

CHAPTER 2

REMEDIES HEARING

2.1 OPENING SUBMISSIONS OF COUNSEL

2.1.1 Claimant counsel

In opening her submissions, claimant counsel Carrie Wainwright advised that evidence would be presented to support the claims set out in the third amended statement of claim in respect of remedies.¹ The remedies sought by Ngati Turangitukua are by way of redress for the Crown's breaches of the Treaty of Waitangi as found in the Tribunal's *Turangi Township Report 1995*. These various breaches together, with supporting evidence, are noted in chapter 3.

The claimants rely in toto on the Tribunal's findings as to fact and as to Treaty breaches. Counsel advised that the further evidence to be presented in the hearing on remedies was intended to elaborate on prejudice suffered as a result of the Crown's Treaty breaches. They ask the Tribunal to factor all the breaches and prejudice found in the 1995 report into its assessment of appropriate remedies.

The statement of claim lists various categories of properties located in the Turangi township that Ngati Turangitukua seek to have returned. These are itemised in various schedules appended to the third amended statement of claim (see app 1). Monetary compensation for specified purposes is also sought, as specified in particular claims. All the remedies sought are considered in the evidence of Mahlon Nepia, which along with other evidence called by the claimants and the Crown, is detailed in chapter 4.

2.1.2 Crown counsel

Crown counsel Peter Andrew, in opening, conceded that the Tribunal can properly consider exercising binding powers within the context of a relief package for all the hapu's Treaty claims to the land in the Wai 84 claim area; that is to say, the Turangi township.² Counsel advised that the Crown did not oppose the making of some resumption orders in this claim but did oppose the resumption of all the memorialised properties, as sought by the claimants.

1. Document E11, p 2; claim 1.1(ac)

2. Document E12, p 1

2.2 THE STATUTORY FRAMEWORK

Before considering the evidence relating to remedies and the submissions on behalf of the claimants and the Crown as to what remedies the Tribunal should make, it is necessary to outline the statutory framework relating to the Tribunal's jurisdiction to make binding recommendations. A number of questions raised by counsel relating to the exercise of the Tribunal's discretion to make such recommendations will also be considered.

In our preliminary decision of 25 March 1997, we gave full consideration to the statutory power of the Tribunal to make binding recommendations for the return of property memorialised pursuant to section 27B of the State-Owned Enterprises Act 1986.³ It would be otiose to repeat our lengthy discussion of the very detailed submissions made by counsel on those provisions in the context of an argument relating to the requisite standard of proof which we have noted in chapter 1.

The Tribunal's jurisdiction to consider claims is conferred by section 6 of the Treaty of Waitangi Act 1975. Section 6(1) gives the Tribunal power to consider any Maori claim that a Maori or group of Maori 'is or is likely to be prejudicially affected' by any legislation, policy or practice, or act or omission of the Crown that 'was or is inconsistent with the principles of the Treaty'.

Section 6(3) empowers the Tribunal to make recommendations to the Crown on action to be taken to remedy any *well-founded* claim. It states:

If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

Section 6(4) provides that:

A recommendation under subsection (3) of this section may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

For reasons that we have discussed in some detail in our preliminary decision, part I of the Treaty of Waitangi (State Enterprises) Act 1988 (the TOWSE Act) conferred expanded powers on the Tribunal.⁴ These were agreed upon by Maori and the Crown in 1987 following the judgment of the Court of Appeal in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (the *Lands* case).

The key sections for our purposes are the insertion by section 4 of the 1988 Act of a section 8A to follow section 8 of the Treaty of Waitangi Act 1975.

Section 8A(1) provides that the section applies to any land or interest in land transferred to or vested in a State-owned enterprise in accordance with the State-

3. Paper 2.57

4. Ibid, pp 2-11

Owned Enterprises Act 1986 whether or not such land or interest is still vested in the State enterprise. Section 8A provides:

(2) Subject to section 8B of this Act, where a claim submitted to the Tribunal under section 6 of this Act relates in whole or in part to land or an interest in land to which this section applies, the Tribunal may—

(a) If it finds—

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

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

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

(3) In deciding whether to recommend the return to Maori ownership of any land or interest in land to which this section applies, the Tribunal shall not have regard to any changes that, since immediately before the date of the transfer of the land or interest in land from the Crown to a State enterprise or an institution within the meaning of section 159 of the Education Act 1989, have taken place in—

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

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

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

Subsection (3) is of importance as giving effect to paragraphs (g)(ii) and (iii) of the preamble to the 1988 Act.

2.3 RELATIONSHIP BETWEEN SECTIONS 6(3) AND 8A

The Tribunal in its preliminary decision rejected submissions of the Crown that the Legislature has in effect provided two separate and distinct codes when the Tribunal, having found a claim to be well-founded, is deciding under section 6(3) what action the Crown should take by way of remedy. A decision as to whether any memorialised land should be returned cannot be made in terms of section 8A(2) standing on its own. Any recommendation for the return of such land is to be included in the recommendations that the Tribunal thinks fit to make under section 6(3) and (4) of the 1975 Act.

We determined that the relevant provisions of section 8A are entirely dependent for their implementation on the powers conferred on the Tribunal by section 6(3). The two sets of provisions together constitute a unified code.⁵

2.4 REMEDIAL NATURE OF RESUMPTION PROVISIONS

In support of his argument on the standard of proof, Crown counsel characterised the binding recommendatory powers as exceptional. As a consequence, he submitted that a higher standard of proof should apply to them. In its decision of 25 March 1997, the Tribunal commented:

We recall that these powers were conferred on the Tribunal by agreement between the Crown and Maori and with the sanction of the legislature in order to ensure that the Crown would meet its Treaty obligations. They are the direct outcome of the Court of Appeal decision in *Lands* case. They were clearly intended to be remedial. Assuming it is appropriate to characterise them as ‘exceptional’, we are not convinced that that circumstance in itself calls for differing standards of proof as between binding and non-binding recommendations which together form the totality of recommendations which may be made under s 6(3).⁶

2.5 WELL-FOUNDED CLAIMS

Although not pursued at the substantive hearing on remedies, it is desirable to refer to a submission by Crown counsel at the standard of proof hearing on ‘well-founded’ as it appears in section 8A(2)(a)(i). Put shortly, the Crown contended that claims that may be well-founded for the purposes of section 6 may not reach the evidential level standard that Crown counsel contended should be required for the purposes of section 8A(2). For reasons that it gave in its decision of 25 March 1997, the Tribunal noted that the reference in section 8A(2)(a)(i) to the Tribunal finding that a claim is well-founded is, in the opening words of section 8A(2), a reference to ‘a claim submitted to the Tribunal under section 6 of this Act [which] relates in whole or in part to land . . . to which this section applies’; that is to say, to State-owned enterprise or former State-owned enterprise memorialised land. It is clear that the jurisdiction to decide whether a claim is well-founded is conferred by and is to be exercised by the Tribunal in terms of section 6 and not section 8A.⁷

The Tribunal also noted in its decision of 25 March 1997 that it adopted an observation of counsel assisting the Tribunal that it is important to bear in mind that the Tribunal has, in its report, determined that the claim is well-founded. We agree with his submission that the Tribunal cannot go back on those findings.⁸

5. Paper 2.57, p 14

6. Ibid

7. Ibid, pp 18–20

8. Ibid, p 22

2.6 THE APPROACH TO REMEDIES

2.6.1 Three forms of action

As noted earlier, if the Tribunal finds any claim under section 6 is well-founded, it has a wide discretion to recommend that action be taken:

- to compensate for; or
- to remove the prejudice; or
- to prevent other persons being similarly affected in the future.

This section, for reasons that we elaborated on in our decision of 25 March 1997, applies as equally to land memorialised under the provisions of section 27B of the State-Owned Enterprises Act 1986 as it does to all non-memorialised land within the jurisdiction of the Tribunal.⁹ The same principles should operate whether the Tribunal is considering binding or non-binding recommendations.

In the present claim, however, we will not be concerned with the third form of action. As noted in our decision of 25 March 1997, the prevention of future prejudice to other persons is more likely to be achieved by legislation or administrative action.¹⁰ The Tribunal in its *Turangi Township Report 1995* confined its initial recommendations to proposed changes to parts II and III of the Public Works Act 1981 and a recommendation that the Act should be amended to provide that it should so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.¹¹

In her closing submissions, Crown counsel Briar Gordon stated:

The Crown wishes to draw to the Tribunal's notice the fact that review of the Public Works Act is in progress, and that the Tribunal's recommendation in its *Turangi Township Report* was one of the factors taken into account in determining the scope of the review.¹²

No time-frame for this review was provided. This Tribunal has received no further information on the progress and status of this review of the Public Works Act. Nor are we aware of any consultation with Maori on this matter.

The Tribunal will, however, be concerned with both the first and the second options in section 6(3); namely, action to compensate for and to remove the prejudice arising from the Crown's Treaty breaches. These are discrete but not mutually exclusive forms of action. Indeed, the same action may serve both purposes. Thus, a binding recommendation for the return of land included in a recommendation under section 6(3) is clearly a means of compensating Maori for land lost as a result of Treaty breaches by the Crown. At the same time, it may well be a means of removing the prejudice caused by such Crown action in that it will serve to restore, in part if not wholly, the rangatiratanga of a hapu or iwi over such land.

9. Ibid, pp 15–18

10. Ibid, p 17

11. Waitangi Tribunal, *Turangi Township Report 1995*, Wellington, Brooker's Ltd, 1995, sec 22.4

12. Document E15, para 56

It is significant that section 6(3) speaks of ‘prejudice’ rather than ‘loss’. Prejudice, as claimant counsel submitted, is a broader, rights-based concept, relating to harm that may be tangible or intangible, whereas the notion of ‘loss’ places more emphasis on loss of a material or economic nature. The Tribunal in its *Taranaki Report* considered that loss could not be quantified simply in terms of land but that it must also be assessed:

in terms of the impairment of the group’s social and economic capacity, the generational distortion of its physical and spiritual well-being, and the flow-on effects on subsequent standards of living.¹³

Counsel for the claimants prefaced her discussion of an approach to remedies by emphasising the need for a principled but not legal approach.¹⁴ She submitted that the Tribunal is not a court of law and it is inappropriate to apply legal constraints to the question of remedies in this jurisdiction. Nor is the Treaty a contract; it is more in the nature of a compact or partnership with a fiduciary underlay. We agree with the foregoing, which is reflected in a statement in the *Muriwhenua Land Report* that, when reviewing historical matters:

The Tribunal is not called upon to determine actionable wrongs, to quantify particular losses or to award damages for property losses and injuries upon legal lines. The Treaty is not a commercial contract, nor is the Tribunal a court.¹⁵

2.6.2 Relevance of Treaty principles

We concur with the view of the Tribunal in the *Muriwhenua Land Report* that:

Since the case for the claims is based upon the principles of the Treaty of Waitangi, it appears the remedy, for general wrongs affecting peoples, should also have regard to Treaty principles.¹⁶

This Tribunal considered that two Treaty principles were of particular application to those claims of Ngati Turangitukua which we hold to be well-founded.

The first is that *the cession of sovereignty was in exchange for the protection of rangatiratanga*.¹⁷

We stressed the importance of this principle, which has been seen by the Tribunal as overarching and far-reaching because it stems directly from articles 1 and 2 of the Treaty itself. Inherent in or integral to this basic principle is:

- the Crown obligation actively to protect Maori rights;
- the duty to consult; and
- redress for past breaches.

13. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, sec 5.9

14. Document E13, paras 3.1.1–3.1.2 (unless otherwise stated, all references to submissions of claimant counsel can be found in this document).

15. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, sec 11.2.3

16. *Ibid*, sec 11.4.4

17. See *Turangi Township Report 1995*, sec 15.2, for a discussion of this principle.

Implicit in this principle is the notion of reciprocity. Under article 1, Maori conceded to the Crown kawanatanga, the right to govern, in exchange for the Crown guaranteeing to Maori under article 2 tino rangatiratanga, full authority and control, over their lands, forests, fisheries, and other valuable possessions (taonga) for so long as they wished to retain them.

The second relevant Treaty principle is the *principle of partnership*.¹⁸

This principle is well established. It was authoritatively laid down in the *Lands* case where the Court of Appeal found that the Treaty signified a partnership between Pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith.¹⁹

In a later case, the Court of Appeal expressed the relationship in this way:

The Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other.²⁰

We have found in the *Turangi Township Report 1995* that the Crown failed in various ways actively to protect the rangatiratanga of the claimants and to act in good faith and reasonably towards them.²¹ At the heart of the claim lies the failure of the Crown to honour many of the undertakings and assurances it gave to the owners, which formed the basis of the approval in principle they gave to the construction of the township on their land. This failure reflected an absence of good faith and was neither fair nor reasonable.

Claimant counsel submitted that the conduct of the Crown should be taken into account by the Tribunal when considering remedies. She contended that the Crown's conduct is specifically relevant in the context of the undertakings given by the Crown in 1964, many of which the Tribunal has found were not honoured by the Crown (see ch 3). We agree that such failures by the Crown are relevant to an assessment of both the seriousness of the breach and the prejudicial effect on the claimants.

2.6.3 The restorative approach

In the *Ngai Tahu Report 1991*, the Tribunal saw the restoration of Ngai Tahu's rangatiratanga as being essential to a just settlement:

It is clear that if the Crown is to meet its Treaty obligation to redress its numerous and longstanding breaches of the Treaty it must restore to Ngai Tahu their rangatiratanga and hence their mana within the Ngai Tahu whenua. . . .

It is equally clear that the restoration of Ngai Tahu rangatiratanga will, in today's circumstances, need to take various forms.²²

18. Ibid, sec 15.3

19. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 642

20. *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 304

21. *Turangi Township Report 1995*, ch 22

22. Waitangi Tribunal, *Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 3, sec 24.2

While the Crown cannot restore rangatiratanga in the abstract, it can restore to Maori some resources that enable Maori to exercise rangatiratanga. The Tribunal agreed that the return of land was an essential component in the restoration of rangatiratanga.²³

The Orakei Tribunal adopted the restoration approach in making recommendations on remedies for Ngati Whatua, who were left landless following Public Works Act seizures and other Crown actions. The Tribunal considered that a policy of tribal restoration must be directed to ‘assuring the tribe’s continued presence on the land, the recovery of its status in the district and the recognition of its preferred forms of tribal authority’.²⁴

Claimant counsel submitted that the restorative approach is directly applicable to the present claim. She referred to the Tribunal finding that the failure to protect rangatiratanga was at the heart of the Crown’s Treaty breaches. Counsel invoked the ‘draconian’ statutory powers of the Crown, the choice of township site, the insistence on acquiring freehold, and the failure to respect the mana of the hapu and preserve an economic base for Ngati Turangitukua as all being matters that directly affected and continue to affect the claimants’ rangatiratanga. We agree with her submission that rangatiratanga must be restored if the Treaty claim is to be resolved.

In the *Muriwhenua Land Report*, the Tribunal expressed a preliminary view on the appropriate approach to relief. It noted that where the place of a hapu has been wrongly diminished an appropriate response is to ask what is necessary to re-establish it. This suggests a restorative approach. On this basis, the Tribunal formulated a number of relevant factors to be considered, which could include:

- the seriousness of the case – the extent of property loss and the extent of consideration given to hapu interests;
- the impact of that loss, having regard to the numbers affected and the lands remaining;
- the socio-economic consequences;
- the effect on the status and standing of the people;
- the benefits returned from European settlement;
- the lands necessary to provide a reasonable economic base for the hapu and to secure livelihoods for the affected people; and
- the impact of reparation on the rest of the community (so that local and national economic constraints are also relevant).

The Tribunal added, ‘the thrust, it may be argued, is to compensate for past wrongs and remove the prejudice, by assuring a better arrangement for the hapu in the future’.²⁵

Counsel for the claimants noted that the Taranaki Tribunal would add to the Muriwhenua Tribunal list:

23. *Ngai Tahu Report 1991*, vol 3, sec 24.5.1

24. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 3rd ed, Wellington, GP Publications, 1996, sec 14.2.3

25. *Muriwhenua Land Report*, sec 11.4.4

That which is necessary to remove the sense of grievance is a related consideration. It cannot be assumed that grievance dissipates with time.²⁶

In his submissions on the general approach to remedies, Crown counsel accepted, as did claimant counsel, that remedies should not be assessed on a damages basis.²⁷

In determining appropriate redress Crown counsel submitted it is necessary for the Tribunal to make some assessment of the effect and extent of the prejudice in question. Such redress should bear some proportion to the prejudice and the nature of the Treaty breaches identified. We agree that, in determining what recommendations the Tribunal should make, regard should be had to the nature, extent, and effect of Treaty breaches.

Crown counsel then referred to the passage from the *Muriwhenua Land Report* cited above in which the Tribunal suggested a number of factors which might be relevant to determining appropriate remedies. Counsel accepted that it is helpful to apply a number of these factors and included all but one of the seven factors proposed by the Muriwhenua Tribunal. Counsel omitted the sixth factor which relates to the lands necessary to provide a reasonable economic base for the hapu and to secure livelihoods for the affected people.

Crown counsel also accepted that the Tribunal may properly have some regard to tribal restoration in assessing appropriate redress. He cautioned, however, that in considering tribal restoration care needs to be taken to ensure that the level of redress does not become dependent on the contemporary needs of iwi that are unconnected with the historical wrongs being addressed. Counsel submitted that the focus of the statutory scheme is upon prejudice caused by the Crown wrongs. He conceded that Treaty breaches in many cases have undermined the economic and social base of iwi. Equally however, he suggested, the current needs of iwi may arise from a wide range of complex political, social and economic factors.

This Tribunal considers the restorative approach to remedies to be appropriate in this claim. It considers the various factors formulated by the Muriwhenua Tribunal to be relevant although not all will have equal weight. Many of the Crown's Treaty breaches diminished the rangatiratanga of Ngati Turangitukua. Other breaches, as a result of the Crown failing to act reasonably and in good faith towards the claimants, seriously eroded the trust which should have been maintained between the Treaty partners. It is apparent to the Tribunal that to redress the prejudice suffered by the hapu it is essential that some land be restored to the hapu for the benefit of its members as a necessary step towards restoring, to some degree, the rangatiratanga of Ngati Turangitukua in their ancestral homeland. This and other measures will be required to assist the hapu to regain their turangawaewae, their standing, as the tangata whenua of their Turangi rohe, and to have their mana appropriately recognised in the wider community.

26. *The Taranaki Report: Kaupapa Tuatahi*, sec 5.9

27. Document E14, para 2.7 (unless otherwise stated, all references to submissions of Crown counsel can be found in this document).

2.7 THE EXERCISE OF BINDING POWERS

2.7.1 Causal nexus

The Tribunal has had some difficulty in reconciling the submissions of Crown counsel on this matter. He correctly noted that binding recommendations can only be made in respect of claims that ‘relate in whole or in part’ (s 8A(2)) to the memorialised land in questions. Later in his submissions, Crown counsel accepted that there is no jurisdictional barrier on the basis of nexus such that the Tribunal is precluded from exercising its binding powers. He accepted that ‘the well-founded claims clearly all relate to the memorialised land’. This because, as he noted, such land was the very same land that was taken by the Crown under the Public Works Act and Turangi Township Act in the first instance – that the taking of all that land (including other land in the area still in Crown ownership) was found by the Tribunal to be in breach of Treaty principles. Given these admissions we might have expected that the jurisdiction of the Tribunal to make binding recommendations in respect of any such memorialised land was beyond question.

2.7.2 Direct relationship?

However, prior to making the above concessions, Crown counsel submitted that the nexus requirement, (which we take to be a reference to the requirement in section 8A(2)), means that there must be a *direct* relationship between the historical wrong and the memorialised land before resumption of the land can be ordered. Section 8A(2) requires only that the claim must ‘relate in whole or in part’ to the land to which the section applies. Section 8A(1)(a) expressly provides that the section applies in relation to *any* land transferred to a State enterprise under section 23 of the State-Owned Enterprises Act 1986. We observe that there is no requirement in the statutory provision that it must relate *directly* to any such land. On its face, a claim may ‘relate’ directly or indirectly to ‘any’ memorialised land.

In support of this submission counsel noted that resumption can only be ordered in respect of a ‘well-founded’ claim that *relates* to memorialised land. ‘Well-founded’ requires a finding of both Treaty principle breach by the Crown and prejudice to the claimants. He conceded this does not mean that there have to be separate and individual Treaty breaches in respect of each particular memorialised property. However, Crown counsel suggested the ‘direct’ relationship requirement means that something more than the property being in the claim area is necessary. ‘Memorialised properties’, he submitted, cannot be returned by way of compensation for ‘general’ Treaty breaches. Counsel appears to have overlooked that s8A(2)(a) applies to *any* memorialised land to which the claim relates. There is nothing in the section which confines the Tribunal’s jurisdiction to particular categories of such land. If this had been intended, plain and unambiguous language would be needed.

Crown counsel submitted that in enacting the 1988 legislation, Parliament did not intend to reserve State assets in order to meet the broad economic claims and needs of tribes. Parliament, he argued, had something more limited in mind, namely, that

binding powers should only be exercised where some specific feature of the history of the asset means that it should be returned to Maori ownership. He gave no reasons for this contention and pointed to no statutory provision which expressly or impliedly placed this narrow interpretation on section 8A(2). Nor did he give any explanation of what constituted ‘some special feature’ of the ‘history’ of the asset.

Crown counsel next stated that ‘binding orders can thus properly be categorised as site-specific redress’. This appears on its face to be no more than a refinement of his earlier unsupported assertion with no basis in the legislation.

To determine whether there is any justification for the narrow interpretation of section 8A(2) contended for by the Crown it is instructive to look at the TOWSE Act which inserted sections 8A, 8B, 8C, and other provisions by way of amendment to the Treaty of Waitangi Act 1975.

As noted in our preliminary decision, these provisions have their genesis in a series of events commencing with the enactment of the State-Owned Enterprises Act 1986; followed by the landmark decision of the Court of Appeal in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (the *Lands* case) which in turn led to negotiations between the Crown and the Maori Council. The outcome was the enactment of the TOWSE Act.

A lengthy preamble to the TOWSE Act gives the background to the Act. Paragraph (f) of the preamble records that there has been agreement on a system of safeguards, to apply after the transfer of assets to State enterprises by the State-Owned Enterprises Act 1986, so that, in the public interest, the transfers authorised by the 1986 Act may take place as soon as practicable.

Paragraph (g) of the preamble is as follows:

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

We note that this paragraph emphasised the need for the position of Maori claimants to be protected; the need to ensure that the Crown complies with section 9 of the State-Owned Enterprises Act (which prohibits the Crown from acting in a manner inconsistent with the principles of the Treaty of Waitangi); and the need for safeguards for Maori.

The safeguards referred to are enacted in section 8A(1)(2)(a), (3) and (4) which we have noted in section 2.3 in our discussion of the statutory provisions. These provisions are intended to protect and safeguard Maori claimants whose claims relate

to land transferred to a State enterprise by providing for its return in terms of sections 8A(2)(a) and 6(3) of the 1975 Act. The provisions are clearly intended to be remedial. If it had been intended that they should be applicable only if they relate directly to some but not all such land, we would expect the statute to have said so. In our view, the provisions of section 8A(2)(a) and section 6(3) should be construed in accordance with section 5(j) of the Acts Interpretation Act 1924 as being remedial and given such 'fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act'.

We consider that the Crown attempt to read down the provision, so as to apply only to claims which relate 'directly' to particular categories of land transferred to State enterprises, is inconsistent with such fair, large, and liberal construction.

2.7.3 Added value

Crown counsel referred to section 8A(3) which provides that, in deciding whether to recommend the return to Maori ownership of any State enterprise memorialised land, the Tribunal is not to have regard to any changes that, since immediately before the date of transfer of the land from the Crown to a State enterprise, have taken place in:

- (a) The condition of the land . . . and any improvements to it; or
- (b) Its ownership or possession or any other interests in it.

Counsel contended that the fact that the Tribunal is precluded from considering 'added value' since the land has been transferred from the Crown emphasises that binding powers are directed at redressing specific historical wrongs relating to particular sites. He submitted that it cannot simply be exercised because the land just happens to be in the claim area, and may, in today's terms, meet the commercial aspirations of claimants.

In considering this submission, we should state what the Tribunal believes to be the purpose of these provisions. They must be read in conjunction with sections 27A and 27B, which were inserted in the State-Owned Enterprises Act 1986 by sections 9 and 10 of the TOWSE Act.

Section 27A of the 1986 Act provides that, where any land is transferred to a State enterprise under section 28 of that Act, the district land registrar is to note a memorial on the certificate of title to the effect that the land is:

Subject to section 27B of the State-Owned Enterprises Act 1986 (which provides for the resumption of land on the recommendation of the Waitangi Tribunal and which does not provide for third parties, such as the owner of the land, to be heard in relation to the making of any such recommendation).

The reason that no provision is made for third parties to be heard on any application for a binding recommendation under section 8A is that they are excluded by section 8C, which limits the persons entitled to be heard on any such application to

the claimant, certain Ministers of the Crown, and any Maori having an interest apart from any interest in common with the public. Thus, neither a State enterprise which owns the land, nor any person who has since acquired the memorialised land, may be heard.

Given the legislative history of the resumption provisions, it is apparent that the reason for preventing a State enterprise or any subsequent owners from being heard by the Tribunal is to ensure that the Tribunal is not inhibited by, for instance, evidence that the State enterprise or a subsequent owner has incurred expenditure in making improvements (added value) to the land, or that the owner would incur personal or financial hardship, should the property be resumed by the Crown and returned to Maori. Should a resumption order be confirmed under section 8B of the Treaty of Waitangi Act 1975, the owner of such land is to be compensated by the Crown under the Public Works Act 1981.

The Tribunal is unable to find in these provisions, the reasons for which appear to be abundantly clear, any justification for Crown counsel's submission that they emphasise 'that binding powers are directed at redressing specific historical wrongs relating to particular sites'. But for the fact that this is a test case, it would appear unnecessary for the Tribunal to consider this submission further. However, in deference to the Crown's submissions, in which this argument is given considerable weight, we will consider its implications further.

The Crown appears to be attempting to confine Maori claimants seeking a binding order for the return of any memorialised land to a time-warp. If the Treaty breach occurred 150 years ago, the Tribunal's jurisdiction to recommend the return of memorialised properties is, it appears, to be confined to specific pieces of land to which specific historical wrongs (ie, Crown Treaty breaches) directly relate. The Crown argument implies that no regard should be had to anything which may have occurred to the land since the Treaty breaches occurred. No regard can be had to any change in its condition or to any improvements to it, viz 'added value'.

The difficulty with this proposition is that this is not what the statute says. It is clear that the Tribunal is prevented by section 8A(3) from taking into account 'added value' since the land was transferred by the Crown to a State enterprise; it is equally clear that the Tribunal is not prevented from taking into account 'added value' which accrued from the time of the Crown's Treaty breach up to the time immediately before the Crown transferred the land to a State enterprise. If, at that time, the character of the land in question had, for instance, changed from pastoral or agricultural to residential or commercial use, the Tribunal is entitled to have regard to its changed character.

In the present claim, it was the Crown which radically changed the character of Ngati Turangitukua's ancestral land. It was the Crown which facilitated the construction of a new township which made provision for industry, housing, commercial buildings, various forms of accommodation, and servicing functions including a town shopping centre, to name only some of the features of the new Turangi township.

It was over 20 years from the establishment of the new town before the Crown embarked on transferring land to State enterprises following the TOWSE Act of 1988 which made such land subject to the provisions of section 8A of the Treaty of Waitangi Act 1975. The new Turangi township, as one would expect, was planned to provide residential, commercial, educational, health, Government agencies, sporting, recreational, and other amenities. By 1988, the town centre with provision for shopping, banking, post-office, and other commercial activities, including hotel and related accommodation, had been largely developed for some 20 years.

We reiterate that section 8A(3) applies to *any* memorialised land, whether it is being used for residential, commercial, or any other use. Moreover, it applies to all such land whatever its use and condition immediately before its transfer by the Crown to a State enterprise.

The Tribunal considers it to be abundantly clear that, in considering whether to recommend the return of any particular section 27B memorialised land, it may have regard, as best it can, to its condition including any improvement immediately before its transfer by the Crown to a State enterprise.

The Crown's narrow view overlooks that the Turangi township was built on ancestral land of Ngati Turangitukua. For several hundred years, it had been their papakainga and a central part of their ancestral home territory. It was their turangawaewae (see ch 4). The fact that, as a consequence of successive Native Land Acts, the land was partitioned and ownership fragmented among Ngati Turangitukua whanau did not mean that it was no longer papakainga land. It retained this character, even as it does today, except that the hapu has been physically excluded from much of it as a result of Treaty breaches of the Crown. No land could be of more importance to Maori than their papakainga land. The Crown's insistence that there be some special feature of the history of the asset, that is, of a particular piece of memorialised land, as distinct from being part of the papakainga land taken by the Crown, is untenable and fails to recognise the depth and abiding nature of the relationships of Ngati Turangitukua to their ancestral home territory, to their papakainga.

2.7.4 Choice of township site

Among the Tribunal's findings of Treaty breaches by the Crown was one relating to the choice of the township site.²⁸ In section 17.2 of its *Turangi Township Report 1995*, the Tribunal discussed the relevant evidence on the choice of the township site. The Crown considered that two sites were suitable – the land taken from the claimants at Turangi West and the nearby site across the Tongariro River known as the Turangi East site. Ngati Turangitukua claimed to have been prejudicially affected by the Crown policy of taking their land for a township without first ensuring that no Crown land was available as an alternative.

The Tribunal noted that physically and climatically the Turangi East site, situated on the east bank of the Tongariro River and on Crown land opposite the then existing

28. *Turangi Township Report 1995*, secs 2.4, 5.8.4, 17.2.2, 18.3.7(5)

Turangi village, was potentially as good as the Turangi West site. Indeed, it had some advantages in that there was more room for expansion than the Turangi West site, which was constrained by the Tongariro River and swamp lands to the north and steep hill slopes to the south. The Turangi East site did, however, need a new bridge over the river.

The Tribunal found that the Turangi East ‘green-field’ site had obvious advantages:

- it was already Crown land;
- there was nobody living on it;
- it would have avoided the enormous disruption caused to the existing Ngati Turangitukua community;
- the Department of Justice did not oppose the use of the site;
- the land was not essential to prison farm operations – the Department of Lands and Survey assumed the management of a substantial block in 1967 and the land was subsequently transferred by the Crown to Landcorp without reference to the Department of Justice; and
- Ngati Turangitukua would have been left in possession of the lands taken for the township.

The Crown did not produce any evidence to the Tribunal to indicate that any serious consideration was given to the Turangi East site, although a Crown witness in cross-examination agreed that the Turangi East site was the Crown’s second choice. The Crown accepted that the tangata whenua had ‘minor input’ into the decision of where to site the town. At meetings in 1964, they were informed that Turangi West was the preferred site of the permanent town; the only alternative suggested to the people was a temporary town at Rangipo some distance away. This was erroneous and misleading as the Crown’s actual second preference was the Turangi East site.²⁹

We have discussed this serious Treaty breach of the Crown because it makes it abundantly clear that a legitimate grievance of Ngati Turangitukua was that the Crown elected to take their land compulsorily when a suitable site existed nearby which was already owned by the Crown and was available, had the Crown so chosen, as the site for the new township. The Tribunal was left unaware of any compelling reason why the Crown needed to take Ngati Turangitukua land instead of utilising its own.

2.7.5 Conclusion on nexus

Given that none of the land needed to be taken, the Tribunal is unable to accept that section 8A(3) can be construed as demonstrating that the Tribunal’s power of making binding recommendations can only be directed at redressing specific historical wrongs relating to particular sites. The grievance of the claimants related not just to *particular sites* but to the *whole* of the land compulsorily taken by the Crown in breach of Treaty principles. The Crown concedes this to be the case.

29. Ibid, sec 17.2.2

The Tribunal considers there is nothing in section 8A or elsewhere in the relevant legislation which prohibits it from exercising its discretion under sections 6 and 8A of the 1975 Act that land within the claim area of any particular condition, whether it be used or have potential for commercial purposes or for any other legitimate purpose, should be the subject of a binding recommendation. It recognises that it is prohibited by section 8A(3) from taking into account any change in that condition or any improvements to it since immediately before the transfer of such land by the Crown to a State enterprise.

We would add that when the Tribunal is considering which, if any, memorialised properties or Crown-owned properties it should recommend be returned to Ngati Turangitukua, it should have regard to the aggregate value of all such properties. That value may include changes in the condition of one or more such properties since their transfer by the Crown to a State enterprise. Common sense would appear to require this course and we do not consider the provisions in section 8A(3) are intended to prevent this being done. The Crown provided full current Government valuation details of all memorialised and Crown-owned properties within the claim area and clearly intended that the Tribunal should have regard to them in deciding how many and which properties it might think it appropriate to recommend should be returned to Ngati Turangitukua.

2.7.6 Total relief package

Crown counsel contended that the Tribunal held in its preliminary decision that binding recommendations should be considered as part of the overall recommendations it should make, having regard to all the circumstances of the case. Counsel then submitted that binding recommendations are thus to be made in the context of a total relief package.

Crown counsel appears to be referring to a comment made by the Tribunal at page 16 of its decision when considering a submission by Crown counsel in relation to section 8A(2)(b). This provides that if the Tribunal finds (a) that the claim is well-founded; but (b) a recommendation for return to Maori ownership is not required it may recommend that the land be no longer subject to resumption. Counsel argued that the use of the term 'required' reinforces his point that the test for return is an objective one. The Tribunal rejected this submission and in the course of doing so noted that the submission overlooked the fact that a decision by the Tribunal as to whether a recommendation for the return of certain land to Maori ownership is not required is made in conjunction with its consideration of what other recommendations it thinks fit, having regard to all the circumstances, to make under section 6(3), whether for the return of land or other action by the Crown. This observation was made in the context of considering Crown counsel's submission that the use of the word 'required' in section 8A(2)(b) indicated that the test was an objective one. The Tribunal did not say, or infer, nor was the question in issue, that binding recommendations can only be made in the context of a total relief package. It not being necessary to do so, we express no opinion on the question. It so happens

that the claimants have in their third amended statement of claim proposed a comprehensive relief package which includes the return of certain memorialised land and Crown land together with other forms of relief. As we noted in our preliminary decision, the relevant provisions of section 8A are entirely dependent for their implementation on the powers conferred on the Tribunal by section 6(3) and the two sets of provisions together constitute a unified code. Where, as in this claim, we have for consideration proposals for a comprehensive relief package, they will all be considered as such. In the circumstances, we were somewhat surprised that Crown counsel stated in his opening submissions that the Crown does not invite the Tribunal to fix a 'quantum level' for the settlement package.

2.7.7 Is the main jurisdiction non-binding?

Crown counsel submits that the Tribunal should recognise that its main jurisdiction is one of non-mandatory recommendations. He invoked a passage from the judgment of Cooke P in *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at page 652. Counsel further contends that binding powers are an exception to the main non-mandatory scheme, a scheme which it is said is based on the concept of a negotiated settlement.

The Tribunal considers this may be true in a good many cases. But cases will doubtless occur from time to time when the Crown, in a particular claim area, has divested itself of all, or substantially all, Crown-owned land, the return of which would be appropriate to compensate a well-founded claim. At the same time, there may be sufficient, or even more than sufficient, memorialised land available in the area which could appropriately be the subject of a binding recommendation. In other cases, there will be an abundance of suitable Crown land available and little if any memorialised land. In yet others, much of the available Crown land may not be suitable, while there may be suitable memorialised land available. In short, it will depend upon the circumstances of any given case, including the appropriateness of recommendations for relief in forms other than the return of land, as to whether the main relief should appropriately come from non-binding or binding recommendations.

2.7.8 Are non-binding powers the starting point?

Crown counsel submits that consideration of the exercise of binding powers is not the starting point of any inquiry into appropriate redress. Counsel submitted that the logical starting point in this claim (and in any others) is with those Crown assets in the Crown land bank. He noted that the claimants in fact seek the return of all the seven properties in the land bank.

We consider this approach too simplistic. Before deciding what properties the Tribunal considers should be returned, whether memorialised land or Crown-owned land, or a mixture of both, it should first review all such properties. It should then determine which are the most suitable to be returned having regard to what is

required to compensate for or remove the prejudice arising from a well-founded claim. This it will do after having regard to all the circumstances of the case. In some instances, some or all of the available Crown properties will be less suitable than some memorialised properties and vice versa. The Tribunal must make the best judgment it can to act fairly and reasonably towards both parties.

Crown counsel went on to consider the exercise of binding powers in this case. He advised that the Crown recognises that in this particular case the Tribunal might properly conclude that the claim can only adequately be settled by including some memorialised land in the redress package. Counsel envisaged that the Tribunal might consider it necessary to resume some of the memorialised land in the Industrial Area given its special significance for the claimants. But outside that area and the specific wahi tapu properties, he submitted that Crown land or cash compensation could be substituted for the return of any other memorialised land. We reserve our comments on this until our discussion of the relief sought by the claimants.

Crown counsel went on, however, to observe that properties described as properties of note (some of which are memorialised properties and others Crown-owned) are being sought for their commercial potential. Claimant counsel, according to Crown counsel, indicated that they were being sought for their 'improvements'. We are unaware whether this is correct. Crown counsel submitted that the statutory scheme of resumption *prevents* regard being had to added value and that this indicates that it is the particular features of the land itself that are important in a resumption determination.

We have considered this last proposition in our earlier discussion of causal nexus. It is sufficient to say here that the statutory scheme prevents regard being had only to value added to land by way of improvements if such value was added 'since immediately before the date of the transfer of the land . . . from the Crown to a State Enterprise' (s 8A(3)). Clearly, the Tribunal can have regard, if it thinks it appropriate, to value added to such land before that time.

2.8 RELATIVITY BETWEEN SETTLEMENTS

2.8.1 Crown submissions

Crown counsel stated that the relativity of compensation/redress as between claimant groups is a matter of fundamental concern to the Crown. It is seen by the Crown as highly relevant to the question of the appropriate level of redress. The theme was a recurring one in the Crown's submissions on remedies.

We were told that, in determining appropriate redress in the context of negotiated settlements, the Crown is acutely aware of the need to maintain relativities between claimants. In determining relativities as between various settlements, the Crown Treaty settlement policies assess remedy on the basis of historical wrongs rather than the relative contemporary social and economic needs of the tribes. Counsel added that this is not to disregard altogether the contemporary needs of the iwi in any particular case. Clearly, he said, redress is to be relevant in today's terms. Although

not stated, the Crown appeared to be inferring that the Tribunal should follow suit. We refrain from comment on the Crown's Treaty settlement policies referred to, except to observe that we are unaware of any statutory or other requirement that obliges the Tribunal to adopt or follow such policies.

While the present claim has constantly been referred to by Crown counsel as 'historical', it must be remembered that the entry of the Crown upon Ngati Turangitukua ancestral land occurred as recently as 1964 and continued for some years thereafter. The events which gave rise to the various Treaty breaches occurred in the presence of and were witnessed by many members of the hapu still living today. A number gave evidence before us at the 1994 hearing and two, Arthur Grace and Eileen Duff, gave further evidence at the remedies hearing last year.³⁰ In that sense, the grievances are contemporary; certainly hapu members who experienced the full force of the Ministry of Works activities some 30 years ago are still living with the consequences.

Crown counsel invoked the 'benchmark settlements' of Tainui and Ngai Tahu and in addition the Ngati Whakaue settlement with the Crown. These are considered later along with the submissions of claimant counsel.

Crown counsel elaborated on the importance of maintaining relativities in later paragraphs of his submissions. He stressed that, if the Tribunal were to disregard previous settlements, serious inequities between claims might arise. Decisions on the quantum of redress should not become dependent on the quantity of memorialised land in a claimant group's rohe. Counsel also stressed the responsibility of the Crown to make informed judgements about fiscal constraints.

2.8.2 Claimants' submissions

Counsel for the claimants, Carrie Wainwright, referred to a passage in the Tribunal's decision of 25 March 1997 which notes a concession by Crown counsel that each claim should be settled on its own merits but with the qualification that equities as between different settlements are of relevance.

Claimant counsel submitted that the Crown's approach to settling Treaty of Waitangi claims has been to create a hierarchy of claims. The approach, she said, naturally means that the assessment of where a claim sits in the hierarchy is essentially the Crown's.

Counsel submitted that it is not incumbent on the Tribunal to make recommendations, whether binding or non-binding, which comply with the Crown's view of where claims sit in its hierarchy. She elaborated on this by saying that, while the Crown's approach to seriousness of breach and prejudice may often overlap with, or even mirror that of the Tribunal; in other cases that will not be so. The special jurisdiction of the Tribunal to make binding recommendations is conferred under legislation which makes no reference to the Crown's policies or remedies. Accordingly, counsel submitted that the Tribunal's view of remedies must flow from

30. Arthur Grace was unwell and his wife Terewai Grace read his submissions, documents E4 and E6, to the Tribunal.

its own view of Treaty breach and consequent prejudice. She emphasised that, since the Tribunal's jurisdiction with respect to recommendations is entirely subjective, it is the Tribunal's and not the Crown's view of the situation that prevails.

The Tribunal observes that, because the assessment of quantum in respect of Treaty remedies is necessarily subjective, one Tribunal could differ from another in its assessment. In the same way, different Ministers and Crown advisors are likely to differ one from the other. There is, however, an important distinction between the Tribunal and the Crown when assessing appropriate redress. In the case of the Tribunal, it will base its assessment on all Crown Treaty breaches which it finds to be well-founded. No such obligation rests on the Crown which may, if it so decides, reject one or more such Treaty findings or may consider them to be less serious than does the Tribunal. Thus, there can be no assurance that the Crown and the Tribunal, in any given claim, are basing their assessment of the degree of prejudice to the claimants on a common assessment of the nature and extent of the Crown's Treaty breaches. Where there is a significant difference in the two assessments, there may well be a correspondingly significant difference in the extent of the remedies thought appropriate by the Tribunal on the one hand and the Crown on the other.

Claimant counsel contended that any policies with respect to settlements which the Crown may have in force at any particular time do not bear directly on the Tribunal's task, because the Crown's policy environment is an entirely separate one from that within which the Tribunal is exercising its jurisdiction on remedies. From a constitutional point of view, she submitted, this was what was intended when the Tribunal was established; the Tribunal is to advise the Crown of *its* view. Counsel suggested it would be a 'fruitless loop indeed' if the Crown simply told the Tribunal its policy or remedies, and then the Tribunal made recommendations back to the Crown accordingly.

Counsel next emphasised that every claimant group's situation is unique, and cannot be directly compared with any other claimant group's situation; any precedent effect of a particular remedies award can only be very general and approximate.

In her reply to Crown counsel's submissions, Ms Wainwright disputed the Crown contention that the 'scheme' of the Treaty of Waitangi Act is to facilitate negotiated settlements between the Crown and Maori.³¹ She emphasised that the Tribunal's function is to inquire into and make recommendations upon any claim submitted to it under section 6 (s 5(1)). The process contemplated is one in which the Tribunal would first determine whether the claim was well-founded, and then decide on what action it should recommend be taken. The benefit of a negotiated settlement between the claimants and the Crown, counsel said, does not feature in the Act, with the exception of the provisions in section 8B which relate to the Tribunal's binding powers. Nor is there any implication that the Tribunal's role is to facilitate a negotiated settlement. At the time the Act was passed (when the Tribunal's powers were not retrospective), the expectation would have been that the Tribunal's recommendation would be implemented by the Crown.³²

31. Document E24, p 8

32. Ibid, pp 8-9

We agree with counsel's analysis of sections 5 and 6 and, in particular, her submissions that prior to 1985, when the Tribunal's jurisdiction was extended to address grievances arising since the signing of the Treaty in 1840, the expectation was that the Tribunal's recommendations would be implemented by the Crown. But, as she recognised, after 1985 the greater complexities associated with remedying historical claims became apparent. Reports of the Tribunal reflect this. From this point on it is understandable, given such complexities and, in some cases, the sheer magnitude of the Crown's Treaty breaches, that the Tribunal has limited its recommendations principally to legislative changes and other measures which would prevent other persons from being similarly affected in the future. It has recognised that, in the first instance at least, it may often be appropriate that claimants should negotiate directly with the Crown on the basis of the terms of the Tribunal's report and its findings. We think the Crown's proposition that the statutory scheme recognises that ultimately Treaty claims can only be satisfactorily resolved through a negotiated settlement between the Crown and claimants should be modified. For the reasons advanced by claimant counsel, we doubt that the statutory scheme does in fact support Crown counsel's proposition. We do, however, accept that most historical claims which have been reported on by the Tribunal are likely to be settled only after negotiations between the parties.

But there will be cases, of which the present is one, where the parties have failed to reach a mutually acceptable settlement. The statutory scheme permits claimants to invoke the Tribunal's powers to make appropriate recommendations which might include both binding and non-binding recommendations. In the unlikely event that only binding recommendations were made, subsequent negotiations might not be needed. But in the generality of cases, the parties would need to agree on a final settlement.

2.8.3 Relativities with other Crown settlements

Ms Wainwright submitted that the claimants' situation is to be distinguished from the huge historical claims such as Tainui and Ngai Tahu. There, the grievances and their effects were so many, varied, and thorough-going that they cannot really be remedied at all, except in a very generalised way. The enormity of these claims, she maintained, leads to their remedies being swept into a package approach where the monetary value of the settlement becomes the basis of comparison between them. In smaller and more recent claims, like those of Ngati Turangitukua, counsel suggested the Tribunal is able much more effectively to focus on the restoration of individual groups.

Claimant counsel contended that it was not fair or just that Maori claimants are being affected by other iwi settlements, into which they have had no input, and the terms of which they may well disagree with.³³ She argued that, because of an inability to compare claims and settlements except at the crudest level, it is unlikely that other

33. Ibid, p 11

settlements will be destabilised if the Tribunal decides that it does not agree with the Crown's view of Ngati Turangitukua's place in the hierarchy.

Claimant counsel submitted that the sample for comparison of the two major Tainui and Ngai Tahu settlements and the one smaller Ngati Whakaue settlement is not adequate, and must therefore be inconclusive. Of the three, only one, Ngai Tahu, was the subject of an investigation and full report by the Tribunal. Counsel contended that the Tribunal would need to know much more about the process of, and policy basis for, the settlements reached, in order to draw from them guidelines for a proper remedy in this claim.³⁴ Ms Wainwright submitted that the database to which the Crown has referred the Tribunal is too small, and the information too slight, for it to be of any but the most general interest.

More generally, claimant counsel maintained that any comparison between Treaty claims and their settlement can only be very approximate and therefore of limited value. She criticised the failure of the Crown to make even a very general comparison between a 150-year-old grievance relating to a large scale raupatu and the present claim, apart from saying that in its judgement this claim is worth no more than \$3–4 million whereas the Tainui settlement is worth some \$170 million. This, she characterised as 'no more than assertion, and represents no more than an opinion'.³⁵

We have earlier noted that Crown counsel invoked the 'benchmark settlements' of Tainui and Ngai Tahu, the Whakotohea settlement (not then concluded), and a settlement with Ngati Whakaue. Since the hearing, the Whakotohea settlement has collapsed and the Crown's offer has been withdrawn. The Tribunal is left with the two largest settlements and the relatively modest Ngati Whakaue settlement as a basis for comparison.

Crown counsel stated that the Tainui and Ngai Tahu settlements, for which the quantum level is \$170 million, both involve very large and significant Treaty grievances. Both settlements are iwi based and involve a significant number of people and of land.

2.8.4 Waikato–Tainui settlement

In the case of the Waikato–Tainui claim, we were provided with a copy of the deed of settlement dated 22 May 1995.³⁶ In addition, we were referred to the Waikato Raupatu Claims Settlement Act 1995 – in particular, the preamble. Parts E to H of the preamble succinctly refer to the invasion, hostilities, and confiscations of Waikato land. It is recorded that in July 1863 military forces of the Crown unjustly invaded the Waikato south of the Mangatawhiri River, and engaged in hostilities against the Kiingitanga and the people. By April 1864, after persistent defence of their lands, Waikato fell back and took refuge in the King Country. The Crown unjustly confiscated approximately 1.2 million acres of land from the Waikato iwi in order to punish them and gain control of the land placed under the protection of the Kiingitanga. The Crown

34. Document E24, p 12

35. Ibid, p 13

36. Document E19

subsequently paid small amounts of monetary compensation and returned, but not generally to those who had fought for the Kiingitanga, approximately one-quarter of the land confiscated.

Widespread suffering, distress, and deprivation were caused to the Waikato iwi as a result of the war waged against them, the loss of life, the destruction of their taonga and property, and the confiscation of their lands, and the effects of the raupatu have lasted for generations. The deed of settlement also briefly refers to these events.

2.8.5 Ngai Tahu settlement

We were also referred by the Crown to the *Ngai Tahu Report 1991* of the Tribunal. Two of the three members of this Tribunal were members of the Ngai Tahu Tribunal and are therefore well aware of its contents. It was not a raupatu claim and no loss of life occurred as a result of the Crown's activities. In brief the Crown, in 1844, embarked on a 20-year project to acquire Ngai Tahu land. By 1864, for the sum of £14,750, it had acquired 34.5 million acres from Ngai Tahu. This was most of the South Island and more than half the land mass of New Zealand. All but an insignificant fraction of Ngai Tahu's land was gone; only 37,492 acres remained. The Tribunal summarised the effect on Ngai Tahu as follows:

By 1864 Ngai Tahu were in a parlous, some might say pitiable condition. They were now an impoverished people largely confined on uneconomic patches of land, almost entirely isolated from mainstream European development, neglected by government at both central and provincial level, marginalised and struggling to survive both individually and as a people. Their rangatiratanga greatly diminished, their communal way of life and the cultural and spiritual values associated with it seriously undermined. As settlement steadily encroached on them from all sides, as land was progressively fenced and drained, as their access to mahinga kai steadily decreased, Ngai Tahu eked out a bare subsistence on land incapable of sustaining them.³⁷

The Crown, in the deed of settlement with Ngai Tahu dated 21 November 1997, made an apology to Ngai Tahu. Among other matters, the Crown acknowledged that it acted unconscionably and in repeated breach of the principles of the Treaty of Waitangi in its dealings with Ngai Tahu in the purchase of Ngai Tahu land. It further acknowledged that it failed to set aside adequate lands for Ngai Tahu's use and to provide adequate economic and social resources for Ngai Tahu. The Crown acknowledged that it failed to preserve and protect Ngai Tahu's use and ownership of such of their land and valued possessions as they wished to retain. It also acknowledged that its failure always to act in good faith deprived Ngai Tahu of the opportunity to develop and kept the tribe for several generations in a state of poverty.³⁸

It is obvious that the magnitude of the loss and suffering incurred by both the Tainui and Ngai Tahu people over a large period of time greatly exceeded that of Ngati Turangitukua. While there are some features in common, others are unique to each of

37. *Ngai Tahu Report 1991*, vol 3, sec 16.1.1

38. Deed of settlement between Te Runanga o Ngai Tahu and Her Majesty the Queen, 21 November 1997, sec 2

the three claims. But it is impossible, given the complexities and special features of the two 'benchmark settlements' and the special features of the present claim, to make more than a very general comparison. The two major settlements do not, in themselves, pin-point any precise relationship between them and Ngati Turangitukua. It must remain a matter of judgement.

2.8.6 Ngati Whakaue settlement

The third settlement relied on was that of Ngati Whakaue, an iwi of Te Arawa. Crown counsel advised that they settled their major land claims, including, amongst other grievances, the lack of payment for the improper acquisition of 20,000 acres, plus additional land takings for the railway track. Their settlement was \$5.2 million and their population according to the 1996 census was 3264. The only other information provided by the Crown was a copy of a settlement agreement between the Crown and Ngati Whakaue dated 25 September 1997.³⁹

We have given careful consideration to this agreement. Its purpose is to record the terms of the settlement of an informally amended Ngati Whakaue Waitangi Tribunal claim (Wai 94), the details of which are set out in paragraph 4 of the agreement.

The grievances are summarised in paragraph 3 as follows:

Ngati Whakaue have grievances concerning the Crown's actions over the leasing arrangements provided for by the Fenton Agreement and the Thermal Springs Districts Act 1881, the adequacy of the purchase price for the Pukeroa–Oruawhata block and the adequacy of compensation paid as a result of the recommendations of the Myers Commission of 1948. They also have grievances concerning the Crown's ownership and management of various reserves within the Pukeroa–Oruawhata block, free hospital treatment pursuant to the Fenton agreement and the Crown's acquisition of lands for railway purposes.⁴⁰

Paragraph 4(e) of the informally amended claim states that Ngati Whakaue considered the Crown had made no payment for an improper acquisition of lands acquired within the Ngati Whakaue rohe by the Crown for railway purposes including the 20,000 acres known as the Patetere block and land taken for the railway track.

The Crown position is stated in paragraph 5 as follows:

Those grievances concerning leasing arrangements in the 1880s have been validated by research in the past. The Crown considers that review of previous compensation granted is justified. Research by the Department of Justice has not validated the grievances concerning alleged improper acquisition by the Crown of lands for railway purposes, although there may still be questions relating to the adequacy of the price paid. Research is currently being undertaken by the Department of Survey and Land Information in order to validate or invalidate grievances concerning reserves gifted by Ngati Whakaue to the Crown.⁴¹

39. Document E20

40. Ibid, p 1

41. Ibid, p 2

We pause to note that, whereas Crown counsel, and Ngati Whakaue in their statement of claim, refer to the lack of payment for the improper acquisition of the 20,000 acres for railway purposes, the Crown does not admit the alleged improper acquisition of such lands, merely a possibility that the purchase price may have been inadequate. This leaves the true position quite uncertain.

Paragraph 6 states that the offer made by the Crown, set out in paragraphs 7 to 9 is made without prejudice or admission of any legal liability.

In paragraph 7, the Crown agrees to transfer three blocks of land known as the Rotorua railway reserve (comprising approximately 15 hectares) to a company owned by a trust on behalf of Ngati Whakaue. The Crown undertakes to reimburse Railcorp for the cost of the land, being not more than \$5 million plus goods and services tax. The Crown also agrees to meet the costs of Ngati Whakaue in negotiating the claim.

The agreement lacks any particulars of the historical events. It appears that the Crown conceded that those grievances concerning certain leasing arrangements in the 1880s have been validated by research. We are unable to gather from the agreement the nature of such grievances and the extent of their prejudice to Ngati Whakaue. It appears significant that the research by the Department of Justice has not validated the grievances concerning the alleged improper acquisition by the Crown of lands for railway purposes, although there might still be questions relating to the adequacy of the price paid. Presumably, a full and impartial inquiry would have been needed to ascertain the true situation. In both instances, payments were made by the Crown at the time. Although we were not told, it would seem likely that the Crown payment on settlement was less, but how much less we do not know, than it would have been had the allegations been fully investigated and found to have supported the claimants' contentions.

In the absence of an adequate explanation of the basis of the settlement and authoritative findings of the facts, including the nature, extent, and seriousness of any Treaty breaches by the Crown, we are unable to make a meaningful assessment of how this settlement relates to the totally different factual situation which has been comprehensively related in our *Turangi Township Report 1995*.

Moreover, the Crown has failed to provide any detailed reasons why, in its view, the Ngati Turangitukua claim, the subject of a full inquiry and report, is worth no more than \$3–4 million compared with the Ngati Whakaue partially-investigated and contested claim. The few generalities proffered by the Crown are of little, if any, assistance to this Tribunal in attempting to assess the relative equities of the two claims.

Finally, we note that Crown counsel made it clear, in submitting that the Tribunal must have regard to redress provided for other claims, that the Crown is not seeking to impose the fiscal envelope concept on the Tribunal. That policy, intended to put a cap on the total amount of money available for the settlement of historical Treaty claims, has been abandoned. Counsel did not say whether the existence of the fiscal cap had an effect on settlements made before it was abandoned. It would be surprising if it did not.

2.9 CONCLUSIONS

2.9.1 Introduction

Because this remedies claim is regarded as a test case, the submissions of counsel have been noted in more detail than might otherwise have been necessary. We have given careful consideration to all the matters put to us by counsel. We now state our conclusions on the main matters raised by them.

2.9.2 Claimants' reliance on Tribunal findings

The claimants are entitled to rely on all the Tribunal's findings as to facts and as to Treaty breaches by the Crown. We have discussed these in chapter 3. The Crown was silent on which of the Tribunal's findings it accepted as the basis for its view of the monetary range appropriate to redress the prejudice suffered by the Ngati Turangitukua hapu. Not all our findings of Treaty breaches were adverted to by Crown counsel. The Tribunal is, of course, required to have regard to all the Treaty breaches which it has held to be well-founded and to the reasons for such findings.

It is clear from the provisions of sections 6 and 8A of the Treaty of Waitangi Act 1975 that the Tribunal, whether exercising its power to make binding or non-binding recommendations, is acting subjectively. No doubt the Crown so acts when making its assessment of what it considers to be the appropriate redress in any particular claim. It necessarily follows that this can result in differences of opinion which, on occasion, may be quite marked.

2.9.3 Remedial nature of binding recommendations

Whether or not the power of the Tribunal to make binding recommendations may properly be characterised as exceptional, it is important to take into account the remedial nature of such power. It would be inconsistent with the judicial and legislative history of section 8A in particular, to ignore the purpose of the provisions enacted in 1988. In our opinion, these were, as the preamble to the 1988 Act made clear, essential in order to protect the position of Maori claimants and to provide safeguards to ensure such protection. A narrow or restrictive interpretation of the relevant provisions of the 1988 Act is to be avoided.

2.9.4 Relevance of Treaty principles

In its approach to remedies, the Tribunal should have regard to those Treaty principles which it has found the Crown to have breached. In assessing the relevance of such breaches, the Tribunal should have regard to the relative seriousness of the various breaches and to their prejudicial effect on the claimants.

2.9.5 A restorative approach

We agree with the Muriwhenua land Tribunal which noted, in expressing a preliminary view on the appropriate approach to relief, that, where the place of a hapu has been wrongly diminished, an appropriate response is to ask what is necessary to re-establish it.⁴² This suggests a restorative approach. We have noted a similar approach by the Ngai Tahu and Orakei Tribunals. We consider the various factors formulated by the Muriwhenua Tribunal to be relevant although not all will have equal weight.⁴³ It is apparent that some land should be restored to the hapu; this is conceded by the Crown. This, along with other measures, will be necessary to restore, to some degree, the rangatiratanga of Ngati Turangitukua in their ancestral homeland.

2.9.6 Need for a 'direct' relationship?

We have not been persuaded by Crown counsel's submissions that there must be a 'direct' relationship between the historical wrong and the memorialised land before resumption can be ordered. Nor, in our view, was Crown counsel correct in suggesting that binding powers should only be exercised when some specific feature of the history of the asset means that it should be returned to Maori ownership. We need not rehearse here our reasons which we have given in some detail earlier.

2.9.7 Presence of direct relationship

But even assuming that Crown counsel's submissions are correct, we consider they afford no barrier to the Tribunal, should we think it appropriate, in making a binding recommendation for the return of any specific memorialised property. This would be so whatever its condition, including any improvements, immediately before its transfer by the Crown to a State-owned enterprise. This is because the Tribunal considers that there is a 'direct' relationship between the historical wrongs recorded in our findings and all the land taken by the Crown in breach of Treaty principles. This includes all memorialised and all non-memorialised land. All such land was ancestral land, part of the papakainga of Ngati Turangitukua. All was of special importance and significance to the hapu. It still is. It was Crown action which radically and irretrievably transformed the physical character of this land. But for Ngati Turangitukua the land retains its unique character of ancestral land, of their papakainga. That is why they seek to have part of such land returned.

2.9.8 Relevance of value added prior to Crown disposal to an SOE

We do not accept that the statutory scheme of resumption prevents regard being had to added value and that this indicates that it is the particular features of the land itself that are important. The statutory scheme prevents regard being had to value added to

42. *Muriwhenua Land Report*, sec 11.4.4

43. *Ibid*

land by way of improvements only if such value was added since immediately before the date of the transfer of the land from the Crown to a State enterprise. The Tribunal is entitled to have regard, if it thinks appropriate, to the condition of the land and any improvements to it before that time.

2.9.9 Relativities

The Crown concedes that each claim should be settled on its merits but adds that equities as between different settlements are relevant.

When considering what remedies are appropriate the Tribunal should have regard to all well-founded breaches. But no such obligation rests on the Crown which may reject one or more such findings or may consider them to be less serious than does the Tribunal. Clearly this can result in significant differences as to the nature and extent of remedies thought appropriate by the Tribunal and the Crown respectively. This, in turn, could lead to different perceptions, possibly significant, in the perceived relationship with other settlements.

We were advised that the relativity of redress as between claimant groups is a matter of fundamental concern to the Crown. However, the Crown referred us to only three operative settlements. Of these, only one had been the subject of an investigation and report by the Tribunal. We infer that no other settlements were thought relevant by the Crown.

2.9.10 Benchmark settlements

Two of the three settlements to which we were enjoined to have regard were 'benchmark settlements'. In both cases the monetary value of the settlements was of the order of \$170 million. In the case of Waikato-Tainui, the people were subjected to raupatu resulting in loss of life and loss of extensive areas of land. Ngai Tahu, who occupied nearly half the land mass of New Zealand were rendered almost landless by the Crown. They were paid a derisory sum for their land. These events occurred over 130 years ago and have had long-lasting effect upon the respective iwi. The magnitude of the losses are so great and the prejudice of such lengthy duration that it is difficult for the Tribunal to make a meaningful comparison between them and the claim before us. It is obvious that many more people were affected by the prejudice to Tainui and Ngai Tahu than to the hapu of Ngati Turangitukua; so much so that a comparison of more than a very general nature is unrealistic. The Tribunal, perhaps understandably, received little assistance from the Crown as to the basis for any comparison between such disparate claims.

2.9.11 The Ngati Whakaue settlement

At first sight, it might be thought the Ngati Whakaue settlement could provide some sort of yardstick. Accordingly, we have given careful attention to the limited amount of information made available to us by the Crown and to Crown counsel's

submissions. In the result, for reasons we have earlier indicated, we have been unable to make a meaningful assessment of how that settlement relates to the totally different factual situation which has been comprehensively related in the *Turangi Township Report 1995*. It is accordingly of limited relevance.

2.9.12 A wider perspective

The Tribunal is, of course, acutely aware of the wider political and legal sphere within which it is operating. It is very conscious of the magnitude of the Crown's fiscal responsibilities. Few, if any, claimants, given the magnitude of the aggregate of all claims for redress under the Treaty of Waitangi Act 1975, can expect to receive total redress for the prejudicial effect of Crown Treaty breaches.

In considering what recommendations it should make in any given case, the Tribunal must have regard to all relevant circumstances. These will include the nature, extent, and effect of the well-founded Treaty breaches, and the additional evidence and submissions received during the hearing on remedies. In considering whether to make a binding recommendation for the return of memorialised land, the Tribunal will take into account the greater consequences that a binding recommendation of memorialised land would have for the Crown than would a non-binding recommendation for the return of Crown-owned land. We will be guided by the judgment of the Court of Appeal in *T v M* (1984) 2 NZFLR 462 delivered by Woodhouse P when he says at page 464, 'It is the principle of good common sense that the more serious the issue the greater should be the care used in assessing it.' As we said in our decision of 23 March 1997, we believe that, if the Tribunal follows this principle of good common sense in assessing the relevant evidence and submissions of counsel, it will be acting fairly to the parties and in accordance with its statutory obligations.

