IN THE COURT OF APPEAL OF NEW ZEALAND

CA353/2015
[2016] NZCA 626

BETWEEN	THE ATTORNEY-GENERAL Appellant
AND	ALAN PAREKURA TOROHINA HARONGA First Respondent
AND	TE AITANGA A MĀHAKI TRUST Second Respondent
AND	WAITANGI TRIBUNAL Third Respondent
AND	DAVID DONALD HARRY BROWN Fourth Respondent

CA545/2015

BETWEEN	VENERABLE TIMOTI FLAVELL Appellant
AND	WAITANGI TRIBUNAL First Respondent
AND	THE ATTORNEY-GENERAL Second Respondent

Hearing:	20 July 2016
Court:	Ellen France P, Harrison and Cooper JJ
Counsel:	CRW Linkhorn, C D Tyson and A J Allan for Appellant (CA353/2015) and Second Respondent (CA545/2015) P J Radich QC, K S Feint and M S Smith for First and Second Respondents (CA353/2015) R N Zwaan and B R Lyall for Third Respondent (CA353/2015) and First Respondent (CA545/2015) RDC Hindle, TKTAR Williams and IFF Peters for Appellant (CA545/2015)

Judgment: 19 December 2016 at 3 pm

JUDGMENT OF THE COURT

A **The appeal in CA353/2015 is dismissed. The orders made in the High Court remain.**

B **The appellant in CA353/2015 must pay costs to the first and second respondents for a standard appeal on a band A basis with usual disbursements — we certify for second counsel; and 30 per cent of the fourth respondent's costs for preparation of a standard appeal on a band A basis together with usual disbursements. There is no order for costs in favour of the third respondent.**

C **The appeal and cross-appeal in CA545/2015 are dismissed. The orders made in the High Court remain.**

D **There is no order for costs in CA545/2015.**

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] These two appeals raise a common issue about the powers of the Waitangi Tribunal under the Treaty of Waitangi Act 1975 (the Act). It follows from the Tribunal's findings in two separate remedies reports that, first, certain claims to Māori ownership of Crown land were well founded and, second, the action to be taken to compensate or remove the prejudice caused by the Crown's acts leading to loss of the land should include its return. The question arising is whether the Tribunal is then bound to recommend to the Crown that the land or part of it be returned to Māori ownership.[1] In the event of the Crown's subsequent failure to settle the claim within 90 days, a binding order would be made for its resumption to facilitate transfer to the claimants.[2]

[2] In this judgment, we refer to the Tribunal's power to recommend that land be returned to Māori ownership as an "interim recommendation", which becomes a "binding order" on the passage of 90 days — together, this process is referred to as the Tribunal's statutory power to make "binding recommendations" for the return of land to Māori ownership.

[3] In the primary case (CA353/2015), the Tribunal found that claims by Alan Haronga on behalf of four Māori entities to 8,626 acres of Crown land within

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1 Treaty of Waitangi Act 1975, ss 8A (for land held in the name of a state-owned enterprise) and 8HB (for licensed Crown forest land).

2 Sections 8B and 8HC.

the Mangatū State Forest north of Gisborne were well founded: the land was removed from Māori ownership by an act which was inconsistent with the Treaty of Waitangi, and at least part of the land should be returned to Māori to remove the prejudice caused.[3] The Tribunal nevertheless decided on a number of grounds to dismiss three of the applications for binding recommendations and adjourned a fourth, while issuing non-binding recommendations that the Crown and the claimants should seek a negotiated settlement including the return of part or all of the land to the claimants.

[4] On Mr Haronga's application to the High Court for judicial review, Clifford J held that the Tribunal had erred in law and misconstrued the statutory scheme of the binding recommendation regime.[4] He quashed the Tribunal's report and directed it to reconsider the applications. The Attorney-General appeals.

[5] In the second case (CA545/2015), the Tribunal found that claims by the Venerable Timoti Flavell on behalf of Ngāti Kahu to land east of Kaitaia were well founded and the land was removed by an act which was inconsistent with the Treaty but declined to make binding recommendations.[5] Instead, as was the case for Mr Haronga's claim, the Tribunal issued a series of non-binding recommendations for settlement.

[6] On Mr Flavell's application for judicial review, Dobson J found that the Tribunal erred, first in treating its power to make binding recommendations as a remedy of last resort as distinct from another available remedy;[6] and, second in failing to consider whether binding recommendations were appropriate for parts only of the land for which a remedy was sought. He set aside parts of the Tribunal's report and ordered it to reconsider. Despite his success before Dobson J, Mr Flavell appeals. The Crown cross-appeals.

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3 Waitangi Tribunal *The Mangatū Remedies Report* (Wai 814, 2014) [*Mangatū Report*].
4 *Haronga v Waitangi Tribunal* [2015] NZHC 1115 [*Haronga* HC].
5 Waitangi Tribunal *The Ngāti Kahu Remedies Report* (Wai 45, 2013) [*Ngāti Kahu Report*].
6 *Flavell v Waitangi Tribunal* [2015] NZHC 1907.

Statutory framework

[7] Both appeals will be determined by our interpretation of the Tribunal's powers under the Act and its amendments and the Crown Forest Assets Act 1989 (the CFAA). In this respect we note that in *Haronga v Attorney-General* (*Haronga* SC) the Supreme Court recently reviewed the statutory framework when allowing Mr Haronga's appeal against the Tribunal's dismissal of his earlier request for an urgent hearing of the claim.[7] The Supreme Court's analysis, to which we shall return, will bear significantly upon our approach.

[8] All parties proceeded on the basis that our analysis of binding recommendations relating to Crown forests must also apply to the largely identical provisions for land held in the name of a state-owned enterprise, introduced by the State-Owned Enterprises Act 1986 and of relevance to the Ngāti Kahu claims. For simplicity, our assessment will focus on the primary case dealing with Crown forest land.

Key provisions

[9] The Tribunal's functions are relevantly described in s 5 of the Act as follows:

> **5 Functions of Tribunal**
>
> (1) The functions of the Tribunal shall be—
>
> (a) to inquire into and make recommendations upon, in accordance with this Act, any claim submitted to the Tribunal under section 6:
>
> …
>
> (ab) to make any recommendation or determination that the Tribunal is required or empowered to make under Schedule 1 of the Crown Forest Assets Act 1989:
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> …

[10] Any Māori individual or group which is prejudicially affected by a past, present or proposed state action that is inconsistent with Treaty principles may

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[7] *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 [*Haronga* SC].

submit a claim to the Tribunal.[8] The Tribunal then has a broad jurisdiction to consider claims and make findings and recommendations in this way:

> **6 Jurisdiction of Tribunal to consider claims**
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> …
>
> (3) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.
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> (4) A recommendation under subsection (3) may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.
>
> …

[11] Section 7(1A) materially provides:

> **7 Tribunal may refuse to inquire into claim**
>
> …
>
> (1A) The Tribunal may, from time to time, for sufficient reason, defer, for such period or periods as it thinks fit, its inquiry into any claim made under section 6.

[12] Section 8HB(1), which was introduced into the main Act by the CFAA, is of central importance:[9]

> **8HB Recommendations of Tribunal in respect of Crown forest land**
>
> (1) Subject to section 8HC, where a claim submitted to the Tribunal under section 6 relates to licensed land the Tribunal may,—
>
> (a) if it finds—
>
> (i) that the claim is well-founded; and
>
> (ii) that the action to be taken under section 6(3) to compensate for or remove the prejudice caused by the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission that was inconsistent with the principles of the Treaty of

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8 Treaty of Waitangi Act, s 6(1).

9 Section 8A(2) is the equivalent provision in respect of land transferred to or vested in a state-owned enterprise.

Waitangi, should include the return to Māori ownership of the whole or part of that land,—

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

(b) if it finds—

(i) that the claim is well-founded; but

(ii) that a recommendation for return to Māori ownership is not required, in respect of that land or any part of that land by paragraph (a)(ii),—

recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land not be liable to return to Māori ownership; or

(c) if it finds that the claim is not well-founded, recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land not be liable to return to Māori ownership.

(2) In deciding whether to recommend the return to Māori ownership of any licensed land, the Tribunal shall not have regard to any changes that have taken place in—

(a) the condition of the land and any improvements to it; or

(b) its ownership or possession or any other interests in it—

that have occurred after or by virtue of the granting of any Crown forestry licence in respect of that land.

(3) Nothing in subsection (1) prevents the Tribunal making in respect of any claim that relates in whole or in part to licensed land any other recommendation under subsection (3) or subsection (4) of section 6; except that in making any other recommendation the Tribunal may take into account payments made, or to be made, by the Crown by way of compensation in relation to the land pursuant to section 36 and Schedule 1 of the Crown Forest Assets Act 1989.

…

[13] Under s 8HC a recommendation by the Tribunal under s 8HB(1)(a) is in the first instance of an interim nature. The Crown and the claimant have 90 days within which to settle according to its terms. Failing that event, the recommendation becomes final. In the relevant statutory provisions, this process is referred to as

resumption, when the land must first be clawed back from state-owned enterprises, or Crown forest land is simply returned to Māori ownership.[10]

[14] Section 36 of the CFAA provides:

> **36 Return of Crown forest land to Māori ownership and payment of compensation**
>
> (1) Where any interim recommendation of the Waitangi Tribunal under the Treaty of Waitangi Act 1975 becomes a final recommendation under that Act and is a recommendation for the return to Māori ownership of any licensed land, the Crown shall—
>
> (a) return the land to Māori ownership in accordance with the recommendation subject to the relevant Crown forestry licence; and
>
> (b) pay compensation in accordance with Schedule 1.

Legislative history

[15] The CFAA's enactment followed the New Zealand Māori Council's application for judicial review of the Crown's proposal to transfer land to state-owned enterprises, thus facilitating the Government's policy of corporatising its commercial activities.[11] The Council advanced the protests of several pending Tribunal claimants that the transfer would put the return of land to Māori ownership beyond the Crown's reach. After this Court's judgment in the *Lands* case,[12] the Crown and the Māori Council reached an agreement that the Crown would be entitled to transfer land to state-owned enterprises subject to return to Māori ownership, which would be mandatory if the Tribunal so recommended. Accordingly, a legislative change to the Tribunal's powers was effected by the Treaty of Waitangi (State Enterprises) Act 1988. The existence of this agreement was recorded in a minute of this Court issued on 9 December 1987, including a precautionary reservation of leave for the parties to apply in an unforeseen event.[13]

[16] Indeed, an announcement by the Minister of Finance on 28 July 1988 of the Crown's intention to sell imminently commercial forests led to the Māori Council's

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10 State-Owned Enterprises Act 1986, s 27B and s 27C; Crown Forest Assets Act 1989, s 36.
11 See generally *Haronga* SC, above n 7, at [56]–[77].
12 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [the *Lands* case].
13 At 719.

further application to this Court. A preliminary question arose of whether the application fell within its reservation of leave to apply. This Court held that "whether assets including forest lands could be disposed of through the new State enterprises to interests outside the State enterprises without breach of the principles of the Treaty of Waitangi" went to "the very heart of the issue" raised in its earlier decision.[14] In *Haronga* SC, the Supreme Court summarised the effect of this Court's decision about Crown forests:

> [70] Further negotiations were undertaken by the Crown and the Māori Council and the Federation of Māori Authorities Incorporated. These resulted in [the Forest Lands Agreement] being entered into on 20 July 1989. This agreement provided for the Crown to be able to sell existing forest crop and other forest assets, providing purchasers with a licence to use the forest land for forestry purposes over the terms of the licence. The purchaser was to pay an initial capital sum and a market-based rental for use of the land.
>
> [71] The agreement also provided for a trust to be created, the Crown Forestry Rental Trust, which would administer a fund into which the annual rental receipts would be paid.

[17] The Forest Lands Agreement materially provided that:

> 6. The Crown and Māori agree that they will jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations within the shortest reasonable period.
>
> ...
>
> 8. If the Waitangi Tribunal recommends the return of land to Māori ownership the Crown will transfer the land to the successful claimant together with the Crown's rights and obligations in respect of the land and in addition:
>
> a) compensate the successful claimant for the fact that the land being returned is subject to encumbrances, by payment of 5% of the sum calculated by one of the methods (at the option of the successful claimant) referred to in paragraph 9 and,
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> b) further compensate the successful claimant by paying the balance of the total sum calculated in paragraph 8(a) above or such lesser proportion as the Tribunal may recommend.
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> …

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[14] *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA) [the *Forests* case] at 152.

> All payments made pursuant to paragraph 8 may be taken into account by the Waitangi Tribunal in making any recommendation under sections 6(3) and 6(4) of the Treaty of Waitangi Act 1975.
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> ...
>
> 15. The attached annex lists the main principles of the two parties within under which this Agreement has been negotiated.
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> 16. The provisions of this agreement are to be reflected and embodied where appropriate in draft legislation and in any event in a trust deed and consent order, the terms of each of which are to be agreed by the parties, in accordance with this agreement.

[18] The main underlying principles recited in the annex were for Māori to minimise "the alienation of property which rightly belongs to Māori" and for the Crown to honour the Treaty principles "by adequately securing the position of claimants relying on the Treaty".[15]

[19] In giving effect to the Forest Lands Agreement, the long title to the CFAA stated that it was:

> An Act to provide for—
>
> (a) the management of the Crown's forest assets:
>
> (b) the transfer of those assets while at the same time protecting the claims of Māori under the Treaty of Waitangi Act 1975:
>
> (c) in the case of successful claims by Māori under that Act, the transfer of Crown forest land to Māori ownership and for payment by the Crown to Māori of compensation:
>
> (d) other incidental matters.

[20] In explaining the statutory history and purpose of both the Act and the CFAA and their interrelationship, the Supreme Court in *Haronga* SC summarised the statutory regime in these terms:

> [76] The statutory history clarifies Parliament's purpose in enacting the 1988 and 1989 legislation. That purpose was to make changes to the process under the 1975 Act for addressing claims of breach of Treaty principles. The changes, which applied to claims in respect of licensed Crown forest land, gave greater protection to those who established their claims were well-founded. Rather than being dependent on a favourable response from the government to a recommendation of the Tribunal, claimants could seek

[15] *Haronga* SC, above n 7, at [73].

> recommendations from the Tribunal for a remedy which would become binding on the Crown if no other resolution of the claim was agreed. *The purpose accordingly was to protect claimants by supplementing their right to have the Tribunal inquire into their claim*[16] *with the opportunity to seek from the Tribunal remedial relief which would be binding on the Crown.* If the Tribunal so decided, that relief could extend to returning Crown forest land to identified Māori claimants. This was in return for permitting the Crown to transfer government-owned assets, including forest crop and other forest assets, to private interests. The government was thereby able to fully implement its corporatisation policy.
>
> (Our emphasis.)

Scope of the Tribunal's discretion

[21] Our particular focus is on the Tribunal's powers under s 8HB(1) of the Act; the interrelationship of that provision with s 6(3); and the scope of the discretion granted by the use of the word "may" where it precedes s 8HB(1) (a), (b) and (c). In *Haronga* SC, the Supreme Court set its context as follows:

> [88] The obligation to consider any recommendations it thought fit to make after a finding of prejudice resulting from Treaty breach here fell to be fulfilled by the Tribunal in the context of Crown forest assets and the special provisions under the heading "Recommendations in relation to Crown forest land". Under them, the Tribunal has the effective responsibility of ordering resumption, where it considers that course appropriate, because the Crown must comply with its recommendations in relation to such land, after a 90 day pause to enable other resolution by agreement. As Baragwanath J remarked in *Attorney-General v Mair*, the result of the 1989 amendments in relation to Crown forest land was to confer upon a claimant with a sound case for the exercise of the judgment of the Tribunal an outcome which, "while expressed as recommendatory, [is] ultimately adjudicatory".[17] That view is consistent with the legislative history, referred to above. *As the long title to the Crown Forest Assets Act makes clear, the legislative package enacted in 1989 envisaged that "successful claims" under the Treaty of Waitangi Act would result in "the transfer of Crown forest land to Māori ownership and for payment by the Crown to Māori of compensation."* The agreement of 20 July 1989 … identified a principle of significance to Māori as being to "minimise the alienation of property which rightly belongs to Māori". *The jurisdiction to order resumption in respect of licensed Crown forest land, conferred on the Tribunal by the 1989 Act, was part of the negotiated solution reached between the Crown and Māori in their agreement, under which both parties gained something of value. It must be understood in that context.*
>
> (Our emphasis.)

[22] The Court then went on to say, by reference to the statutory discretion:

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16 Treaty of Waitangi Act, s 6(2).

17 *Attorney-General v Mair* [2009] NZCA 625 at [102].

> [91] The Tribunal is not obliged to recommend resumption. That is clear both from the wording of s 6(3) and s 8HB. Section 8HB applies to all claims relating to licensed land, as the 1961 lands are. The Tribunal has three options only in relation to claims for licensed Crown forest land. It may recommend that the land be not liable to return to Māori ownership if it finds the claim not to be well-founded.[18] If it finds the claim to be well-founded, it must consider whether remedial action "to compensate for or remove the prejudice" it has found "should include the return to Māori ownership of the whole or part of the land".[19] If so, it may include such a recommendation in its recommendation under s 6(3) (so that the resumption takes effect after the 90 day pause if not overtaken). If a recommendation for return is "not required ... by paragraph (a)(ii) of this subsection", it may recommend that the land "not be liable to return to Māori ownership".[20] (This discretion is necessary because the land may be subject to other claims which makes its clearance from liability premature).
>
> [92] The scheme therefore is that, following a finding that a claim is well-founded, s 8HB(1)(a) is the controlling provision. The Tribunal must consider whether its return "should" be recommended as part of a recommendation under s 6(3) "to compensate for or remove the prejudice caused [by the act found to be in Treaty breach]".

[23] Mr Radich QC for Mr Haronga draws from these and other statements in *Haronga* SC the following principles applying to a well-founded claim with which, allowing some modification, we agree:

(a) The Tribunal's power to make binding recommendations under s 8HB(1) of the Act where a claim relates to licensed Crown land is additional to the powers available under s 6(3). Its jurisdiction in this important respect is distinct from its general recommendatory jurisdiction, importing an obligation to exercise powers of an ultimately adjudicatory nature.[21]

(b) The Tribunal cannot rely on the existence of competing claims as a reason not to determine an application — "it is the obligation of the Tribunal to decide between competing claims".[22] The Tribunal's discretionary power under s 7 of the Act to not inquire into a claim or defer its inquiry for a finite period is limited within the context of its

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18 Treaty of Waitangi Act, s 8HB(1)(c).
19 Section 8HB(1)(a)(ii).
20 Section 8HB(1)(b).
21 *Attorney-General v Mair*, above n 17, approved in *Haronga* SC, above n 7, at [88].
22 *Haronga* SC, above n 7, at [106].

Crown forest land jurisdiction.[23] "Given the very considerable protection accorded to claims in respect of Crown forest land, there can be no alternative remedy that is adequate."[24]

(c) The Tribunal has a statutory duty which it alone must discharge. It is bound to make a decision on whether to grant a remedy where the statutory prerequisites are met.[25] Parliament envisaged that in discharging its duty the Tribunal would use those of its powers best suited to provide a just result between the claimants — one that it "thinks right"[26] — if it is of the view that land should be returned.

[24] We shall now address each appeal separately against the common legislative framework and relevant principles, starting with the Mangatū claims.

The Mangatū claims (CA353/2015)

Background

[25] The background facts to the Crown's appeal are narrated comprehensively in *Haronga* SC and by Clifford J in *Haronga v Waitangi Tribunal* (*Haronga* HC).[27] With the benefit of those judgments, we are able to distil the facts relevant to this appeal into a more summary form.

[26] This litigation has a long history. Mr Haronga, on behalf of the Mangatū Incorporation (Mangatū), has for some time pursued a claim for the return of land. In substance, the claim was originally filed in the Tribunal as Wai 274 by Eric Ruru in 1992; it remains unresolved a quarter of a century later. Three other parties are affected — Te Aitanga a Māhaki Trust (Māhaki), Ngā Ariki Kaipūtahi and Te Whānau a Kai.

[27] *Haronga* SC sets out the genesis of Mangatū's claim:

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23 At [80]–[84].
24 *Haronga* SC, above n 7, at [81].
25 At [78].
26 At [107].
27 At [7]–[23]; *Haronga* HC, above n 4, at [2]–[21].

> [7] In 1881 the Native Land Court first granted the Mangatū No 1 block of 100,000 acres to twelve individuals who were to hold the land on trust. In 1893 Mangatū Incorporation was established to represent those beneficially entitled to the block.[28] The purpose of setting up the Incorporation to hold the land was to protect it from pressures to sell. Mangatū Incorporation was one of the first protective incorporations set up by Māori. It is of considerable importance to the Incorporation that it has succeeded in retaining most of the block in the years since 1893. Today the Incorporation has 5,000 owners.
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> [8] In 1961 the Crown purchased 8,626 acres of Mangatū No 1 block for erosion control purposes. The Incorporation was reluctant to sell but did so because it was prevailed upon to believe there was no option other than Crown ownership. The land acquired by the Crown in 1961 is the subject of the present appeal. Today it forms a quarter of the Mangatū State Forest.

[28] Mangatū argued that the Crown purchased the land in breach of the principles of the Treaty. It sought the land's return in restoration, noting that all the land forming the Mangatū State Forest is otherwise Crown land available for reparation and settlement of historic grievances. The Tribunal heard the claims within a district-wide inquiry into all Tūranganui-a-Kiwa claims; that is, the region otherwise known as Poverty Bay in Te Reo Pākehā.

[29] The Tribunal's 2004 report found that all four claims were well founded.[29] The Crown had acquired the land in breach of a wide range of Treaty principles over many years. However, the Tribunal declined to make specific recommendations for a remedy. Instead, the Crown and other claimants were left responsible for negotiating a single district-wide settlement of the cluster of all claims. Leave was reserved to apply further if necessary.

[30] What followed was summarised in *Haronga* SC in this way:

> [2] In the negotiations, conducted under the umbrella of Turanga Manu Whiriwhiri for all claimants of the district, the interests of Mangatū Incorporation and Te Aitanga a Māhaki, the hapu to which the owners principally belong, were represented by Te Whakarau (formerly known as Te Pou a Haokai), the third respondent. A draft Agreement in Principle for settlement emerged in July 2008. It became clear then that what is proposed will not include return of the land to Mangatū Incorporation. Instead, Te Whakarau will have an option to purchase the whole or part of the Mangatū forest, including the 1961 lands. The owners of

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28 Pursuant to the Mangatū No 1 Empowering Act 1893.

29 Waitangi Tribunal *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004).

> Mangatū Incorporation will share in the overall settlement by reason of their membership of Te Aitanga a Māhaki but will not receive the specific redress they have sought for the Treaty breach in relation to the 1961 lands. It is the intention of the government that the final settlement will be given effect in legislation which will remove the jurisdiction of the Tribunal in respect of the claim on behalf of Mangatū Incorporation seeking a binding recommendation for return of the 1961 land to the proprietors of the Incorporation.

[31] Mr Haronga was dissatisfied with the draft agreement. In July 2008 he filed a further claim with the Tribunal. He sought a binding recommendation for the land's return to Mangatū. As a result of *Haronga* SC, the Tribunal gave urgency to hearing Mr Haronga's claim.

The Mangatū Remedies Report

[32] The Tribunal issued the Mangatū Remedies Report in December 2013. It was satisfied that the claims by Mangatū, Māhaki and Ngā Ariki Kaipūtahi were well founded and related to Crown forest licensed land.[30] All the applicants had accordingly satisfied the basic statutory prerequisites for eligibility for a binding recommendation. However, the Tribunal concluded that a binding recommendation was not an appropriate remedy for any of the parties.[31]

(a) Mangatū

[33] The Tribunal declined to make a binding recommendation to return the whole of the land to Mangatū for these reasons:[32]

> (a) Return of all the land, together with payments of the accumulated rentals and sch 1 compensation, was more than was necessary to compensate for or remove the prejudice suffered by the shareholders. Mangatū does not require economic or financial restoration; and the statutory scheme does not allow the Tribunal to adjust monetary compensation.

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30 *Mangatū Report*, above n 3, at 104-131.
31 At 104–131.
32 At 104–116.

(b) The whole package of land and monetary compensation, which the incorporation would receive on a binding recommendation, would be disproportionate compared to the total settlement package offered by the Crown to the Māhaki cluster to remedy serious Treaty breaches — redress unduly favouring one claimant is likely to create fresh grievances, which will interfere with restoration of the various relationships.

(c) A binding recommendation for return of the whole of the land provides acre-for-acre redress and if the same criterion was applied to other applicants within the cluster then the increase in the settlement package would be unsustainably large.

(d) It would not be possible to divide the land fairly.

[34] As a result, the Tribunal found that the difficulties associated with returning even part of the land to Mangatū "strongly suggest that these matters require constructive discussion, compromise, negotiation and reasonable agreement amongst all the parties".[33] Also, the Tribunal had incomplete information on which to base a decision about that part of the land which should be returned to Mangatū. The claimants themselves should decide among themselves what is fair and equitable.

(b) Ngā Ariki Kaipūtahi

[35] The Tribunal was satisfied that Ngā Ariki Kaipūtahi's claim should be settled promptly. It is a small group with a distinct and significant well-founded claim for part of the land. Its rights and interests are currently limited to a shareholding in Mangatū as part of the wider community of owners. Its use of resources on the land is limited by Mangatū's operations.

[36] However, Ngā Ariki Kaipūtahi's application for a binding recommendation was dismissed for these reasons:[34]

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[33] At 115.
[34] At 116–121.

(a) The land that was lost cannot now be reasonably identified or quantified.

(b) Calculation of the economic loss flowing from the loss of the land is subject to considerable uncertainty.

(c) Even if the loss could be accurately identified and quantified, it would be difficult to make a reliable assessment of the land lost on which to base a fair and equitable pro rata division of the land between Ngā Ariki Kaipūtahi and other applicants.

(d) There were uncertainties over exactly who represents Ngā Ariki Kaipūtahi.

[37] The preferable approach, the Tribunal found, was for Ngā Ariki Kaipūtahi to overcome the legacy of its internal divisions which had impeded resolution of their mandate issues. Once this occurred it could engage with other cluster claimants.

(c) Te Whānau a Kai

[38] The Tribunal was satisfied that the claims by Te Whānau a Kai, while it was a small group, include some of the most serious Treaty breaches to have occurred in this country. Te Whānau a Kai was nevertheless an unwilling participant in the remedies process. Its preference was to spend its time negotiating a settlement with the Crown. Its application for a binding recommendation was declined for similar reasons relating that of the first two claimants.[35]

(d) Māhaki

[39] Māhaki's application was based on its representation of all other cluster claimants who had not applied for binding recommendations. The Tribunal adjourned its application pending either a return to settlement negotiations with the Crown or, if that failed, a full remedies hearing.[36] In particular, the Tribunal

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35 At 121–125.
36 At 125–130.

identified these factors as relevant: the Crown's settlement offer had included redress in the form of an option to purchase all of the Mangatū State Forest; the comprehensive redress sought could only be achieved through settlement negotiations with the Crown; the Tribunal would need further evidence to conduct a comprehensive remedies process; and Māhaki's mandate to represent claimant groups would require reconfirmation. Adjournment would provide the parties and the Tribunal with an opportunity to consider constructive suggestions for progress in negotiations with the Crown.

(e) Conclusion

[40] The Tribunal concluded with non-binding recommendations about the appropriate pathway to settlement. In general, given the prejudice suffered by Mangatū, the most appropriate form of redress for its shareholders would be return of at least some of the land. Mangatū's discrete claim should be considered and settled within the wider settlement context rather than individually. The other claimants had "lost most of their land and resources and struggled to maintain distinctive hapū identities with minimal financial support".[37] They deserved immediate relief.

[41] By contrast, the Tribunal said, granting resumption would require adherence to "a strict statutory formula" from which the Tribunal could not depart, even if the parties themselves want changes in order to achieve a resolution.[38] The claimants would be better served by negotiating with the Crown for as large a settlement package as possible, including agreement about the division of proceeds. Settlement could provide a range of redress and allow the parties to regain a measure of autonomy, a much more preferable option to a Tribunal-imposed solution of binding recommendations.

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37 At 131.
38 At 131.

Decision

(a) Introduction

[42] Mangatū and the three other claimants sought judicial review of the Tribunal's decisions. Clifford J held that the Tribunal had erred in law in a number of respects.[39] We shall deal with his reasoning when addressing each of the grounds of appeal.

[43] Before addressing the Crown's particular grounds of appeal, we note Mr Linkhorn's general proposition that the High Court's construction of the Tribunal's discretionary power would lead to an absurdity. The Tribunal would be compelled to become the ultimate arbiter of mana whenua interests under urgency as between groups with overlapping interests and competing claims to settlement assets. He submits that Parliament cannot have intended such a result.

[44] In Mr Linkhorn's submission, the Tribunal's decision that a binding order was not the best option to remedy the well-founded claims for the Mangatū claimants was reasonable and logical on the facts and did not disclose an error of law. The Tribunal carefully balanced the merits of the competing claims and what would amount to a reasonable level of redress to meet them; its approach was restorative in assessing redress; and it had proper regard to earlier or contemporaneous redress arrangements negotiated with other groups. The Tribunal's approach did not defer unduly to the Crown's settlement policy.

[45] Mr Radich appeared for both Mangatū and Māhaki in this Court.[40] He recognised the overlapping and potentially conflicting nature of their claims. Māhaki has both a direct claim to the land and, as already noted, seeks the land's return within its wider claim. Mr Radich emphasised, however, that Mangatū and Māhaki have sought unity and respect for each other's interests by avoiding concurrent claims for recourse to the same property. Mangatū views a binding order as the principled method of return of the land. Māhaki does not oppose this result; it retains a contingent claim to the same land if Mangatū is unsuccessful.

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39 *Haronga* HC, above n 4.

40 Counsel for the fourth respondent, David Brown, filed written submissions supporting the first and second respondents in opposition to the Crown's appeal but did not appear at the hearing.

(b) First ground of appeal

[46] The Crown's first ground of appeal is that Clifford J was wrong to conclude that the Tribunal found all the statutory prerequisites for making an interim recommendation for resumption were met. The Judge rejected the Crown's argument, which he described as "somewhat hesitantly expressed",[41] that the Tribunal had not formally concluded in terms of s 8HB(1)(a)(ii) that the response to the well-founded claims it found to exist should include return of all or part of the land. In Mr Linkhorn's submission, the Tribunal's statements that remedies "should include" return of land were in the nature of observations which did not commit it to making a binding recommendation and that was not what it intended.

[47] In the course of its report the Tribunal said this:[42]

> It is clear that to remove the prejudice suffered by the shareholders of the incorporation the 1961 land, at least a part it, should be returned to them. The question is how this is best done.

[48] The Tribunal made similar observations about Māhaki's claim.[43] Not only had it suffered prejudice from economic deprivation and the loss of land but also grievous loss to mana, rangatiratanga and loss of political autonomy. Again, the Tribunal commented that redress should include return of land.

[49] We agree with Mr Linkhorn that these statements are more by way of commentary than expressing the Tribunal's commitment to making a binding recommendation. However, we are satisfied that the Tribunal found expressly the claimants had established the first two elements of the threshold requirement in s 8HB(1)(a). The statements on the Mangatū claim followed the Tribunal's reaffirmation of its findings that the Crown's actions in acquiring the land represented a breach of the Treaty principles; and that the Mangatū shareholders had suffered grave cultural and spiritual prejudice because of the loss of the land.

[50] The Tribunal had previously recited the four statutory prerequisites for resumption: that is, the claims were well founded; the claims relate to Crown forest

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41 *Haronga* HC, above n 4, at [72](a).
42 *Mangatū Report*, above n 3 at 105.
43 At 129.

land; the remedy ought to include return of the land to Māori ownership; and, with provisional qualifications relating to the Ngā Ariki Kaipūtahi and Māhaki claims, the groups to whom the land should be returned are clearly identified as appropriate for that purpose. The Tribunal then repeated its findings made in its 2004 report that all four applicants had well-founded claims which related to the Crown forestry land; and stated that all applicants "therefore have the basic statutory requisites needed to be considered eligible for a binding recommendation".[44]

[51] Moreover, we agree with Clifford J that the Tribunal would not have proceeded to consider whether to exercise its recommendatory powers if it had not already found that the third and fourth elements of the power to issue binding recommendations — that the remedy ought to include the return of land to Māori ownership and that the claimants were clearly identified as appropriate for that purpose — were established.[45] It follows that the Crown's first ground of appeal must fail.

(c) Second and third grounds of appeal

(i) Crown's argument

[52] We are satisfied that there is little real difference between the substance of the Crown's second and third grounds of appeal, which can be most appropriately addressed in a composite way.

[53] The Crown submits that the Tribunal retains its broad discretion to make any recommendations it considers required (or none) under s 6(3) where the claim is to Crown forest land. The applicability of s 6(3) means that the Tribunal must consider "all the circumstances of the case". Clifford J was accordingly wrong to treat s 8HB(1) as a code and to limit the Tribunal's discretion to four options. The Judge failed to apply "the correct lens" when analysing the Tribunal's approach.

[54] Mr Linkhorn accepts *Haronga* SC's direction that the Tribunal must consider whether or not to order a return to Māori ownership where the claims include Crown

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44 At 104.

45 *Haronga* HC, above n 4, at [74].

forest land.[46] However, he says the Tribunal is not obliged to make such an order: the decision whether to employ that remedy is of an essentially discretionary nature and may be declined on the facts,[47] as the Tribunal concluded in Mangatū's case. The Tribunal may also validly adjourn such a determination where a negotiated settlement is in prospect.[48] Mr Linkhorn says that is exactly what happened in the two reports at issue in both appeals under consideration: the Tribunal considered the options before deciding in its broad s 6(3) discretion — "having regard to all the circumstances of the case" — against making a binding recommendation.

[55] In particular, Mr Linkhorn submits, Clifford J erred in failing to recognise the Tribunal's obligation to have regard to relativities and equity between the claimants when declining to make binding recommendations; and in taking account of the potential impact of statutory compensation payments. The Tribunal properly paid close regard to inter- and intra-iwi decision-making, and in doing so did not abdicate its statutory function. Clifford J erred in underestimating the complexity of the cases before the Tribunal, which do not always lend themselves to the comparatively blunt application of what ultimately becomes a binding order.

[56] Mr Linkhorn also emphasised that:

(a) The Tribunal's primary obligation is to assist the Crown in meeting its Treaty obligations through a practical application of the Treaty, as is provided in the long title and preamble to the Act,[49] which can be implemented through a variety of recommendations available to the Tribunal as to how the Crown might meet its duties to provide redress for well-founded claims.

(b) It is not antithetical to the memorial regime for the Tribunal to have regard to the other ways — the range of redress — available to the Crown to meet its Treaty obligations. A transfer by way of binding order would be the least preferred option in the Treaty context,

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46 *Haronga* SC, above n 7, at [78] and [80].
47 At [91] and [110].
48 At [86]–[87].
49 At [79].

whereas negotiated resolution of claims would be the most compliant with the Treaty.

(c) The Tribunal made its own independent assessment of the level of the prejudice suffered by Mangatū and the other claimants and what it considered necessary for the Crown to address that prejudice. It left open the possibility of binding recommendations for Māhaki pending further negotiation, consistently with *Haronga* SC's observation that the Tribunal might lawfully adjourn its inquiry where a negotiated resolution remains possible.[50]

(d) In amplification of the Crown's absurdity proposition, Mangatū's interpretation would allow a single claimant to effectively draw all other interested parties into an adversarial process for final determination of rights and interests to Crown forest land liable to return to Māori ownership, regardless of whether those third parties wished to pursue a negotiated resolution of their claims or not.

(ii) Our assessment

[57] The Crown's argument turns on our construction of the nature and extent of the discretionary power vested in the Tribunal by s 8HB(1) and its interrelationship with the Tribunal's discretion under s 6(3). Our interpretation must necessarily be influenced by its context, particularly the Forest Lands Agreement.

[58] The Tribunal's originating function was to inquire into and make recommendations on any claim submitted to it.[51] By s 6(3) it was empowered to recommend to the Crown that action be taken to compensate or remove prejudice once it found a claim was well founded. However, as a result of the 1989 legislative changes following the Forest Lands Agreement, the recommendatory power assumed a more specific and prescriptive dimension for claims to Crown forest land.

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50 At [86].
51 Treaty of Waitangi Act, s 5(1)(a).

[59] The policy objective inherent in the 1989 changes is plain. Parliament's expectation was that the Tribunal would be empowered to act decisively by adopting the expanded range of remedies available to it. By performing an adjudicatory function, the Tribunal would act as a clearing house for claims meeting the statutory prerequisites. In the terms of the Forest Lands Agreement, it would be enabled to "identify and process all claims relating to forestry lands and … make recommendations within the shortest reasonable period" — by this means "[minimising] the alienation of property which rightly belongs to Māori".

[60] As noted, the Tribunal had found affirmatively that the claimants had satisfied all four statutory prerequisites: the claims were well founded; they related to Crown forest land; the remedy ought to include return of the land to Māori ownership; and some or all of the identified groups were appropriate for that purpose. The only issue remaining for the Tribunal was as to which recommendation it should make — either that the land should be returned or that it should be removed from liability to return. It was not able to avoid performance of its statutory obligation by adopting the middle ground of dismissing or adjourning the applications for the purpose of leaving the parties to negotiate settlement of their differences.

(iii) Mangatū

[61] We agree with Clifford J's identification of the two main but erroneous grounds upon which the Tribunal relied for dismissing Mangatū's claim: first, the impact of sch 1 compensation on what the Tribunal regarded as necessary and appropriate to compensate for or remove the prejudice suffered by the Crown's wrongful act assessed by comparison with the Crown's settlement policies; and, second, the difficulty in determining fairly and equitably the part of the land to be returned to Mangatū.[52] We shall address each ground accordingly.

[62] First, in our judgment, the Tribunal erred in taking into account the downstream consequences of an interim recommendation relative to the Crown's settlement policies. Once the Tribunal was satisfied that the statutory prerequisites

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[52] *Haronga* HC, above n 4, at [107].

were met, an interim recommendation would follow unless return of all or part of the land was more than was necessary to compensate for or remove the prejudice to Mangatū.[53] The consequences of the application of s 36 of the CFAA as against other claimants was not relevant.

[63] In any event, in *Haronga* SC the Supreme Court expressed the view that the Tribunal can make some adjustments to reflect the mandatory compensation:

> [107] … Although compensation under Sch 1 goes with the land, the Tribunal may recommend return with or without compensation and in any event may order terms or conditions. (It may be for example that some adjustment to any additional compensation or the imposition of terms or conditions is considered if the Tribunal finds that the price paid to Mangatu Incorporation in 1961 was fair.) The Tribunal has ample power to impose terms and conditions and to adjust interests if that seems necessary. …

We agree with Clifford J that the Tribunal is able to alter sch 1 to award as low as 5 per cent of the listed compensation figure, thereby providing the necessary degree of flexibility in order to do what is fair and just.[54] Also, the Tribunal could under s 6(3) make a non-binding recommendation of compensation subject to a condition subsequent that the binding recommendation and prescribed compensation come into effect after 90 days. The Forest Lands Agreement expressly contemplated such adjustments — "All payments made pursuant to [the return of land to Māori ownership] may be taken into account by the Waitangi Tribunal in making any recommendation under sections 6(3) and 6(4)" — which further highlights the independent nature of the binding powers beyond the threshold provision.

[64] Within this context, we are satisfied that where the claim is to Crown forest land the reference in s 6(3) to the Tribunal's power to recommend "if [the Tribunal] thinks fit having regard to all the circumstances of the case" applies only to the threshold inquiry contemplated by that provision into whether the Crown should act to compensate for or remove the prejudice. The phrase "all the circumstances of the case" does not extend the statutory discretion to the next stage of the inquiry into the appropriate remedy. Section 8HB(1) then becomes the controlling provision.

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53 See above at [33](a).

54 *Haronga* HC, above n 4, at [108].

[65] The s 8HB(1)(a) discretion is of limited scope; it was conferred with the intention of promoting the policy and objects of the Act and the CFAA and is to be exercised for that purpose.[55] It is not an unfettered discretion but rather imposes an obligation to act once the Tribunal finds the statutory prerequisites are satisfied.[56] In that event, its powers are limited to a selection between two alternatives, both requiring a recommendation — either that the land be returned or no longer be liable to the Tribunal's binding recommendations. The Supreme Court has recognised a residual discretion within the latter alternative, which is necessary because the land may be subject to other claims making its clearance from liability premature[57] – described by Clifford J as the Tribunal's fourth option.[58] But the Tribunal is bound throughout to consider whether to recommend return of the land as part of its formal recommendation under s 6(3) to compensate for or remove the prejudice caused by the Treaty breach.[59]

[66] Second, once the Tribunal was satisfied Mangatū's claim met the statutory prerequisites, the issue was whether that claim should be the subject of a recommendation for return of all or part of the land; if not, the land should be removed from liability for return or not be cleared from liability because that step would be premature. The Tribunal had to make that decision, difficult though it may have been, between competing or overlapping claims. It was not sufficient for the Tribunal to pass the dispute back to the claimants to decide among themselves what was fair and equitable or disclaim its function because it had incomplete information. It was empowered to require further evidence if necessary.[60]

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55 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1030 per Lord Reid.

56 Compare *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd* [2016] NZCA 276, [2016] 3 NZLR 303 at [80]–[81].

57 *Haronga* SC, above n 7, at [91].

58 *Haronga* HC, above at n 4, at [78]–[83].

59 At [92].

60 Clause 8(1) of sch 2 to the Treaty of Waitangi Act deems the Tribunal to be a Commission of Inquiry under the Commissions of Inquiry Act 1908. As a Commission of Inquiry, the Tribunal has generic powers of investigation and to summon witnesses: Commissions of Inquiry Act, ss 4C–4D.

(iv) Ngā Ariki Kaipūtahi and Te Whānau a Kai

[67] We agree with Clifford J that the Tribunal made similar errors when dismissing the claims by Ngā Ariki Kaipūtahi and Te Whānau a Kai.[61] The Tribunal was satisfied that Ngā Ariki Kaipūtahi's claim should be settled promptly because it was a small group with a distinct and significant well-founded claim for part of the land. However, its rights and interests were currently limited to its capacity as a shareholder in Mangatū. That factor, along with others, caused the Tribunal considerable difficulty in deciding whether its claim was sustainable. Nevertheless, if it was not so satisfied, the Tribunal should not have dismissed the application but made an alternative recommendation that the land be released from liability for Ngā Ariki Kaipūtahi's claim given that iwi or hapū would obtain redress through Mangatū. Te Whānau a Kai's claim was in the same category.

(v) Māhaki

[68] The Tribunal relied on two grounds for adjourning Māhaki's claim: first, Māhaki's ongoing negotiations with the Crown for comprehensive relief; and, second, the Tribunal would require further evidence in order to conduct a comprehensive remedies inquiry, which would include reconfirmation of Māhaki's mandate to represent the disparate groups making up this entity.

[69] We agree with Clifford J that the Tribunal was not entitled to defer to the existence of negotiations with the Crown to adjourn an application for the return of land to Māori ownership.[62] An affirmative decision was required, one way or the other. As with the other claimants, the Tribunal was satisfied that Māhaki had established a claim to the land and redress in the form of return of some or all of the land was appropriate. Again, the Tribunal was empowered to call for further evidence if the existing evidence was inadequate.

(d) Conclusion

[70] We recognise the difficulties presented by competing or overlapping claims to Crown forest land where the Tribunal is satisfied that redress should include the

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61 *Haronga* HC, above n 4, at [111]–[113].
62 *Haronga* HC, above n 4, at [100] and [109].

return of some or all of that land to Māori ownership. Further, the context in which the Tribunal is operating has changed considerably since the CFAA, with the Crown and claimants having reached comprehensive settlements of claims throughout the country. However, the Tribunal's adjudicative function is plain in the light of the significant changes introduced by the CFAA. The Tribunal is itself obliged to determine relativities and equity between claimants. It cannot abdicate to the parties themselves its responsibilities to resolve the merits of the competing claims; it must make a binding decision on the merits. The majority judgment of the Supreme Court in *Haronga* SC addressed this very issue. Its essence is captured in William Young J's dissenting judgment:

> [136] The reasons of the majority conclude that … the Tribunal's functions are adjudicatory. A body exercising an adjudicatory function can be expected to act like a court. Litigants before the court are conventionally entitled to a determination on the claims they bring.

[71] Indeed, the Forest Lands Agreement provided expressly that the Tribunal is the suitable forum for resolving claims to land; and that a binding order would apply mechanically from an interim recommendation made in favour of a claimant meeting the statutory criteria:

> If the Waitangi Tribunal recommends the return of land to Māori ownership the Crown will transfer the land to the successful claimant together with the Crown's rights and obligations in respect of the land and in addition [to compensation].

[72] As noted earlier,[63] the Crown retains a 90-day window within which to settle a claim before the Tribunal's interim recommendation crystallises into a binding order. Thus, the Tribunal performs an intermediate role as a potential circuit breaker of prolonged or stalemated settlement negotiations. As events have transpired, the Tribunal has performed this function on only one occasion — by recommending the return of surplus land compulsorily acquired in the 1960s under the Public Works Act 1928 and the Turangi Township Act 1964.[64] In the event its recommendation did not become binding. The Crown and Ngāti Tūrangitukua claimants reached an alternative arrangement during the 90-day period, reflecting the reality that an

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63 At [2] above.

64 Waitangi Tribunal *The Turangi Township Report* (Wai 84, 1995).

interim recommendation for the return of land to Māori ownership provides claimants with a sizeable bargaining lever in negotiations.

[73] Before us Mr Linkhorn submitted that the Tribunal's powers to make binding recommendations are less stringent than the Forest Lands Agreement envisaged. But the Tribunal's statutory powers relating to Crown forest lands are the result of a compact entered into by Ministers of the Crown with the New Zealand Māori Council and the Federation of Māori Authorities Inc. Its purpose was to advance the Government's favoured policies of corporatisation and privatisation while seeking to address the serious prejudice suffered by Māori through historic and enduring settler colonialism. In particular, the Agreement allowed the Crown to proceed in its sale of forestry cutting rights in 1990, totalling over $1 billion in revenue for the state.[65] The Crown cannot justifiably complain that in exercising its binding powers the Tribunal will forestall its ability to negotiate a more favourable settlement.

[74] The Tribunal's concern not to create a fresh set of grievances is justified. Indeed, an irony would result if a binding order of the Tribunal prejudicially affected other claimants or related parties. But it must be inferred from the terms of the Act and the CFAA, construed against the background of the Forest Lands Agreement, that Parliament was confident the Tribunal was best placed to pre-empt that consequence by exercising the additional remedial powers with which it was entrusted. As noted in the long title to the Act, the Tribunal is the expert body appointed "to determine whether certain matters are inconsistent with the principles of the Treaty". The legislature saw the Tribunal as the appropriate vehicle to carry into effect the purpose of the CFAA amendments to the principal Act and the Forest Lands Agreement: the transfer of Crown forest land to Māori ownership and payment by the Crown to Māori of compensation in the event of successful claims.

[75] It follows that the Crown's appeal must fail on all grounds.

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[65] The Treasury "Income from State Asset Sales as at May 2014" (14 May 2014) <www.treasury.govt.nz>.

The Ngāti Kahu claims (CA545/2015)

Background

[76] Mr Flavell brought a claim before the Tribunal for the hapū and iwi of Ngāti Kahu and for Te Rūnanga-ā-Iwi o Ngāti Kahu, the mandated iwi authority representing Ngāti Kahu and its claims against the Crown. His application followed the Tribunal's production of its Muriwhenua Land Report in 1997, which recognised the well-founded claims of five iwi in the far north of the North Island including Ngāti Kahu.[66] As Dobson J observed, each iwi had its own rohe but there was a considerable degree of overlap between claims.[67]

[77] Ngāti Kahu's claim related to the Crown's breaches of the Treaty principles. In its 1997 report, the Tribunal found that Ngāti Kahu along with Te Hiku iwi had suffered prejudice from pre-1865 land transactions. The social and economic consequences had been devastating. The Crown conceded and the Tribunal found that Ngāti Kahu was deserving of redress. The Tribunal's view was that relief should be given sooner rather than later.[68] But progress to finality has not occurred, despite the passage of nearly two decades.

[78] The Crown has been in ongoing negotiations with all five iwi since the 1997 report. In 2007, Ngāti Kahu applied to the Tribunal for binding recommendations for resumption of lands within its rohe and for Crown forest assets including accumulated rentals. In 2008 Ngāti Kahu and the Crown entered into an agreement in principle. The Crown later entered into a collective agreement in principle with all five iwi, jointly identified as Te Hiku o Te Ika a Maui (Te Hiku). In 2011 the Crown's negotiations with Ngāti Kahu broke down. The iwi revived its application for remedies.

[79] As Dobson J recited:[69]

> [8] Ngāti Kahu's application sought binding recommendations in respect of all resumable properties within the remedies area it asserted, including

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66 Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) [*Muriwhenua Report*].
67 *Flavell v Waitangi Tribunal*, above n 6, at [4].
68 *Muriwhenua Report*, above n 67, at 405.
69 *Flavell v Waitangi Tribunal*, above n 6.

> those that had already been offered to Ngāti Kahu as part of the settlement with the Crown, and those that were then on offer to other Te Hiku iwi. In addition, the application sought non-binding recommendations that included $205 million in compensation and legal recognition of Ngāti Kahu's dominion over the sea adjacent to its remedies area out to a 200 mile limit.
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> [9] Each of the other Te Hiku iwi have concluded deeds of settlement with the Crown. A further iwi, Ngāpuhi, and hapū affiliated to Ngāpuhi, also have claims to some properties within Ngāti Kahu's asserted remedies area, but Ngāpuhi interests had not engaged with the Crown or had claims addressed by the Tribunal at that time.[70]
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> [10] The ratification of the settlement deeds for the other Te Hiku iwi is reflected in the Te Hiku Claims Settlement Bill that was introduced into the House of Representatives in April 2014.[71] The terms of settlement reflected in that Bill involve the transfer of Crown lands and Crown forest assets to each of the four other Te Hiku iwi. The assets to be transferred pursuant to those settlements include assets that are the subject of Ngāti Kahu's claims. The allocation of those assets also involves compromises by each of the four iwi where their claims to such assets competed or overlapped. From the Crown's perspective, it has held back assets that may have contributed to those settlements, in anticipation of allocating such assets to Ngāti Kahu.

The Ngāti Kahu Remedies Report

[80] In its 2013 remedies report, the Tribunal agreed that land and cash should be provided by way of redress to Ngāti Kahu.[72] But it was satisfied that other components, which were important for restorative purposes, were solely within the Crown's authority to make available. Included within that category was the return of waihi tapu and other lands of high cultural significance, the creation of opportunities for increased recognition of the claimant's authority and responsibilities, and an apology from the Crown for the prejudice caused by its breaches of the Treaty principles.

[81] In the event the Tribunal declined to make binding recommendations for these reasons:[73]

> [I]n the context of a settlement framework that has changed markedly over the past decade, fair redress for those claims can be secured by other means. … Our further reasons relate to:

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70 *Ngāti Kahu Report*, above n 5, at 86 and 91.

71 The Bill was read for a second time on 30 June 2015, without any apparent indications that its progress to enactment would be disrupted.

72 *Ngāti Kahu Report*, above n 5, at 97.

73 At 100.

- the doubtful benefit to Ngāti Kahu, when weighed against the disadvantages that would surely flow, of section 27B [of the State-Owned Enterprises Act 1986] memorialised properties being resumed in their favour;

- the absence of a restorative justification for the resumption of roads; and

- the complexity of mana whenua interests in the resumable properties that are available for use in Treaty settlements, which militate against their resumption, exclusively, to Ngāti Kahu.

[82] The Tribunal also observed:[74]

> Ngāti Kahu brought little evidence of their specific relationships with most of the section 27B lands, and no real proposal as to how the properties would assist in their tribal recovery. Yet resumption of those lands would, we consider, deliver the final blow to the prospects of repairing relations with their whanaunga and would cause a serious deterioration in their already troubled Treaty relationship with the Crown. A likely consequence would be that lands of undoubted cultural and economic significance to Ngāti Kahu would no longer be available to them. In addition, it seems probable that resumption would alienate many members of the local community who would be unlikely to be persuaded of the grounds or the justice of such a measure when redress for the well-founded claims of Ngāti Kahu can be provided by other means.

[83] The Tribunal made a sequence of non-binding recommendations, including a revision of the adequacy of the Crown's offer to Ngāti Kahu as at the time of the hearing.[75] The Crown has subsequently amended its offer to accord (from its perspective) with the scope of remedies which the Tribunal was prepared to recommend for Ngāti Kahu. The offer still remains open for acceptance.

[84] Mr Hindle emphasised that Ngāti Kahu's existing claim is for grievances occurring before 1865. It has filed a separate claim for subsequent grievances, which has not yet been investigated or heard by the Tribunal. It is this claim which the Crown insists Ngāti Kahu must surrender if any land is to be returned to it in a settlement.

[85] Also, Mr Hindle advises, since Dobson J delivered judgment all four other Te Hiku entities have settled their historic claims with the Crown. Included among them are well-founded claims by those iwi which were in contest with Ngāti Kahu's

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74 At 101.
75 At 111.

claims. The settlements are now the subject of legislation.[76] Each claimant has received apologies, lands, cultural redress and other relief.

High Court decision

[86] Ngāti Kahu applied for judicial review of the Tribunal's decision. Dobson J found that the Tribunal made two material errors of law: first, by treating binding recommendations as a remedy of last resort which was distinct from another remedy available to it in exercising its s 6(3) discretion;[77] and, second, by failing to consider whether it was appropriate to make binding recommendations for parts only of the land for which a remedy was sought, particularly for the parts which were not subject to more compelling overlapping claims.[78]

[87] Dobson J was unsure about the materiality of the Tribunal's errors to its decision. He allowed what he called "a real prospect" that, if directed to reconsider Ngāti Kahu's application for binding recommendations, the Tribunal might still reach the same answer.[79] However, he deferred ordering relief for 28 days to afford Ngāti Kahu an opportunity to decide whether it wished the Court to make orders.[80] Ngāti Kahu subsequently confirmed that it sought orders. Dobson J set aside the Tribunal's decision on the application for binding recommendations and remitted it for reconsideration according to his directions on the law.[81]

[88] Before addressing the substance of the competing arguments, we record our agreement with Mr Linkhorn that the Judge's second finding was in error in holding:

> [86] Where the numerous alternatives as to the scope of binding recommendations sought appears not to have been squarely before the Tribunal, it is understandable that it would not separately consider the claims for resumption of each area of its own volition. However, a failure to consider the application in respect of an identifiable subset of the properties sought was an error of law. If such alternatives were before the Tribunal, then the appropriateness of binding recommendations in respect of those properties would be a valid consideration affecting the Tribunal's discretion.

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76 Ngāti Kuri Claims Settlement Act 2015; Ngāi Takoto Claims Settlement Act 2015; Te Aupouri Claims Settlement Act 2015; Te Rarawa Claims Settlement Act 2015.

77 *Flavell v Waitangi Tribunal*, above n 6, at [47]–[54].

78 At [80]–[88].

79 At [103].

80 At [109].

81 *Flavell v Waitangi Tribunal* HC Wellington CIV-2014-485-6385, 24 September 2015.

We are satisfied that the Tribunal was not under an obligation to consider resumption of properties which were not within the scope of Ngāti Kahu's claim. Accordingly, we will confine ourselves to the Crown's challenge to the Judge's last-resort finding, which was the focus of Mr Linkhorn's argument before us.

Appeal

[89] Mr Hindle raised nine separate grounds of appeal against Dobson J's judgment. Many grounds are overlapping or relatively inconsequential; Mr Hindle accepted that the main arguments came down to a submission of one composite error. That was Dobson J's apparent refusal to accept that the Tribunal's statutory discretion is circumscribed according to the principles identified in the majority judgment of the Supreme Court in *Haronga* SC and applied by Clifford J in *Haronga* HC.

[90] However, it is unnecessary for us to decide this submission for two reasons. First, our decision on Mr Haronga's appeal sets out the correct principles to be applied by the Tribunal when reconsidering Ngāti Kahu's application for binding recommendations for Crown forest land and land transferred to or vested in a state-owned enterprise. Second, Ngāti Kahu has no jurisdictional basis for appealing the judgment. The true effect of Mr Hindle's submission is that the Tribunal's order should be affirmed but on different grounds. That is the correct jurisdictional nature of Ngāti Kahu's argument. It is supporting the judgment under appeal on different grounds, which will fall for appropriate consideration when we address the Crown's cross-appeal.

Cross-appeal

[91] The Crown appeals against Dobson J's finding that the Tribunal erred in its 2013 remedies report in finding that the Tribunal adopted a last-resort approach in reaching its decision — that is, binding recommendations were only to be recommended where other forms of relief were inadequate.[82] Mr Linkhorn submits that, rather than adopting a last-resort approach, the Tribunal acted in accordance with its general restorative approach to remedies while noting that binding

[82] *Flavell v Waitangi Tribunal*, above n 6, at [47]–[48].

recommendations require particular care, consistent with their purpose and effect. The Tribunal simply exercised a considered level of restraint having regard to the essentially protective purpose and compulsory nature of binding orders.

[92] We agree with Dobson J that the Tribunal erred. After reviewing the relevant legislative history, the Tribunal noted its statutory discretion on whether or not to recommend resumption, observing that while it was bound to consider whether to make adjudicatory recommendations it was not so obliged. However, for the reasons given on Mr Haronga's appeal against the Mangatū Remedies Report, we are satisfied that once it was satisfied Ngāti Kahu's claim met the statutory prerequisites the Tribunal was bound to make an adjudicatory recommendation — either that the land should be returned to Māori ownership or a recommendation that the return of land to Māori ownership is not required.[83] The Tribunal has a choice between these two alternatives but is bound to follow one of the available paths.

[93] Instead, the Tribunal expressly found that:[84]

> … it is implicit in the notion that the Tribunal's resumptive power provides additional protection to claimants, that the power should be used only when there is no other means of securing the redress that the claimants should receive.

The reason for this conclusion was the Tribunal's inability "to make precise findings on mana whenua over specific properties where the relationships are so intertwined".[85] On this issue, Dobson J held that, because there was an unusual extent of overlapping interests and the task was immeasurably more complex, the Tribunal was absolved from the obligation to make a recommendation.[86] However, once the Tribunal held the claim met the statutory prerequisites it was required to adopt one of the four available options. To that extent we are satisfied that the Judge erred. The real point is that this error was generated by the Tribunal's rationalisation of its powers to making binding recommendations as a last resort.

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83 Including the fourth option referred to earlier of deciding not to clear the land for resumption because of other competing claims.

84 *Ngāti Kahu Report*, above n 5, at 103.

85 At 90.

86 *Flavell v Waitangi Tribunal*, above n 6, at [78]–[79].

[94] Mr Linkhorn also submitted that Dobson J erred in finding the Tribunal's error was material because there was a gap in its analysis. Mr Linkhorn essentially repeats his substantive submissions on the first ground, supplemented by a general submission that the Tribunal's decision was based on a range of grounds separate from any last-resort considerations. He submits that none of the Tribunal's reasoning is expressly influenced by that factor; and that the Tribunal weighed the competing dynamics of binding orders as against the terms of a settlement.

[95] However, we can see no fault in the Judge's reasoning that the Tribunal's error may have had a material effect.[87] The Tribunal's conclusion on whether to make binding recommendations was directly influenced by its view that the power should be invoked only if no other means of redress were available. We acknowledge the Tribunal's observation that, even if its last-resort approach was wrong, "the various uncertainties and difficulties that would result from our exercise of the resumptive power" led it to consider the alternative of non-binding recommendations. It is plain, nevertheless, that the Tribunal's last-resort approach was influential in its decision to formulate non-binding recommendations, rather than considering whether to make binding recommendations. The Tribunal would not have followed that course but for its adoption of the last-resort approach. Furthermore, for the reasons we have earlier outlined in the Haronga appeal, those "various uncertainties and difficulties" are not of themselves a ground for deciding against exercising the resumptive power.

[96] It follows that the appeal and cross-appeal each must fail.

Result

[97] The appeal in CA353/2015 is dismissed. The orders made in the High Court remain.

[98] The appellant in CA353/2015 must pay costs to the first and second respondents on a standard appeal on a band A basis with usual disbursements — we certify for second counsel; and 30 per cent of the fourth respondent's costs for

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[87] At [86]–[88].

preparation on a standard appeal on a band A basis together with usual disbursements. There is no order for costs in favour of the third respondent.

[99] The appeal and cross-appeal in CA545/2015 are dismissed. The orders made in the High Court remain.

[100] As each party has been unsuccessful in CA545/2015, there will be no order for costs.

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