BINDING REMEDIES: THE NGĀI TAHU TREATY SETTLEMENT NEGOTIATIONS IN A POST-HARONGA CONTEXT

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Treaty of Waitangi settlements in New Zealand have been a result of political compromise. While financial limits have been set and the relativities between settlements have been established, there has been no concrete formula. The Crown and the Māori negotiating group have sat down at the negotiating table and worked out a figure, largely under the control of the Crown. In contrast, the Waitangi Tribunal has held the potential use of binding powers since 1989 for SoE lands and Crown Forest assets, but has only used these once. Ngāi Tahu’s settlement was a result of compromise, but at various points in its negotiation process it also wanted the Tribunal to use its binding powers. Within the context of the current High Court, Court of Appeal and Supreme Court decisions in the Mangatū and Ngāti Kahu cases, this article will explore some of Ngāi Tahu’s efforts at the use of binding powers for their claims and what the recent judicial backing of those powers means for settlements that have passed and the remaining settlements to come.

1. Introduction

The development of the Treaty of Waitangi (Treaty) settlement process in New Zealand has been noted as a significant accomplishment both domestically and internationally.1 After over a hundred years of protesting, petitioning and marching some tangible effort has finally been made by the New Zealand Government (the Crown) to transfer some land, provide some financial compensation and even develop, at times, co-management arrangements over large areas.2 While Treaty settlements negotiations are a political rather than a legal process, settlements intersect with the law in a number of different ways. Lawyers are heavily involved in the process, whether in the Waitangi Tribunal (also referred to as Tribunal) setting or through the ongoing involvement of Crown Law and private law firms in advising on the negotiation of agreements. Settlements are enacted so the Crown’s relations with the tribe (or large natural grouping as it is now referred to) are on a statutory basis. Settlements also change the law and legal structures in a number of different ways, including the Resource Management Act 1991, the National Parks Act 1980 and tax law. One aspect of the process where the law has not generally been involved is determining the quantification of loss.

Determining the financial limit of any form of historical restitution is fraught with an innumerable set of influences. How do we quantify loss? According to the Office of Treaty Settlements (OTS), full compensation for all the economic losses of a claimant group is not possible because “identifying the effects of

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2 Aroha Harris Hiko: Forty Years of Māori Protest (Huia, Wellington, 2008).
various causes on the economic status of the claimant group today is such a complex matter. They state that even if there is an acceptable way to calculate losses it would place too great a burden on the present and future generations of taxpayers. In that context the OTS has set financial limits ($170 million quantum, not adjusted for inflation), and established relativities between claims. The nature of the breach is also taken into account (for example, raupatu or non-raupatu\textsuperscript{4}), the amount of land lost and the size of the claimant group.\textsuperscript{5} While OTS leads the direct negotiation process, the Waitangi Tribunal has largely been tasked with inquiring into and reporting on the various claims.\textsuperscript{6} The Tribunal on nearly all occasions, except for the 1987 Report on the Orakei Claim, has deferred making recommendations on quantum in order to allow the parties to enter negotiations.\textsuperscript{7} In the case of Ngāi Tahu’s negotiations, both parties specifically asked the Tribunal to leave the amount of financial compensation or quantum to the direct negotiations.\textsuperscript{8} But since the Treaty settlement process formally began in the late 1980s with the establishment of OTS’s predecessor, the Treaty of Waitangi Policy Unit, the Tribunal has held some binding powers with regards to the return of state-owned enterprise (SoE) lands, Ministry of Education lands, and Crown Forestry rentals, lands and financial compensation. It has only used these once, for SoE lands in the Ngāti Turangiitukua rohe, but has generally attempted to leave the negotiation of quantum to OTS.\textsuperscript{9} Ngāi Tahu’s settlement was a result of compromise, but at various points in its negotiation process it also tried unsuccessfully to get the Tribunal to use its binding powers. In the past six years the courts have given support to applicants trying to force the Waitangi Tribunal to make binding orders although none have been made yet. This article will discuss the wider context of the Tribunal’s binding powers, the only report in which the Waitangi Tribunal used those powers, The Turangi Township Remedies Report, and Ngāi Tahu’s application in the mid-1990s. It will then turn to the recent actions taken since the Haronga case in 2011\textsuperscript{10}, including the Mangatu and Ngāti Kahu remedies applications and Tribunal reports. The courts have largely ignored the development of the modern Treaty settlement process during the 1990s and 2000s by encouraging claimants’ remedies applications without regard for the more than 60 settlements that have previously been signed. Judges need to tread carefully as their findings could drastically disrupt the relatively stable Treaty settlement process in place.

\textsuperscript{3} Office of Treaty Settlements Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future (Wellington, 2011) at 89.
\textsuperscript{4} Confiscation or non-confiscation.
\textsuperscript{5} Office of Treaty Settlements Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future (Wellington, 2011) at 89.
\textsuperscript{7} Waitangi Tribunal Report of the Waitangi Tribunal on the Orakei Claim (Wai 9, 1987).
\textsuperscript{8} Waitangi Tribunal The Ngāi Tahu Report (Wai 27, 1991) at 1061.
The Waitangi Tribunal’s binding powers developed in the peak of Treaty litigation in the second half of the 1980s when various Māori groups and entities won court cases halting the Fourth Labour Government’s sweeping neo-liberal reforms. The Tribunal’s first binding powers were set by the 1988 Treaty of Waitangi (State Enterprises) Act following the New Zealand Māori Council’s (NZMC) victory in the Court of Appeal in 1987. In the *New Zealand Maori Council v Attorney-General* (1987) case, widely known as the “Lands case”, the Court found that the Crown’s planned privatisation of state assets was contrary to s 9 of the State-Owned Enterprises Act 1986 (SoE Act) which held that “[n]othing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.” The Court issued a “declaration that the transfer of assets to State enterprises without establishing any system to consider in relation to particular assets or particular categories of assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful.” The courts forced the Crown to negotiate some kind of outcome by developing a “scheme of safeguards giving reasonable assurance that lands or waters will not be transferred to State enterprises in such a way as to prejudice Māori claims that have been submitted to the Waitangi Tribunal on or after 18 December 1986 or may foreseeably be submitted to the Tribunal.” The result was the Treaty of Waitangi (State Enterprises) Act 1988 which inserted into the Treaty of Waitangi Act 1975 (Treaty of Waitangi Act) binding powers for the Tribunal under which it could order the return of SoE or Ministry of Education lands if the Tribunal concluded that a relevant claim was well-founded.

The Waitangi Tribunal’s power to make general recommendations is contained in s 6(3) of the Treaty of Waitangi Act: “If the Tribunal finds that any claim submitted to it … 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.” Included in those potential remedies are the binding powers contained within s 8 of the Treaty of Waitangi Act. Under s 8A of the Treaty of Waitangi Act the Tribunal can “include in its recommendation under section 6(3), a recommendation that that land or that part of that land or that interest in land be returned to Maori ownership (which recommendation shall be on such terms and conditions as the Tribunal considers appropriate and shall identify the Maori or group of Maori to whom that land or that part of that land or that interest in land is to be returned).” Section 8B of the Act laid out the 90-day interim recommendation powers of the Tribunal. This section essentially provided the Crown and the claimants with a 90-day window

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12 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA). In *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at fn 25, Elias CJ attempted to change the case’s label to the “SOE case” rather than the “Lands case” because she argued that the claims were as much about water as land. Despite the misnomer it is still widely known as the Lands case.

13 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at [666].
to work out a settlement outside of the mandatory powers process established by the Act. The 1988 Treaty of Waitangi (State Enterprises) Act also inserted into the SoE Act a protection mechanism on SoE and Ministry of Education lands under which those lands would have memorials on their title which could provide for their resumption on the orders of the Tribunal. These memorials were registered on land titles under s 27A of the SoE Act, and the powers of resumption were contained within s 27B: “Where the Waitangi Tribunal has, under section 8A(2)(a) of the Treaty of Waitangi Act 1975, recommended the return to Maori ownership of any land or interest in land transferred to a State enterprise ... that land or interest in land shall ... be resumed by the Crown ... and returned to Maori ownership.”

Similar binding powers were also established in relation to the privatisation of Crown forests that were established in the 1989 Crown Forest Assets Act (CFAA). Ultimately the compromise contained within the CFAA enabled the Crown to retain the land on which Crown forests grew but sell the right to grow the trees – Crown Forest licences. The land would be returned when licences expired, a percentage of the rentals out of the licences would be set aside for use when the relevant claimant group settled, and financial compensation would also be paid. Some of these rentals were also used to fund claimant research. The provisions regarding the mandatory return of licensed Crown forest land on an order of the Tribunal for a well-founded claim in s 8HB of the Treaty of Waitangi Act is nearly identical to the wording provided in s 8A in relation to SoE and Ministry of Education lands. Section 8HC, much like s 8B, also contains a 90-day interim period under which negotiations can be undertaken to provide for a settlement before the binding powers take effect. Under s 36 of the CFAA after the Tribunal makes a final recommendation for the return of licensed Crown forest land the Crown must return the land to Māori ownership and pay compensation in accordance with the First Schedule of the CFAA. This schedule established the manner in which compensation would be calculated. Under cl 3 of the schedule there are three different ways in which the compensation is determined, with the manner chosen by the “person to whom the compensation is payable.” The first option under cl 3(a) bases the compensation on the market value of the trees, under cl 3(b) the market stumpage of the trees, and under cl 3(c) the forest rentals received by the Crown in relation to that specific block of forest. A minimum of 5 per cent of the specified amount calculated under one of the three clauses noted above is provided to the successful claimant, and on the recommendation of the Tribunal further compensation up to 100 per cent of the amount calculated can also be provided.14

In addition to the binding powers developed for SoE and Ministry of Education lands, and Crown forest lands and assets in 1988 and 1989, a final set of mandatory provisions were also added to the Treaty of Waitangi Act for former Railways lands. Under the New Zealand Railways Corporation Restructuring Act 1990 the Tribunal can make a binding recommendation under s 8HJ of the Treaty of Waitangi Act to apply the provisions in s 8 for SoE and Ministry of Education lands to Railways lands.15

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15 New Zealand Railways Corporation Restructuring Act 1990, s 43.
3. The development of the Crown's treaty settlement process

The formation of the Waitangi Tribunal and the court cases establishing the Treaty of Waitangi within New Zealand’s legal framework were important in pushing the Government to negotiate settlements with iwi, but the Tribunal could not negotiate for the Crown. It was widely accepted by all parties that it was up to the Government to negotiate and until the late 1980s it had not made any substantial efforts to begin negotiations. Until late 1988, the Labour Government maintained that the settlements of the past for major Māori grievances were full and final and they would not be re-opened. Māori groups, the Tribunal, the courts, internal factions within the Labour Party led by Koro Wetere and Geoffrey Palmer and the binding powers system effectively served to change the Government’s mind and pushed it to negotiate. These events prompted the Fourth Labour Government to create the first official government policy unit charged directly with dealing with breaches of the Treaty of Waitangi, the Treaty of Waitangi Policy Unit (ToWPU). From the very beginning the Crown Law Office (CLO) would play a significant role in assisting ToWPU to develop Treaty policy advice to government and gradually other departments also began to play a part – Treasury (in relation to fiscal matters), the Department of Conservation (DoC), the Department of Prime Minister and Cabinet (DPM&C) and Manatu Māori (later Te Puni Kōkiri). ToWPU was originally established to solely provide policy advice to the Government on Treaty of Waitangi issues, but ToWPU officials were quickly drawn into involvement in direct negotiations.

While participating in scoping negotiations with Waikato-Tainui over their raupatua claims in its first year of operation, ToWPU drafted the Government’s Principles for Crown Action on the Treaty of Waitangi in 1989. The Government established five principles to govern Crown action on the Treaty: 1) The Principle of Kāwanatanga or the Crown’s right to govern; 2) The Principle of Rangatiratanga or the Māori right to self-management; 3) The Principle of Equality; 4) The Principle of Cooperation; and 5) The Principle of Redress. While the principle of redress was a novel approach by the Crown that was appreciated by Māori, there were other aspects of the Principles that came under criticism. Some Māori leaders felt that the principle of rangatiratanga was too limited and had undermined the findings on sovereignty made by the Waitangi Tribunal. The Crown sought to limit the principle of rangatiratanga to resources that Māori

20 Mason Durie Te Mana, Te Kawanatanga (Oxford University Press, Auckland, 1998) at 204-205.
had already retained rather than resources that had been sold, confiscated or otherwise obtained by the Crown through unscrupulous means.\textsuperscript{21}

During this period the Waitangi Tribunal remained underfunded.\textsuperscript{22} When the Labour Government was defeated by the generally conservative National Party in 1990 there were some fears that the minimal advances made at the end of the 1980s through the establishment of ToWPU, the Crown Forestry Rental Trust and amendments to legislation, such as the SoE Act, would be reversed. The National Party had not traditionally been the political party associated with the promotion of legislation and policies that would help Māori generally. To the surprise of some, Justice Minister Douglas Graham along with the Prime Minister, Jim Bolger, pushed for a settlement process through direct negotiations. Negotiations that had just begun with Waikato-Tainui in 1989 continued, after a brief hiatus, in 1991 with the National Government and in the same year negotiations officially began with Ngāi Tahu. While there were regular monthly ad hoc meetings between the Crown and Waikato-Tainui and Ngāi Tahu negotiators respectively there was little advancement in either negotiation in the early 1990s. However, representatives from each party to negotiations were part of the pan-Māori fisheries negotiating team that concluded a $170 million settlement with the Crown in 1992 and which would establish the $170 million maximum benchmark for all future settlements.\textsuperscript{23}

The Crown’s negotiations with Waikato-Tairua and Ngāi Tahu were equally struggling around the 1993 election, but by the end of 1994 Waikato-Tainui had signed an Agreement in Principle (AIP) and Ngāi Tahu’s negotiations had completely collapsed. Just prior to the settlement with Waikato-Tainui in late 1994, the Crown released its new formal Treaty negotiating policy document that built on the principles produced in 1989, \textit{The Crown’s Proposals for the Settlement of Treaty of Waitangi Claims.}\textsuperscript{24} While the policy addressed a number of issues related to the development of the Treaty settlement process, there was a prominent backlash from Māori groups to the unilateral fiscal limit of

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\item \textsuperscript{23} The pan-Māori fisheries settlement, often referred to as the Sealord deal, was signed on 23 September 1992. Coupled with the interim $20 million settlement reached in 1989 with the Labour Government, the Crown paid an additional $150 million for a total of $170 million and provided Māori with 20 per cent of all quota for fisheries brought within the quota management system. Māori would then use this sum to enter into a joint venture agreement with Brierley Investments to purchase Sealord Products Ltd. The Māori Fisheries Commission was renamed the Treaty of Waitangi Fisheries Commission and it was tasked with developing a method for the equitable distribution of the fisheries assets amongst the iwi across the country. After 12 difficult years of negotiation between Māori the Māori Fisheries Act was passed in 2004. Paul Moon “The Creation of the ‘Sealord Deal’” (1998) 107(2) The Journal of the Polynesian Society 145; RP Boast “Māori Fisheries 1986-1998: A Reflection” (1999) 30(1) Victoria University of Wellington Law Review 111; Māori Fisheries Act 2004; Richard S Hill \textit{Māori and the State: Crown-Māori Relations in New Zealand/Aotearoa, 1950-2000} (Victoria University Press, Wellington, 2009) at 254-255; Margaret Mutu “The sea I never gave’: Fisheries Settlements” in Janine Hayward and Nicola R Wheen (eds) \textit{Treaty of Waitangi Settlements} (Bridget Williams Books, Wellington, 2012) at 115-120.

\item \textsuperscript{24} Department of Justice \textit{Crown Proposals for the Settlement of Treaty of Waitangi Claims} (Wellington, 1994).
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$1 billion (set in 1992) placed on the total amount available for compensation—the “fiscal envelope.” In addition to the fiscal cap, the Crown’s proposals also did not recognise the possibility of Māori ownership of natural resources (except for pounamu or greenstone) and conservation land would only be returned in very limited and unique circumstances. Nonetheless, as Alan Ward has noted, they were a significant policy shift that consisted of much more than just the fiscal cap: “they acknowledged that historical injustices had occurred; accepted that the Crown had a duty to make reparation in settlements that were fair and sustainable, and removed the sense of grievance; and accepted that the resolution of claims must be consistent and equitable between groups.” In early 1995, the ToWPU was renamed the Office of Treaty Settlements. Following Waikato-Tainui’s settlement Ngāi Tahu eventually recommenced negotiations with the Crown in mid-1996 and signed its own AIP by October 1996 just prior to the 1996 election. The first two pioneering Treaty settlements had laid down some benchmarks. The binding powers system had pushed the process forward but the political will that was necessary to implement the large scale transfer of Crown lands, provision of financial compensation, co-management regimes, and general Crown–Māori relationship building was not going to be provided under a legal system.

4. The Turangi township remedies report

As the political Treaty settlement process gained some momentum the Tribunal rarely used its binding powers. This was due to a number of factors, including the political pressure noted above, but also because until recently they were relatively rare. It was widely assumed that the existence of the Tribunal as a whole could be compromised if the Tribunal used its binding powers. At the least it was feared that the Crown would merely legislate away those binding powers as quickly as they had legislated them in. Only once, in 1998, did the Tribunal use its binding powers in the Turangi Township Remedies Report. This was related to a more recent and very specific claim of the local Ngāti Tūrangitukua hapū and iwi, the establishment of the Turangi Township during the construction of the Tongariro power scheme. The power scheme uses water flowing from rivers to generate power: the Rangitikei, Whangaehu, Whanganui and Tongariro rivers. The water passes through power stations at Rangipo and Tokaanu. The water eventually ends up in Lake Taupo which flows into the Waikato River which has eight power stations on it. In contrast to most claims investigated by the Waitangi Tribunal since 1985, the Turangi Township claim was of very recent origin, largely centred around the mid-1960s. Did the severity of the Treaty breaches and their recent nature affect the Tribunal’s decision to issue the interim binding recommendations? Or was it the perilous position into

28 Waitangi Tribunal The Turangi Township Report (Wai 84, 1995) at 20.
which the claimants had been placed by the impending privatisation of their lands? Arguably it was both aspects that influenced the Tribunal’s thinking.

The centrepieces of the Turangi Township claim were the draconian statutory powers used by the Crown to compulsorily take Māori land under the Public Works Act 1928 and the Turangi Township Act of 1964. Under these Acts the Crown could take the claimants’ land compulsorily without any notice to the owners or any right of objection, without any consent or consultation, without any right to return the land once it was no longer needed and at a price determined by the Crown. Most dramatically, the Crown claimed the right to enter the claimants’ land with bulldozers without any notice to the owners well before a proclamation taking the land had been gazetted. Four sites had been identified by the Crown for the proposed township, two Māori-owned land blocks and two belonging to the Crown. One of the Māori-owned blocks, Turangi West, was chosen for the site. Only two rounds of limited consultation took place with the owners, the second held only eleven days before bulldozers arrived. Some owners were unable to save their homes from the destruction.29

The Crown did not honour a number of undertakings made to the claims in the few meetings it held with the owners. The original plan was to purchase 800 to 1,000 acres of freehold but the Crown ended up purchasing 1,665 acres. The industrial lands which were meant to be leased and returned after 10–12 years were instead purchased out right. The compensation paid under the Public Works Act 1928 was also unreasonably low as it was determined by restrictive rules imposed by the war-time Finance Act (No. 3) 1944, still in place in the 1960s. The Tribunal found that Ngāti Turangitukua had not been fairly and fully compensated for the compulsory taking of their land. The 1928 Public Works Act also did not contain legislative provisions for the return of land no longer required for Public Works. This was something provided for in the newer 1981 Public Works Act, but it was not available to Ngāti Turangitukua owners. While this was a positive aspect of the 1981 Act the Tribunal also recommended a number of changes to the Public Works Act.30

The Tribunal held the inquiry in the second half of 1994. As the claim was being heard in August 1994 the claimants gave notice of their application for the resumption of land covered by the claim and vested in or transferred to a state-owned enterprise under the SoE Act. When the Tribunal heard closing submissions by the Crown and claimants in October 1994 they advised both parties that any submissions on remedies should await a second stage after the Tribunal had made findings on fact and Treaty breaches, only then could a remedies hearing be held. The Tribunal advised the parties to enter direct negotiations but left open the possibility that if the negotiations did not reach an agreement then the claimants could apply for a remedies hearing.31 Negotiations began soon thereafter in 1995 and continued into 1996 when they came to a standstill in July 1996.32

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31 Waitangi Tribunal The Turangi Township Report (Wai 84, 1995) at 375-376.
In mid-July 1996 counsel for the claimants, Carrie Wainwright, notified the Tribunal that Ngāti Turangitukua had formally withdrawn from their negotiations. They sought a reconvening of the Tribunal for a remedies hearing and that would include the return of land bearing s 27B memorials of SoE land. This included residential properties, business properties and industrial land adding up to nearly 108 properties. Of those, 74 properties were memorialised while 34 were Crown or SoE owned but not memorialised. Their total value was just over $9.5 million. Financial compensation was also sought for the establishment of the Turangitukua House to develop as the cultural identity and learning centre for the hapū, preservation and maintenance of wahi tapu, to enable the purchase of land in the Industrial Area no longer in Crown ownership, and as a “start fund” to build the social capital of the hapū. The claimants also sought the return of all recreation reserve properties in fee simple, a co-management regime for conservation lands and site specific redress for ancillary claims.

The Crown did not oppose the mandatory return of land in principle; it only opposed the return of all the lands that the claimants were seeking. A hearing was to be held at Hirangi Marae in Turangi. In September 1996 the Crown submitted that a higher standard of proof should be required for binding recommendations by the Tribunal that would be higher than that required for the Tribunal’s non-binding recommendations. In late February 1997 the Tribunal heard detailed submissions on the question from both parties. In its decision on the matter about a month later the Tribunal expressed its understanding of the seriousness of its powers. In that case a range of circumstances would need to be taken into account before issuing the binding recommendations. The Tribunal held that its mandatory and binding powers were a product of a statutory remedy to the legal problems facing the Crown, and that the Tribunal was not acting outside of the law. The powers were intended to be remedial when they were created. In addition, Crown counsel also wanted to restrict the Tribunal’s binding powers solely to memorialised lands that related directly to the breach rather than what s 8A(2) of the Treaty of Waitangi Act set out, which was that the claim could “relate in whole or in part” to the land to which the section applies. The Tribunal found that if each claim had to relate to a specified memorialised block of land, then it would have said so explicitly in the legislation. The Tribunal would rely on the Acts Interpretation Act 1924 and would give such “fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act”.

The claimants themselves sought a principled rather than a legal approach. Their counsel submitted that the Tribunal was not a court of law so it was inappropriate to apply legal constraints to the question of remedies. This was in line with the stance taken by the Muriwhenua Land Tribunal which reported in 1997 that “[t]he Tribunal is not called upon to determine actionable wrongs, to

33 Wainwright would later become a Māori Land Court Judge and Tribunal Presiding Officer (most prominently presiding over the Whanganui Land Inquiry and the Tāmaki Makaurau Settlement Process Inquiry).
34 Waitangi Tribunal The Turangi Township Remedies Report (Wai 84, 1995) at 85-99.
36 Waitangi Tribunal The Turangi Township Remedies Report (Wai 84, 1995) at 4-10.
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. Both parties agreed that the remedies should not be provided on a damages basis. The Tribunal advocated the restorative basis that it had advocated in Muriwhenua, Orakei and Ngāi Tahu. The Orakei Report infamously established the doctrines regarding the reparation of Māori needs versus Māori rights. The Tribunal cautioned that in considering tribal restoration, care needed to be taken to ensure that the level of redress did not become dependent on the contemporary needs of iwi that are unconnected with the historical wrongs being addressed. Nonetheless, the focus of the statutory scheme was upon prejudice caused by the Crown wrongs. The Tribunal conceded that Treaty breaches in many cases had undermined the economic and social base of iwi. Equally however, they suggested, the current needs of iwi may arise from a wide range of complex political, social and economic factors. 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 hapū 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 hapū 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 commented at length on the issue of relativity between settlements and how they could affect the binding recommendations. The Crown could only point to the benchmark Waikato-Tainui and Ngāi Tahu settlements and the, at that time recent, $5.2 million settlement with an iwi of Te Arawa, Ngāti Whakaue. The Crown essentially was forcing the Tribunal to adopt its fiscal envelope policy which had been adjusted to discussing the relativities between claims. The Tribunal was given no evidence on the manner in which the Crown arrived at those settlements and how the nature of the claims played into it. Waikato-Tainui had suffered war and confiscation, while Ngāi Tahu had suffered from iniquitous land purchases. Their grievances were over 130 years old while Ngāti Turangitukua was a relatively small hapū of Ngāti Tūwharetoa that had suffered for over 30 years. Although they were historical claims by definition they were contemporary in nature. While the Tribunal stated that it would take the greatest of care in making binding recommendations, it had little

37 Waitangi Tribunal Muriwhenua Land Report (Wai 45, 1997) at [11.2.3].
38 Commentators such as Michael Belgrave have made observations about the Crown’s focus on “needs” rather than property rights. Belgrave has commented on the manner in which Treasury “emphasised the re-establishment of the tribal estate as the primary focus of settlements” and suggested that “redress could be achieved relatively inexpensively.” Michael Belgrave Historical frictions: Māori claims and reinvented histories (Auckland University Press, Auckland, 2005) at 320 and 325-326.
39 Waitangi Tribunal The Turangi Township Remedies Report (Wai 84, 1995) at 11-14.
to compare the negotiations reached with Waikato-Tainui, Ngāi Tahu and Ngāti Whakaue. Only Ngāi Tahu had a Tribunal report so the evidence was difficult to compare. As a result not much could be done.\textsuperscript{41}

In the end, the Tribunal recommended the return of 15 memorialised commercial properties valued at about $3.2 million rather than the $6.3 million sought by the claimants. Eight of the fifteen properties were now in private hands. In addition the Tribunal recommended that the Crown return Crown-owned property that was not memorialised valued at $2.2 million. So that memorialised residential properties were not affected the Tribunal also ordered the return of further non-memorialised properties valued at $700,000 total. In total for the entire value of the Tribunal’s orders was just under $6.1 million. In terms of monetary compensation the Tribunal recommended at least $1 million. The Tribunal did not order the return of recreation reserves in fee simple, but it did recommend that DoC negotiate with the Ngāti Turangitukua Charitable Trust over the return of lands in trust ownership or joint management arrangements.\textsuperscript{42}

The Tribunal provided the legislatively mandated 90-day interim orders under which the Crown and Ngāti Turangitukua had 90 days to arrive at a negotiated settlement before permanent binding orders were made under s 8B of the Treaty of Waitangi Act on 6 July 1998. Due to the pressure by the Tribunal, a settlement was finished in time and the final binding orders were never made. The Deed was signed on 26 September 1998, with about 10 days to spare before the binding recommendations became final. As John Dawson has commented quite dramatically: “So the sword of clawback, suspended over the Crown, forced a settlement at the final hour.”\textsuperscript{43}

Ngāti Turangitukua ended up receiving a $5 million quantum that the Crown considered was fair and durable in comparison to other Treaty settlements. This was augmented by the gifting of Turangitukua House, the site of the urupa of Ngāti Turangitukua’s ancestor, Ria. This was also the only private property returned through the binding powers system. The Crown also provided $200,000 to enable the refurbishment of the House and the kaumātua flats near Hirangi Marae that were returned. Instead of the residential properties that were memorialised the Crown returned three Crown properties with long-term leases for the Turangi Police Station, the Turangi DoC Headquarters and the Tongariro High School with only the land. The Ngāti Turangitukua Charitable Trust obtained a Right of First Refusal over Crown commercial and residential properties, Electricity Corporation of New Zealand (an SoE) and New Zealand Post property. Two DoC reserves in Turangi with low commercial value were returned at no cost to the hapū, and DoC and the Taupo District Council (TDC) agreed to transfer at no cost the underlying title of most of the major reserves in Turangi with management and control remaining with the TDC. With regards to wāhi tapu, DoC, TDC and Environment Waikato all pledged to improve their existing processes for consulting with Ngāti Turangitukua. The kaumātua flats and the small Kokiri Centre were returned at a discounted cost of about $100,000. The settlement also contained an apology and historical account, something which

\textsuperscript{41} Waitangi Tribunal \textit{The Turangi Township Remedies Report} (Wai 84, 1995) at 24-31.
\textsuperscript{42} Waitangi Tribunal \textit{The Turangi Township Remedies Report} (Wai 84, 1995) at 100-104.
\textsuperscript{43} John Dawson “The Remedies Reports” in Janine Hayward and Nicola Wheen (eds) \textit{Te Roopu Whakamana i te Tiriti o Waitangi: Waitangi Tribunal} (Bridget Williams Books, Wellington, 2004) 125 at 133.
would not have been possible with binding recommendations by the Crown. Interest was also paid for the period between the signing of the Deed and passing of legislation. The final settlement was perhaps nearly the value that the Tribunal recommended, with additional non-financial aspects. Clearly it was a better idea from the point of view of Ngāi Turangitukua to sign the Deed.44

5. Ngāi Tahu remedies applications

The Turangi Remedies Report was released in 1998, a year after the Ngāi Tahu Deed of Settlement was signed. Ngāi Tahu’s claims were as wide-ranging as any in the Treaty settlement process, but the main plank of Te Kerēme (the Claim) was the ten unjust purchases of around 34 million acres of land from 1844–1864, and the subsequent loss of mahinga kai or food gathering areas.45 Ngāi Tahu had engaged in whaling and sealing enterprises in the early nineteenth century and believed that their land sales to the Crown and Europeans would guarantee their own usage rights to the resources in the region and strengthen robust political, economic and social relationships with newcomers. The land purchases varied from the notorious duplicity exhibited by Crown Land Purchaser Walter Mantell in Kemp’s purchase in 1848, the Port Levy and Port Cooper purchases of 1849 and the Murihiku purchase in 1853 to the almost fair Rakiura purchase in 1864.46 Promises of schools and hospitals were especially emphasised to justify the low prices paid.47 The Crown left Ngāi Tahu marginal and miniscule reserves and within a generation of the first land sale Ngāi Tahu were left landless and impoverished as settlers were provided with cheap and wide-ranging estates throughout the region.48 Ngāi Tahu’s claims were heard by the Waitangi Tribunal from 1987–1989 and the first of four reports (the others covering their legal personality, fisheries and ancillary claims) covering the main claim was published in February 1991. Although the Tribunal did not accept all of Ngāi Tahu’s claims, it overwhelmingly concluded that the Crown had breached the principles of the Treaty in its interactions and engagement with Ngāi Tahu.49

Ngāi Tahu’s negotiations with the Crown had begun in 1991 and after a fairly productive and positive early start in the first six months of negotiations, they became bogged down in a series of different issues covering the staggering number of different forms of redress. At its core the main issue revolved around the quantum, which subsequently affected a number of other issues, although it was certainly not the most important.50 The negotiations over the financial value

50 Richard Price The Politics of modern history-making: the 1990s negotiations of the Ngāi Tahu tribe with the Crown to achieve a Treaty of Waitangi claims settlement (University of Canterbury, Christchurch, 1994).
of the settlement came to a head in February 1992 when Ngāi Tahu proposed two settlements at the start and end of the month—worth $1.3 billion and $650 million respectively. The Crown, under tight Treasury restraint, countered unofficially with a $100 million offer that was not received well by the Ngāi Tahu negotiating group. The breakdown which eventuated officially in December 1994 really began in February 1992. As the negotiations dragged on, Ngāi Tahu continued to enjoy the benefit of their unique land-banking arrangements under which Ngāi Tahu could purchase Crown properties and on-sell at a profit, sometimes on the same day. Nothing else was going very well though in the negotiations. As a result Ngāi Tahu always kept its options open. Legal avenues of redress were often used by the Ngāi Tahu negotiating team to pressure the Crown and in the background the team had those legal options ready. When the negotiations broke down in December 1994 Ngāi Tahu's junior legal advisor, current Minister of Treaty Negotiations Christopher Finlayson, filed a number of lawsuits on behalf of Ngāi Tahu. The courts had been the site of boundary disputes between Ngāi Tahu and Rangitāne and other northern South Island iwi and hapū, and also a series of lawsuits involving the Treaty of Waitangi Fisheries Commission. By the end of 1994, Ngāi Tahu had turned the focus of litigation towards the Crown: the Attorney-General, Landcorp, DoC, Coalcorp (as it was then known) and others. Amongst the seventeen lawsuits in place in 1995, were two important legal options dubbed “Black Box” and “Green Box”. Both boxes referred to different forms of legal remedies related to quantum, while all of the other lawsuits covered various other issues, such as pounamu, whales at Kaikoura, Landcorp, Coalcorp and other SoE properties. The Black Box related to the acquisition of mos. of Banks Peninsula which the Tribunal report had referred to as “unconscionable fraud” due to the dodgy purchasing practices employed by the Crown. When an act is described as unconscionable it can override the statute of limitations. Thus the Ngāi Tahu negotiating team built a case around legal remedies for the purchase of Banks Peninsula that it threatened to take through the courts. The Black Box did not proceed very far but it was occasionally hinted at by Ngāi Tahu negotiators. It was estimated that the level of compensation which could be garnered from common law action would be approximately $310 million. The more immediately threatening legal option was the “Green Box”. The Green Box related to the Tribunal’s binding powers under the CFAA. Ngāi Tahu was in a unique position under which there was a plethora of forestry redress in their rohe since it made up most of the South Island. Ngāi Tahu were only offered five Crown Forests, but sought much more. Ngāi Tahu’s lawyers had estimated that if the Tribunal were to revert all Crown licensed land over


to Ngāi Tahu, licence fees already received and paid into the Crown Forestry Rental Trust and compensation equal to 5 per cent of the market value of the trees, the market stumpage or the net proceeds received by the Crown on the sale of cutting rights would be worth $350 million. As previously noted, if a claim is well-founded by the Tribunal, then the claimant group then has the option of making an application for remedies under which Crown Forest land, rentals and a level of monetary compensation based on stumpage rates and other economic factors is ordered by the Tribunal to the claimant group. The Crown greatly feared the use of those binding powers as it explicitly challenged the political nature of the Treaty settlement process which is meant to be under the control of the Crown.\textsuperscript{55} Other iwi also feared a potential remedies application because the Crown Forestry Rental Trust, which was established in 1989 to hold accumulated rentals and distribute funds to claimants for research, would have been severely compromised economically.\textsuperscript{56}

The option for Ngāi Tahu to take their case back to the Waitangi Tribunal always remained a possibility, and it was occasionally threatened during the first year of the negotiations in 1991–1992 by Ngāi Tahu to stress to the Crown its own leverage. This threat was finally carried out in late 1994 when Finlayson filed a memorandum requesting binding recommendations for forestry assets in the Ngāi Tahu rohe under s 8HB of the Treaty of Waitangi Act. An application for the Tribunal to make orders for the Crown to return state-owned assets was not made. A meeting with the Tribunal was planned for early 1995. It was originally meant to be presided over by Judge Ashley McHugh, who had presided in the original inquiry and was seen by many as sympathetic to Ngāi Tahu because of his role as Presiding Officer of the Ngāi Tahu Waitangi Tribunal inquiry. At the last second the Chairperson of the Waitangi Tribunal, Chief Judge Eddie Durie, replaced McHugh. Citing a lack of funding and time, Chief Judge Durie refused to hear the Ngāi Tahu case. Ngāi Tahu subsequently filed proceedings against Chief Judge Durie for refusing to hear their urgent inquiry, and against the Attorney-General for not providing enough funding for the Waitangi Tribunal.\textsuperscript{57}

Ngāi Tahu clearly presented a very difficult decision for Chief Judge Durie. Ngāi Tahu had been one of the first major hearings of the post-1985 era and four separate reports had been published between 1991 and 1995 regarding the Ngāi Tahu claim. The backlog of other claims was quite substantial and Chief Judge Durie considered that Ngāi Tahu had already been given a large amount of the Tribunal’s attention and resources. Nevertheless the option for Ngāi Tahu to return to the Tribunal had always existed, and from the point of view of the majority of Ngāi Tahu beneficiaries, not only Ngāi Tahu Chief Negotiator Sir Tāpene O’Regan, returning to the Tribunal was clearly the best course of action at that time.\textsuperscript{58} The negotiations had come to a complete standstill. Coupled

\textsuperscript{55} Douglas Graham Trick or Treaty? (Victoria University of Wellington Institute for Policy Studies, Wellington, 1997) at 82-83.


\textsuperscript{57} Steve Evans “Ngāi Tahu to file in High Court over South Island forestry claim” \textit{The Independent} (United Kingdom, 31 March 1995).

\textsuperscript{58} “Ngāi Tahu hui-a-tau,” 2-3 November 1994, NT 140 B(x)9, Box 53, Te Runanga o Ngāi Tahu archives.
with the series of lawsuits in the High Court a return to the Tribunal for binding recommendations was a natural extension of the Ngāi Tahu strategy.\(^{59}\)

In internal Ngāi Tahu memoranda it was insinuated that Chief Judge Durie was essentially in cahoots with the Crown to prevent Ngāi Tahu advancing its claim through binding recommendations. Chief Judge Durie stressed in his memorandum that it was largely the need for other iwi to share the limited resources allocated by the Crown to the Waitangi Tribunal, and that it did not reflect at all on the strength of Ngāi Tahu’s claim. The Crown was genuinely concerned about the potential for Ngāi Tahu to get the Tribunal to use its binding powers and upend the Crown’s unilateral development of Treaty settlement policy. The Crown had just spent over two years internally developing the policy and signed a Heads of Agreement for the first major tribal settlement with Waikato-Tainui on 21 December 1994. A deed of settlement had yet to be signed, but it was planned for 22 May 1995.\(^{60}\) If Ngāi Tahu’s remedies application was approved by the Tribunal, theoretically compensation could flow to Ngāi Tahu before Waikato-Tainui had formally settled. Sir Geoffrey Palmer represented Chief Judge Durie in the High Court. The case was heard in camera and held up by delays and appeals until Ngāi Tahu formally recommenced their negotiations after a major effort by Prime Minister Bolger and his DPMC officials to smoothen out the differences between the two sides. All litigation was suspended when the Te Rūnanga o Ngāi Tahu Act was passed in April 1996.\(^{61}\) The Ngāi Tahu deed of settlement was signed just over a year and a half later in November 1997.\(^{62}\)

6. Haronga and the Mangatu remedies report

Other than Ngāi Tahu and Ngāti Turangitukua in the mid to late 1990s not many other iwi tried to apply for binding orders of SoE and/or Crown Forestry assets, but the pattern particularly picked up in 2006. In 2009 the Chairman of the Mangatu Incorporation on the East Coast of the North Island, Alan Haronga, sought an urgent hearing of the Waitangi Tribunal to recommend that the Crown return to the owners of the Mangatu Incorporation an 8,626 acres sized block of the Mangatu State Forest. The Waitangi Tribunal had found in its 2004 Tūranganui a Kiwa (Poverty Bay) district report *Tūranga Tangata Turanga Whenua* that the Crown had acquired that section of the Mangatu State Forest from the Incorporation in breach of the principles of the Treaty of Waitangi in 1961.\(^{63}\) A settlement with Turanga iwi: was imminent in 2009 and many of the Incorporation’s owners were members of one of the largest iwi in the region, Te Aitanga a Mahaki. The Incorporation wanted the land returned to its owners rather than as part of an iwi-wide settlement.


\(^{60}\) Wira Gardiner *Return to Sender: What really happened at the fiscal envelope hui* (Reed Books, Auckland, 1996); The Crown Waikato-Tainui Raupatua Deed of Settlement (Wellington, 1995).


\(^{62}\) Ngāi Tahu Deed of Settlement, 21 November 1997.

\(^{63}\) Waitangi Tribunal *Tūranga Tangata Turanga Whenua Report* (Wai 814, 2004) at 733.
The settlements that were proposed in the region addressed some of the most severe Treaty breaches by the Crown anywhere in the country, including an attack on the defensive pa at Waerenga a Hika, the deportation without trial of prisoners from that battle, and the systematic execution of followers of Te Kooti Arikirangi, the Whakarau, at Ngātapa Pa, all taking place in the 1860s. In addition, the Crown forced, under duress, the purchase of over 1.1 million acres of land in the region, and confiscated hundreds of thousands of acres from alleged “rebels”. Following the war the Native Land Court was introduced to the region and many of the remaining Māori landowners were forced to take their lands through the Court to participate in the new settler economy. Although many of the Incorporation’s owners were members of Te Aitanga a Māhaki there were other groups that were also involved in the region-wide negotiations, including Ngā Ariki Kaiputahi and Te Whanau a Kai who had an interest in the forest through their own claims from the Turanga District Inquiry.

A second application for binding remedies (the first having been rejected by Judge Craig Coxhead because of a lack of urgency and the fact that negotiations were ongoing) was rejected by Judge Stephen Clark. Haronga sought a judicial review of Judge Clark’s decision in the High Court, the Court of Appeal and the Supreme Court. After both lower Courts rejected Haronga’s applications, in May 2011 the Supreme Court under Elias CJ found in his favour and quashed Judge Clark’s decision and ordered an urgent remedies hearing of the Mangatu claim. The Court found that after finding claims well-founded the Tribunal had a duty to hear a claim for binding recommendations although it did not necessarily have to make binding orders.

The Haronga case was anything but clear-cut. Although there was a majority in favour of the decision, William Young J provided a dissenting opinion. In addition to finding that the Tribunal was obliged to decide whether or not to make a binding order, the majority also found that the Tribunal had not exercised its jurisdiction to inquire into the claim by its 2004 Turanga Tangata Turanga Whenua report. This was a key plank of Judge Clark’s decision as well as the Court of Appeal and High Court reviews, that the Tribunal in 2004 had already provided recommendations. By separating the claim related solely to the 1961 Crown acquisition of the Mangatu Incorporation’s lands, the majority reasoned that the 2004 report did not discharge the Tribunal from specifically inquiring and reporting on the Mangatu Incorporation’s specific claims. Connected to this point, the Supreme Court held that Haronga’s application for an urgent hearing was not affected by the ongoing negotiations between Te Whakarau and the Crown.

In the judgment the majority traversed the statutory history behind the binding powers provided under the Treaty of Waitangi (State Enterprises) Act 1988 and the CFAA, but completely ignored the entire political history behind the dozens of settlements signed since that legislation was enacted.

64 Waitangi Tribunal Turanga Tangata Turanga Whenua Report (Wai 814, 2004).
65 Waitangi Tribunal (Wai 1489, #2.5.4, 28 August 2008); (Wai 1489, #2.5.10, 21 October 2009).
Court did not mention the previous applications for urgency and the precedents set by separating the Waitangi Tribunal’s primary purpose from historical inquiry and subsequent findings to binding recommendations. The majority also issued recommendations that diverted from the usual method of ordering a reconsideration of the decision to grant urgency. Instead the Court ordered that the urgent hearing be held. Despite this order, the issue of how the Tribunal was to proceed into its remedies hearing was in no way clear. By merely stating that it was for “the Tribunal to exercise its statutory obligation to inquire into the claim for resumption”, the Supreme Court provided no detailed instructions. How was the Tribunal supposed to balance the competing interests for the block? How much compensation should be ordered and on what basis? It seemed as if the Supreme Court was ordering a hearing against the Tribunal’s findings, and asking them to make it up as they went along.

In contrast to the majority led by Elias CJ, William Young J remained influenced by the wider political ramifications. William Young J pointed to the Tribunal’s discussion in 2004 of relativities between the different claims and the ongoing settlement process in the region that had a strong influence on the Tribunal’s decision not to grant urgency. In addition he also discussed the complexity behind the Mangatu Incorporation’s claim, such as the effect on the claimants who were not included in the 1881 Native Land Court determination that later led to the establishment of the Mangatu Incorporation in 1893. While recognising the frustration experienced by Haronga and the Mangatu Incorporation, William Young J stressed that the political process that was in place needed to continue and the case for urgency was not merited.70

Not long after the Supreme Court instructed the Tribunal to have the remedies hearing three other Māori organisations in the region made their own application for binding orders and were made parties to the remedies inquiry: Te Aitangi a Mahaki and Affiliates (TAMA) which had represented all claimants in the Mahaki cluster throughout most of the direct negotiation process, and two hapū that had broken away from the TAMA mandate, Ngā Ariki Kaiputahi and Te Whanau a Kai.

All of the groups had similar historical claims in relation to the events reported on in the Turanga Tangata Turanga Whenua report. The Mangatu State Forest and the associated Crown Forest License interest payments were going to form a part of the redress provided for claimants in the region in general. The Crown had offered TAMA in its original role representing all three claimant groups (including Ngā Ariki Kaiputahi and Te Whanau a Kai) a $32 million settlement. All three groups stated that they had preferred negotiations with the Crown but had been forced into joining the Mangatu Incorporation’s application.71

If binding recommendations were made in favour of the Mangatu Incorporation, it would receive the land purchased in 1961, valued in 2014 at $3.68 million and the accumulated rentals of $2.75 million. As stated earlier in this article binding recommendations for Crown Forest land include the return of land, rentals and compensation payable according to sch 1 of the CFAA. Under the CFAA three methods of compensation are payable. If binding recommendations are made a minimum of 5 per cent of the total compensation must be made, and the amount and method of calculating the compensation

71 Waitangi Tribunal Mangatu Remedies Report (Wai 814, 2013) at 126-127.
are determined by the claimant. Under the first method outlined in cl 3(a) of the schedule, 5 per cent compensation would be either $359,210 if based on the filing date of the urgent application for remedies (Wai 1489) or $896,885 if the calculation was based on the filing of the original Mangatu forest claim (Wai 274). If cl 3(b) of the schedule were used the compensation at 5 per cent would be either $1,400,977 or $3,575,927. Under cl 3(c) the compensation at 5 per cent would be either $848,300 or $6,031,900. Multiplying each of those figures by twenty for 100 per cent of compensation provides some very large potential settlements just under $135 million when including the accumulated rentals.72

Ngā Ariki Kaiputahi’s specific grievances related largely to the 1881 Native Land Court hearing regarding Mangatu that left them out of the title, and the 1917 rehearing in which they could not participate. In their application for binding remedies they offered to distribute the redress themselves to other claimants in the region. The total possible redress would be the same as that for Mangatu, just under $135 million. Te Whanau a Kai made it clear that it preferred a negotiated settlement with the Crown and only participated to ensure potential assets used in settlements would not be decided without their input. They initially put forward a suggestion for a 40 per cent share of the Crown Forest Land within the Turanga Inquiry District, or 3,067 hectares of land. TAMA’s standing representing the most claimants in the region gave it the strongest mandate to receive a binding recommendation despite the tenuous nature of TAMA’s mandate to represent those in the Mahaki cluster. The Tribunal found its case the strongest but still pushed TAMA to re-enter negotiations.73

The Tribunal reported in December 2013 and declined to make binding orders to any of the groups, rejecting the applications of the Mangatu Incorporation, Ngā Ariki Kaiputahi and Te Whanau a Kai, and adjourning the application of TAMA. The Tribunal found that it would do more harm to the others if any one group was favoured. The Tribunal also declined to make orders because the remedies available from the Tribunal would not be suitable redress, such as an apology or historical account, but also on the basis that the Tribunal would be unable to guarantee fair and proportional redress to all parties proportional to the claim/issue being remedied, and in a way that would not disrupt the proportionalities with those groups already settled.74 Reference was specifically made to two other settlements negotiations in the Turanga region with neighbouring iwi Rongowhakaata and Ngāi Tamānuhiri with respective quanta of $22.2 million and $11 million.75

In 2014 Haronga again filed for a judicial review, this time of the Mangatu Remedies Report. Delivering his judgment in May 2015 in the High Court, Clifford J found in Haronga’s favour noting that the fact that the binding recommendations would blow out the relativities established by the previous twenty years of the Treaty settlement process was irrelevant. Clifford J made a rather strange rationale that at the time that the Crown Forest Agreement was signed in 1989 the Crown’s Treaty settlement policy did not exist and no

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72 Waitangi Tribunal Mangatu Remedies Report (Wai 814, 2013) at 105-106.
73 Waitangi Tribunal Mangatu Remedies Report (Wai 814, 2013) at 116-130.
74 Waitangi Tribunal Mangatu Remedies Report (Wai 814, 2013) at 130-133.
relativities or limits had been set. But was that not the point that now that all of this had happened why give judicial backing to binding remedies at such a late stage when over sixty settlements had been signed? Clifford J also stated that the Tribunal had declined to make binding orders because determining between the different groups was “too hard” and that the difficulty of making a determination was not a valid reason for declining it. Clifford J believed that the Tribunal had a statutory provision which it had to follow through. Clifford J did note that were the Tribunal to make binding orders, it could alter the sch 1 compensation award to as low as 5 per cent of the compensation figure calculated to provide flexibility for a “fair and just” amount in terms of relativities. This essentially has come to create, ironically for the current Treaty Negotiations Minister, Christopher Finlayson, an uncertainty regarding who controls the Treaty settlement policy. Is it the courts who can blow out relativities because of a statutory framework that has been overshadowed by a political process? The entire point of the Treaty settlement process as it was created was that a legalistic approach would cost the nation too much. As the Tribunal stated repeatedly in the Mangatu Remedies Report, compensation on an acre for acre basis is not possible under the economic, political and practical constraints of the Treaty settlement process.

7. The Ngāti Kahu Remedies Report

Slightly less radical than Clifford J who quashed the Mangatu Remedies Report, was Dobson J in the High Court judicial review of the Ngāti Kahu Remedies Report, Flavell v Waitangi Tribunal, delivered in August 2015. The case involved the Ngāti Kahu negotiations led by Professor Margaret Mutu in the far North, Te Hiku o te Ika. Ngāti Kahu’s pre-1865 claims were well-founded by the Tribunal in its 1997 Muriwhenua Land Report (along with the other iwi of Te Hiku – Ngāi Takoto, Te Aupōuri, Te Rarawa, Ngāti Kuri and some hapū of Ngā Puhi). Large alienations of land took place under the Crown's 1840-1865 Pre-emption policy, leaving all the iwi and hapū of Te Hiku o te Ika in a precarious economic and social position. Ngāti Kahu had attempted to request binding orders from the Tribunal a number of times beginning in 1998. They were adjourned to enable negotiations to continue. In 2008 an AIP was signed by Ngāti Kahu and in 2010 in concert with the other Te Hiku iwi on redress that would be shared collectively. Then, in May 2011, just before the first Haronga decision was delivered in the Supreme Court, Ngāti Kahu submitted a preferred partial settlement to the Crown for negotiation that widely exceeded the parameters established in the AIPs of 2008 and 2010 which was rejected by the Crown.

In July 2011 Ngāti Kahu revived its application for binding orders from the Tribunal and in the post-Haronga climate were granted a remedies hearing by Judge Clark, the same Judge who had his original decision not to grant the Mangatu Remedies inquiry quashed by Elias CJ. All of the other Te Hiku iwi

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76 Haronga v Waitangi Tribunal [2015] NZHC 1115 at [96].
77 Haronga v Waitangi Tribunal [2015] NZHC 1115 at [108].
78 Flavell v Waitangi Tribunal [2015] NZHC 1907.
79 Waitangi Tribunal Muriwhenua Land Report (Wai 45, 1997).
80 Waitangi Tribunal Ngāti Kahu Remedies Report (Wai 45, 2013) at 5-6.
81 Waitangi Tribunal (Wai 1489, #2.5.4, 28 August 2008); (Wai 1489, #2.5.10, 21 October 2009).
also made concurrent applications for binding orders and all iwi were heard together during the inquiry.\textsuperscript{82} The report released in February 2013 rejected Ngāti Kahu’s request for approximately $260 million worth of SoE assets, Crown Forest assets and financial compensation stating that if orders were made then settlements negotiations by other Te Hiku iwi would be upset and the size and scope of Ngāti Kahu’s settlement far exceeded precedents set throughout the country.\textsuperscript{83}

The Tribunal found that redress for the wrongful dispossession of 70 per cent of Ngāti Kahu lands by 1865 was long overdue. However, owing to the circumstances of wider Treaty settlement negotiations in the region, the Tribunal concluded that the use of its binding powers was not warranted. A central consideration in arriving at this conclusion was the relationship of the five main iwi of the Muriwhenua region: Ngāti Kahu, Te Rarawa, Te Aupōuri, Ngāi Takoto, and Ngāti Kuri. These iwi, though autonomous in their own right, have common ancestral origins and shared whakapapa, which had been reflected in their approach to the Muriwhenua land inquiry, when the five iwi brought their claims to the Tribunal jointly and prosecuted their claims collectively. The iwi subsequently pursued separate settlements of their claims with the Crown. However, the iwi returned to a more collective approach from 2008 to resolve issues of intertwined and competing claims to Crown-owned land and assets which had prevented any settlement from being reached. Ultimately dissatisfied with what they could achieve through settlement negotiations with the Crown, Ngāti Kahu withdrew from those negotiations and applied to the Tribunal for remedies. In doing so, they risked the settlements that Te Aupōuri, Te Rarawa, and Ngāi Takoto had agreed with the Crown as Ngāti Kahu sought the return of land earmarked for return to these iwi. Presiding officer Judge Clark said in his accompanying letter to the Minister of Māori Affairs: “A well-established Treaty principle has it that the Crown should not, in remedying the grievance of one group, create a fresh grievance for another group.”\textsuperscript{84}

The Tribunal, instead, made a series of non-binding recommendations to the Crown. It found that if agreed to by the parties, these recommendations would provide for the restoration of the economic and cultural well-being of Ngāti Kahu. These included the return of a number of sites of ancestral importance, including wāhi tapu, and a series of governance arrangements to allow Ngāti Kahu to have a significant say in the administration of other sites, as well as establishing relationships with local bodies and other institutions. Further recommendations included cash payments designed to revitalise the iwi, both culturally and socially, and an opportunity to assume ownership of a range of commercial properties, to assist in re-establishing the commercial base of the iwi.\textsuperscript{85}

In contrast to Clifford J in the 2015 Mangatu case from the High Court, Dobson J found that the relativities and the wider process and system already established by OTS did have an influence on the Tribunal’s findings. The main issue Dobson J found with the Tribunal was that it did not consider binding recommendations for areas of land less than Ngāti Kahu had requested, and that

\textsuperscript{82} Waitangi Tribunal Ngāti Kahu Remedies Report (Wai 45, 2013) at 8.
\textsuperscript{83} Waitangi Tribunal Ngāti Kahu Remedies Report (Wai 45, 2013) at 96-103.
\textsuperscript{84} Waitangi Tribunal Ngāti Kahu Remedies Report (Wai 45, 2013) at 96-103.
\textsuperscript{85} Waitangi Tribunal Ngāti Kahu Remedies Report (Wai 45, 2013) at 109-120.
it characterised the binding recommendations as an issue of last resort. Rather than quash the report, Dobson J directed Ngāti Kahu and the Crown to resume negotiations and report back to him because the errors in law were not substantial enough to overturn the report’s decision.86

8. Haronga and Flavell in the Court of Appeal

After Ngāti Kahu chose not to resume negotiations the orders of Dobson and Clifford JJ remained in place, and the Crown filed appeals to both High Court decisions. The appeals were heard together by Ellen France P, Harrison and Cooper JJ in July 2016. The decision was written by Harrison J and delivered in December 2016.87 With regards to Mangatu, the Crown’s appeals were dismissed in the Court of Appeal and the original decision of Clifford J was upheld. The Crown’s first ground of appeal was that Clifford J was wrong to conclude that the Tribunal found all the statutory prerequisites for resumption had been met. The Crown’s second and third grounds for appeal were interrelated and essentially held that Clifford J had failed to consider the number of different options available outside of a statutory framework. Much like Clifford J, Harrison J chose to ignore the wider political context and historical development of the modern Treaty settlement process even if he recognised that it could influence his decision.88 Harrison J looked at the matter strictly through the statutory requirements necessary for a binding recommendation: that the claim had been “well-founded”, related to Crown forest land, that the Tribunal had found that the remedy ought to include return of land to Māori ownership, and some or all of the identified groups were appropriate for receiving the land and compensation.

Describing the 1989 Forest Lands Agreement which led to the CFAA without any political context, Harrison J held that the binding powers provisions in the legislation performed “an adjudicatory function” in which “the Tribunal would act as a clearing house for claims meeting the statutory prerequisites.” This characterisation of the Waitangi Tribunal as the foremost expert on settlements matters influenced Harrison J’s decision making. While Clifford J in the High Court made no mention of the dozens of agreements reached since the 1989 agreement, Harrison J in the Court of Appeal at least recognised their existence noting that the “Crown and claimants have reached comprehensive settlements of claims throughout the country”.89 Harrison J even noted the irony of the Tribunal’s binding orders causing a fresh set of grievances and prejudicially affecting other claimants or interested parties.90 But none of those facts was enough to sway Harrison J’s decision.

Dealing with the Ngāti Kahu claims in much less detail, Harrison J dismissed the Crown’s appeal on Dobson J’s decision partially in favour of the claimants. Harrison J went further than Dobson J and found that the Tribunal was bound to choose either to making a recommendation to return the land or that it was not required and memorials could be removed. Harrison J also found that the unusual and complex set of relationships and overlapping interests in the lands sought by

86 Flavell v Waitangi Tribunal [2015] NZHC 1907 at [88], [93] and [108].
88 Attorney-General v Haronga [2016] NZCA 626, [2017] 2 NZLR 394 at [70 - 75].
89 Attorney-General v Haronga [2016] NZCA 626, [2017] 2 NZLR 394 at [70].
90 Attorney-General v Haronga [2016] NZCA 626, [2017] 2 NZLR 394 at [73].
Ngāti Kahu was not enough reason to decline binding recommendations. With both appeals dismissed, the Crown has taken the unusual step of not appealing the decision to the Supreme Court. Both Mangatu and Ngāti Kahu remedies will be heard again, with Mangatu up first sometime in late 2017 or early 2018. The Waitangi Tribunal now has some serious decision to make.

9. Conclusion

It is unclear exactly what the repercussions of these two decisions will be for the Treaty settlement process. Certainly unsettled negotiating groups have not been flooded to the Tribunal to apply for binding orders in anticipation of a more lenient Tribunal ... yet. Deeds of Settlement have been signed and legislation enacted around the country, including the other four iwi of Te Hiku. Today Ngāti Kahu allege that their interests in Takahue Forest were given to another iwi in Te Hiku and their rights to Kaitaia airport have been undermined as was apparent in their occupation in September 2015. The Mangatu Incorporation is due assets and financial compensation worth approximately $135 million if the s 8HB is followed and binding orders have to be made for their section of the Mangatu Crown Forest.

The Tribunal rejected Ngāi Tahu’s request initially on the basis of resourcing. Mangatu was first rejected on these grounds, amongst others. But the decision not to order binding recommendations, once having held a hearing, is a different matter from the question of granting a hearing, which the Supreme Court addressed in Haronga. It seems the courts are shunting the Tribunal towards a particular outcome, and Ngāi Tahu might wonder about what effect that might have to relativities, or what they might have achieved had a hearing been granted. But a Ngāi Tahu remedies hearing, featuring a single group, would have posed quite different circumstances from Ngāti Kahu (multiple claimant groups, multiple sites of interest) and Mangatu (multiple claimant groups, one site of interest).

So what has caused the judiciary to take this type of turn to the s 8 power of the Treaty of Waitangi Act and the CFAA? Is it Elias CJ who was the lead counsel for the NZMC in the seminal 1987 case that created the memorial and binding powers? Has part of the judiciary given up on separating the legal side of things from the politics of Treaty settlements? Already the settlements reached during the Labour Government era of 1999–2008 are largely out of proportion from the current round of settlements, and this is a pressing issue now. What will happen if the Mangatu Incorporation are provided with full compensation? How will Ngāi Tahu and the number of other Māori groups who made applications for binding orders react? Counsel for claimants, like Karen Feint, have a rather narrow view of the wider issue. As lawyers they see that a legal alternative is available, so it should be used. The wider context is recognised by those such as Baden Vertongen, also a lawyer, who thinks that alternative remedies such as binding powers and the settlement process by OTS can exist together.

91 Attorney-General v Haronga [2016] NZCA 626, [2017] 2 NZLR 394 at [92-95].
still unsure. Only time will tell, but it is clear we are in the middle of a very significant moment in the history of the modern Treaty settlement process.