ms Anderson conceded, a signed deed of settlement 'is a very hard thing to undo.'[96] Undertaking a tikanga resolution process after the deed is signed is likely to harden the parties' positions and undermine the process. Once again, the Crown prioritised a speedy settlement over preventing further grievances.

As for the independent facilitation process the Crown implemented in 2017 to resolve inter-iwi disagreements over Hauraki's rights in Tauranga Moana, it too was unlikely to deliver a satisfactory outcome. From the evidence we heard, this initiative had the potential to deliver a tikanga-based process, but lacked many of the pre-conditions we consider vital to the success of such a process (these are set out below). For example, only a single hui was held, which was patently insufficient. The parties had no say on the design of the process, how the meeting would be regulated, or how it would accommodate the tikanga of the various iwi engaging in the process. This was a case where input was needed in advance of the hui from an independent tikanga expert who could have worked with parties to determine the parameters of engagement. Given its design flaws, it is unsurprising that the process did not work.

We consider that the Crown's commitment to making space for tikanga-based processes was too often qualified by its urge to expedite settlements. Undoubtedly, using such processes to establish interests and/or resolve redress disputes takes time. But, as we have emphasised repeatedly, the Crown's overriding duty in these circumstances is to avoid creating fresh grievances. Yet this is precisely what has happened here. And perversely, by creating that new grievance, the settlement process has been even further prolonged because of the need for parties to participate in this urgent inquiry.

Had tikanga been engaged at an appropriate point, while all parties still had something at stake, delay to the Crown's agenda may have been minimal.

In our view, new grievances, disputes over redress, litigation, and time-wasting could all be avoided were the Crown to properly facilitate, encourage, and support a tikanga-based process. Such a process is possible without conferring a veto power on any party. Instead, all parties would be expected to share and test evidence of their interests, develop mutual understandings, and resolve issues.

The Crown is not responsible for devising a one-size-fits-all tikanga-based process for dealing with overlapping interests; it is up to the groups involved to design and implement a process that is tika in terms of their own values, relationships, and circumstances. But, in every settlement where overlapping interests arise, the

96. Transcript 4.1.1, p 271

Crown must facilitate, support, and monitor a sound tikanga-based process. It should provide funding, administrative support, access to facilitators or mediators, and more. To the extent that parties cannot agree on a process for a tikanga-based approach, the Crown should consider engaging an independent tikanga expert as an advisor to help set the parameters of such a process. This should be clearly stated in the *Red Book*. The Crown may not be responsible for the tikanga-based process, but it cannot be a passive bystander watching impatiently from the sidelines.

Tikanga is primarily a way of developing, regulating, and maintaining relationships; every aspect of a process based on it should be designed with this in mind. In our view, a robust tikanga-based process would incorporate the following principles and practices:

- Tikanga regulates the conduct of all. Those who seek a tikanga process should act tika themselves.
- A tikanga-based process need not be triggered by the Crown; it could be initiated by any group with overlapping interests.
- The tikanga-based process must take place early on, at the point where all parties still have something at stake. It is too late for a tikanga-based process once a party has received and accepted a Crown redress offer. It is certainly too late once a deed has been initialled, let alone signed.
- All parties should participate in the design of the process. If the parties cannot agree, the Crown should consider appointing an independent expert to assist with this.
- The process itself should be flexible. It will need to recognise that more than one meeting may be required and that the course of the process may be influenced, or developed, by the parties as discussions unfold.
- A range of expertise is essential in such a process. People with skills in facilitation, mediation, and tikanga will likely be required. If all these skills cannot be found in one individual, the process may need to involve more than one independent expert and/or appropriately skilled representatives from the various parties.
- By definition, a tikanga-based process cannot and should not be compulsory. But to be effective, it should incentivise those parties that engage in it and disincentivise those who do not. If iwi do not participate, adverse inferences may be drawn against them.
- We expect one element would be present in any tikanga-based process: the requirement for groups to disclose and share information about their interests in, and connections with, those areas in which overlapping interests exist. It is essential that interests are scrutinised and tested, ideally orally, in an open forum involving all groups. The process must be seen, by any reasonable test, to have been fair and robust, with every group able to participate fully and openly.
- Where groups are concerned about disclosing sensitive information, appropriate safeguards can be put in place to ensure only the relevant parties have

access to the information and it does not enter the public sphere (see our comments above).

We accept the Crown's argument that such a process cannot be compulsory. Overlapping groups cannot, and should not, be forced into such a process. However, the Crown needs to do all it can to encourage, support, and facilitate such a process. This may involve meeting with the settling group to explain the importance of the groups meeting kanohi ki te kanohi to try and resolve the issue through tikanga; and providing funding, administrative support, access to facilitators, mediators and/or independent tikanga experts. The Crown also needs to ensure that sufficient time is provided to allow the process to be undertaken in a full and meaningful way.

We also consider that iwi should not be afraid to engage in such a process. This is an opportunity for iwi to come together using traditional practices, customs, and values to resolve issues of tribal significance. Such a process empowers the iwi to resolve matters themselves, exercising their tino rangatiratanga, rather than relying on a Ministerial decision. Such a process will also strengthen tribal bonds and relationships, rather than causing the division, upset, and mamae we have seen in this inquiry.

As noted above, those seeking to engage in a tikanga process must act tika themselves. They must approach the process with a genuine desire to resolve the issue, through tikanga. An objecting group cannot use such a process as a ruse to try and delay or frustrate a settlement they do not agree with. Such an approach is not tika and the Crown would be justified in refusing to condone such tactics. We consider that Ngāi Te Rangi, Ngāti Ranginui, and Ngātiwai have expressed a genuine intention to try and resolve the issues raised in this inquiry through tikanga. In these circumstances, the Crown should do all it can to facilitate this process.

Should a group refuse to engage in a tikanga-based process, the Crown should consider whether that aspect of the proposed redress should be parked. The Crown has shown on numerous occasions, such as with the Tauranga Moana Framework, that it is willing to remove, and delay, contested redress items where agreement cannot be reached. Where this occurs, the Crown should, once again, do all it can to encourage and facilitate the tikanga resolution process to take place, before the contested redress is progressed further. Alternatively, a group refusing to engage in such a process should do so at their own risk. To be plain, if a group is unwilling to participate fully and openly in such a process, it must face the real prospect that the Crown may not recognise the interest that the group claims.

What we are proposing is a significant departure from the present situation. However, we consider such a process is essential before any redress decisions are made, given they have such significant cultural and commercial consequences for groups with overlapping interests.

When a tikanga-based process is unable to produce agreement, unilateral decision-making should not be the Crown's only option. We are encouraged by past examples where we have seen the Crown accommodate or introduce innovative strategies (some rooted in tikanga) to resolve redress disputes. The examples

discussed below demonstrate that a range of other approaches are possible and should be considered before the Crown makes a unilateral decision to maintain or withdraw a redress offer. They show the Crown, in conjunction with claimant groups, adopting alternative dispute resolution methods to resolve an impasse.

The Central North Island Forests settlement included a tikanga-based resolution process for the allocation of that forest land. This provided that the land would be allocated to iwi on the basis of mana whenua, as agreed by iwi, kanohi ki te kanohi, or using the resolution process provided for in the deed.[97]

The Whakarewarewa and Roto-a-Tamaheke Vesting Act 2009 vested land at Whakarewarewa in the Whakarewarewa Joint Trust, on behalf of Ngāti Whakaue and Tūhourangi-Ngāti Wāhiao. The deed establishing the joint trust included an arbitration procedure for determining the beneficial entitlement to the land.[98]

The Te Kawerau ā Maki settlement provided that ownership of the Kopironui property would be resolved by consent between the disputing groups, or failing that, determined by the Māori Land Court.[99]

We acknowledge that these processes may not be appropriate in all cases, nor were they without flaws. But they show that alternatives do exist, and the Crown should at least explore them with settling and overlapping groups before it resorts to making an outright determination.

In sum, we consider that a tikanga-based process must be the starting point whenever the Crown contemplates offering redress that will affect the interests of other groups. Indeed, such a process is essential if the Crown is to avoid creating fresh grievances over redress. We find that, by failing to properly promote, allow for, and facilitate tikanga-based processes at the appropriate times and especially at the start of negotiations, the Crown has breached its duty to avoid creating fresh grievances. As a result, it has prejudicially affected iwi with overlapping interests and breached the principles of partnership, good faith, and active protection.

5.7 Protecting All Parties and Maintaining Relationships

5.7.1 The claimants' and interested parties' positions

The *Red Book* acknowledges that the Crown must deal fairly and equitably with all claimant groups throughout the settlement process. It also states that strengthening the relationship between the Crown and Māori is an integral part of the settlement process that must be reflected in all settlements.[100]

Counsel for Ngāi te Rangi submitted that the Crown's redress decisions had damaged whanaungatanga and left the iwi's relationship with the Crown 'in tatters'.

97. CNI (Central North Island) Forests Iwi Collective (Ngāi Tūhoe, Ngāti Manawa, Ngāti Tūwharetoa, Ngāti Whakaue, Ngāti Whare, Raukawa and the Affiliate Te Arawa Iwi/Hapu) and Her Majesty the Queen in right of New Zealand, 'Deed of Settlement of the Historical Claims of CNI (Central North Island) Forests Iwi Collective to the Central North Island Forests Land', 25 June 2008, sch 3

98. Whakarewarewa and Roto-a-Tamaheke Vesting Act 2009, preamble

99. Te Kawerau ā Maki Claims Settlement Act 2015, ss 74–77

100. *Red Book*, p 25

The Crown's '"brutal mechanisms" and settlement processes' were to blame for the damaged relationship, Ngāi te Rangi claimed.[101] Counsel argued that the Crown's duty of active protection required it to act in a way that protects whanaungatanga and extends to all parties, whether currently inside or outside negotiations.[102]

Counsel for Ngātiwai submitted that the Crown's redress processes also failed to preserve intertribal relationships.[103] Relationships within individual iwi were also damaged, according to the Ngāti Pūkenga Trust: 'Rather than fostering relationships, the Crown's overlapping claims policy created ill feeling, fraught relationships, and a lack of confidence between the kāinga of Ngāti Pūkenga.'[104]

5.7.2 The Crown's response

The Crown submitted that upholding a duty to one iwi may have an impact on another – something it says that Ngāi Te Rangi, for one, fails to acknowledge.[105] Similarly, the Crown argued there is an inherent tension between its objective to settle without unfair delay (so as not to deprive groups of the benefits of settlement) while also building and maintaining relationships with all Māori.[106]

Further, counsel argued that if relationships have been damaged, the Crown's actions are not solely to blame; any damage may be a 'natural fallout from polarised negotiating positions'. It submitted that the duty to preserve relationships is a shared duty.[107]

5.7.3 What the Tribunal finds

The Crown has a duty to protect all parties, whether settled or not, and to promote and maintain relationships with all tangata whenua groups. We agree with the Crown that discharging these duties is challenging. However, the inherent difficulty of doing so does not exempt the Crown from criticism when it acts in a way inconsistent with maintaining positive relationships, or if its actions favour one party at the expense of another. The Tribunal found in *The Tāmaki Makarau Settlement Process Report* that the Crown had failed to maintain relationships with tangata whenua groups whose interests overlapped with those of the settling group, and said it must proactively seek to avoid damaging relationships between iwi.[108]

In this report, we have already found that the Crown failed to undertake proper consultation, failed to disclose relevant information, failed to properly provide for a tikanga resolution process, and prioritised expediting the Hauraki settlement over preventing further grievances. This has led to mistrust, ill-feeling, and an 'us versus them' relationship between the claimants, the Crown, and Hauraki

101. Submission 3.3.13, p 74
102. Ibid, p 13
103. Submission 3.3.11, pp 4, 19
104. Submission 3.3.24, p 17
105. Submission 3.3.26, p 37
106. Document A40 (Lillian Anderson, brief of evidence, 8 March 2019), p 10
107. Submission 3.3.26, pp 17–18
108. Waitangi Tribunal, *The Tāmaki Makarau Settlement Process Report*, pp 86, 101

iwi. Therefore, we also find that the Crown's actions have been to the detriment of relationships between iwi, as well to the Crown's own relationship with Māori. This breached the Treaty principles of partnership and active protection.

5.8 Providing Additional Redress after Reaching Initial Agreements

5.8.1 The claimants' and interested parties' positions

Claimants argued that on several occasions the Crown offered Hauraki iwi additional redress items beyond those initially agreed to, and that these offers were made without a proper consultation process.

In the case of Ngāi te Rangi, their counsel submitted that the iwi was now reconsidering all previous redress agreements, given the nature and extent of redress offered to Hauraki after initial agreements were reached with the Tauranga Moana Iwi Collective in 2012–14, and the lack of process and engagement with them about the proposed redress.[109] Counsel further submitted that, while the Crown had criticised them for reneging on previous agreements, the Crown itself had sometimes required parties to step away from agreements. In Ngāi Te Rangi's view: 'Agreements can be, and are, made and unmade. It seems in this case it comes down to whether the Crown requires redress to be changed, and in the case of Hauraki, it does not.'[110]

Counsel for Ngāti Ranginui described their concerns over several redress items that were offered to Hauraki iwi after initial agreements. For example, on the preservation clause, Ngāti Ranginui rejects the Crown's argument that the clause merely preserves the ability of Hauraki iwi to participate in the Tauranga Moana Framework through the fifth seat. As we have already noted, Ngāti Ranginui submit that the clause in fact goes much further, including confirming 'that all "Iwi of Hauraki" have interests in Tauranga Moana when that has not been established'.[111]

Ngāi te Rangi's and Ngāti Ranginui's positions were supported by several interested parties. Counsel for Ngāi Tamawhariua and Te Whānau-a-Tauwhao submitted that as the redress subsequently added to the Pare Hauraki settlement went beyond what had been discussed in 2012, any such arrangements were no longer relevant – especially as Hauraki iwi had not established they had sufficient interests in Tauranga Moana to support the redress provided.[112]

Likewise, counsel for Ngāti Pūkenga described the Crown's reliance on 2012 agreements reached with the Tauranga collective to support its later redress offers, despite Tauranga iwi objections, as a breach of its Treaty obligations to Ngāti Pūkenga. Counsel submitted that the earlier agreements had been conditional on Hauraki iwi justifying that they had traditional rights in the area that would entitle them to such redress and what that would mean for the traditional rights

109. Submission 3.3.13, pp 46, 47–48
110. Submission 3.3.33, p 25
111. Submission 3.3.10, p 17
112. Submission 3.3.19, p 6

of Tauranga Moana groups. Further, counsel submitted that the onus was on the Crown to follow a proper process to ensure that happened, before reaching any binding redress agreements with Hauraki.[113] As noted earlier, counsel advised that Ngāti Pūkenga's opposition to the Hauraki redress meant they would not now sign the Pare Hauraki Collective deed, even though they were a nominated party to it.[114]

Counsel for the Ngāti Pūkenga Trust confirmed that the redress the claimants (as part of the Tauranga collective) consented to Hauraki receiving was agreed 'on the basis that there was no potential for prejudicial impact or a concession of mana whenua' by the collective. When the full extent of the redress became apparent, Ngāti Pūkenga's consent 'was not supported or maintained'.[115]

5.8.2 The Crown's response

The Crown rejected many of the arguments advanced by Tauranga iwi. Counsel submitted that iwi concerns were, in reality, primarily with the outcomes of the settlement process – namely, redress offered to Hauraki – rather than with the Crown's processes.[116] On the preservation clause, counsel submitted that the clause was 'entirely appropriate' and the least that the Hauraki collective could expect if the commitments already made by the Crown and agreed to by other iwi were to be preserved.[117] Crown counsel also rejected the Tauranga iwi view that the clause goes further than initial agreements, arguing that in fact the clause

> must naturally be read as reflecting the 2012 undertaking and it will be reasonably applied to reflect that. . . . It does nothing more than reflect the 2012 undertaking and the 2014 offer of Hauraki participation in the fifth seat. Any concerns that it binds the Crown to go further are misplaced.[118]

Nor did the preservation clause in the Tauranga Moana Framework 'confirm' any Hauraki interests, Crown counsel submitted.[119]

The Crown argued that Ngāi Te Rangi had not just withdrawn or suspended their support for previously agreed redress items but had decided to 'renege' on agreements. Crown counsel submitted that they had no basis to do so. The Tauranga iwi made commitments to Hauraki iwi, and Hauraki and the Crown were entitled to rely on those commitments, except in exceptional circumstances.[120] Again, Crown counsel charged Tauranga iwi with having other reasons to withdraw from earlier redress agreements – namely, that those agreements did not achieve their own settlement goals. The Crown submitted, 'A party cannot purport to enter into an

113. Submission 3.3.20, p 6
114. Ibid, pp 2–3
115. Submission 3.3.24, p 5
116. Submission 3.3.26, pp 101, 109
117. Submission 3.3.8, p 6
118. Submission 3.3.26, p 95
119. Ibid, p 143
120. Ibid, p 85

agreement but privately reserve to itself the right to go back on it down the track because, in hindsight, the agreement did not achieve its ambitions.'[121]

Counsel for Hauraki iwi supported the Crown's submission that Tauranga iwi concerns about redress items were 'not about the Crown's approach, its policies or its processes, rather they involve fundamental objections to Pare Hauraki redress.' Counsel agreed that 'the Crown was, and is, entitled to rely on the Tauranga Iwi – Pare Hauraki agreements for the relevant redress offers', and there was no Treaty breach.[122]

5.8.3 What the Tribunal finds

Tauranga Moana iwi argued that the redress items the Crown proposed giving to Hauraki increased in number and scope over time. As we heard, these iwi were criticised by the Crown and Hauraki for expressing their objections on the basis that the redress they were objecting to had already been willingly agreed to, was nothing new, or did not prejudice the claimants. Therefore, the Crown says, the claimants had no grounds to either complain or withdraw their agreement to earlier redress items.

The Crown also denied that Tauranga iwi set conditions when agreeing to specific redress items at the time. Crown witness, the former Treaty Negotiations Minister, the Honourable Christopher Finlayson, gave evidence that the attachment of conditions to those agreements

> appears to be a recent development. There was no conditionality associated with any of the agreements reached at that time. The redress offered to Hauraki iwi was a recognition that they do have interests in the Te Puna–Katikati area of Tauranga Moana. The redress was offered only in relation to those interests. We did not at any point contemplate going beyond those interests.[123]

But other evidence clearly shows that the Crown's redress offers *did* go beyond the interests noted by the Minister, and also that Tauranga iwi's agreement on some early redress items was indeed conditional. Correspondence between the Tauranga Moana Iwi Collective, senior Crown officials, and the Minister in October 2012, for example, explicitly refers to 'conditions'. Writing to the Minister, the collective agreed to an allocation of right-of-first-refusal rights in the Katikati and Te Puna blocks, but stipulated their agreement was given 'on the following conditions', including that 'Hauraki Iwi are not provided any redress south of the Te Puna block'. They further stipulated that they would 'vigorously oppose any redress for Hauraki in areas where we have mana whenua and ahi kaa.'[124]

In another letter to the Minister in August 2014, the collective confirmed that they 'reluctantly accept your proposal to add a fifth iwi seat to the Tauranga Moana

121. Submission 3.3.26, p 86
122. Submission 3.3.27, pp 21, 13
123. Document A57 (Christopher Finlayson, brief of evidence, no date), p 6
124. Document A40(a), pp 292–293

Governance Group'. Again, they did so on the basis of certain conditions being met, including that the seat would only come into effect if the collective had first participated in an overlapping engagement process aimed at confirming other iwi interests in their rohe. For Hauraki iwi, their interests 'would be limited to parts of the Katikati and Te Puna blocks, at the north-western end of Tauranga Moana."[125]

In our view, this evidence clearly shows that Tauranga Moana iwi did advise the Crown that their acceptance of some proposed redress items was conditional, and that those conditions were set out. The evidence also shows that when they read the Hauraki deed immediately before initialling, Tauranga Moana iwi found it included additional redress items that they had not previously seen or agreed to. They also found that some items agreed in 2012–14 now went much further than what they had originally agreed. This was particularly the case with the provision for a fifth seat on the framework's governance group in the 'preservation clause'. What Tauranga Moana iwi had previously agreed to was for another iwi to be represented on the governance group, through the fifth seat, and for that iwi to be determined through an overlapping engagement process. But no such process took place. Now, the preservation clause in the deed effectively guaranteed the fifth seat (or at least some form of representation through the fifth seat) to 'the iwi of Hauraki' – meaning all iwi, rather than just those iwi who had been properly identified as having legitimate customary interests in Tauranga Moana.

We share the claimants' concerns that the preservation clause was inserted in the deed without the thorough consultation that should be part of any robust overlapping redress process. We also share the claimants' view that this clause has significant implications. Clause 22.7 confirms Hauraki iwi representation on the framework's governing body (at least at some level) through the fifth seat. This clause also refers to Hauraki generally, rather than to the specific iwi that the Crown say have demonstrated rights in Tauranga Moana. Moreover, the preservation clause resolves the ultimate issue of Hauraki representation when this had not been agreed to by Tauranga Moana iwi. Rather, they agreed to the provision of a fifth seat, on the basis that representation on that seat was still to undergo an overlapping claims process.

Ngāi Te Rangi's proposal for a subcommittee including Marutūāhu's interest where relevant was rejected by the Crown because Hauraki rejected it. We saw no indication that any tikanga process was considered.

The Crown says it inserted the preservation clause to honour the 2012 undertaking it gave the Tribunal that Hauraki would receive 'no less favourable' provision than Tauranga Moana. However, that undertaking was not sought by the Tribunal; it was simply offered by the Crown. The undertaking was also offered without the agreement of, or consultation with, Tauranga Moana iwi. The Crown took this step with the knowledge that Tauranga Moana is of significant importance to Tauranga Moana iwi, and the framework was a critical aspect of their settlement. In these circumstances, we cannot see how the Crown could give such an undertaking without first consulting Tauranga Moana iwi.

125. Ibid, pp 541–542

We also accept that the preservation clause was an attempt by the Crown to reflect the Tribunal's finding that Hauraki 'are likely to suffer significant prejudice as a result of clause 10.3' of the legislative matters schedule to the Tauranga Moana Iwi collective deed.[126] However, that finding was made in the context of the Tribunal considering whether to grant an urgent inquiry, which it did on very narrow grounds relating to the activation of the fifth seat. The substantive inquiry was never undertaken, and the Tribunal did not make formal recommendations on how the Crown should address any prejudice to Hauraki. While the Crown may have been trying to address the Hauraki grievance, it oversteered, and created further grievances in the process.

Eventually, the cumulative effect of the Crown adding, expanding, and conflating redress items offered to Hauraki was that Ngāi Te Rangi decided to withdraw from all previously agreed positions, whether conditional or not.

While the frustration experienced by Ngāi Te Rangi is understandable, we have concerns about their decision to withdraw from all previously agreed redress. The duty of acting honourably and in good faith goes both ways. This principle applies not only to the Crown but also to Māori. Stepping away from agreements entered into freely, and in good faith (even if reluctantly), is an extreme step. While some of those agreements were conditional, others were not. In this regard, we note that Ngāti Ranginui have not sought to withdraw from all the earlier redress agreements. In these circumstances, we consider that the Crown was entitled to rely on those unconditional agreements reached with Tauranga Moana iwi when offering redress to Hauraki.

However, the Crown can only rely on what was agreed. Similarly, the Crown cannot rely on an agreement for one item of redress to justify another item of redress, without at least going through a proper overlapping claim process with the other groups. Agreements may be reached as a result of compromise, and it is wrong to assume that such an agreement equates to recognising an iwi's interest in the area for the purpose of alternative redress not discussed or agreed. When the Crown went further in proposing additional redress to Hauraki in Tauranga Moana, beyond what had been earlier agreed and without going through a proper overlapping redress engagement process, it was not acting in good faith.

Finally, we are concerned that the Crown has sought to represent the claimants' concerns as being primarily focused on outcome and not process. The Crown says dissatisfaction with outcome is not evidence of a Treaty breach.[127] While we agree with that statement in principle, in our view, the claimants are concerned about both outcome *and* process – and justifiably so given the potentially significant impacts of those outcomes. As we discussed earlier, good process *is* important. If the Crown follows a flawed process, it can expect to be criticised for the resulting outcome. In this case, dissatisfaction with outcome may not be proof of a Treaty breach, but it is undeniably the consequence of such a breach.

126. Chief Judge Wilson Isaac, memorandum appointing panel to hear Wai 2357 and Wai 2358 claims, 3 April 2012 (Wai 2538 ROI, memo 2.5.15), p 15; see also ch 4, app, cl 22.7.2
127. Submission 3.3.26, p 5

We find that the Crown's actions in providing Hauraki iwi with additional redress, without undertaking a robust overlapping redress process, have created fresh grievances for the claimants. This contravenes the Crown's own guidelines; as we have noted, the *Red Book* is explicit that 'Treaty settlements should not create further injustices' to claimant groups or anyone else.[128] More importantly, we find that it is a breach of the principle of active protection and the duty to avoid creating fresh grievances.

5.9 Contested Redress: Reconsidering or Proposing Alternative Redress

5.9.1 The claimants' and interested parties' positions

Counsel for Ngātiwai submitted that when they expressed concerns about proposed redress items, the Crown failed to consider offering alternatives – such as other properties within Hauraki's own rohe rather than in contentious overlapping areas such as Aotea and Mahurangi. Nor did the Crown consider how it might 'provide the same value to Hauraki iwi through the settlement without causing inter-tribal divisions and an affront to the mana of Ngātiwai.'[129]

Similar allegations were made by other claimants and interested parties. Counsel for Ngāti Ranginui said that the Crown had initially agreed to adjust one of the redress items that affected them, namely the boundaries of the area covered by the conservation framework. However, counsel submitted that the Minister later reversed this decision under pressure from Hauraki iwi, despite being aware that Ngāti Ranginui 'would not be happy'. Ultimately, the boundaries remained where they were.[130]

Counsel for Ngāi te Rangi asserted that the Crown's unwillingness to defer initialling the Hauraki Deed in the face of Tauranga iwi concerns had put them in a 'take it or leave it' situation that threatened their own settlement prospects. Counsel submitted that it was unclear whether the Crown ever considered further engagement or 'whether it could do anything else to resolve the issues raised'.[131]

Counsel for Ngāti Pūkenga, Ngāi Tamawhariua, and Te Whānau-a-Tauwhao also submitted that Tauranga negotiators were put in a 'take it or leave it' situation if they wanted to complete their settlement.[132] Counsel referred to Mr Tawhiao's description of Katikati hapū representatives being 'in tears' at having to make concessions in order to progress the Ngāi Te Rangi claim.[133] Again, counsel submitted that the Crown should have given all parties the chance to 'work through' redress disputes using a tikanga-based process, before reaching any binding redress agreements.[134]

128. *Red Book*, p 24
129. Submission 3.3.11, pp 18–19
130. Submission 3.3.10, p 20
131. Submission 3.3.13, pp 73, 53
132. Submission 3.3.19, p 5; submission 3.3.20, p 6
133. Submission 3.3.19, p 5; transcript 4.1.1, p 77
134. Submission 3.3.19, p 5

5.9.2 The Crown's response

Counsel defended the Crown's general approach to offering settlement redress, including how it dealt with claimant objections to specific redress items.

Counsel submitted that the evidence showed the Crown had acted in good faith towards Ngāi Te Rangi and the redress it had offered to Hauraki was 'appropriate in all the circumstances'.[135] The Crown could not 'disregard the rangatiratanga of Hauraki iwi by retracting their redress just because that was what Ngāi Te Rangi sought.' The Crown needed to uphold good faith agreements between iwi unless alternative agreements could be reached through a process that Hauraki would have needed to agree to. Counsel submitted that Hauraki was not prepared to accept Ngāi Te Rangi's prescriptions, 'especially the precondition that it surrender its redress'.[136]

Likewise, counsel submitted the Crown had acted in good faith throughout its dealings with Ngātiwai, including over the contested redress.[137] In response to Ngātiwai's claim that it should have explored the possibility of offering alternative redress to Hauraki iwi, the Crown submitted:

> where the Crown accepts that a claimant group has interests that warrant redress, particularly in relation to areas where the Crown has acknowledged historical Treaty breaches, then redress elsewhere is unlikely to meet the group's settlement aspirations. And if the Crown is able to provide redress in such areas then it should.[138]

Moreover, counsel submitted that, throughout the Crown's negotiations with Tauranga and Hauraki iwi, the Crown had in fact reconsidered or amended certain redress items that it had originally proposed. For example, counsel pointed out that both the conservation framework and the minerals relationship agreement were amended by agreement with the Hauraki collective so that their boundary did not extend into the Te Puna–Katikati blocks or overlap with the Tauranga Moana Iwi Collective's Te Kupenga Framework.[139]

Hauraki iwi confirmed this, with counsel submitting that on several occasions the Crown had amended or withdrawn redress 'late in the piece' so that claimant iwi had more time to respond to settlement offers.[140] Counsel cited instances of the Crown redrawing maps, reducing its recognition of Pare Hauraki customary interests, 'engag[ing] historians to review historians reviewing historians', employing external facilitators and tikanga experts, and delaying deed signings because of pending general elections.[141] In addition, counsel for Hauraki submitted, the evidence showed that, when matters were 'complex or intractable', the Crown

135. Submission 3.3.8, p 3
136. Submission 3.3.26, p 88
137. Submission 3.3.30, p 7
138. Ibid, p 64
139. Submission 3.3.8, p 6
140. Submission 3.3.27, p 5
141. Ibid

was willing to attempt different approaches or take more time to try finding resolution.[142]

5.9.3 What the Tribunal finds

We saw some evidence in this inquiry of the Crown being willing to revise redress offers or develop alternatives on occasion – for instance, redress offered to Ngāti Porou ki Hauraki was subsequently withdrawn after other Hauraki iwi objected. We also note that counsel for Ngāi Te Rangi acknowledged that the Crown had altered some contested redress items following Tauranga iwi opposition; they included Ministry of Primary Industry Quota Rights of First Refusal, which the iwi considers no longer 'in issue'.[143]

Whether to alter redress or contemplate alternatives in the face of iwi objections is one of the challenges facing the Crown: it must balance the interests of multiple parties and be fair to them all, not just the one it happens to be negotiating with at the time. In our view, the Crown could and should do much more, using and supporting the kind of tikanga-based process we have elsewhere recommended to resolve redress conflict between groups.

142. Ibid, p 21
143. Submission 3.3.7(a), p 1

CHAPTER 6

NGĀTI POROU KI HAURAKI

6.1 Background

Ngāti Porou ki Hauraki are an iwi of Hauraki. Their interests are primarily, but – according to Ngāti Porou ki Hauraki – not exclusively, in Harataunga (Kennedy Bay) and Mataroa on the Coromandel Peninsula.[1] These areas are also known as the tuku whenua areas as they were gifted to Ngāti Porou ki Hauraki by a rangatira of Ngāti Tamaterā, Paora Te Putu, in the early 1850s.[2] Ngāti Porou ki Hauraki's presence in the tuku whenua areas is not disputed but the extent of their influence and interests outside of those areas is hotly contested.[3]

Ngāti Porou ki Hauraki were a member of the Hauraki collective from 2010 until they withdrew in February 2014.[4] In December 2013, the iwi rejected their share of the financial redress apportioned to them as part of the collective settlement quantum, as well as aspects of their individual redress package.[5] They then withdrew from the negotiations, although they did not formally notify the Crown. In July 2014, the Minister for Treaty of Waitangi Negotiations wrote to the Ngāti Porou ki Hauraki negotiators advising them he was unwilling to progress their iwi-specific negotiations while the financial redress offer remained unaccepted.[6]

Ngāti Porou ki Hauraki re-entered iwi-specific negotiations in April 2016. In January 2017, John Tamihere, lead negotiator for Ngāti Porou ki Hauraki, initialled the Pare Hauraki Collective redress deed on the condition that the Crown would explore further iwi-specific redress for them.[7]

In December 2017, having negotiated a redress package that Ngāti Porou ki Hauraki indicated they would accept, the Crown made a final iwi-specific redress offer to them.[8]

From February to June 2018, the Crown undertook an overlapping engagement process, consulting with other iwi about the redress items offered to Ngāti Porou ki

1. Document A34 (John Tamihere, brief of evidence, 18 February 2019), pp 8–9
2. Ibid, p 9; doc 19(a), p 39
3. Document A44(b) (Richard John Barker, brief of evidence, 11 March 2019), pp 17–18; doc A44(a), p 131
4. Document A19(a), p 15
5. Document A45(a), pp 125–126, 128
6. Submission 3.3.12, p 9; doc A45(a), pp 130, 136
7. Document A44(a), p 1
8. Document A44(b) (Richard Barker, brief of evidence, 11 March 2019), p 10

Hauraki. Following objections from some iwi, the Crown withdrew some redress items from offer.[9]

On 3 July 2018, Ngāti Porou ki Hauraki filed a claim and urgency application to the Waitangi Tribunal.

6.2 Parties' Positions

6.2.1 The claimants

Ngāti Porou ki Hauraki claimed that the Crown's negotiation process breached the Treaty of Waitangi and they were prejudiced by the Hauraki negotiations. The claimants' overarching allegation was that the Crown's negotiation process was flawed and lacked elements of natural justice.[10]

In particular, the claimants alleged that they were denied access to funding and resources to negotiate their own settlement, excluded from research commissions, and denied access to the Crown.[11] According to the claimants, this meant that they were marginalised and not given an effective voice in negotiations.[12] The claimants argued that, because of these issues, they have not received a fair redress offer from the Crown.[13] Further, they claimed the negotiation process has created 'two tiers of tangata whenua' and as a result, whanaungatanga in Hauraki has been damaged.[14]

In conclusion, they claimed that the Crown failed in its duties to Ngāti Porou ki Hauraki. Specifically, it failed to actively protect the iwi, failed to provide redress, and damaged whanaungatanga in the Hauraki rohe.[15]

6.2.2 The Crown

The Crown denied that it has breached the Treaty or caused any prejudice to Ngāti Porou ki Hauraki.[16] Instead, the Crown said that the evidence showed that it 'acted appropriately, fairly and reasonably'.[17]

It argued that the offers to Ngāti Porou ki Hauraki were commensurate with the Treaty breaches the iwi suffered; that the Crown's recognition of Ngāti Porou ki Hauraki interests accords with the available evidence; and that any discord created between Hauraki iwi during negotiations cannot be attributed to the Crown's actions, but is something that may occur 'inherently' as part of an overlapping engagement process.[18]

9. Document A44(b) (Richard Barker, brief of evidence, 11 March 2019), pp 15–22
10. Submission 3.3.12, pp 1–2
11. Claim 1.1.5, pp 3–4
12. Submission 3.3.12, pp 11–12
13. Ibid, p 15
14. Ibid, p 11
15. Ibid, p 37
16. Submission 3.3.26, p 157
17. Ibid, p 159
18. Ibid, pp 159–161

6.2.3 Interested parties

Counsel for the Hauraki iwi also denied that Ngāti Porou ki Hauraki were treated unfairly, claiming they were a fully participating member of the Hauraki collective, until their withdrawal. Counsel also pointed out that Ngāti Porou ki Hauraki initialled the redress deed in January 2017, 'which specifies the apportionments between the iwi of Hauraki they now oppose'.[19] Counsel argued there had been no Treaty breach.

6.3 The Issues for the Chapter

Having considered the parties' positions, we now consider whether the negotiation process prejudiced Ngāti Porou ki Hauraki, specifically:

- Did the Crown treat Ngāti Porou ki Hauraki fairly and equally with other members of the Hauraki collective during the collective negotiation process?
- During their iwi-specific negotiations, did the Crown undertake a Treaty-compliant process for resolving overlapping redress items that were offered to Ngāti Porou ki Hauraki outside the tuku whenua areas?

6.3.1 Ngāti Porou ki Hauraki and the collective negotiation process

6.3.1.1 *Provision of funding: was it fair and equal?*

The claimants alleged the Crown did not treat members of the Hauraki collective fairly and equally in negotiations. Instead, the Crown 'chose' certain 'winners' and that group was the Marutūāhu collective, which sits within the Hauraki collective.[20] According to the claimants, the Crown 'chose [the Marutūāhu collective], funded them, and, while appearing to be working with the Hauraki collective has worked almost exclusively with Marutūāhu representatives in seeking to finalise this settlement'. Ngāti Porou ki Hauraki were ignored, had limited access to funding while a member of the collective, and did not receive claimant funding directly from the Crown until August 2016.[21]

The Crown described Ngāti Porou ki Hauraki's claims they were denied funding and excluded from research commissions as 'false' and referred the Tribunal to the evidence of both the Crown and the iwi of Hauraki.[22]

Crown negotiator Michael Dreaver outlined how the Crown approved claimant funding for the Hauraki negotiations on a collective basis in 2010:

> Claimant funding is a contribution towards the expenses a claimant group incurs in negotiating a historical Treaty settlement and is designed to contribute to key milestones in the negotiation process. Spending of claimant funding is managed by the

19. Submission 3.3.27, p 20
20. Submission 3.3.12, p 11
21. Ibid, pp 11, 19
22. Submission 3.3.26, p 159

mandated representatives of the claimant group, but evidence of expenditure must be provided with requests for further releases of funding.[23]

Mr Dreaver said that he was aware that the Crown Forest Rental Trust also provided funding to the collective.[24]

The Hauraki collective had the authority to determine how the funding was to be distributed. Mr Dreaver said the records provided to the Crown show that Ngāti Porou ki Hauraki negotiators received funding, alongside other Hauraki negotiators. The Crown had no reason to think that the funding was being distributed unfairly; he did not recall 'any serious issues' being raised that individual iwi were not receiving their 'fair share' of funding allocated by both the Crown and the Crown Forestry Rental Trust.[25]

Crown witness Leah Campbell stated that as Ngāti Porou ki Hauraki had not been engaged with the collective since 2014, they would not have had access to any funding the Crown had provided the collective since that time.[26] Ms Campbell also provided evidence that Ngāti Porou ki Hauraki received exceptional circumstances funding, as a contribution towards the negotiation process, when they re-entered iwi-specific negotiations. As at 12 April 2019, they had received $93,665.47 with a balance of $56,334.53 remaining.[27]

Witness for the Hauraki iwi, Terrence John McEnteer, deputy chairman of the Hauraki collective, also stated that Ngāti Porou ki Hauraki had 'directly received hundreds of thousands of dollars over the years from the [Crown Forestry Rental Trust/Office of Treaty Settlements] funding made available to the Hauraki collective'. This money was separate from the exceptional circumstances funding provided directly from the Crown to Ngāti Porou ki Hauraki.[28]

In reply to Mr McEnteer's evidence, claimant counsel stated that 'Mr Tamihere's evidence is that he received nothing'.[29]

Although we were not provided with a copy of the collective's records showing how they distributed the funding, the Crown provided evidence showing that in October 2012, the Office of Treaty Settlements was drafting Ngāti Porou ki Hauraki's historical account and Mr Tamihere was 'very comfortable' with what was being proposed.[30] The Crown's evidence also shows that Ngāti Porou ki Hauraki were aware that Crown funding was available to support historical research into their interests when they re-entered iwi-specific negotiations, but that the iwi failed to take up the offer.[31]

23. Document A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 11
24. Ibid; doc A45(a), p 86
25. Document A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 12
26. Document A48(b) (Leah Campbell, brief of evidence, 12 April 2019), p 105
27. Ibid, pp 105–106; doc A48(a), pp 1916–1932
28. Document A42 (Terrence John McEnteer, brief of evidence, 10 March 2019), pp 67–68
29. Submission 3.3.12, p 12 fn 41
30. John Tamihere to Office of Treaty Settlements, email, 26 October 2012 (doc A45(a), p 104)
31. Document A48(a), p 1922; doc A44(a), pp 10, 11, 13

In our view, Ngāti Porou ki Hauraki's claim that they were denied funding and resources to negotiate their own settlement is not supported by the evidence. The iwi clearly received resources or funding, both as a member of the Hauraki collective and separately to negotiate their own iwi-specific settlement. If Ngāti Porou ki Hauraki did have serious concerns about the allocation of funding within the Hauraki collective while they were participating in the collective negotiations, we would expect to see clear and cogent evidence of them raising such concerns with the collective or the Crown at that time. We did not.

6.3.1.2 *Managing conflict of interests*

The claimants alleged that the negotiation process was flawed because the Crown failed to adequately manage conflicts of interests arising from the chair and negotiator of the Hauraki collective, Paul Majurey, also being the Marutūāhu negotiator, a negotiator for Ngāti Maru and counsel for the Hauraki collective.[32] Claimant counsel submitted that this gave Mr Majurey 'three bites of the apple' – first as the Hauraki collective's negotiator, 'second as Marutūāhu negotiator, and third as Ngāti Maru negotiator'.[33]

According to the claimants, the Crown failed to do anything about this perceived conflict of interest because the Crown had picked the 'winners': the Marutūāhu collective and its members. Further, although Marutūāhu also sat within the Hauraki collective, their strength of numbers gave them 'a veto power over others'.[34] Claimant counsel submitted that the Crown was aware of concerns within the Hauraki collective that the dominance of the Marutūāhu collective would preclude a fair settlement for all and 'ought to have intervened to ensure prejudicial outcomes were avoided', but took no action.[35] As a result, Ngāti Porou ki Hauraki's interests were effectively marginalised.

Ngāti Porou ki Hauraki claimed that nowhere is this marginalisation more aptly demonstrated than where their rights and interests have been confined to the two tuku whenua areas.[36] Claimant counsel submitted that 'due to the lack of funding and provision of information and research' the Crown reached the view that Ngāti Porou ki Hauraki's interests did not extend outside of the geographically defined areas at Mataora and Harataunga.[37] However, according to the claimants, Ngāti Porou ki Hauraki's influence and interests extend far beyond these areas.[38] Counsel argued that the Crown's 'fixed view' concerning the tuku whenua areas 'contaminated' the negotiation process, undermining their chances of achieving a fair settlement.[39]

32. Submission 3.3.12, pp 6, 9
33. Ibid, p 11
34. Ibid
35. Ibid, pp 9–10
36. Ibid, p 12
37. Ibid, p 13
38. Document A34 (John Tamihere, brief of evidence, 18 February 2019), pp 9–10
39. Submission 3.3.12, p 14

Ngāti Porou ki Hauraki claimed that the 2.5 per cent of the settlement quantum apportioned to them as financial redress ($2.5 million) is low and must have been influenced by the Crown's 'preconceived idea' that the iwi were limited to the two tuku whenua areas.[40] Ngāti Porou ki Hauraki withdrew from the collective, and negotiations, not long after the Crown's offer was made. However, they asserted that their withdrawal was not just on the basis of the allocation but because of 'the prejudicial nature of the process', whereby they felt that they had been excluded and confined to the tuku whenua areas.[41]

Further, in evidence and submissions, Ngāti Porou ki Hauraki also claimed that the Crown 'threatened' to reduce the settlement quantum if they withdrew from the collective.[42]

The Crown denied that Ngāti Porou ki Hauraki were treated as 'second class tangata whenua'; in other words that the Crown favoured other iwi and marginalised Ngāti Porou ki Hauraki.[43] It strongly rejected allegations of unfair and unequal treatment, and the alleged dominance of the Marutūāhu iwi within the Hauraki collective. The Crown asserted that it treated all Hauraki iwi fairly and reasonably, including Ngāti Porou ki Hauraki. It stated 'there is no evidence' that Ngāti Porou ki Hauraki were marginalised within the collective or the negotiation process.[44]

The Crown argued that the only evidence Ngāti Porou ki Hauraki had provided to prove 'that the Crown picked other iwi as winners to the detriment of Ngāti Porou ki Hauraki' was the fact that Ngāti Porou ki Hauraki were only offered 2.5 per cent of the settlement quantum.[45]

Other than the statement that the quantum calculation was influenced by the Crown's 'preconceived idea' that Ngāti Porou ki Hauraki be restricted to the two tuku whenua areas, the Crown submitted that the iwi produced no evidence substantiating why they consider the 2.5 per cent allocation is low, or prejudicial, or the result of Ngāti Porou ki Hauraki being treated as 'second-class tangata whenua'.[46]

Further, the Crown argued that it saw no evidence that Ngāti Porou ki Hauraki were prejudiced by internal dynamics within the collective, and said it had no reason to intervene to protect them.[47]

The Crown rejected the argument that it 'threatened' to lower the settlement quantum if Ngāti Porou ki Hauraki withdrew. Instead, the Crown explained, the higher offer of $2.5 million was a result (and a benefit) of belonging to a larger collective. A lower offer of $1.5 million would reflect the consequences of the iwi negotiating 'by themselves'.[48]

40. Submission 3.3.12, pp 14–15
41. Ibid, p 16
42. Ibid, pp 17–18; doc A34, p 7
43. Submission 3.3.26, pp 159, 203
44. Ibid, pp 159, 164, 208
45. Ibid, p 160
46. Ibid, pp 166–167
47. Ibid, p 208
48. Ibid, pp 174–175

The Crown described its rationale for calculating the financial redress (although not the exact quantum) to be offered for Treaty breaches. The Crown explained that offers are 'primarily based on the nature and severity of each iwi's historical Treaty grievance and land loss, and secondary factors such as population size.'[49]

On our reading of the evidence, it would seem that Ngāti Porou ki Hauraki have interpreted this explanation to mean that they were being penalised for *not* selling land. As their counsel postulated during cross-examination of the Crown's negotiator, Mr Dreaver: 'for iwi like Ngāti Porou ki Hauraki who have low levels of land loss because they weren't sellers, as Mr Tamihere said, that calculation really leaves them out in the cold doesn't it?'[50]

Mr Dreaver explained that the Treaty settlement process 'is about redressing Crown breaches of the Treaty which had an impact on the rights of that iwi. If the iwi did not lose land then the breaches are less severe.'[51]

On one view, it could seem that Ngāti Porou ki Hauraki think they should be compensated for not selling land and for being 'the largest holder of freehold whenua out of all of the iwi of Hauraki'.[52] Clearly, the iwi are unhappy with the redress offered by the Crown. However, unhappiness is not proof of a Treaty breach – nor that Ngāti Porou ki Hauraki were marginalised. We accept that the Crown's rationale for calculating redress that is commensurate with Treaty breaches is reasonable. Without limiting the potential for other redress, we accept that, when compensating for loss of land, it is illogical to compensate for land that was not lost.

Ngāti Porou ki Hauraki's dissatisfaction with the redress they were offered also seems to have fuelled their belief that the Crown threatened them into staying in the collective negotiations. We reject this proposition. The Crown, through the Minister and officials, made it clear to Ngāti Porou ki Hauraki that the $2.5 million allocated to them reflected the collective nature of the Hauraki negotiations, and depended on the iwi belonging to the Hauraki collective. A lower figure of 'no more than $1.5 million', on the other hand, reflected the disadvantages of negotiating alone.[53] Clearly, Ngāti Porou ki Hauraki were being offered an incentive to stay within the collective process. In our view, this was a reasonable negotiating tactic given the Crown's clearly expressed preference to negotiate with 'large natural groupings'.[54]

We turn now to discuss Ngāti Porou ki Hauraki's allegations of favouritism and the supposed 'veto power' of the Marutūāhu collective. Before considering this claim, we note in passing that the Marutūāhu iwi were only five out of the twelve total Hauraki iwi.

49. Ibid, p 169
50. Transcript 4.1.2, p 37
51. Ibid, p 37
52. Submission 3.3.12, p 4
53. Document A45(a), pp 106
54. *Red Book*, p 27

6.3.1.3 *Engaging with the Crown*

The claimants alleged that they were denied access to the Minister and Crown officials while Mr Majurey and the Marutūāhu collective received favoured status.[55] Besides referring at times to Mr Majurey's various positions, claimant counsel referred to an agenda for meetings with the Crown negotiator. This agenda showed the Crown negotiator meeting with the Hauraki collective in the morning, Marutūāhu after a break, and Ngāti Maru later in the afternoon. Counsel portrayed this as 'in effect Mr Majurey and Ngāti Maru for that matter get three bites of the cherry every time he met with you while other negotiators miss out'.[56]

In both his written brief and under cross-examination, Mr Dreaver categorically denied that the Marutūāhu collective received more access than other iwi. He asserted that the 'Marutūāhu iwi had no greater access to the Minister or me in the context of the Hauraki Collective or iwi-specific negotiations'.[57] He argued that although Mr Majurey held multiple roles, this did not advantage Marutūāhu iwi because, in any given meeting with the Crown, Mr Majurey was acting on behalf of that specific group, and both negotiators were used to managing any potential conflicts of interest.[58]

Mr Dreaver agreed he had met with Mr Majurey many more times ('close to 100') than with Ngāti Porou ki Hauraki, whom he recalled meeting with more than the three times claimed by Mr Tamihere.[59] But Mr Dreaver clarified that he most often met Mr Majurey in the context of fortnightly meetings with the wider Hauraki collective, to which all negotiators were invited. He also pointed out that Mr Tamihere had not always attended meetings where Mr Dreaver had met with Ngāti Porou ki Hauraki representatives.[60]

Mr Dreaver asserted that all Hauraki iwi were free to request meetings, he had never rejected a meeting request from any Hauraki iwi, and had made a point of meeting at a time and place convenient for iwi.[61] For example, 'I had people meeting me in my living room . . . on my front porch. We did quite a lot of our negotiations on the front porch'.[62]

He also noted that often informal or formal discussions would take place between himself and iwi negotiators during breaks at Hauraki collective hui, but that as Mr Tamihere often left before lunchtime, few such interactions occurred between them.[63]

55. Submission 3.3.12, pp 11, 12, 19
56. Transcript 4.1.2, p 34
57. Document A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 20
58. Transcript 4.1.2, p 35
59. Ibid, pp 30, 33
60. Transcript 4.1.2, p 33; doc A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 22
61. Document A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 20
62. Transcript 4.1.2, p 34
63. Document A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 22

Regarding access to the Minister, Mr Dreaver stated that up until Ngāti Porou ki Hauraki withdrew from the collective negotiations, the iwi had met with the Minister four times – comparable with other iwi at that time.[64]

The Tribunal notes that the allegation of Crown favouritism toward Marutūāhu is broad in nature and therefore not easy to assess. We observe, however, that no cogent evidence has been provided to support the claim that the Crown strategically favoured Marutūāhu iwi (that is, 'picked winners') or met with other Marutūāhu iwi negotiators (aside from Mr Majurey) more often than with non-Marutūāhu iwi negotiators. The claim that the Crown favoured Marutūāhu thus seems to rely heavily on the fact that the Marutūāhu collective chair held three leadership roles within the Hauraki negotiations, so had more contact with Crown officials than other negotiators did.

It is possible to speculate that Mr Majurey's relatively frequent contact with Crown officials led to stronger interpersonal relationships with them than other negotiators enjoyed, and that this may have advantaged Marutūāhu iwi, however subtly. Even if this were true, however – and we do not know it is – such a situation would not justify an allegation of calculated favouritism on the part of the Crown.

Based on the evidence before us, we cannot conclude that the claim of Crown favouritism toward Marutūāhu is well-founded, or that Ngāti Porou ki Hauraki were prejudiced by any dominance of the Marutūāhu collective, or any perceived conflicts of interests within the Hauraki collective.

6.3.2 Iwi-specific negotiations

6.3.2.1 *Protecting Ngāti Porou ki Hauraki's interests while they were out of the negotiations*

Claimant counsel submitted that after Ngāti Porou ki Hauraki withdrew from the collective and 'sat outside of negotiations', the Crown failed to protect their position and interests. According to the claimants, Ngāti Porou ki Hauraki had no funding or ability to follow the negotiations and keep abreast of developments. They claimed that in their absence, other iwi were able 'to assert rights, interests, and their cultural footprint across the Hauraki and seize on the assets available'.[65]

The Crown denied that it failed to protect Ngāti Porou ki Hauraki's interests while the negotiations continued without them. It provided a list of the measures taken, including:

- ring-fencing and preserving the iwi-specific redress offered before they withdrew; and
- developing accession provisions that preserved the option for Ngāti Porou ki Hauraki to participate in the collective redress later – including participating in the commercial redress, and all collective cultural redress.[66]

64. Document A45(b) (Michael Dreaver, brief of evidence, 11 April 2019), p 22
65. Submission 3.3.12, pp 18–19
66. Submission 3.3.26, pp 209–210

Ngāti Porou ki Hauraki also continued to receive all collective documents and could have applied for exceptional circumstances funding to allay costs associated with reviewing the material.[67]

The claimants confirmed that they continued to receive Hauraki collective documentation but expected the Crown to protect their interests while not participating in negotiation: 'It is fair to say we have been copied in on information, we have not participated full stop. It is incumbent on the Crown to actively protect our interests in our absence.'[68]

Ngāti Porou ki Hauraki claimed that they 'were forced out into the cold', allowing other iwi to seize on the assets while they were outside negotiations.[69] But, in our view, the evidence shows clearly that Ngāti Porou ki Hauraki chose to withdraw from the collective negotiations. And it is just as clear they knew that the negotiations would continue without them. As Mr Tamihere said in evidence:

> I carefully indicated to the new Chief Negotiator that we had waited until all other eleven iwi in the Hauraki had initialled their iwi Deeds of Settlements and also the Collective Redress Deed. . . . I requested that the Crown disclose what was left in the commercial land bank and also in the Conservation area that had not been claimed by other Iwi.[70]

Under cross-examination, Mr Tamihere said that when the iwi re-entered negotiations with a new negotiator, 'I requested that he provide all of the Crown assets that were still on the table that had not been seized upon by the other 11 iwi given the absence that Ngāti Porou had. That was provided and it's in the evidence. We then knew, Ngāti Porou negotiators knew what we had to deal with'. Later, he described Ngāti Porou ki Hauraki needing 'to go back and look at where our footprint could be expressed within the leftovers'.[71]

In our view, this clearly demonstrates that Ngāti Porou ki Hauraki were waiting to see what redress items remained available after other iwi had negotiated their settlements. This was their negotiation strategy. The motivation behind this approach was not clear to us. However, as Ngāti Porou ki Hauraki chose to follow it, we consider that they cannot now complain that their interests or 'cultural footprint' – which the iwi was anxious to extend as far as possible[72] – had not been protected while they sat outside of the negotiations.

Short of the Crown having stopped all negotiations with the other iwi – which not only would have been unfair to those iwi but was also clearly not part of Ngāti Porou ki Hauraki's strategy – it is hard to see how much more the Crown could have done to protect their interests while they chose to remain outside.

67. Submission 3.3.26, pp 210
68. Document A21 (John Tamihere, brief of evidence, 8 August 2018), p 3
69. Submission 3.3.12, p 19
70. Document A34 (John Tamihere, brief of evidence, 18 February 2019), p 16
71. Transcript 4.1.1, pp 220, 234
72. Document A34 (John Tamihere, brief of evidence, 18 February 2019), pp 16, 18; doc A44(b) (Richard Barker, brief of evidence, 11 April 2019), p 4; doc 44(a), pp 12, 23

6.3.2.2 *Re-entering iwi-specific negotiations and dealing with overlapping interests*

In April 2016, Ngāti Porou ki Hauraki and the Crown agreed to re-commence iwi-specific negotiations with a new Crown negotiator, the Hon Richard Barker.[73] In January 2017, Mr Tamihere initialled the Pare Hauraki Collective redress deed on behalf of the three Ngāti Porou ki Hauraki negotiators, subject to the condition that the Crown would investigate additional iwi-specific redress items for the iwi. These included commercial and cultural properties in areas outside of Harataunga and Mataora, where Ngāti Porou ki Hauraki claimed they also had interests.[74]

By December 2017, the Crown and Ngāti Porou ki Hauraki negotiators had identified several new redress items. These included additional commercial properties held by the Ministries of Justice and Education, the transfer of public conservation land, an overlay classification over land at the base of Tokatea maunga, and $1.5 million in cultural redress funding for the iwi.[75] On 18 December 2017, the Crown wrote to the negotiators setting out the Crown's 'best and final offer' to settle Ngāti Porou ki Hauraki's historical claims, based on the items that had been identified.[76]

Claimant counsel agreed that the Ngāti Porou ki Hauraki negotiators and Mr Barker negotiated a settlement package that might have been favourably received if put to the iwi for ratification.[77]

The Crown then went through an 'overlapping claims engagement process' that included identifying the groups whose interests overlapped with the proposed redress offered to Ngāti Porou ki Hauraki, and consulting them.[78] Six Hauraki iwi objected to some redress items outside the tuku whenua areas that the Crown proposed to provide to Ngāti Porou ki Hauraki.[79]

In April 2018, Mr Tamihere requested a meeting with the six iwi, with support from the Crown, to discuss the overlapping redress items. The meeting went ahead, but according to Crown negotiator Richard Barker, it 'didn't go well'. The other iwi remained opposed to the inclusion of redress outside the tuku whenua areas.[80]

In response to the opposition from other iwi, the Crown decided to withdraw some of the redress items – three cultural redress vestings within the Coromandel Forest Park and the Te Ramarama Conservation Area; and four non-exclusive redress items, including statutory acknowledgements at Whakanekeke, Harataunga, and Hikurangi and the overlay classification at Tokatea.[81] On 25 June

73. Submission 3.3.12, p 29
74. Document A44(b) (Richard Barker, brief of evidence, 11 April 2019), pp 7–9
75. Ibid, p 10
76. Document A44(a), p 25
77. Submission 3.3.12, p 29
78. Document A44(b) (Richard Barker, brief of evidence, 11 April 2019), pp 15–16; submission 3.3.12, p 29
79. Document A44(b) (Richard Barker, brief of evidence, 11 April 2019), p 17; doc A44(a), p 53; submission 3.3.12, p 29
80. Document A44(b) (Richard Barker, brief of evidence, 11 April 2019), p 20; doc A34 (John Tamihere, brief of evidence, 18 February 2019), p 17
81. Document A44(a), pp 53, 61–62

2018, Mr Barker met with Mr Tamihere to advise him of the Crown's decision to withdraw those items.[82]

On 3 July 2018, Mr Tamihere filed his urgent application to the Waitangi Tribunal.

The claimants alleged that the Crown's process for resolving overlapping redress items in this case was not fair or robust. In particular, they claimed, the Crown clearly failed to require the contesting 'parties to engage in good faith' or evaluate the merits of the objections.[83]

They argued that the Crown's decision to withdraw the offer of contested redress was 'arbitrary', had no basis in evidence, and was motivated by the Crown's desire to quickly finalise the Hauraki collective settlement.[84] They asserted that the entire process damaged whanaungatanga.[85]

The Crown insisted that its process for offering and resolving the contested redress items was fair. According to the Crown, it made clear to Ngāti Porou ki Hauraki throughout the process that any iwi-specific redress items would only be finally included if iwi with overlapping interests also agreed.[86]

The Crown said it withdrew elements of the contested redress based on evidence: Ngāti Porou ki Hauraki failed to supply evidence that its interests in the contested items were stronger than or equal to the interests of other iwi, 'despite repeated requests'. It also considered the opposition of other iwi, who could show clear and specific interests. The Crown states that it 'acted reasonably and in good faith in relation to that offer and withdrawal'.[87]

The Crown also rejected that its actions undermined whanaungatanga, instead believing that it 'acted reasonably and in good faith to avoid this as far as is possible'.[88]

In our view, the Crown did act appropriately. Ngāti Porou ki Hauraki requested a meeting with the objecting iwi to try and resolve the issue, kanohi ki te kanohi. The Crown assisted by arranging that meeting. It seems that iwi present at the meeting expressed strong and concerted opposition to the redress being offered outside the tuku whenua areas. In these circumstances, the Crown had facilitated a meeting, as requested by Ngāti Porou ki Hauraki. The outcome of that meeting was clear and absolute. No agreement was reached between the interested iwi. No further opportunities or processes were sought to try and resolve the issue through tikanga.

The Crown then weighed the evidence put forward by Ngāti Porou ki Hauraki and the objecting iwi. It assessed that the objecting iwi could demonstrate stronger interests in the contested areas than Ngāti Porou ki Hauraki. This was the basis of

82. Document A44(b) (Richard Barker, brief of evidence, 11 April 2019), p 23; doc A44(a), p 53
83. Submission 3.3.12, p 31
84. Ibid, pp 32–34
85. Ibid, p 37
86. Submission 3.3.26, pp 159, 181; doc A44(b) (Richard Barker, brief of evidence, 11 April 2019), p 10
87. Submission 3.3.26, pp 159, 187; doc A44 (Richard Barker, brief of evidence, 11 April 2019), p 25
88. Submission 3.3.26, p 160

the Crown's decision to withdraw the contested redress items. We do not consider the Crown acted inconsistently with the principles of the Treaty by doing so.

The Crown's actions did have negative effects by raising Ngāti Porou ki Hauraki's expectations for their iwi-specific redress (despite indicating the redress items were subject to resolving overlapping interests). This appears to have aggravated already heightened tensions between the iwi involved. However, we are not convinced that the Crown could have done much more in the circumstances.

6.4 What the Tribunal Finds

Based on the evidence before us, we find that the Crown did not treat Ngāti Porou ki Hauraki unfairly and any prejudice to the iwi in the negotiation process was not caused by the Crown. Thus, we find Ngāti Porou ki Hauraki's claim is not well-founded.

CHAPTER 7

SUMMARY OF FINDINGS AND RECOMMENDATIONS

7.1 Summary of Findings

We present a summary of our findings made in chapters 3 and 5, and set out our recommendations.

7.1.1 The *Red Book*

We find that *Ka Tika a Muri, ka Tika a Mua* (the *Red Book*) is vague, unhelpful, inadequate, and inaccurate as a statement of Crown policy and practice to inform Māori. We are particularly concerned that the *Red Book* has not been amended in light of the very clear recommendations set out in *The Tāmaki Makaurau Settlement Process Report* more than 12 years ago.

7.1.2 Consultation on redress proposals

In failing to carry out a proper consultation process, we find that the Crown breached its partnership obligation to Tauranga Moana iwi and Ngātiwai. It also breached its duty to consult by excluding Ngātiwai from discussions over Aotea until late in the negotiations, despite them having clearly expressed an interest very much earlier.

7.1.3 Transparency: disclosing and sharing information

In failing to communicate openly with Ngāti Ranginui, Ngāi Te Rangi, and Ngātiwai, and in failing to share information with and between all groups, we find that the Crown has breached:

- the principles of partnership and active protection;
- its duty to act honourably and in good faith to all iwi and not just the settling group;
- its obligation to protect or preserve amicable tribal relationships.

The Crown's conduct has created fresh grievances, fractured relationships, and caused further delays to the settlement process.

7.1.4 The use of tikanga-based processes

We find that, by failing to properly promote, allow for, and facilitate tikanga-based processes, at the appropriate times and especially at the start of negotiations, the Crown has breached its duty to avoid creating fresh grievances. As a result, it has prejudicially affected iwi with overlapping interests and breached the principles of partnership, good faith, and active protection.

7.1.5 Protecting all parties and maintaining relationships

In respect of Ngāi Te Rangi, Ngāti Ranginui, and Ngātiwai, we find that the Crown acted in a way that damaged relationships between iwi and with the Crown. This breached the Treaty principles of partnership and active protection, and caused fresh grievances.

7.1.6 Providing additional redress after reaching initial agreements

We find that the Crown's actions in providing Hauraki iwi with additional redress, without undertaking a robust overlapping redress process, have created fresh grievances for the claimants. This is another breach of the principle of active protection, and the duty to avoid creating fresh grievances.

7.2 Recommendations

Having thus found that the Crown acted inconsistently with the Treaty principles of partnership and active protection; failed in its duties to act honourably and in good faith, and to avoid creating fresh grievances; and failed in its obligation to protect or preserve amicable tribal relationships, we find that the Crown has prejudicially affected Ngāi Te Rangi, Ngāti Ranginui, and Ngātiwai. Accordingly, we recommend:

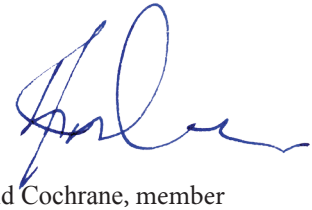
- that the legislation giving effect to the Pare Hauraki Collective settlement deed, and the individual Hauraki iwi settlement deeds, does not proceed until the contested redress items have been through a proper overlapping claims process as set out in this report.

Beyond making this specific recommendation, we also address broader issues raised by what we have seen in this inquiry of the Crown's policies, processes, and practices when dealing with groups with overlapping interests. Accordingly, we further recommend:

- that the Crown, when undertaking overlapping engagement processes during settlement negotiations, fully commits to and facilitates consultation, information-sharing, and the use of tikanga-based resolution processes that reflect the principles we have identified in chapters 3 and 5 above; and
- that the Crown amends the *Red Book* to record its current policies, processes, and practices, and in particular to:
  - explicitly acknowledge the Crown's commitment to consultation, information-sharing, and tikanga-based resolution processes at the appropriate times, and
  - include the principles on which those processes should be based, taking into account the findings in this report, and other Waitangi Tribunal reports, concerning overlapping interest claims.

Dated at Wellington this 13th day of December 2019

Judge Miharo Armstrong, presiding officer



David Cochrane, member

Dr Rawinia Higgins, member

Dr Ruakere Hond, member

APPENDIX I

CLAUSE 22 OF THE PARE HAURAKI COLLECTIVE REDRESS DEED

Source: Hako, Ngāi Tai ki Tāmaki, Ngāti Hei, Ngāti Maru, Ngāti Paoa, Ngāti Porou ki Hauraki, Ngāti Pūkenga, Ngāti Rāhiri Tumutumu, Ngāti Tamaterā, Ngāti Tara Tokanui, Ngaati Whanaunga, Te Patukirikiri, and the Crown, 'Pare Hauraki Collective Redress Deed', 2 August 2018, pp 145–146

22 Tauranga Moana

22.1 The Crown recognises the Iwi of Hauraki have interests in Tauranga Moana, particularly in Te Puna–Katikati.

22.2 The Iwi of Hauraki world view is the Iwi of Hauraki have interests within Tauranga Moana, which are of great spiritual, cultural, customary, ancestral and historical significance.

22.3 The Iwi of Hauraki and the Crown acknowledge and agree this deed does not:

22.3.1 provide for cultural redress in relation to Tauranga Moana as that is to be confirmed in separate negotiations; nor

22.3.2 prevent the development of cultural redress in relation to Tauranga Moana.

22.4 The Iwi of Hauraki consider the Hauraki Treaty settlements will not be complete until they receive cultural redress in relation to Tauranga Moana.

22.5 The Crown acknowledges the Hauraki Collective and the Tauranga Moana Iwi Collective have agreed to discuss through a tikanga-based process how Tauranga Moana is to be protected and enhanced.

22.6 The Crown acknowledges and agrees unless the Hauraki Collective and Tauranga Moana Iwi Collective reach an alternative agreement through a tikanga-based process, the Tauranga Moana Framework will be provided for in separate legislation to be introduced to the House of Representatives as soon as the following matters have been resolved to the satisfaction of TMIC, the Crown and the Hauraki Collective, and in accordance with the principles of Te Tiriti o Waitangi/the Treaty of Waitangi:

22.6.1 whether a process is required, and, if so the nature of that process, for resolving the disagreements referred to in Part 1, paragraph 10.3 of the Appendix to Part 3 of the TMIC Legislative Matters Schedule;

22.6.2 how such legislation will provide for the participation of two or more iwi with recognised interests in Tauranga Moana through one seat on the Tauranga Moana Governance Group (as provided in Part 1, paragraph 1.1.5 of the Appendix to Part 3 of the TMIC legislative matters schedule); and

22.6.3 the scope of the area marked as 'A' on the Tauranga Moana Framework plan in the TMIC attachments.

22.7 When the Tauranga Moana Framework is enacted through standalone legislation the Crown:

22.7.1 affirms the right of the Iwi of Hauraki, on the basis of its recognised interests in Tauranga Moana, to participate through the seat described in clause 3.11.4(e) of the Legislative Matters Schedule of the Tauranga Moana Iwi Collective Deed will be preserved; and

22.7.2 notes the Waitangi Tribunal's statement that 'there is prejudice to Hauraki iwi as a result of the inclusion of clause 10.3' of the Legislative Matters Schedule of the Tauranga Moana Iwi Collective Deed.

22.8 For the purposes of this part 22, *Hauraki Collective* means the body appointed to negotiate historical treaty settlements on behalf of the Iwi of Hauraki

APPENDIX II

SELECT INDEX TO THE RECORD OF INQUIRY

RECORD OF HEARINGS

Panel Members

The panel members were Judge Miharo Armstrong (presiding), David Cochrane, Professor Rawinia Higgins, and Dr Ruakere Hond.

Counsel

The Crown

The Crown was represented by Paul Rishworth QC, Gregor Allan, Jason Gough, Jacki Cole, Anne O'Driscoll, and Tessa Simpson.

The claimants

Wai 2616 (Ngāi Te Rangi)

Charlie Tawhiao on behalf of the Ngai Te Rangi Settlement Trust Tauranga Moana was represented by Season-Mary Downs, Heather Jamieson, and Chelsea Terei.

Wai 2666 (Ngātiwai)

Haydn Thomas Edmonds on behalf of the Ngātiwai Trust Board and the iwi of Ngātiwai was represented by Kiri Tahana and Matewai Tukapua.

Wai 2735 (Ngātiwai Kiri Tahana, Matewai Tukapua)

John Tamihere on behalf of Te Runanga o Ngāti Porou ki Hauraki was represented by Bryce Lyall.

Wai 2754 (Ngāti Ranginui)

Ronald Te Pio Kawe on behalf of the Ngā Hapū o Ngāti Ranginui Settlement Trust and Ngā Hapū o Ngāti Ranginui was represented by Damian Stone, Matewai Tukapua, and Ngaroma Tahana.

The interested parties

Full status

Jocelyn Mikaere-Hollis on behalf of the Te Tāwharau o Ngāti Pūkenga Trust was represented by Areta Gray, Te Kani Williams, and Kristal Rogers.

Ngāti Maru, Ngāti Tamaterā, Te Patukirikiri, Ngāti Whanaunga, and Ngāti Pāoa were represented by Paul Majurey.

Jill Taylor and Nicki Scott on behalf of Ngāti Rahiri Tumutumu were unrepresented.

The trustees of the Ngāti Tara Tokanui Trust on behalf of Ngāti Tara Tokanui were represented by Aidan Warren and Connie Bollen.

Watching brief only

Deane Adams on behalf of Ngāti Huarere ki Whangapoua was represented by Charl Hirschfeld and Barney Tupara.

Michael Beazley on behalf of Te Uri o Makinui/Ngāti Maraeariki and Ngāti Rongo ki Mahurangi was represented by Linda Thornton.

Michael Beazley on behalf of Ngāti Rēhua-Ngātiwai ki Aotea was represented by Linda Thornton.

Mokoro Gillett on behalf of the Ngāti Hauā Iwi Trust was unrepresented.

Arapeta Wikito Pomare Hamilton, Joyce Baker, and Deon Baker on behalf of the descendants of Pomare II and members of Ngāti Manu, Te Uri Karaka, Te Uri o Raewera, and Ngāpuhi ki Taumārere were represented by Annette Sykes, Jordan Bartlett, and Rebekah Jordan.

Huhana Lyndon and others on behalf of Ngāti Rēhua, Ngātiwai, and Ngāpuhi whānau were represented by Winston McCarthy.

Morehu McDonald and Hinengaru Thompson Rauwhero on behalf of Ngā Hapū o Ngāti Hinerangi and Ngāti Hinerangi Wai claimants were represented by Robyn Zwaan.

Kristan John MacDonald, Chris Reihana Koroheke, James Bernard Mackie, and Aperehama Edwards on behalf of themselves and Te Whanau o Rangiwhakaahu were represented by Alice McCarthy and Winston McCarthy.

The Ngati Manuhiri Settlement Trust was represented by Jason Pou.

The Ngāti Pāoa Iwi Trust was represented by Matanuka Mahuika and Tara Hauraki.

Ngāti Whātua Ōrākei were represented by Justin Graham, Aditya Vasudevan, Te Aopare Dewes, and Hanamaraea Walker.

Kipouaka Pukekura-Marsden and John Ohia on behalf of Ngāti Pūkenga Iwi ki Tauranga Moana were represented by Michael Sharp.

The Raukawa Settlement Trust was represented by Baden Vertongen.

Maatai Ariki Kauae Te Toki on behalf of Hako i te Rangi te Pupu o Hauraki was unrepresented.

Mapuna Turner on behalf of Ngāti Rahiri Tumutumu was represented by Bryce Lyall.

Phillip Wharekawa on behalf of Ngāi Tamawhariua and Te Whānau-a-Tauwhao was represented by Michael Sharp.

The Hearing

The hearing was held at Waiwhetu Marae from 8 to 12 April 2019.

RECORD OF PROCEEDINGS

1. Statements

1.1 Statements of claim

1.1.1 Season-Mary Downs, Chelsea Terei, and Heather Jamieson, statement of claim of Charlie Tawhiao on behalf of the Ngāi Te Rangi Settlement Trust, 14 March 2017

(a) Season-Mary Downs, Chelsea Terei, and Heather Jamieson, amended statement of claim of Charlie Tawhiao on behalf of the Ngāi Te Rangi Settlement Trust, 21 December 2018

1.1.2 James Ferguson, statement of claim of Stanley Papa on behalf of Te Whakakitenga o Waikato Incorporated, 31 March 2017

1.1.3 Kiri Tahana, statement of claim of Haydn Edmonds on behalf of the Ngātiwai Trust Board and the iwi of Ngātiwai, 24 July 2017
(a) Haydn Thomas Edmonds, amended statement of claim, 21 December 2018)

1.1.4 Justin Graham, statement of claim of Terrence (Mook) Hohneck on behalf of the Ngāti Manuhiri Settlement Trust, 14 September 2017

1.1.5 Bryce Lyall, statement of claim of John Tamihere on behalf of himself and all the people of Ngāti Porou ki Hauraki, 3 July 2018

1.1.6 Damien Stone and Matewai Tukapua, statement of claim of Ronald Te Pio Kawe on behalf of Ngā Hapū o Ngāti Ranginui Settlement Trust and Ngā Hapū o Ngāti Ranginui, 10 August 2018

1.4 Statements of issues

1.4.1 Judge Miharo Armstrong, David Cochrane, and Professor Rawinia Higgins, Tribunal statement of issues, [18 January 2019]

2. Tribunal Memoranda, Directions, and Decisions

2.5 Pre-hearing stage

2.5.15 Judge Patrick Savage, memorandum encouraging parties to continue engaging with Crown, 20 July 2018

2.5.25 Judge Miharo Armstrong, David Cochrane, and Professor Rawinia Higgins, memorandum granting urgency, 9 November 2018

2.5.28 Judge Miharo Armstrong, David Cochrane, and Professor Rawinia Higgins, memorandum, memorandum rejecting reconsideration of urgency decision, confirming final statement of issues, and addressing participation by interested parties, 18 January 2019

3. Submissions and Memoranda of Parties

3.1 Pre-hearing represented

3.1.13 Justin Graham, memorandum seeking leave for Ngāti Whātua Ōrākei to participate as an interested party, 13 April 2017

3.1.14 Baden Vertongen, memorandum seeking leave for the Raukawa Settlement Trust to participate as an interested party, 13 April 2017

3.1.16 Mokoro Gillett, memorandum seeking leave for the Ngāti Hauā Iwi Trust to participate as an interested party, 13 April 2017

3.1.156 Winston McCarthy, memorandum seeking leave for Wai 2677 claimants Huhana Lyndon and others of Ngāti Rehua, Ngātiwai, and Ngāpuhi to participate as an interested party, 26 November 2018

3.1.157 Tania Te Whenua, memorandum seeking leave for Phillip Wharekawa to participate as an interested party, 28 June 2017

3.1.158 Tania Te Whenua, memorandum seeking leave for Phillip Wharekawa to participate as an interested party, 28 June 2017

3.1.159 Michael Sharp, memorandum seeking leave for Phillip Wharekawa to participate as an interested party, 26 November 2018

3.1.160 Robyn Zwaan, memorandum seeking leave for Dr Morehu McDonald and Hinengaru Rauwhero to participate as an interested party, 26 November 2018

3.1.161 Aidan Warren and Connie Bollen, memorandum seeking leave for the Ngāti Tara Tokanui Trust to participate as an interested party, 27 November 2018

3.1.167 Areta Gray, memorandum seeking leave for the Te Tāwharau o Ngāti Pūkenga Trust to participate as an interested party, 27 November 2018

3.1.170 Deane Adams, memorandum seeking leave for the Ngāti Huarere ki Whangapoua Trust to participate as an interested party, 27 November 2018

3.1.172 Maatai Te Toki, memorandum seeking leave for Hako i te Rangi te Pūpū ō Hauraki to participate as an interested party, 27 November 2018

3.1.173 Maatai Te Toki, memorandum seeking leave for Hako i te Rangi te Pūpū ō Hauraki to participate as an interested party, 27 November 2018

3.1.174 Maatai Te Toki, memorandum seeking leave for Hako i te Rangi te Pūpū ō Hauraki to participate as an interested party, 27 November 2018

3.1.175 Maatai Te Toki, memorandum seeking leave for Hako i te Rangi te Pūpū ō Hauraki to participate as an interested party, 27 November 2018

3.1.176 Maatai Te Toki, memorandum seeking leave for Hako i te Rangi te Pūpū ō Hauraki to participate as an interested party, 27 November 2018

3.1.177 Maatai Te Toki, memorandum seeking leave for Hako i te Rangi te Pūpū ō Hauraki to participate as an interested party, 27 November 2018

3.1.178 Paul Majurey, memorandum concerning the interested parties, interlocutory issues, statement of issues, filing of evidence, hearing arrangements, and timetable, 28 November 2018

3.1.179 Jill Taylor and Nicki Scott, memorandum seeking leave for Ngāti Rahiri Tumutumu to participate as an interested party, 27 November 2018

3.1.180 Paul Majurey, memorandum seeking leave for Ngāti Maru, Ngāti Tamaterā, Te Patukirikiri, and Ngāti Whanaunga to participate as interested parties, 3 December 2018

3.1.181 Bryce Lyall, memorandum seeking leave for Mapuna Turner to participate as an interested party, 5 December 2018

3.1.182 Robyn Zwaan, memorandum seeking leave for Wai 2733 claimants Dr Morehu McDonald and Hinengaru Rauwhero to participate as an interested party, 7 December 2018
(a) Phil Smith to Morehu McDonald, letter concerning petition seeking withdrawal of the Ngāti Hinerangi Trust's mandate to settle Ngāti Hinerangi claims, 4 September 2018

3.1.183 Aidan Warren and Connie Bollen, memorandum seeking leave for the Ngāti Tara Tokanui Trust to participate as an interested party, 7 December 2018

3.1.184 Winston McCarthy, memorandum seeking leave for Wai 1711 claimants Kristan MacDonald, Chris Koroheke, James Mackie, and Aperehama Edwards to participate as an interested party, 7 December 2018

3.1.185 Winston McCarthy, memorandum seeking reconsideration of decision on urgency and providing further information on extent of participation sought by Wai 2677 claimants as an interested party, 7 December 2018

3.1.186 Kipouaka Pukekura-Marsden, memorandum seeking leave for Ngāti Pūkenga Iwi ki Tauranga Moana to participate as an interested party, 7 December 2018

3.1.187 Linda Thornton and Bryce Lyall, memorandum seeking leave for Wai 2181 claimant Michael Beazley to participate as an interested party, 10 December 2018

3.1.188 Linda Thornton, memorandum seeking leave for Wai 2576 claimant Michael Beazley to participate as an interested party, 8 December 2018

3.1.189 Areta Gray, memorandum seeking leave for late filing and for the Te Tāwharau o Ngāti Pūkenga Trust to participate as an interested party, 10 December 2018

3.1.217 Annette Sykes, Rebekah Jordan, and Jordan Bartlett, memorandum seeking leave for Wai 354 claimant Arapeta Hamilton and Wai 1535 claimants Joyce Baker and Deon Baker to participate as interested parties, 7 February 2019

3.1.218 Season-Mary Downs, Chelsea Terei, Josey Lang, and Heather Jamieson, memorandum filing briefs of evidence of Huhana Rolleston, Charlie Tawhiao, and Paora Stanley, 18 February 2019

3.1.266 Jamie Ferguson, Paul Majurey, and Jason Gough, joint memorandum of counsel for Waikato-Tainui, Iwi of Hauraki, and the Crown advising of agreement reached, abandoning urgency application, and withdrawing evidence, 4 April 2019

3.3 Opening, closing, and in reply

3.3.1 Kiri Tahana (Wai 2666), submissions on behalf of Ngātiwai, 5 April 2019

3.3.4 Naroma Tahana and Matewai Tukapua (Wai 2754), submissions on behalf of the Ngā Hapū o Ngāti Ranginui Settlement Trust and Ngā Hapū o Ngāti Ranginui, 5 April 2019
(a) Naroma Tahana and Matewai Tukapua, comps, supporting documents to submission 3.3.4, no date

3.3.7 Season-Mary Downs, Chelsea Terei, and Heather Jamieson (Wai 2616), opening submissions on behalf of the Ngāi Te Rangi Settlement Trust, 5 April 2019
(a) 'Updated List of Contested Redress', table, 5 April 2019
(b) Season-Mary Downs, Chelsea Terei, and Heather Jamieson, comps, supporting documents to submission 3.3.7, no date
(c) Season-Mary Downs, Chelsea Terei, and Heather Jamieson (Wai 2616), summary of opening submissions on behalf of the Ngāi Te Rangi Settlement Trust, 8 April 2019

3.3.8 Paul Rishworth (Crown), opening submissions on behalf of the Crown, 5 April 2019

3.3.10 Naroma Tahana and Matewai Tukapua (Wai 2754), closing submissions on behalf of the Ngā Hapū o Ngāti Ranginui Settlement Trust and Ngā Hapū o Ngāti Ranginui, 8 May 2019

3.3.11 Kiri Tahana (Wai 2666), closing submissions on behalf of Ngātiwai, 8 May 2019
(a) Kiri Tahana, comp, supporting documents to submission 3.3.11, no date

3.3.12 Bryce Lyall and Linda Thornton (Wai 2735), closing submissions on behalf of Ngāti Porou ki Hauraki, 10 May 2019

3.3.13 Season-Mary Downs and Heather Jamieson (Wai 2616), closing submissions for the Ngāi Te Rangi Settlement Trust, 8 May 2019
(a) Season-Mary Downs and Heather Jamieson (Wai 2616), amended closing submissions for the Ngāi Te Rangi Settlement Trust, 6 June 2019

3.3.17 Aidan Warren and Connie Bollen, closing submissions on behalf of the Ngāti Tara Tokanui Trust, 5 June 2019

3.3.19 Michael Sharp, closing submissions on behalf of Ngāi Tamawhariua and Te Whānau-a-Tauwhao, 5 June 2019

3.3.20 Michael Sharp, closing submissions on behalf of Ngāti Pūkenga Iwi ki Tauranga Moana, 5 June 2019

3.3.24 Te Kani Williams and Kristal Rogers, closing submissions on behalf of the Te Tāwharau o Ngāti Pūkenga Trust, 5 June 2019

3.3.26 Paul Rishworth and Tania Simpson, closing submissions on behalf of the Crown, 10 June 2019
(a) Table outlining contested redress items, no date
(b) Te Pio Kawe to Christopher Finlayson, printout of email concerning Tauranga Moana Iwi Collective redress and Ngā Hapū o Ngāti Ranginui Claims Settlement Bill, 23 March 2016

3.3.27 Paul Majurey, closing submissions on behalf of Iwi of Hauraki, 11 June 2019
(a) 'Hauraki Collective and Iwi of Hauraki Redress in "Tauranga Moana Framework Area"', map, no date

3.3.30 Paul Rishworth and Tania Simpson, closing submissions on behalf of the Crown concerning Ngātiwai, 17 June 2019

3.3.32 Naroma Tahana and Matewai Tukapua (Wai 2754), submissions in reply on behalf of Ngā Hapū o Ngāti Ranginui Settlement Trust and Ngā Hapū o Ngāti Ranginui, 2 July 2019

3.3.33 Season-Mary Downs, Chelsea Terei, and Heather Jamieson (Wai 2616), submissions in reply on behalf of the Ngāi Te Rangi Settlement Trust, 2 July 2019
(a) Season-Mary Downs, Chelsea Terei, and Heather Jamieson (Wai 2616), amended submissions in reply on behalf of the Ngāi Te Rangi Settlement Trust, 2 July 2019

3.3.35 Te Kani Williams and Kristal Rogers, submissions in reply on behalf of the Te Tāwharau o Ngāti Pūkenga Trust, 28 June 2019

4. Transcripts and Translations

4.1 Transcripts

4.1.1 National Transcriptions Service, draft transcript for hearing days 1–3, no date
(a) Te Tāwharau o Ngāti Pukenga Trust, table of corrections to draft transcript for hearing days 1–3, no date
(b) Ngāi Te Rangi Settlement Trust, table of corrections to draft transcript for hearing days 1–3, no date
(c) Ngāti Tara Tokanui Trust, table of corrections to draft transcript for hearing days 1–3, no date
(d) Ngāti Tara Tokanui Trust, table of corrections to draft transcript for hearing days 1–3, no date
(e) Ngāti Porou ki Hauraki, table of corrections to draft transcript for hearing days 1–3, no date
(f) Ngātiwai Trust Board, table of corrections to draft transcript for hearing days 1–3, no date

4.1.2 National Transcriptions Service, draft transcript for hearing days 4 and 5, no date

RECORD OF DOCUMENTS

* Document confidential and unavailable to the public without leave from the Tribunal

A. Documents Submitted up to Completion of Casebook

A1 Dr Huata Palmer, brief of evidence, 14 March 2017
(a) Dr Huata Palmer, brief of evidence, no date
(b) Dr Huata Palmer, brief of evidence, no date

A2 Ngarimu Blair, affidavit, 8 March 2017

A3 Charlie Tawhiao, brief of evidence, 14 March 2017

A4 Reon Tuanau, brief of evidence, 14 March 2017

A5 Huhana Rolleston, brief of evidence, 14 March 2017
(a) Huhana Rolleston, comp, supporting documents to document A5, no date

A6 Huhana Rolleston, brief of evidence, 12 June 2017
(a) Huhana Rolleston, comp, supporting documents to document A6, no date

A7 Huhana Rolleston, brief of evidence, 16 June 2017
(a) Rick Barker to Pare Hauraki Collective, printout of email concerning proposed signing date of 'Pare Hauraki Collective Redress Deed', 15 June 2017

A8 Haydn Edmonds, affidavit, 21 July 2017
(a) Haydn Edmonds, comp, supporting documents to document A8, 21 July 2017

A9 Rōpata Diamond, affidavit, 21 July 2017
(a) Te Witi McMath, 'Investigation of Title to the Offshore Islands, Islets and Rocks off the Coastline of Aotea (Great Barrier Island)', typescript, 14 September 1995

A10 *Vacated and replaced by document A33*
(a) *Vacated and replaced by document A33(a)*
(b) *Vacated and replaced by document A33*
(i) *Vacated and replaced by document A33(a)*
(ii) *Vacated and replaced by document A33(b)*
(iii) *Vacated and replaced by document A33(c)*
(iv) *Vacated and replaced by document A33(d)*

A11 Aperahama Edwards, affidavit, 21 July 2017
(a) *John da Silva – Whangarara* (1998) 25 Taitokerau MB 212 (25 TTK 212)

A12 Hori Parata, affidavit, 31 July 2017
(a) Hori Parata, comp, supporting documents to document A12, no date

A13 Terrence (Mook) Hohneck, affidavit, 13 September 2017
(a) Terrence (Mook) Hohneck, comp, supporting documents to document A13, no date

A14 Charlie Tawhiao, second brief of evidence, 20 September 2017
(a) Joshua Gear, application to the Environment Court for declarations pursuant to sections 310 and 311 of the Resource Management Act 1991, ENV-2018-AKL-000, 18 December 2018
(b) Willie Te Aho to Paul Majurey, printout of email concerning focus of teleconference with Tauranga Moana Iwi Collective, 28 May 2013
Areta Gray to Erica Rolleston, Willie Te Aho, Awanui Black, Riri Ellis, Hinemarie, Pio Kawe, Matanuku Mahuika, Rahera Ohia, CEO Ranginui, Mita Ririnui, Huhana Rolleston, Shad Rolleston, Rehua Smallman, TAM reception, Charlie Tawhiao, Lou Te Keeti, Rob Unwin, Spencer Webster, and Dominic Wilson, printout of email concerning teleconference numbers, 28 May 2013
Willie Te Aho to Areta Gray, Shad Rolleston, and Kia Ora Group Ltd, printout of email concerning title boundaries, 28 May 2013
David Clode to Willie Te Aho, Paul Majurey, Reweti Wiki, and Charlie Tawhiao, printout of email concerning title boundaries, 28 May 2013
Willie Te Aho to Paul Majurey, Reweti Wiki, and Charlie Tawhiao, printout of email concerning title boundaries, 28 May 2013
Paul Majurey to Reweti Wiki and Charlie Tawhiao, printout of email concerning teleconference with Tauranga Moana Iwi Collective, 28 May 2013
Reweti Wiki to Reweti Wiki and Charlie Tawhiao, printout of email concerning Crown understanding of outstanding matters with Tauranga Moana Iwi Collective and Pare Hauraki Collective overlapping claims, 27 May 2013
(c) Willie Te Aho to Matthew Russell and Sebastian Bishop, printout of email concerning nil transfer cost vesting in in Ngāi Te Rangi and Hauraki iwi of Rawaka Drive, Tanners Point, and Broadway properties, 30 May 2013
Areta Gray to Erica Rolleston, Willie Te Aho, Awanui Black, Riri Ellis, Hinemarie, Pio Kawe, Matanuku Mahuika, Rahera Ohia, CEO Ranginui, Mita Ririnui, Huhana Rolleston, Shad Rolleston, Rehua Smallman, TAM reception, Charlie Tawhiao, Lou Te Keeti, Rob Unwin, Spencer Webster, and Dominic Wilson, printout of email concerning agreements reached at teleconference with Pare Hauraki Collective, 29 May 2013

A15 Susan Kiri Leah Campbell, affidavit, 9 October 2017
(a) 'Summary of Engagement between the Crown and Ngātiwai', table, no date

A16 Aperahama Hurihanganui, affidavit, 17 October 2017

A17 Haydn Edmonds, affidavit, 3 November 2017

A18 Leigh McNicholl, affidavit, 19 June 2018
(a) Leigh McNicholl, comp, supporting documents to document A18, [19 June 2018]

A19 John Tamihere, affidavit, 4 July 2018
(a) John Tamihere, comp, supporting documents to document A19, 3 July 2018

A20 John Tamihere, affidavit, 27 July 2018
(a) 'Ngāti Porou ki Hauraki: Proposed Revised Redress Package', map, 27 July 2018

A21 John Tamihere, affidavit, 8 August 2018

A22 Ronald Te Pio Kawe, brief of evidence, 9 August 2018
(a) Ronald Te Pio Kawe, comp, supporting documents to document A22, [9 August 2018]

A23 Susan Kiri Leah Campbell, affidavit, 17 August 2018

A24 Charlie Tawhiao, brief of evidence, 24 August 2018
(a) Andrew Little to Charlie Tawhiao, printout of email announcing Crown's intention to sign 'Pare Hauraki Collective Redress Deed' and listing post-consultation amendments to deed, 26 July 2018
(b) Season-Mary Downs to Andrew Little, printout of email reiterating continued opposition to signing of 'Pare Hauraki Collective Redress Deed', 2 August 2018

A25 Tania McPherson, affidavit, 23 August 2018
(a) Andrew Little to Haydn Edmonds, printout of email concerning tikanga required to resolve overlapping claims with Hauraki, [26 July 2018]

A26 John Tamihere, affidavit, 8 November 2018
(a) John Tamihere, comp, supporting documents to document A26, 8 November 2018

A27 Arapeta Hamilton, affidavit, 7 February 2019
(a) Arapeta Hamilton, comp, supporting documents to document A27, 7 February 2019

A28 Huhana Rolleston, brief of evidence, 18 February 2019
(a) 'Updated Chronology of Key Events (February 2017 to February 2019)', table, no date
(b) Huhana Rolleston, comp, supporting documents to document A28 covering 2017, 18 February 2019
(c) Huhana Rolleston, comp, supporting documents to document A28 covering 2018, 18 February 2019

A29 Charlie Tawhiao, brief of evidence, 18 February 2019

A30 Paora Stanley, brief of evidence, 18 February 2019

A31 Lewis (Opo) Ngawaka, affidavit, 23 August 2018

A32 Keatley Hopkins, affidavit, 4 September 2018

A33 Tania McPherson, affidavit, 18 February 2019
(a) Tania McPherson, comp, supporting documents to document A33, [19 February 2019]
(b) Paul Monin, 'The Islands Lying between Slipper Island in the South-east, Great Barrier Island in the North and Tiritiri-Matangi in the North-west' (commissioned research report, Wellington: Waitangi Tribunal, 1996)
(c)* Associate Professor Michael Belgrave, Dr Grant Young, and Anna Deason, 'Tikapa Moana and Auckland's Tribal Cross Currents: The Enduring Customary Interests of Ngati Paoa, Ngati Maru, Ngati Whanaunga, Ngati Tamatera and Ngai Tai in Auckland' (commissioned research report, Paeroa: Hauraki Māori Trust Board and Marutuahu Confederation, 2006)

(d) Treaty of Waitangi Fisheries Commission, *He Kawai Amokura: A Model for Allocation of the Fisheries Settlement Assets* (Wellington: Te Ohu Kai Moana, [2019])

A34 John Tamihere, brief of evidence, 18 February 2019
(a) John Tamihere, comp, supporting documents to document A34, 18 February 2019

A35 Ronald Te Pio Kawe, affidavit, 18 February 2019
(a) Ronald Te Pio Kawe, comp, supporting documents to document A35, [18 February 2019]

A36 Veronica Bouchier, affidavit, 19 February 2019
(a) Māori Land Court, 'Taumata B Title Details Report –Block 28902', Māori Land Online, www.maorilandonline.govt.nz, last modified 18 February 2019

A39 Te Kenehi Robert Mair, brief of evidence, 8 March 2019
(a) Te Kenehi Robert Mair, comp, supporting documents to document A39, 8 March 2019
(b) Te Kenehi Robert Mair, brief of evidence, 12 April 2019

A40 Lillian Anderson, brief of evidence, 8 March 2019
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