

CHAPTER 4

ANALYSIS, FINDINGS, AND RECOMMENDATIONS

4.1 THE CROWN'S SETTLEMENT OFFER TO NGĀTI AWA

In December 1998, the Crown and Ngāti Awa entered into a heads of agreement for the settlement of all Ngāti Awa historical claims. Accompanying the heads of agreement was an offer of settlement by the Crown. The offer was on terms that 'elements of redress in the offer remain conditional on the resolution of cross-claims'.¹ In October 2000, the Crown revised its settlement offer, and also changed the basis upon which cross-claims were to be dealt with. The Crown relieved Ngāti Awa of the responsibility for dealing with cross-claims. The Crown's letter of offer dated 4 October 2000 stated that the settlement offer was now subject to the Crown's confirmation that cross-claim issues in relation to the proposed redress had been addressed to the satisfaction of the Crown.²

The content of the settlement package was amended in response to the representations made to the Crown by cross-claimants, and on the basis of the Crown's own historical research. The changes made by the Crown were these:

- ▶ the withdrawal of approximately 25 per cent of the Matahina Crown forest licensed lands from the offer;
- ▶ the offer to transfer Matahina A5 was reduced to a non-exclusive offer of a statutory acknowledgement over this site;
- ▶ the offer to vest Tauwhare Pā scenic reserve in Ngāti Awa solely as a reserve became an offer to include the reserve within the area over which a joint management committee is to be established. Other tribes may subsequently also be represented on this committee;
- ▶ the Ngāti Awa deed of settlement is now to include an acknowledgement that Kaputerangi is significant to other iwi (including other Mataatua iwi), and Ngāti Awa is required to reflect this in published and interpretation materials produced about the site;
- ▶ the Ngāti Awa deed of settlement now includes a statement that the granting of non-exclusive redress to Ngāti Awa does not prejudice the Crown's ability to provide similar redress to other groups as part of a settlement, if appropriate.

1. Document A1(a), annex D, para 4

2. Ibid, annex AE, para 6(b)

4.2

The aspects of the settlement offer now on the table to which other claimants object are these:

- ▶ the transfer of 75 per cent of the Matahina Crown forest licensed lands (Matahina A1B, A1C, and A6) to Ngāti Awa;
- ▶ the vesting of the stratum title to Matahina A4 in Ngāti Awa;
- ▶ the granting to Ngāti Awa of a non-exclusive statutory acknowledgement in respect of Matahina A5;
- ▶ the vesting in Ngāti Awa of Kaputerangi historic reserve, subject to existing reserve status and the acknowledgement that Kaputerangi is significant to other iwi;
- ▶ the vesting in Ngāti Awa of 10 acres of the Port Ōhope recreation reserve, subject to reserve status, along with an adjacent one-hectare nohoanga entitlement;
- ▶ the establishment of a joint management committee over Moutohorā Island, Ōhope scenic reserve, and Tauwhare Pā scenic reserve, on which other tribal groups may also be represented;
- ▶ the granting to Ngāti Awa of a non-exclusive statutory acknowledgement in regard to Moutohorā Island, and the right to collect hāngi stones from the island;
- ▶ the granting to Ngāti Awa of a non-exclusive preferential right to purchase up to 5 per cent of any marine farming or other authorisations within part of Ōhiwa Harbour.

4.2 ISSUES

The Tribunal's focus in this inquiry is relatively narrow. We have been called upon to look into whether the Crown's policies and practices, as implemented in its settlement negotiations with Ngāti Awa, are in accordance with the principles of the Treaty of Waitangi.

We must determine whether:

1. the Crown's policies, as expressed in the content of the settlement offer; and
2. the Crown's practices, as expressed in its communication and consultation with affected claimants;

are in accordance with the Treaty principles.

Arising out of the first of these two main heads of inquiry are the following topics:

- ▶ the background to Crown forest licensed lands;
- ▶ the Crown's policy on the inclusion of Crown forest licensed lands in Treaty settlements;
- ▶ the cross-claimants' view of the Crown's policy;
- ▶ why the Crown rejects the approach contended for by cross-claimants;
- ▶ the application of the Crown's policy to the Crown forest licensed land at Matahina; and
- ▶ the Tribunal's findings.

We then consider the class of redress that the Crown calls cultural redress. Here, the topics are as follows:

- ▶ Kaputerangi;
- ▶ Matahina A4 and A5;
- ▶ Ōhiwa Harbour;
- ▶ Moutohorā Island; and
- ▶ the Tribunal's findings.

Under the second main heading, we investigate the Crown's practices, as expressed in its communication and consultation with affected claimants. We look at whether the Crown's conduct was compliant with the principles of the Treaty of Waitangi. We then consider whether the Crown recognised, and complied with, a duty to preserve amicable tribal relations. To the extent that the Crown's conduct was not compliant, we look at whether and to what extent prejudice resulted.

We will analyse, and make findings on, each of these topics in turn.

4.3 CROWN FOREST LICENSED LANDS

In 1988, the Government was in the throes of implementing its objective of corporatising, and subsequently privatising, State-owned businesses. Its legislative vehicle for this was the State-Owned Enterprises Act 1986. Section 9 of this Act made it illegal for the Government to do anything under the Act that was inconsistent with the principles of the Treaty of Waitangi. Relying on the words of section 9, Māori claimants sought to stop the Government from transferring assets out of public ownership without first finding the means of protecting the Māori interests in those assets. That Māori interest arose from the fact of their having claims before the Waitangi Tribunal in which the assets might comprise a portion of the settlement recommended by the Tribunal.

The New Zealand Māori Council brought its first successful challenge to the Crown's policy in what is now referred to as the lands case.³ In 1987, the judges of the Court of Appeal issued their five landmark judgments. Their collective tenor was that 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.⁴

The upshot was that the Government was precluded from transferring the Crown's assets to the new State-owned enterprises without first making provision for the future Māori interest in those assets that could arise from a successful claim to the Waitangi Tribunal. The Court of Appeal required the Crown and Māori to sit down and work out a system of

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

4. This was the recollection of the case expressed by the president of the Court of Appeal in *Te Rūnanga o Wharekauri Rekohu Incorporated & Ors v Attorney-General & Ors* unreported, 3 November 1992, CA297/92, p 8.

safeguards for Māori interests. The system of protections agreed upon provided for the mandatory return of State-owned enterprise land to Māori upon order by the Waitangi Tribunal.⁵

One of the new State enterprises that had been created was Forestcorp. Forestcorp was to take over the Crown's forestry assets. At the time of the lands case, it was assumed that when forests were sold by Forestcorp to third parties, the land on which the trees stood would comprise part of the transaction. It was also assumed that memorials on the certificates of title for the land would show that the land could be compulsorily resumed by the Crown following a decision by the Waitangi Tribunal.

Subsequently, however, the Government resolved to keep the land in Crown ownership, and sell instead a right to manage the land and cut the trees on it for a fixed period of years. Forestcorp would act as the Crown's agent. By this means, the Government hoped to maximise the value of the forests by bypassing the memorial system that came into play only on the transfer of *land*. There would be no system of protection for Māori interests in the cutting and management rights to be sold.

When the New Zealand Māori Council brought the case back to the Court of Appeal, the court made it clear to the Crown that no general sale of forestry rights without reference to the Māori interest in the forests would be allowed.⁶

The result was that the parties went away and together worked out a scheme that was enshrined in the Crown Forest Assets Act 1989. Under this Act, the forest land would stay in Crown ownership, but the forests would be sold outright. However, the Crown Forestry Rental Trust was established to hold all rentals on forest land until such time as Māori claims to forests had been heard by the Waitangi Tribunal. Where such a claim proved successful, the entitled Māori would receive rental payments on the forest land from the date of sale of the land (the accumulated rentals). The Crown would pay to the successful claimants at least 5 per cent of the value of the forests by way of recognition of the encumbrance on the land constituted by the owner of the trees. Interest on the trust's funds would be spent to assist Māori claimants in the preparation, presentation, and negotiation of their claims.

By means of this arrangement, the position of Māori claimants to forests was granted a measure of protection and the Government was able to pursue its policy of divesting itself of business interests.

Of recent times, the practice has emerged in negotiating Treaty settlements of claimants and the Crown agreeing between themselves the component of the settlement that comprises Crown forest licensed land. They make a joint approach to the Tribunal for the necessary orders, or alternatively effect their agreement by legislation.

5. The system of protections was legislated in the Treaty of Waitangi (State Enterprises) Act 1988.

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

Difficulties of course arise where the Crown forest licensed land that the Crown wishes to offer to one group in settlement is also claimed by other groups that are not in settlement negotiations. That is the situation here.

4.4 THE CROWN'S POLICY ON CROWN FOREST LICENSED LANDS IN TREATY SETTLEMENTS

The main focus of the cross-claimants in their evidence and submissions was on the proposal of the Crown to transfer to Ngāti Awa 75 per cent of the Crown forest licensed land comprised in Matahina A1B, A1C, and A6.

In addition to the Crown forest licensed land offered to them in the Matahina blocks, Ngāti Awa is to receive about a third of the Crown forest licensed land in the Rotoehu Forest. That element of the settlement package was not the subject of objection by the claimants appearing before this Tribunal.

It is relevant, however, to note the total Crown forest licensed land component of the proposed settlement package. This is because along with the Crown forest licensed land come the accumulated rentals on that land. These rentals are held by the Crown Forestry Rental Trust, until payable to the confirmed beneficiary. The accumulated rentals do not form part of the quantum of the settlement, but are in effect a kīnaki on the top. This kīnaki effect of course creates incentives for claimants to maximise the Crown forest licensed land component in their settlement, because the quantum of the accumulated rentals grows in proportion to the quantity of land transferred.

It is appropriate that the accumulated rentals do not form part of the quantum of the settlement, because the payment of accumulated rentals to entitled Māori was agreed as part of the Crown forest assets settlement between Māori and the Crown, described above. It seems to us that it would be wrong if the value of the accumulated rentals were included in the settlement quantum agreed now between claimants and the Crown, because the claimants' entitlement to the accumulated rentals was in effect part of that earlier settlement. We note, however, that Mr Hampton of the Office of Treaty Settlements informed the Tribunal that this is an issue that has been the subject of consideration in government policy circles, including the Māori Affairs Select Committee, in recent times.

There is no doubt that this legacy from the Crown forests assets settlement creates what The Treasury would, we think, call a distortion in the motivation of claimants in settlement negotiation with the Crown. Claimants are inevitably focused on maximising the Crown forest licensed land component in the settlement package, because the accompanying accumulated rentals inflate the effective value of the settlement. There is an extent to which this urgency hearing itself is a product of that distortion.

Ms Collins, of the Office of Treaty Settlements, expressed the Crown's position as follows:

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4.4

Resolution of cross-claim issues is increasingly becoming the most difficult issue confronting Treaty settlements, and the factor most likely to delay settlement. The Crown, in negotiating settlement packages, is aware of its Treaty obligations to (in this case) Ngāti Awa, and to overlapping claimants. Just as it needs to ensure that a settlement package will not affect the Crown's capacity to offer fair redress to overlapping claimants, it needs to ensure that Ngāti Awa receives a settlement offer that is fair and appropriate to settle its grievances. This involves a difficult balancing of often conflicting issues that ultimately requires the exercise of a political judgement.⁷

How does the Crown go about that balancing exercise?

First, as we mentioned above, the Crown no longer puts on the claimant party in settlement negotiations with the Crown the onus of resolving cross-claims. The position appears to be that the party in settlement negotiations (as Ngāti Awa is here) is expected to do the best it can to obtain agreement from its Māori neighbours to the content of the settlement package. But the Crown accepts that this will often be effectively impossible. This acceptance follows comments made by the Ngāti Awa Tribunal to this effect.⁸ Now, the Crown simply needs to be satisfied that cross-claim issues have been addressed. In practice, this seems to amount to a requirement that best endeavours have been made under the circumstances. When officials think that all that can be reasonably done has been done, they draw a line and go no further. They accept that a certain degree of cross-claimant hostility to contested redress is inevitable.

It was not really clear to us to what extent the Crown officials see the Crown as obliged to take on responsibility for resolving conflicts arising from its offers of redress that are subject to cross-claim. This is an issue to which we will return (in section 4.12) where we deal with the Crown's duty to preserve amicable tribal relations.

It seemed to us that, during the time it was negotiating with Ngāti Awa, and then responding to the concerns of cross-claimants, the Crown was engaged in a process of developing and refining its policies with respect to the allocation of interests in Crown forest licensed lands, and the management of cross-claims to those lands. This process of developing the policy, and communicating it, is another matter to which we shall return (in section 4.11).

Ms Collins identified the document 'DB' annexed to her evidence as the culmination of the Crown's thinking on the allocation of rights to Crown forest licensed land, and the management of cross-claims. DB is a briefing paper to the Minister in Charge of Treaty of Waitangi Negotiations.⁹ It was not written and sent until 22 March 2002, some six years into the negotiations with Ngāti Awa, and some three years into discussions with cross-claimants.

7. Document A1, para 152

8. Waitangi Tribunal, *The Ngāti Awa Raupatu Report* (Wellington: GP Publications, 1999), pp 131–136

9. Document A1(b), annex DB

Where Crown forest licensed land is involved, the Crown recognises the need to balance the commercial nature of the asset with the cultural and historical associations of groups claiming an interest in the land.¹⁰

Drawing on the content of DB, Ms Collins said that the factors that the Crown considers in determining a fair allocation of forest land are these:

- 162.1 Has a threshold level of customary interest been demonstrated by each claimant group?
- 162.2 If a threshold interest has been demonstrated:
 - 162.2.1 What is the potential availability of other forest land for each group?
 - 162.2.2 What is the relative size of likely redress for the Treaty claims, given the nature and extent of likely Treaty breaches?
 - 162.2.3 What is the relative strength of the customary interests in the land?
- 162.3 What are the range of uncertainties involved? The Crown should take a 'precautionary' approach in offering forest land to particular groups where uncertainties exist.¹¹

This was the summary in Ms Collins' evidence. From it she omitted a continuation of paragraph 162.3 that was included in DB. In the original, the paragraph read like this:

What are the range of uncertainties involved? The Crown should take a 'precautionary' approach in offering forest land to particular groups where uncertainties exist, particularly where overlapping claimants may be able to show breaches of the Treaty relating to the land, and would lose the opportunity to seek resumptive orders from the Tribunal.¹²

Ms Collins and Mr Hampton made it clear that, in practice, the Crown may make the decision about whether blocks should or should not form part of a settlement without becoming heavily involved in measuring the relative customary interests of the various claimants to those blocks. Ms Collins explained that the relative strength of customary interests is likely to be a dominant factor only where there is limited Crown forest licensed land available.¹³ Where the Crown is satisfied that cross-claimants have available to them other areas of Crown forest licensed land for potential future settlement, the exercise of evaluating the relative connections of the cross-claimants to the land in question will therefore assume relatively less importance.

10. Document A1, para 158

11. Ibid, para 162

12. Document A1(b), annex DB, para 20

13. Document A1, para 168

4.5 THE CROSS-CLAIMANTS' VIEW OF THE CROWN'S POLICY

Before us, we heard the Ngāi Tūhoe cross-claimants criticise the Crown's policy with respect to the inclusion in this settlement package of the Matahina Crown forest licensed land. The cross-claimants told us that the ancestral links of Ngāi Tūhoe with that land were stronger than those of Ngāti Awa. They said no proper assessment can be made at this time of the relative Māori interests in this land, because there has only been partial research, and no Waitangi Tribunal has inquired into it. The inquiry of the Ngāti Awa Tribunal was limited to the area within the confiscation boundary. The Matahina lands in question lie well south of that boundary. This means, they said, that the Crown should make no permanent allocation of interest in the forest land there to Ngāti Awa until such time as all the parties have been heard. This would enable findings to be made on the relative interests of the relevant Ngāi Tūhoe hapū, of Ngāti Rangitihi and Ngāti Awa, and for rights in the Matahina forest land to be allocated accordingly.

The cross-claimants allege that the Crown's policy breaches the principles of the Treaty. The breach of many alleged duties was pleaded, but we think that the essential complaint is that the Crown has not sufficiently protected the interests of claimants affected by its settlement offer to Ngāti Awa. Counsel for the Tūhoe–Waikaremoana Māori Trust Board emphasised in his submissions the prejudice to Ngāi Tūhoe arising from the loss of their opportunity to seek from the Waitangi Tribunal binding recommendations for the resumption of the Matahina Crown forest licensed lands. Cross-claimants also criticise the Crown's consultation with affected parties. They say that it was neither effective nor meaningful. This goes to the Crown's duty to exercise the utmost good faith in its dealings with Māori. We will deal with process issues separately in section 4.11.

4.6 WHY THE CROWN REJECTS THE APPROACH CONTENDED FOR BY THE CROSS-CLAIMANTS

It was plain that the Crown understands the position for which the cross-claimants are contending. The cross-claimants want the Crown to step back from delivering to Ngāti Awa redress to which they might also one day be entitled once their claims have been fully researched, presented to the Waitangi Tribunal, and reported upon. Of particular concern, as we have said, is the Crown's intention to transfer 75 per cent of the Matahina Crown forest licensed lands.

These lands comprise part of the Kaingaroa Forest. The Tribunal intends hearing claims to the Kaingaroa Forest in its Kaingaroa and Urewera district inquiries. Ngāti Rangitihi's claims will probably be heard in both the Rotorua and Urewera district inquiries. The Tribunal's forward timetable is subject to change, depending on the speed of progress in active district inquiries. However, on the basis of current information, the Urewera Tribunal is due to

begin hearings in mid-2003. The Rotorua Tribunal is unlikely to begin hearings before the end of 2003. Hearings in the Kaingaroa district inquiry are unlikely to begin before 2006. Thus, the claims of all the cross-claimants to the Matahina Crown forest lands are unlikely to be reported upon before 2007. It would be only then that the respective interests of Ngāti Awa, the Ngāi Tūhoe hapū, and Ngāti Rangitihi, in the Matahina Crown forest licensed lands and in the other Crown forest licensed lands in which they potentially have interests, would be ascertained. We note that from our knowledge thus far of the claimants' competing views, we doubt that the relative interests of hapū and iwi in Matahina lands could ever really be stated with precision. Nevertheless, it is implicit in our analysis of the timing of the relevant district inquiries that we agree with the Crown's observation that, in order to satisfy the cross-claimants' requirements, inquiry could not be limited to the Matahina blocks. This is because the Tribunal would need to understand the totality of the cross-claimants' claims in order to assess whether and what quantity of land to recommend as redress, and in order to be satisfied that sufficient land is available in Crown hands to provide fair redress.¹⁴

Thus we see that the cross-claimants are inviting the Tribunal to take the view that where redress is contested, the Tribunal must hear all the cross-claimants. Where the contested redress is licensed land under the Crown Forests Assets Act 1989, the Tribunal should determine its allocation. The cross-claimants take the view that the delay that this would cause to settlement is a lesser concern than the potential prejudice to cross-claimants of settlements proceeding.

Ngāti Haka Patuheuheu takes the position that delay is not the only alternative to offering the redress proposed to Ngāti Awa. Their counsel instances the way in which the Maramarua Forest was handled in the settlement between the Crown and Waikato-Tainui. Effectively, the forest has been held aside for later determination of ownership as between Waikato-Tainui and a cross-claimant. Seven years after that settlement, no allocation has yet been made. Counsel also advocates what she calls a trust model. As we understand it, this would involve placing the disputed lands in trust pending later determination of rights. She also speaks of other redress being available for Ngāti Awa, and by this we assume she means cash.

How does the Crown respond to these arguments? Why has it resisted the cross-claimants' suggestions?

The Crown has comprehensively resisted the suggestion that settlements should be delayed until after the interests of all these claimants have been reported upon. Ms Collins said in her evidence:

Waiting for these hearings to conclude would pose a significant delay to Ngāti Awa who have been in negotiations for over 5 years, and for other groups who may wish to enter into direct negotiations.¹⁵

14. Paper 2.39, para 29

15. Document A1, para 155

The Crown submitted in closing that it:

does not accept Ms Ertel's submission that a delay of say, five years, would be a mere 'blip' in history. The settlement has been vigorously negotiated over several years. If there were further delay, and in particular, delay of the kind heralded by the cross-claimants, then the momentum towards settlement would be lost.¹⁶

The first reason offered by the Crown for rejecting the cross-claimants' position is therefore the unacceptability of delay in effecting settlements. The Crown quoted in support of its position the statement made by the Tribunal in the *Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report*. The Tribunal there said:

If the Tribunal were to take the view that the Crown ought not to deliver redress to any claimant where there are overlapping or cross-claims, the repercussions for the Crown settlement policy would be very serious. It would thwart the desire on the part of both the Crown and Māori claimants to achieve closure in respect of their historical Treaty grievances. Indefinite delay to the conclusions of Treaty settlements all around the country is an outcome the Tribunal seeks to avoid.¹⁷

The second factor to which the Crown referred in support of its policy is that licensed land is a significant commercial asset. It needs to fit within the quantum of a redress package.¹⁸

Mr Hampton explained the Crown's process of negotiating settlements. A quantum is agreed between the parties. From that quantum, commercial assets may be 'bought'. Crown forest licensed land is classed as a commercial asset. The quantum limits the amount of licensed land that can be included in a settlement package.

There is not necessarily a correlation between the group with the dominant interest (pre-supposing that could be reliably ascertained) and a group entitled to have allocated to it that level of redress.

Traditionally, it was hapū groups that primarily held manawhenua. The Crown's policy is not to settle with hapū, but with large natural groupings of claimants. But, that point aside, the value of Crown forest licensed land is such that hapū, whose membership is usually relatively small, could expect to receive only small quantities of it by way of settlement.

Thirdly, there is the question of fairness. As the Crown said in submission:

with commercial redress the Crown wants to provide fair redress for all claimant groups. Theoretically, a small group might be identified as having a dominant interest. Should they get all the licensed land? This would not be consistent with the Tribunal's approach

16. Document A13, para 13

17. Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2001), p 20

18. Document A13, para 36

that redress should be fair redress 'to compensate or to remove the prejudice' (section 6, Treaty of Waitangi Act 1975).¹⁹

A fourth point is that forestry land cannot necessarily be partitioned or shared, although these are options to be considered. On this, the Crown said:

the division of Crown forest licensed land may need to take into account commercial imperatives and not simply traditional customary attachments. For licensed land to be an appropriate commercial asset it needs a viable acreage and, therefore, raises different issues even from transferring, say, a city office block.

Licensed land cannot readily be shared (ie treated as non-exclusive redress) if all parties do not wish to combine in its management.²⁰

That raises a further pragmatic point. Even if parties were prepared to participate in joint management, say if the land were placed in a joint trust, such an arrangement will usually involve a partial settlement of the claims of other claimants whose claims are at large, and whose mandate to settle has not been secured. There are obvious difficulties for the Crown, to which the Crown has referred in the context of the Ngāti Awa settlement, of being drawn into settling with other groups who are not in settlement negotiation with the Crown so as to be free to grant redress to a party that *is* in settlement negotiation. The Crown could easily end up effectively having partial settlements with claimants all around the country, the nature and extent of whose claims are only dimly perceived, and whose mandate and representation arrangements are not in place.

The Tribunal considers that there is a further point to be made in support of the Crown's approach. This point is, we think, implicit in its policy but was not really expressed except perhaps by Mr Hampton in response to questions asked by the presiding officer.

The Crown sees as part of its role a wider duty to ensure equity between claimants generally with respect to the availability of interests in Crown forest licensed lands as part of Treaty settlements.

The situation is this. The location and extent of Crown forest licensed landholdings is entirely arbitrary. Whether a tribe's rohe includes, or is near to, an area where there is also Crown forest licensed land is likewise a product of happenstance. The Crown's landholdings that are available for Treaty settlements are limited, and many claimants (like Ngāti Awa) wish to have land included as part of their settlements. This is a reflection of the high value of land in Māori culture. Claimant groups often seek symmetry between the land that was lost as a result of Treaty breaches and the return of land by the Crown in settlement therefor. While that symmetry will almost never be available, a cash-only settlement would be unacceptable to most claimants.

19. Ibid, para 40

20. Ibid, paras 37–38

The Crown wishes, to the extent it sensibly can, to share out the Crown forest licensed land between entitled Māori groups. It does not wish groups to be arbitrarily benefited because their tribal areas happen to include, or be near to, large quantities of Crown forest licensed land. This would lead to what is effectively a windfall gain that bears no relation to the relative level of harm, suffering and grievousness of breach experienced.

Finally, the Crown rejects the argument that the right of resumption enshrined in the Crown Forest Assets Act 1989 creates a legitimate expectation that can thwart the settlement of claims until such time as all claimants have been heard by the Waitangi Tribunal. The Crown says that the purpose of the forestry deal enshrined in the 1989 Act was to ensure that the Crown did not divest itself of assets it might require to settle Māori claims. Here, the Crown is using those very assets to settle claims. The Crown summarised its position in closing:

If, in relation to licensed land, the Crown can demonstrate that it is acting in good faith in providing redress, and at the same time preserving reasonable capacity for other settlements in the future, it is difficult to see that the aspect of resumption should disturb this.²¹

4.7 THE APPLICATION OF THE CROWN'S POLICY HERE

Ngāti Awa is a tribe that suffered from raupatu, and whose people were the victims generally of seriously prejudicial Crown conduct. Their settlement with the Crown is sizeable. However, there is no Crown forest licensed land in the areas where Ngāti Awa's interests are strongest. They have interests, together with Ngāti Tūwharetoa ki Kawerau and Ngāti Mākino, in Rotoehu Forest. The only other area of Crown forest licensed land where they have strong interests – although arguably outside their area of core interests – is at Matahina.

It is plain that other tribes also have interests there. We heard, and accept, that it is likely – even probable – that various Ngāi Tūhoe hapū, and Ngāti Haka Patuheuheu in particular, can demonstrate connections with the Matahina lands in question as strong as those of Ngāti Awa. Ngāti Rangitihi, too, have connections with part of those lands.

But, the Crown says, those groups have connections with *other* lands where Crown forest licensed land is located. Those areas of forest lands are potentially available for inclusion in their settlements, when that day comes.

The Crown says that its two criteria for determining whether the Matahina Crown forest licensed land should be included in their settlement with Ngāti Awa are:

- ▶ do Ngāti Awa have a threshold interest in that land?; and
- ▶ do the other groups who have threshold interests in that land also have threshold interests in *other* Crown forest licensed land that can be settled on them in the future?

21. Document A13, para 51

In the case of the Matahina land, it did not seem to us that the Crown's primary concern had been to assess the relative strength of the customary interests in the land. Ms Collins explained this by saying that the relative strength of customary interests is likely to be a dominant factor only where there is limited land available.²² According to the Crown, that is not the case here.

Here, the Crown considers that there is opportunity for Ngāi Tūhoe to have settled on it up to 20,400 hectares of Crown forest licensed land, not including the Matahina licensed lands.²³ Those lands are located in the Patunamu Forest (which is likely also to be claimed by Ngāti Kahungunu and Ngāti Ruapani) – an area of approximately 3350 hectares; in the Heruiwi 1 and 2 blocks – an area of approximately 8300 hectares; and in the Matahina c and c1, Waiohau, Te Whāiti 1 and 2, and Heruiwi 4 blocks – an area of approximately 8840 hectares.²⁴ It is useful to note that the area of Crown forest licensed land to be included in the Ngāti Awa settlement package, taking into account the withdrawal of 25 per cent of the Matahina lands, is 9428 hectares.

Likewise, the Crown says that Ngāti Rangitihi will probably be able to demonstrate threshold interests in many other parts of the Kaingaroa forest. In particular, the Native Land Court awarded to Ngāti Rangitihi interests in the Paeroa East 1A and Paeroa East 1A West blocks, of which approximately 4000 hectares is now Crown forest land, and in the Rerewhakaitu block, of which approximately 1500 hectares is now Crown forest land.²⁵

The Crown was satisfied that the Crown forest licensed land at Matahina should be settled on Ngāti Awa because it is the *only* Crown forest licensed land apart from the Rotoehu Forest in which Ngāti Awa can demonstrate a threshold interest. In other words, if Ngāti Awa were to be granted interests in licensed lands outside Rotoehu, this had to be it.

The Crown contrasted this with the position of Ngāi Tūhoe and Ngāti Rangitihi, with their relatively plentiful other options.

The policy explained by the Crown of course raises issues for hapū groups like Ngāti Haka Patuheuheu, who are naturally desirous of having available to them interests in Crown forest licensed lands that are within or close to their traditional tribal area, and to which they have strong ancestral links. For Ngāti Haka Patuheuheu, the Matahina forest lands are *the* forest lands with which they have these strong connections. They may well have connections with other forest lands, but they are not (they say) as strong. They have ties, but not (they say) ties that are as immediate or compelling. *These* are the lands that Ngāti Haka Patuheuheu want included in any settlement between it and the Crown.

In response, the Crown offers the arguments set out in section 4.4 above. It says further that it does not settle with hapū groups, but only with large natural groupings of claimants.

22. Document A1, para 168

23. *Ibid*, para 178

24. *Ibid*

25. *Ibid*, para 182

The Crown has focused on Ngāi Tūhoe as the larger group to which Ngāti Haka Patuheuheu, as a hapū, belongs. The wider group has claims into other areas. Secondly, the 25 per cent reserved from the Matahina lands to be settled on Ngāti Awa would be sufficient for that part of the Ngāi Tūhoe interest being expressed by Ngāti Haka Patuheuheu. That hapū is not, after all, so very large, and would not be expected to be the recipient of a settlement, or part of a settlement, that would be of such value as would equate to a larger share.

The effect of the Crown's policy for Ngāi Tūhoe is that the weight of the Ngāi Tūhoe grievances that are specific to these Matahina lands that are to be settled on Ngāti Awa will need to be expressed through the settlement on Ngāi Tūhoe of some or all of the 25 per cent of lands within these Matahina blocks retained by the Crown, and through transfer to them of lands elsewhere. The position is the same for Ngāti Rangitihi.

4.8 FINDINGS ON THE CROWN'S POLICY AND ITS APPLICATION TO THE MATAHINA LANDS

We agree with the Crown that, in a situation such as this, judgement and caution is required. It is not an easy situation. It is not a situation to which tikanga really speaks, because the disposition of the Crown's forest licensed landholdings, and the relative claims of Māori groups to them, are a product of the post-colonial era. Perhaps it can be said, though, that there is a natural pragmatism inherent in tikanga which, in our view, finds expression in the essentials of the Crown's policy.

There really is no solution that the Crown could come to here that would be universally applauded. The attachment of Ngāi Tūhoe hapū and Ngāti Rangitihi to the Matahina lands, and their desire to have them included in their tribal settlements, is entirely understandable. But likewise, these are lands with which Ngāti Awa also has ancestral connections. They too wish to have Crown forest licensed lands included within their settlement. Ngāti Awa suffered grievously from the Crown's Treaty breaches. These are the only licensed lands (apart from Rotoehu) where they can demonstrate a threshold interest. Pragmatism and fairness are principles that have led the Crown to the solution they propose, and this Tribunal can see no Treaty basis for differing from the Crown as to the substance of its policy. While the implementation of the policy produces negative effects for some groups, we consider that those negative effects are, on balance, less than those that would arise from the alternatives.

We do not consider it a viable option for lands that are the subject of dispute between competing tribal groups to be placed in a trust pending a final allocation when all claims have been heard and determined. That would not be viable because Ngāti Awa would not be able to sign off on its settlement with the Crown. The Matahina Crown forest licensed lands, together with the accumulated rentals from those lands, comprise a considerable proportion of the Ngāti Awa settlement – about 25 per cent, we were told. They comprise the largest land component in the settlement, and land is preferred to cash. If the lands were removed from

the settlement and placed in a holding pattern in which the ultimate ownership of the lands fell to be determined in the future, Ngāti Awa would have no certainty as to the actual content of its full and final settlement with the Crown. And yet they are required to make this critical decision now: will they endorse the deal that has been negotiated by their representatives and the Crown or not? How could such a decision be made? How would they judge whether the deal was going to be adequate for their needs or not? They would not know the extent of the deal. The effect of this, we think, is that the settlement would be unable to be concluded.

A moratorium on the award of Crown forest licensed lands until all claims have been heard would likewise delay the settlement of claims indefinitely. This, we think, is not a viable alternative either. Nor do we think it in keeping with the spirit and intent of the Crown Forest Assets Act 1989.

Nobody appearing before us supported delaying settlements with the Crown. The Tribunal can find no support in the Treaty for delaying settlements. The Tribunal has said in previous reports, and we repeat, that the settlement of Treaty grievances as soon as possible is an objective we applaud.²⁶

We are mindful too of the urgings of the Ngāti Awa Tribunal for the parties to settle, even though the Tribunal had not reported on the area outside the confiscation boundary.²⁷ That Tribunal noted that the agreement of cross-claimants to the return of contested lands would probably not be possible. However, the Tribunal proposed that where particular lands are sought and there is no agreement, the matter should be referred back to the Tribunal for a recommendation after such further hearing of those interested as may be necessary.

Cross-claimants have told us that such further inquiry is necessary here, and one party at least has made application for the Ngāti Awa Tribunal to be reconvened for this purpose.

However, it is plain to us that the situation in which the Ngāti Awa Tribunal envisaged that their further inquiry might be required was one where the Crown proposed to allocate interests in a particular site or locality in proportion to the relative strength of the claims of the claimants. If such an exercise had been undertaken here, we would agree that the Ngāti Awa Tribunal (if it were available), or another Tribunal convened for the purpose, might usefully make further inquiry into the historical circumstances relating to the area in question. However, the Crown has said, and we accept, that the Government has arrived at a policy with regard to the allocation of interests in Crown forest licensed land that does not in all cases involve assessing the relative strength of customary interests in that land. Indeed, the relative strengths are likely only to be a dominant concern where those potentially entitled to be granted interests in certain Crown forest licensed land are predicted to have difficulty in demonstrating a threshold interest in any other areas of licensed land. The clear policy

26. Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report*; Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000)

27. Waitangi Tribunal, *The Ngāti Awa Raupatu Report*, pp 8, 136

underpinning this is the desire of the Crown to achieve equity between claimants at the macro as well as the micro level.

It seems to us then that as the Crown is not, as a matter of policy and practice, inquiring extensively into the relative interests of claimants to the Crown forest licensed land at Matahina, further information about those interests elicited through a Tribunal inquiry is not really to the point. The question is whether the Crown's policy and practice, which the Crown says does not require further factual input, is in breach of the principles of the Treaty. If it is not, then further inquiry by the Ngāti Awa or any other Tribunal is not called for at this juncture, because more historical information is not germane to any of the decisions currently being made.

We should note, however, that it is by no means our impression that the Crown has made its decision to offer 75 per cent of the Matahina Crown forest licensed land to Ngāti Awa in a factual vacuum. Ms Collins' evidence, and the accompanying documentation, detailed a careful process in which the Crown has had access to a good deal of historical information about the Matahina lands, and the various tribal connections to them. From the material put before the Tribunal, to which we have referred in section 3.9, we agree with the Crown that there is sufficient information now available to establish that both Ngāti Awa and Ngāi Tūhoe have strong interests in the Matahina lands, and Ngāti Rangitīhi too have interests in the western part of the block.

From the not inconsiderable volume of material available to us in the form of historical research reports, together with the evidence presented to us, we were able to reach these views on the factual situation:

- ▶ the Matahina lands are historically contested lands as between Ngāti Awa and Ngāi Tūhoe; it is not clear that either group held sway there for any substantial period;
- ▶ the Native Land Court processes ultimately resulted in Ngāti Awa being awarded the bulk of the land, but there is evidence to suggest that the Ngāi Tūhoe interests may not have been fully or objectively assessed;
- ▶ irrespective of what further hearings there are of evidence relating to these lands, it is likely that it will always be very difficult, from the distance of approximately 120 years, to unravel what happened in the various Native Land Court hearings, and what (if any) different awards ought to have been made;
- ▶ there are differences in interpretation over the effect of a peace agreement made at Ōhui, which has come to be known as Te Tatau Pounamu i Ōhui. This agreement is said by Ngāi Tūhoe to have established a southern boundary for Ngāti Awa at Ōhui; it is said by Ngāti Awa to have had no such effect. It is likely that it will always be very difficult now, with the scant contemporaneous commentary on the then understandings of Te Tatau Pounamu, either to reconcile the different interpretations, or decide in favour of one of them;

- ▶ hapū traditionally linked with these lands, including Ngāti Haka Patuheuheu and particularly Ngāti Hāmua and Warahoe, have whakapapa connections both with Ngāi Tūhoe and Ngāti Awa, with the links to these two over-groups waxing and waning with time and historical circumstance;
- ▶ there are differences of interpretation regarding the Waikowhewhe Stream. Ngāi Tūhoe claim that the stream marked Ngāti Awa's southern boundary. Ngāti Awa dispute this, claiming that the Waikowhewhe Stream falls within the Ngāti Awa area of claim, and that they claim beyond the stream;
- ▶ Ngāti Rangitahi have associations with the western side of the Matahina block, and were granted a portion of the block by the Native Land Court in 1884.

We think that it is extremely unlikely that any further evidence would show that any of these groups did *not* have ancestral links to this land. In other words, the current level of information supports the Crown's view that all three groups have threshold interests, with Ngāti Awa and Ngāi Tūhoe certainly having interests that go beyond that description. We are satisfied, therefore, that the factual basis exists for the Crown to implement its policy with respect to the Matahina Crown forest licensed lands. The policy itself must also, of course, be compliant with the principles of the Treaty.

We consider that the policy is so compliant. We consider that the reasons underpinning the policy, set out in section 4.6 above, are good reasons, and motivated by intentions that are consistent with the principles of the Treaty.

Indeed, the Tribunal would have to have very compelling reasons to act so as to thwart Ngāti Awa in their strong desire to conclude their many years of negotiation with the Crown by settling their grievances once and for all. The part of the proposed deal that relates to the Matahina lands is an important part. We consider that the means of dealing with the Matahina lands proposed by Ngāti Awa and the Crown, while not the only means, is a means not so wanting in good judgement and good faith for this Tribunal to be minded to ask the Crown to change it. We are conscious that, if we were to do so, there would be a high risk of derailing the whole settlement. We would be prepared to do that only if satisfied that the Crown is acting in breach of Treaty principle. It is not enough that we, or some of us, might ourselves have chosen to deal with the matter differently. Our focus is not on whether we like or approve the Crown's policy. It is on the Treaty, and whether or not the Crown has fallen foul of it. We are satisfied that, so far as this policy is concerned, it has not.

There is an aspect of the Crown's policy, however, that requires further comment. The Crown decided to offer the Matahina Crown forest licensed land to Ngāti Awa without a full inquiry to ascertain whether Ngāti Awa's interests were dominant there. The Crown maintain that there was no need for such an inquiry because the Ngāti Rangitahi and Ngāi Tūhoe claims would be able to be settled by means of Crown forest licensed land located in other places where those groups have threshold interests.

The Ngāi Tūhoe claimants have queried the Crown's assessment. They say that in those other places, other local iwi and hapū will have dominant interests. They speak of a domino effect, with groups having manawhenua in Crown forest licensed land being pushed out in favour of larger groups with only a threshold interest.

It seems to us that the Crown has a difficult balancing exercise on its hands. We do not consider that the Crown's approach is wrong in principle. We find favour particularly with the flexibility imported by the precautionary approach that is employed where there are uncertainties. That precautionary element came into play in this case, where the Crown withdrew parts of the redress in response to the uncertainties introduced by the cross-claimants' representations.

Nevertheless, it is apparent that the Crown will need to be very careful to ensure that it *does* retain the capacity to do justice to all.

With respect to the cross-claimants appearing in this urgent hearing, the Crown has identified particular blocks, to which we have referred in section 4.7, where it considers the claimants will be able to demonstrate a sufficient level of interest to justify the inclusion of these lands in future settlements. The Crown has given no guarantees. But its duty to act in good faith certainly comes into play here. If these claimants' claims against the Crown are proven, they will be looking to the Crown for satisfaction partly in the form of Crown forest licensed land. They will have a call on the blocks identified by the Crown. The Crown must ensure that it remains in a position to do for these cross-claimants what, out of a concern for good faith and fairness, it has done for Ngāti Awa.

Further comment is also required on an aspect of Treaty breach alleged by the Ngāi Tūhoe cross-claimants, and in particular by counsel for the claimants in Wai 36. Counsel submitted that the Crown's policy dispossesses Ngāi Tūhoe of a right to appear before the Waitangi Tribunal to establish its links to the land in question, and by that means to obtain binding recommendations for its resumption. His submissions in this regard are premised on the belief that the Tribunal's assessment of entitlement to contested Crown forest licensed land will be based on the relative strength of customary interests. We simply note that this may indeed be the basis upon which the Tribunal will issue binding recommendations. But the question of how the Tribunal will interpret and implement its powers under the Crown Forest Assets Act 1989 is still open, because the jurisdiction remains untried. It is also possible that in its application of the relevant sections, the Tribunal will seek to bring about a result not so very different from that which the Crown's policy here endeavours to achieve. We certainly do not consider that it is a matter about which counsel can properly claim there is a decided view.

4.9 CULTURAL REDRESS

With regard to the items of cultural redress opposed by the cross-claimants, the Tribunal considers the claims in regard to Kaputerangi and the Matahina A4 and A5 blocks to be the most significant.

4.9.1 Kaputerangi

The Crown offered to vest in Ngāti Awa the fee simple estate in the Kaputerangi historic reserve, subject to the continuation of its reserve status. The site is approximately five hectares and is located to the east of Whakatāne. The Crown determined that Kaputerangi was highly significant to Ngāti Awa in terms of the iwi's ancestry and identity, and because Ngāti Awa have continuously occupied this area. Kaputerangi is also located in what the Crown has determined to be Ngāti Awa's 'core area'. Ngāi Tūhoe claimants object to the offer on the ground that Kaputerangi is important to all Mataatua iwi as it is the pā site of Toi, and is near the landing place of the Mataatua waka. Site-specific research commissioned by the Crown indicated that many iwi, including Mataatua iwi, associate with Kaputerangi through whakapapa. The Crown also understands that this is accepted by Ngāti Awa, and that other claimant groups acknowledge that Kaputerangi is within the area occupied by Ngāti Awa, and that Ngāti Awa are the kaitiaki of Kaputerangi.

The Crown submitted that the decision to proceed with the offer to transfer the fee simple estate to Ngāti Awa (subject to reserve status) was based on the understanding that only Ngāti Awa have a dominant interest in the site deriving from both occupation and ancestral associations. The Crown and Ngāti Awa have agreed that the interests of other iwi in Kaputerangi be acknowledged in the deed of settlement, and reflected in any published or interpretation materials produced by Ngāti Awa about the reserve. The Crown has indicated that it considers these concessions to be 'broadly consistent with the guardianship role of Ngāti Awa' with regard to Kaputerangi.

4.9.2 Matahina A4 and A5

The Crown originally offered to vest the stratum title of Matahina A4, and the title of Matahina A5, in Ngāti Awa. This decision was made on the grounds that both sites are significant urupā for Ngāti Awa, and that the sites were taken from Ngāti Awa for public works purposes in 1968. Matahina A4 is a one-acre site adjacent to the Matahina Dam. It does not include land under the dam or any part of the lakebed. Matahina A5 is an approximately three-acre block located on the western bank of Lake Matahina. The area includes a small portion of the lakebed.

Both the Tūhoe–Waikaremoana Māori Trust Board and Ngāti Haka Patuheuheu object to the offer of these sites to Ngāti Awa. The Crown commissioned site-specific research as well as carrying out its own historical investigation. This research confirmed to the Crown that the Matahina area was contested and occupied by a number of groups over a long period of time, and that the area was significant to each of them. The Crown determined that Ngāti Awa had a dominant interest in Matahina A4, primarily through the interests and associations of the hapū Ngā Mahi, Ngāti Hāmua, and Warahoe, as demonstrated in evidence presented to the Native Land Court. The Crown found that while Ngāti Awa had strong interests in Matahina A5, there was insufficient historical evidence of associations with Matahina A5 to justify an offer of exclusive redress.

On this basis, the Crown decided to proceed with the offer to Ngāti Awa of the stratum title to Matahina A4, but withdrew its offer to transfer Matahina A5. Instead, Ngāti Awa were offered the grant of a statutory acknowledgement in respect to Matahina A5, which is non-exclusive. The Crown can offer a statutory acknowledgement to other claimants in the future if appropriate. The Crown has also indicated that it retains the ability to provide other cultural redress in the area, for example the lakebed of Lake Matahina.

The other items of contested cultural redress relate to Ōhiwa Harbour and to Moutohorā Island.

4.9.3 Ōhiwa Harbour

The Crown initially offered Ngāti Awa exclusive cultural redress to the north and west of Ōhiwa Harbour, recognising Ngāti Awa's customary interests in this area. The Crown offered to vest 10 hectares of the Port Ōhope recreation reserve in Ngāti Awa subject to reserve status, along with an adjacent one-hectare nohoanga (temporary camping) entitlement. The Crown also offered to vest Tauwhare Pā scenic reserve in Ngāti Awa as the administering body of the reserve, under section 26 of the Reserves Act 1977.

Following objections by the Tūhoe–Waikaremoana Māori Trust Board to the offer of redress in this area, and in light of its own research, the Crown found that the strength of Ngāti Awa's interests in the area justified the offer of exclusive redress. The Crown identified other Crown land around the southern and eastern shores of Ōhiwa Harbour as being potentially available for future settlements with other groups, if appropriate. The Crown proceeded with the offers relating to the Port Ōhope recreation reserve.

With regard to Tauwhare Pā scenic reserve, the Crown acknowledged that there is evidence of 'fluctuating fortunes' of different iwi in this area, and that other groups might be able to demonstrate particular relationships with the pā site. The Crown indicated that, at Ngāti Awa's request, they would adjust the original offer to vest the reserve in Ngāti Awa as the administering body to an offer to include the reserve within a joint management

committee to be established over Moutohorā Island and Ōhope scenic reserve. This is non-exclusive redress, as representatives of other iwi may be appointed to the committee.

Ngāi Tūhoe claimants also objected to the offer to grant Ngāti Awa a preferential right to purchase up to 5 per cent of any authorisations within the Ōhiwa Harbour that the Minister of Conservation may offer by public tender in accordance with part VII of the Resource Management Act 1991. This would include, for example, the granting of marine farming authorisations. While this offer is exclusive to the extent of this 5 per cent, the Crown argues that it is effectively non-exclusive as similar redress may be offered to other claimant groups as part of future settlements if appropriate. This recognises that the Crown does not consider that Ngāti Awa had exclusive rights to the harbour.

4.9.4 Moutohora Island

Ngāti Awa had initially requested that Moutohorā Island be transferred to them as part of the settlement on the grounds that they had occupied the island until the early nineteenth century and that it remains an important mahinga kai site. The Crown opposed such a transfer because of the high conservation values attached to the island. They instead offered to recognise Ngāti Awa interests by establishing a joint management committee to allow Ngāti Awa participation in the management of the island under the Reserves Act. This is non-exclusive redress, as the Crown retains the ability to appoint other iwi to the joint management committee as part of future settlements if appropriate. The Crown is also offering Ngāti Awa a statutory acknowledgement and the right to collect hāngi stones from the island. This is also non-exclusive redress.

4.10 THE TRIBUNAL'S FINDINGS ON CULTURAL REDRESS

We cannot discern, in the Crown's approach to the inclusion of cultural redress in settlements, flaws that go to Treaty compliance. We think that the Crown properly reviewed its position in relation to the Matahina A4 and A5 blocks. Otherwise, the cultural redress seems to us to be structured in a way that appropriately recognises Ngāti Awa's mana, but leaves room for other groups to be recognised in future settlements.

With respect to Kaputerangi, we agree with claimants that it is unfortunate that the fluid layering of rights conferred through tikanga must be supplanted by European law. However, we also accept that the Crown is obliged to operate in this context.

It is our understanding that the effect of the transfer of the fee simple estate to Ngāti Awa, combined with the preservation of the reserve status, is to make Ngāti Awa kaitiaki of this land. The reserve status means that the area remains available for public access. We think it important that Mataatua iwi and hapū continue to be able to express their connection to this

place in accordance with their traditional norms. If it proves that, in practice, the access of the general public to the land interferes with those norms, we think that consideration should be given to changing the nature of the reserve status to make special provision for Mataatua iwi and hapū. We think it appropriate that the Crown provides an undertaking to review the situation with Ngāti Awa and relevant other Mataatua groups (including Ngāi Tūhoe groups) in five years' time. If, at that time, it appears that the ability of these groups to express their connection with Kaputerangi is being compromised by the access of the general public, the Crown should make such changes to the status of the land as are necessary and possible.

4.11 THE CROWN'S COMMUNICATION AND CONSULTATION WITH CROSS-CLAIMANTS

In section 4.8, we have said that we consider that the Crown's policies on the inclusion of Crown forest licensed land in settlements, and the management of cross-claims to that category of redress, do not breach the principles of the Treaty.

We do note, however, that some of the language employed by the Crown to describe its policy – or perhaps language by which the Crown's policies have become known – is unfortunate.

It is not, we think, helpful to characterise Crown forest licensed lands as 'commercial assets' that are in their nature 'substitutable'.

It is clear that Crown forest licensed lands have a commercial value, and that value is one to which Māori people are fully alert. We have discussed the appeal of the accumulated rentals to those in settlement negotiations with the Crown. And Mr Nikora made clear to the Tribunal that, in addition to the tribe's objections to the redress for Ngāti Awa based on ancestral connections with the Matahina lands, Ngāi Tūhoe would prefer to receive in settlement these forest lands rather than other forest lands because they are better located to form an economic unit with Ngāi Tūhoe's other forest holdings.

However, everyone knows, including the officers of the Crown, that, to Māori, land is never purely a commercial asset. It is a taonga tuku iho; an integral part of Māori self-identification; and a tangible expression of whakapapa.

Nor is land ever 'substitutable' in Māori terms, in that one piece of land is not like another. The connections of people to particular land mean that all land to which traditional links are known and understood will have special significance to the Māori groups who can make those connections. In that sense, the forestry land at Matahina is certainly *not* substitutable for forestry land elsewhere.

It struck us, therefore, that the Crown had been rather obtuse in the communication of its policy. Its pragmatic underpinnings had been masked by language guaranteed to raise cultural hackles.

The questions we had about the communication of the Crown's policy in this case were not limited to its nomenclature, however.

In hearing, we heard a great deal from the cross-claimants about who was told what when. In particular, it was apparent to us that there are representation issues between the Ngāi Tūhoe cross-claimants that counsel for Ngāti Haka Patuheuhehu and Ngā Rauru o Ngā Pōtiki brought out in the form of criticisms of the Crown. The Crown had allegedly not responded sufficiently early to the fact that these groups were no longer under the umbrella of larger tribal groups.

Another issue was whether the Crown had relied – wrongly, it was alleged – on earlier intimations that Ngāi Tūhoe and Ngāti Rangitahi were not pursuing their interests in the Matahina Crown forest licensed land.

Ultimately, we do not think that either of these topics requires a great deal of focus. We were satisfied, on the evidence, that all of the groups that appeared before us were in consultation long enough for their concerns to be understood by the Crown. We felt that they had long enough to gather together the material that was required under the circumstances.

We felt the difficulty was more that the Crown did not really disclose its policy agenda to the parties affected by the proposed settlement with Ngāti Awa.

We do not suggest that the Crown was being deliberately secretive. It was more that the Crown did not convey to the Māori groups concerned the real policy basis for the Crown's decision that the links of other tribal groups with the Crown forest licensed land at Matahina are to be forgone in favour of Ngāti Awa's.

It seemed to us that at no point were the cross-claimants put on notice that the Crown was not going to be swayed from its point of view that these lands should go to Ngāti Awa *even if* the cross-claimants could show that their customary interests were dominant. The Crown did make clear its view that the cross-claimants' claims could potentially be satisfied by the grant of Crown forest licensed lands elsewhere in the future. But we do not think the cross-claimants understood that this meant that the assessment of the relative strength of the customary interests in the land was a very secondary concern. The Tūhoe cross-claimants in particular seemed to us to have been consistently of the view that the proposed inclusion of the Matahina forest lands in the settlement with Ngāti Awa was predicated on the Crown's view that Ngāti Awa's interests there were stronger than those of Ngāi Tūhoe.

We think it is not surprising that the cross-claimants did not really understand where the Crown was coming from. We do not think that any of the letters we have been referred to really articulate the essence of the policy, *and* the reasoning behind it. If they had, we think that the cross-claimants would have been in a better position. They would not have agreed with the policy, because it runs counter to their perception of their interests at this point in time. Nevertheless, they were entitled to know precisely what game they were in, and we do not think the Crown's communications that we have seen put them properly in the picture.

This is partly, we think, a function of the fact that the Crown was developing its policy during the period when it was communicating with the cross-claimants. In the Crown's communications with the Minister over time, it is not hard to discern that the officials' perception of the precise nature of the balancing act in which the Crown was engaged was changing. It had not crystallised until March of this year, in the briefing to the Minister numbered 'DB' in the bundle. By then, there had been many interchanges between Crown officials and cross-claimants in which we think there was a distinct potential for cross-claimants to be less than clear about what the Crown wanted from them, and how final decisions would be made.

In particular, it seems to us that the cross-claimants were not put in a position to understand fully the context within which the historical material they were providing would be used. Its relative unimportance, given the Crown's assessment of the sufficiency of other Crown forest licensed land that was available for the settlement of their claims, was not appreciated. We do not think it was clearly communicated.

We do not think that the Crown's failure to deliver consistently a clear and well-reasoned message to cross-claimants arose from bad faith. The truth of the matter was that officials were, to an extent, making it up as they went along. While the main messages, and the thinking behind them, may not have changed very much, the relative importance of the different factors that were being considered, and the management of uncertainties, did.

We think that the cross-claimants have a justifiable sense of not having been dealt with properly. But we hesitate to find that the Crown was acting in bad faith. We do not think that any double-dealing was going on. It was more that Crown officials did not have immediate answers for situations as they developed, and were doing the best they could in an awkward situation. Nevertheless, we do not think that this is good enough.

We are conscious, though, that prejudice to the cross-claimants does not appear to have resulted. They say that they are prejudiced by the policy itself, in that they will no longer have the opportunity to receive as redress for their claims 75 per cent of the Matahina Crown forest licensed lands. But we have found that policy does not breach the principles of the Treaty. We are here considering whether the claimants have been prejudiced by the Crown's failure to communicate its policy clearly and well. Ultimately, they have not. The Crown demonstrated to us in the presentation of its evidence and submissions that it understands the cross-claimants' concerns. The Crown is the decision-maker here. It determines what it will offer to Ngāti Awa. Its unwillingness to change course arises not from any failure to hear and understand the cross-claimants, but from its belief that its policy is the better one. We do not think that there is anything further the cross-claimants could have done or said that would have bettered their position with the Crown.

Accordingly, notwithstanding the failure on the part of the Crown to manage well the communication of its policy and the reasons for it, we do not think that the cross-claimants have ultimately been prejudiced by that failure.

4.12 THE CROWN'S DUTY TO PRESERVE AMICABLE TRIBAL RELATIONS

There is no doubt that the management of cross-claims is a difficult area. To put it bluntly, if the Crown wants to get on with the process of settling claims, it is obliged to choose between claimants whose interests may not always have been the subject of comprehensive reports. In this process, groups of Māori will inevitably be annoyed, disappointed, hurt, sad, even angry – sometimes in turn; sometimes all at once.

We approve the objective of settling claims, even where all the matters upon which decisions are being made are not fully known.

But officials must be acutely aware that, in doing this work, they are moving in murky waters. There is much potential for misunderstandings and mixed messages that give rise to fear and resentment. Those involved must be at pains to be even-handed in their dealings with different groups, and open and transparent.

It is very important that the Crown's policy is well known and understood by those communicating it. It is critical that they are able to explain the reasons for it, so that when the Crown appears to prefer the interests of one group over another, the choice is understood, even if not agreed with. As we have said, we consider that, in these settlement negotiations, the Crown did not achieve this objective.

We have recorded how, in its dealings with Ngāti Awa, the Crown initially put the onus on Ngāti Awa to resolve cross-claims. Then, in 2000, the Crown changed the requirement. Now it was enough for the Crown to be satisfied that cross-claims had been addressed.

It is not clear from this requirement who is supposed to be addressing the cross-claims. In the case of the Ngāti Awa settlement, it is apparent that Crown officials took on themselves the responsibility of contacting cross-claimants, explaining what was going on, and trying if possible to obtain their agreement to the settlement package on offer to Ngāti Awa.

Those officials knew that communications between Ngāti Awa and Ngāi Tūhoe had broken down. Ngāti Awa told the Tribunal about how they had made a decision not to have any more meetings about the content of the settlement package, because they were sick of making concessions. Many of those concessions had been sought because of the Crown's endeavours to meet the concerns of cross-claimants.

We understood Ngāti Awa's feelings. But we did wonder whether perhaps it would have been available to the Crown to identify some areas – particularly in the category of cultural redress – where further discussion could have borne fruit. It seemed to us, for instance, that understandings could have been arrived at with respect to Kaputerangi. Arriving at understandings on cultural redress is possibly most critical for future relations.

We think that the Crown should be pro-active in doing all that it can to ensure that the cost of arriving at settlements is not a deterioration of inter-tribal relations. The Crown must also be careful not to exacerbate the situations where there are fragile relationships within tribes.

Inevitably, officials become focused on getting a deal. But they must not become blinkered to the collateral damage that getting a deal can cause. 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.

We consider that the Crown should not be satisfied that cross-claims have been addressed until really no stone has been left unturned. Even if a consensual approach can be achieved only in relation to *one* item of contested redress, that can ameliorate the wider relationships in issue. The Crown has a duty in this regard, flowing from the principles of partnership and good faith under the Treaty of Waitangi.

It is not clear to us to what extent the officials working on the Ngāti Awa settlement understood the nature of the Crown's responsibility in this regard. Crown counsel referred to the duty to minimise the negative impact of settlement on cross-claimants as one of the factors it is required to balance in achieving a settlement.²⁸ However, we were concerned that the need to manage the detrimental effect on relationships between claimant groups, whenever and wherever possible, may not have been given sufficient weight by officials implementing the Crown's policy.

In its decision on the application for an urgent hearing in relation to the Crown's proposed settlement with Ngāti Ruanui, the Waitangi Tribunal indicated to the Crown the proactive nature of its duty to minimise negative effects of Treaty settlements. That was a case where the breakdown in relationships was internal to the tribe. The Tribunal there encouraged Crown officials to find, and where necessary pay for, techniques to help those concerned work through the impasse.

The simple point is that where the process of working towards settlement causes fall-out in the form of deteriorating relationships either within or between tribes, the Crown cannot be passive. It must exercise an 'honest broker' role as best it can to effect reconciliation, and to build bridges wherever and whenever the opportunity arises. Officials must be constantly vigilant to ensure that the cost of settlement in the form of damage to tribal relations is kept to the absolute minimum.

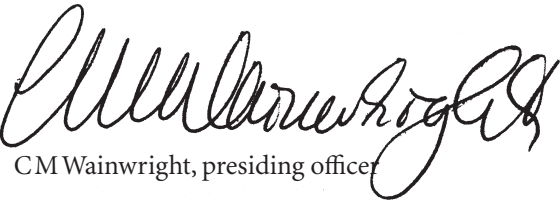
We do not underestimate the difficulty of this task. But neither do we underestimate the potential for harm to Crown-Māori relations if this area of risk is not carefully and positively managed.

We accept that, in this case, the failure by the Crown to ensure that all options were tried did not amount to an absence of good faith. We think that officials had not fully appreciated the nature and extent of their duty.

We recommend that the Office of Treaty Settlements works to improve its officials' understanding of how this duty might be fulfilled in practice, including familiarity with mediation techniques, the employment of marae processes, and the use of third-party facilitators.

28. Paper 2.40, para 28

Dated at *Wellington* this *26th* day of *July* 2002


CM Wainwright, presiding officer


M. J. Bazley, member


A Koopu, member



JT Northover, member



