CHAPTER 1

WHAKAWHANAUNGATANGA/RELATIONSHIPS

Te Tino Rangatiratanga and Whanaungatanga

The Treaty is about relationships. They lie at its very core. Primarily, and most obviously, the relationship at issue is between te iwi Māori and the Crown. But it is also about relationships between Māori. That is because the Treaty confirms rangatiratanga, and being a rangatira is about relationships too: between a rangatira and his people, and between different hapū and iwi that independently have and exercise rangatiratanga.

Because of the Treaty, Māori have two different kinds of relationships with the Crown.

At its most basic, article III confirms the rights of Māori as citizens of New Zealand. These are rights they have in common with non-Māori. They include all the entitlements and obligations of citizenship. Citizenship in New Zealand carries with it the benefit on the one hand of the stability and safety of a civilised state that guarantees the rule of law, and undertakes in the worst exigency to provide the necessaries of life. On the other hand it carries with it the obligation to pay taxes, and live within established laws or suffer the consequences.

But article II of the Treaty establishes a different connection with the Crown from that enjoyed by non-Māori in New Zealand. Article II guarantees te tino rangatiratanga, which is the absolute authority of chiefs to be chiefs, and to hold sway in their territories. By that guarantee, the Crown recognised and confirmed Māori relationships and property that were in existence when the Treaty was signed. Confirmation of te tino rangatiratanga is about the maintenance of relationships. In traditional Māori society, chiefs were only rarely autocrats. They sprang out of and were maintained in their positions of authority by their whanaunga; their kin. Whanaungatanga was therefore a value deeply embedded in the maintenance of rangatiratanga. It encompassed the myriad connections, obligations and privileges that were expressed in and through blood ties, from the rangatira to the people, and back again.

In the modern context, the Treaty continues to speak. The Crown's guarantee of te tino rangatiratanga continues, even where today the guarantee lacks the original context and content of possession by hapū Māori of lands and forests.[1]

Through the Treaty settlement process, today's Crown, the Government, acknowledges that the Treaty guarantee of te tino rangatiratanga has not consistently been honoured, and that as a nation we must recognise this and respond to it appropriately. A response is required because of the consequences for generations of Māori people, down to the present generation, of the Crown's obligations not having been consistently fulfilled.

One of the most devastating consequences of the failure to give effect to the guarantee of te tino rangatiratanga has been the breakdown of Māori social structures – the structures that created and expressed whanaungatanga. The ubiquitousness of modern, western models for living was always going to present a great challenge to communal societies. But the failure by the Crown to protect the landholding systems that bound Māori people together

made the fragmentation of Māori kin groups inevitable. Contemporary problems within Māori society are often linked to a lack of cohesion in families, both nuclear and extended. Demonstrating causation will always be hard, but it is plain that something serious has damaged te taura tangata, the ties that bind.

The renaissance in Māori culture in recent decades has seen a reassertion of kin ties through a strengthening of hapū and iwi. While this trend of reaffirming Māori identity has not gathered in all Māori – and arguably has missed some of the most needy – nevertheless it is a positive development. In many ways, it is today's expression of te tino rangatiratanga – that is, the authority of Māori kin groups to determine their own path and manage their own affairs.

The Present Situation

Nowadays, one of the most important periods in the history of hapū and iwi is when they engage with the Crown in a process to settle their Treaty grievances. Usually, this comes after engagement with the Waitangi Tribunal in a district inquiry, but sometimes not. In the Tāmaki Makaurau situation, there has been no Waitangi Tribunal district inquiry.

Being involved in hearings before the Waitangi Tribunal can be very affirming for the whānau, hapū and iwi of a district. The Office of Treaty Settlements typically focuses on settling with one 'large, natural group' in an area, but in a district inquiry the Waitangi Tribunal focuses on all the Māori claimant groups that together comprise the tangata whenua population. The retelling of traditional and personal stories in evidence before the Tribunal promotes understanding of whakapapa, and affirms the connections between people. Where settlement negotiations proceed without this background, the task of unravelling who's who and what's what can be particularly challenging.

That was the situation in the present case. In 2003, the Crown embarked upon Treaty settlement negotiations with Ngāti Whātua o Ōrākei about their Treaty grievances in Tāmaki Makaurau. Officers from the Office of Treaty Settlement set out on a process in the course of which they would form a strong relationship with Ngāti Whātua o Ōrākei. The relationship bore fruit. By mid-2006, an agreement in principle was in place. We heard in evidence that this situation is to the satisfaction of the Crown, and to Ngāti Whātua o Ōrākei. But it was apparent to us, hearing the parties to this urgent inquiry, that in gaining a draft settlement with Ngāti Whātua o Ōrākei, the Crown lost something perhaps equally important: the trust and goodwill of the other tangata whenua groups in Tāmaki Makaurau.

If the price of securing a deal with Ngāti Whātua o Ōrākei is to jeopardise other relationships – not only the relationship between the other tangata whenua groups and the Crown, but also those between the other tangata whenua groups and Ngāti Whātua o Ōrākei – then the price may well be too high.

But perhaps the more compelling question is whether the price needed to be paid. Is it really impractical to suggest that it is possible to secure a settlement with one group without alienating its neighbours and relatives?

The subject of this part of our report is relationships: what the Treaty requires, what non-settling groups want, and why the Office of Treaty Settlements is failing to meet the needs of groups other than the group with which it is negotiating a settlement.

Previous 'Cross-Claim' Inquiries

This urgent inquiry is the latest in a series that the Tribunal has conducted at the behest of groups upset about aspects of the Crown's settlement, and process of settling, with others. In other words, they were all situations where groups

not in settlement negotiations with the Crown considered that they were adversely affected by how the Crown was going about settling the Treaty claims of another group. The adverse effect arose from the Crown's acknowledgement of the interests of the group with which it was settling before it formed a relationship with neighbouring and/or related groups.

Since 2000, the Crown has concluded Treaty settlements with Te Uri o Hau (2000), Ngāti Ruanui (2001), Ngāti Tama (2001), Ngāti Awa (2003), Tūwharetoa (Bay of Plenty) (2003), Ngā Rauru Kītahi (2003), Te Arawa (Lakes) (2004), and Ngāti Mutunga (2005). The Tribunal has received at least 29 applications for urgent inquiries relating to settlements.[2] Eight urgent inquiries have been conducted. This tally includes this present inquiry, and another relating to the Crown's proposed settlement with Te Arawa groups. That urgent inquiry took place at about the same time as this one, and its Tribunal will report soon.

The applicants for urgent inquiries fall broadly into two categories. The first category is made up of people who say that those whom the Crown regards as having a mandate to settle their claims really do not have a mandate. We call these the mandate urgencies. They comprise The Pakakohi and Tangahoe settlement claims inquiry (2000), and three inquiries into the Crown's proposed settlement with part of the tribal grouping of Te Arawa (2004, 2005, and 2007).

Into the second category fall those applicants who say that the settlement to which the Crown and a mandated group are about to agree unacceptably infringes upon their legitimate interests. We call these the cross-claim urgencies. They are: *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* (2001), *The Ngāti Awa Settlement Cross-Claims Report* (2002), and *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (2003). These claims arose when the Crown was settling with Ngāti Tama about land in which Ngāti Maniapoto said it had interests; when the Crown was settling with Ngāti Awa about land in which Ngāi Tuhoe and Ngāti Rangitihi said they had interests; and when the Crown was settling with Ngāti Tūwharetoa ki Kawerau about land in which Ngāti Awa said they had interests. The current urgent claims concerning the proposed settlement with Ngāti Whātua o Ōrākei in Tāmaki Makaurau fall into the same category, and have much in common with the others that the Tribunal has looked into.

The Tribunals that inquired into those previous claims had real misgivings about how the Crown pursued a settlement with the mandated group, without sufficiently understanding, acknowledging, or engaging with other groups with interests in the same area. In each case, though, the settlement process was well advanced by the time the Tribunal became involved. With a draft settlement on the table, those Tribunals concluded that it was really too late in the piece to mend the process problems; in fact, it was not clear that they could be mended. Under those circumstances, it seemed wrong to postpone the settlement between the Crown and the mandated group. To do so would be effectively to punish the mandated group, which in each case had waited a long time for a settlement, and had worked hard to achieve one. In each case, there was a delicate balancing exercise between two sets of interests. On the one hand were the interests of the group that had worked hard with the Crown to achieve a draft settlement that they wanted to proceed; on the other hand were the interests of the groups that had not been involved in that process, but whose interests had been negatively affected both by the defects in process and by the outcome. They wanted the settlement halted, or very substantially changed. In each case to date – and not always for the same reasons – the Tribunal chose to support the Crown and the settling group.

Those Tribunals did, however, try to impress on the Crown that the means by which settlements are arrived at are very important, and that, as regards dealing with the interests of claimants other than the group with whom they were settling, the Office of Treaty Settlements had erred. In their reports, they emphasised:

- The need for the Crown to recognise, deal with, and limit the effect of, the first-cab-off-the-rank factor[3] – that is, the benefits that flow to the first group in an area to settle with the Crown. Benefits arise from enhanced mana as a result of various kinds of redress and recognition conferred by the settlement. Usually, there are also economic advantages from going first.
- The need for the Crown, in dealing with one group, to ensure that it preserves its capacity to provide similar redress to others who demonstrate a comparable interest in the future.[4]
- The need for the Crown to avoid dealing conclusively with important sites in favour of one group, when the interests of others are not as well understood, and may subsequently prove to be as compelling.[5]
- The need for the Crown to communicate its policy for settling claims clearly and consistently so that consultation is effective.[6]
- The need for the Crown to be pro-active in doing all that it can to ensure that the cost of arriving at settlements is not a deterioration of intra- and inter-tribal relations.[7]
- While there is no problem in principle with the Crown's policy that settling claimants should assume responsibility for addressing cross-claims, at least in the first instance, sometimes the issues raised are extremely difficult ones, and the Crown must stand ready to work with the groups concerned to explore other options.[8]

The Ngāti Awa settlement cross-claims Tribunal said:

> where the process of working towards settlement causes fallout in the form of deteriorating relationships either within or between tribes, the Crown cannot be passive. It must exercise an 'honest broker' role as best it can to effect reconciliation, and to build bridges wherever and whenever the opportunity arises. Officials must be constantly vigilant to ensure that the cost of settlement in the form of damage to tribal relations is kept to an absolute minimum.[9]

The Ngāti Tūwharetoa ki Kawerau settlement cross-claims Tribunal said:

> We believe that it is very difficult to deal with cross-claimants fairly if they are brought into the settlement process only as it nears its conclusion. Inevitably, the Crown ends up defending a position already arrived at with the settling claimants, rather than approaching the whole situation with an open mind and crafting an offer with one group that properly addresses the interests of others with a legitimate interest.
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> We think that officials put too little emphasis on understanding the modern-day tribal landscape within which they were operating, and the potential effect on that landscape of the proposed mechanisms for redress. In particular, officials failed to understand that issues surrounding cultural redress go well beyond ensuring that redress of the same kind is available to others. This is a key difference, in our view, between cultural and commercial redress.[10]

These comments, made in respect of those earlier negotiations and settlements, apply even more strongly to the present one. Whereas the earlier inquiries concerned different aspects of process failure, all of them come together in the Tāmaki Makaurau situation – and here there are some new problems.[11] It appears to us that the approach of the Office of Treaty Settlements officers has not changed materially from those earlier cases to the present one.

Officials' Response to the Tribunal's Views

In the course of this inquiry, we learned that the Office of Treaty Settlements had reservations about the practicality of the Tribunal's advice set out in reports following the inquiries of 2001, 2002, and 2003.

In 2003, officials reported to the Minister in Charge of Treaty of Waitangi Negotiations on the Crown's approach to cross-claims.[12] The document was in part a response to

The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report 2003, which the Tribunal released earlier that year.

Officials told the Minister that

> the Tribunal has set the bar too high in terms of perceptions of the Crown's obligations to cross-claimants and the steps that the Crown should take to meet those obligations. Its observations appear to be symptomatic of a limited understanding of the work and time that is required for negotiations, the difficulties of engaging with cross-claimants, and the pragmatic balancing exercise that is required between the interests of the settling groups and those of cross-claimants.
>
> The Crown's primary objective is to negotiate fair and durable settlements in a timely manner. While cross-claim processes should be robust, it should not delay settlements unduly.

The views of the Office of Treaty Settlements expressed here are entirely consistent with the approach revealed in evidence before us, in that securing a settlement with the mandated group is officials' focus and priority. The competing interests of others are an obstacle to be overcome with as little engagement of time and resources as possible. We saw little sign of a balancing exercise. It seemed that the resources available for the negotiation process are dedicated overwhelmingly to forming and maintaining a relationship with the group whose claims are to be settled. Forming a relationship with other groups has almost no priority. The thinking is that their turn will come when one day – at some unspecified time in the future – they become a settling group.

Although we could see why officials take the approach they do in response to the many pressures on them, we think that the priority they accord cross-claim issues in reaching settlements is too low. To treat other groups in such a cavalier fashion puts at risk the very objectives of the settlement process – durability of settlements, and the removal of a sense of grievance.

The Office of Treaty Settlements officials' advice to the Minister in 2003 was that they would adjust the process in response to Tribunal recommendations, but only to a very limited extent. They would: (1) engage in preliminary in-house research to identify overlapping claimant groups that have, or may have, interests in an area, and gauge the extent of those; (2) encourage and assist the settling group to initiate dialogue with overlapping claimants and establish a process for reaching agreement on their mutual interests; and (3) once terms of negotiation are signed, make contact with overlapping claimants, setting out the Office of Treaty Settlements' approach to overlapping claims and seeking information as to the nature and extent of such claims.[13]

The Office of Treaty Settlements witness at the hearing told us that the Ngāti Whātua o Ōrākei negotiation was the first in which these 'enhancements' of the overlapping claims process were applied.[14] Although we accept that changes have been made to the Office of Treaty Settlements' practice as regards other tangata whenua groups, in the Tāmaki Makaurau situation we saw that (a) the changes prefigured in the Office of Treaty Settlements' briefing to its Minister were implemented only in part;[15] and (b) even full implementation would not have sufficed. At hearing, the Crown's witness emphasised the Office of Treaty Settlements' commitment to its process, but we thought there was a lack of appreciation that a process is not an end in itself: it is something that happens to people. At root, processes are about relationships. In the Treaty context, as we have said, negotiating settlements is about running a set of interactions that bear on rangatiratanga. That is why the Office of Treaty Settlements officials must understand the groups' whanaungatanga, and protect it.

First Cab Off the Rank

The Crown has said, in this and previous urgent inquiries on cross-claims, that they have to start somewhere. There are many parts of New Zealand, and many Māori groups, and they cannot be negotiating a Treaty settlement with everyone simultaneously. It follows that there must

be a queue, and when you have a queue, some will be at the front, and others will be at the back. Those at the back will usually be annoyed that they weren't nearer the front. That's an inevitable circumstance of the settlement process, and we all have to live with it.

So then, given that there is a queue, for the Crown to pick Ngāti Whātua o Ōrākei as the first Tāmaki Makaurau candidate for concluding a settlement is certainly understandable. The Crown had dealt with them before,[16] and knew them to have robust and stable leadership. The Ngāti Whātua o Ōrākei Māori Trust Board has a statutory mandate,[17] neatly shortcutting one of the sometimes onerous pre-conditions to agreeing terms of negotiation.[18] The group was apparently united and resolute in its desire to go down the 'direct negotiations' route, rather than waiting for a Waitangi Tribunal hearing.[19] The Crown was satisfied that Ngāti Whātua o Ōrākei had substantial and well-founded Treaty claims to the Tāmaki isthmus,[20] and apparently regarded them as sufficiently numerous to constitute a 'large, natural group'.[21] Moreover, the Crown thought it was about time a full and final settlement was concluded in Tāmaki Makaurau.[22] All these factors conspired to give Ngāti Whātua o Ōrākei the nod of approval.

Unfortunately, though, this cannot be the end of it. And why not? Because in choosing Ngāti Whātua o Ōrākei – a choice not obviously exceptionable – the Crown

- continued a pattern of preferring Ngāti Whātua o Ōrākei over other groups for settlement purposes;
- had no real strategy for how it was going to deal with the other groups; and
- proceeded over the next few years to engage with Ngāti Whātua o Ōrākei in a way that in effect secured for it a primary place,[23] and for the others a secondary place.

Managing the Other Relationships

In the decision to grant urgency to this inquiry, the presiding officer set out as a reason for proceeding to hearing the fact that Ngāti Whātua o Ōrākei has already been in several settlement negotiations of various kinds with the Crown. These negotiations resulted in four previous settlements and part-settlements:

1. The passage of the Ōrākei Block (Vesting and Use) Act 1978 led to the return of title to 29 acres of land and a $200,000 loan from the Māori Trustee.
2. The Ōrākei settlement of 1991 saw the transfer of small areas of land and a cash payment of $3 million.
3. The 1993 Surplus Auckland Railway Lands on-account settlement gave $4 million to Te Runanga o Ngāti Whātua and the Ngāti Whātua o Ōrākei Trust Board.
4. The $8 million settlement in 1996 responded to the Trust Board's claim to compensation for the loss of preferential access to subsidised State housing in Ōrākei.[24]

Thus, Ngāti Whātua o Ōrākei had already been the subject of a number of settlement initiatives. Did this put the Crown under a greater obligation, in making its most recent decision to negotiate a settlement with Ngāti Whātua o Ōrākei alone,[25] to investigate alternatives?

At the hearing, it appeared from the Crown's evidence that the officials concerned were not really alert to the negative consequences that might ensue from putting Ngāti Whātua o Ōrākei in the top spot again, and leaving the other groups out. But it emerged from documents filed by the Crown after the hearing that at least one official was alive to the risks. Peter Hodge was reporting to Rachel Houlbrooke in 2003, when he wrote a number of memoranda relating to what he called engagement with cross-claimants in the context of the negotiations then under way with Ngāti Whātua o Ōrākei.[26] Looking back now with the benefit of hindsight, Mr Hodge's take on the situation was prescient. At the time he wrote, the Crown was encountering resistance by Ngāti Whātua o Ōrākei to engaging in dialogue with cross-claimants.[27] His memoranda recount

his concerns, and suggest strategies for overcoming the difficulties being encountered.

It is intriguing to find an official in the Office of Treaty Settlements expressing views that might have come from a Waitangi Tribunal report on these issues, when the Office in general was apparently not especially receptive to previous Tribunals' views. Mr Hodge's suggestions similarly failed to gain traction, it seems, as we can find no indication that what he said was heeded or acted upon – despite the fact that his analysis was cogent, and his suggestions both sensible and practicable. Documents that the Crown made available just before the completion of this report indicate that other officials were less enthusiastic than Mr Hodge about early engagement with 'overlapping' claimants.[28]

The issues addressed in Peter Hodge's memoranda lie at the heart of this inquiry. However, no other Crown evidence or submissions has thrown any light on them. All we know is that one Office of Treaty Settlements official put into writing concerns that relate to how the office could achieve substantive early engagement with cross-claimants and Ngāti Whātua o Ōrākei's reluctance to participate in that process in a helpful way, and what the Crown needed to do about that.[29] We know that he predicted danger ahead if these problems were not resolved.[30] They were not. His fears were realised. As noted, Peter Hodge's memoranda were among documents filed after the hearing, denying parties, and the Tribunal, the opportunity to ask questions about them. This is a situation we find very unsatisfactory.

Peter Hodge's memoranda put their finger on a potentially implosive aspect of the negotiation with Ngāti Whātua o Ōrākei, but from the evidence presented to us, it seems that he was ignored. We think that the failure to deal with the points he raised is a symptom of the same approach that led earlier to the Office of Treaty Settlements choosing to enter into negotiation again with Ngāti Whātua o Ōrākei alone. The Office of Treaty Settlements did not want to deal with the other tangata whenua groups in Tāmaki Makaurau. They were too many, too diffuse, too difficult, and none of them on its own was a 'large natural grouping'.

The focus of the Crown's Treaty settlement policy is to conclude settlements with deserving – and preferably also 'large' and 'natural' – groups of claimants. This is an unexceptionable objective, offering efficiency on all levels. But with finite resources for undertaking the work, and considerable political pressure to achieve settlements with as many groups as possible in as short a timeframe as possible, the Office of Treaty Settlements is really in the business of picking winners. Winners are groups who appear to offer the best chance of being able to deliver their constituency to a significant settlement.

On the face of it, this seems sensible. Picking winners is the rational response of young and able civil servants to the set of pressures they are under.

So why do we have a problem with it? Our reasons are these:

- Winners tend to be groups who, relative to other Māori groups, have already had successes. They are led by outstanding people like Sir Hugh Kawharu, they have good infrastructure (communication capability, sound accounting practices and good legal structures), and stable, committed membership. Arguably, though, those most in need of settlements – who may often be the very groups whose Treaty rights were least respected in the process of colonisation – are those who do not fulfil a 'success' profile. On the 'picking winners' basis, those groups will be last in the settlement queue.
- When the Crown targets for settlement the most high profile, effective group in a district, and leaves out the other tangata whenua groups, it reinforces the view that they matter less. When the Crown keeps doing it (in Auckland, Ngāti Whātua o Ōrākei has now been chosen four times), that implication is even stronger.
- When the winners are picked out, they feel and act more like winners. This can leave the other tangata whenua groups in the district feeling like losers. They

can feel that they have been relegated to a class of also-rans. Suspicion and resentment are the natural result.

- What will the Crown do to settle with all the smaller, more diffuse groups that, in the end, will be left over? There is no apparent strategy. If there is, those groups do not know of it. They feel as if their claims are in limbo, and destined to remain there.
- The purpose of settlements is to enable Māori to feel less aggrieved by Crown conduct of the past. Peace and reconciliation is not the obvious outcome when significant numbers are aggrieved anew by a process that does not respect them.

Thus, although the 'picking winners' strategy may seem efficient, to what end is it efficient? As a country, our motives for seeking to settle longstanding Treaty grievances are admirable. But settlement is only worth doing if we are doing it in a way that takes us further along the path towards peace and reconciliation. What we are finding in these settlement cross-claim inquiries is that 'overlapping claimants' are left looking – and feeling – like losers. In our opinion, this means that we must look long and hard at how we are going about settling, and seek ways to make changes so that those good intentions do not end up being only that.

The Special Features of Tāmaki Makaurau

Probably, there will always be casualties arising from the one-size-fits-all nature of government policies, but if there were ever an area where outcomes would benefit from the maximum flexibility of approach, this is it. Māori groups are not the same, and groups of Māori groups that together occupy different areas of the country, are definitely not the same. Every region has its own special features as a result of the combinations of people whose rohe is there. Add regional differences arising from factors such as settlement patterns and urbanisation, and you have sets of variables that cry out for tailored responses. We think that dovernment policy, though, militates against this. There is real emphasis on achieving settlements, and a standard approach that is applied fairly unquestioningly to all situations seems to offer the easiest fix.

In opening submissions, though, counsel for the Crown emphasised the importance of flexibility:

> Crown settlement policies are an important guide but are not always applied in a wholly rigid manner so as to preclude outcomes that are appropriate to the particular circumstances of an individual settlement. Retention of some flexibility in a process of this kind is essential.[31]

We are in agreement with the sentiment expressed here. However, the Crown's statements about why it did what it did in these negotiations consistently emphasised the role of policy in determining conduct. We did not see much appetite for flexibility, nor evidence of it.

We thought that the context for these negotiations meant that a flexible approach was necessary, because standard policy might not be appropriate to the Auckland situation. It seemed to us that the situation in Tāmaki Makaurau is very particular, if not unique.

Auckland is now a highly urbanised area with very valuable real estate. In the pre-contact era, Tāmaki was likewise seen by Māori as a desirable place to live, no doubt because of its warm climate, multiple harbours, and good volcanic soil. Unsurprisingly, successive waves of invaders competed for dominance there down the centuries, and the early establishment of Pākehā settlement on the shores of the Waitematā only added to its attractions. Thus, it was – and remains – an intensively occupied part of the country, where constant habitation by changing populations of Māori as a result of invasions, conquests, and inter-marriage has created dense layers of interests. The disposition of those interests as between the various groups identifying as tangata whenua there in 2007 is the subject of controversy. The tangata whenua groups involved in that debate

number about 10,[32] of which six played an active part in our inquiry.[33]

Defending its standard approach to securing settlements, the Crown insisted that Tāmaki Makaurau is 'not unique or fundamentally different from other areas'.[34] We disagree. We think that the combination of characteristics set out in the previous paragraph is unique. Moreover, unlike many other parts of the country that were intensively occupied by Māori, most land blocks did not go through the Native Land Court in the nineteenth century, and neither has the Tāmaki isthmus been the subject of a district inquiry by the Waitangi Tribunal. Compared with the usual situation, therefore, we have here less information about the occupation of the area by Māori in pre-contact times, and also about the effects of colonisation.[35]

We think that it would have been better if from the outset the Crown had recognised and acknowledged that the situation in Tāmaki Makaurau was and is complex. Apart from Peter Hodge, officers in the Office of Treaty Settlements appear not to have confronted the problems arising from cross-claimants. They certainly reassured their Minister that the situation was nothing out of the ordinary.[36] We think that this tendency to understate the difficulties meant that it took too long for officers to properly address what is, in our estimation, a situation that is specific and challenging, both as to the many groups' history and their contemporary manifestations.

We think it was important that the officers recognised this early, because only then could they have acted to manage the relationships involved.

What Was at Issue?

The trouble was, though, that the Office of Treaty Settlements did not see management of relationships as its role. Its view of how it needs to engage with what it calls overlapping claimants is clear, and narrow. It was restated in Ms Houlbrooke's evidence many times in the course of the hearing.[37] What the Office of Treaty Settlements wants to talk about to overlapping claimants is the redress the Crown proposes to offer the mandated group. It wants to know how other groups will be affected by that proposed redress. In Tāmaki Makaurau, therefore, the Office of Treaty Settlements' approach was that, until officers had sorted out the ingredients of a settlement with Ngāti Whātua o Ōrākei, and expressed them in an agreement in principle, there wasn't really anything to talk about with the other tangata whenua groups.

So the Crown made no overtures to meet with any of the other tangata whenua groups in Tāmaki Makaurau in the years prior to the agreement in principle (2006).[38] Any such meetings would take place only after the agreement in principle was in place.

We thought that this was a very limited view. To put it plainly, we think that the Office of Treaty Settlements has it wrong when it comes to dealing with what it calls overlapping claimants.

We went back, in preparing this report, to our previous reports on overlapping claims, and refreshed our memories about those earlier cases. Four years since the Tribunal's last inquiry into the handling of competing tangata whenua interests, we were dismayed to find that the Tāmaki Makaurau situation is basically a case of déjà vu. Virtually all the elements of the earlier cases arise again here and (perhaps because of the special Tāmaki Makaurau features discussed above), with worse effects. The Office of Treaty Settlements may claim that it has heeded our earlier advice, but it seemed to us that nothing has happened in the intervening years that improves the experience of 'overlapping' claimant groups.

Notes

1. In its English version, the Treaty guarantees to Māori 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties'; the Māori version confirms 'te tino rangatira-

tanga o o rātou wenua o rātou kainga me o rātou taonga katoa'. At the time when the Treaty was signed, all of the resources listed in article II belonged to Māori. Since then, most of the lands and forests have passed into other ownership. In recent times, however, Māori have regained significant ownership of New Zealand's commercial fishery through Treaty settlements. As regards other taonga, a number of Waitangi Tribunal reports and court decisions have recognised the retention by Māori of taonga such as te reo Māori (and Crown obligations arising as a result).

2. It is possible that there are more. This is the number that could be found by staff in the Tribunal's registrarial section. However, separate statistics for settlement-related applications have not been kept.

3. Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* (2001), p 18

4. Ibid, pp 22–23

5. Ibid, pp 23–24, re Te Kawau Pā

6. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report* (2002), pp 85–87

7. Ibid, pp 87–88; Waitangi Tribunal, *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (2003), p 63

8. Waitangi Tribunal, *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report*, pp 63–64

9. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report*, p 87

10. Waitangi Tribunal, *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report*, pp 67, 69

11. In the previous claims, there was a problem with the Crown confronting new situations and effectively making policy in an ad hoc way. There is now more experience in dealing with competing interests of other tangata whenua groups, and more developed policy. Now we see ad hockery arising in departures from the stated policy, leading to a lack of consistency, and difficulty for claimants in predicting how officials will handle settlements. An example is the notion of predominance of interests, and in what circumstances officials will consider it to be applicable. In an earlier inquiry relating to Crown forests (*The Ngāti Awa Settlement Cross-Claims Report)* the Tribunal was told that predominance of interests was a concept that was applied only in the context of Crown commercial assets and had no role in cultural redress. Here, though, we were told that predominance of interests was the basis upon which interests in maunga were to be recognised as cultural redress: see ch 3, Ngā Hua, at pp 66, 77.

12. Rachel Houlbrooke, the manager policy/negotiations in the Office of Treaty Settlements, was the office's witness at the hearing. Her briefing paper dated 14 August 2003 to the Minister in Charge of Treaty of Waitangi Negotiations, is entitled 'The Crown's Approach to Cross-Claims including a Response to the Waitangi Tribunal's Cross Claims Report'. Paragraph 10 asks the Minister to note that the report will be used as a best practice guide within the Office of Treaty Settlements: doc A38(a), DB1.

13. Ibid, p 5

14. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 11.1

15. The extent to which the changes were made is discusssed in chapter 3.

16. There had been four previous settlement initiatives. These are described later in this chapter under 'Managing the Other Relationships', pp 11–13.

17. Section 19(1) of the Orakei Act 1991 states: '. . . Trust board may from time to time negotiate with the Crown . . . any outstanding claims relating to the customary rights . . . of the hapu . . . the Trust Board shall have sole authority to conduct any such negotiations in respect of the hapu'.

18. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* [the *Red Book*], 2nd ed (Wellington: Office of Treaty Settlements, [2002]), p 35: 'The mandate of the claimant group representatives is conferred by the claimant group and then recognised by the Crown', p 45: 'Mandated representatives need to demonstrate that they represent the claimant group, and the claimant group needs to feel assured that the representatives legitimately gained the right to represent them. This can only be achieved through a process that is fair and open.'

19. Professor David Williams, a witness for Ngāti Whātua o Ōrākei, told the Tribunal that one of the motivations for Ngāti Whātua o Ōrākei seeking direct negotiation was that they were not scheduled to be heard by the Waitangi Tribunal for a long time: hearing recording, 14 March 2007, track 1.

20. Crown counsel, closing submissions (paper 3.3.21), para 3.5

21. The Office of Treaty Settlements' *Red Book* says (p 51) that one of the criteria that claimants need to meet to be admitted for negotiation is that they comprise a large natural group. In her evidence for the Crown (doc A38, para 41), Rachel Houlbrooke said that the Office of Treaty Settlements had advised its Minister in October 2002 that Ngāti Whātua o Ōrākei are not an iwi in their own right but a group of hapū within the wider Ngāti Whātua iwi. Officials estimated the Ngāti Whātua o Ōrākei population at between 3000 and 4000.

22. In the Crown's final day of hearing closing submissions, Crown counsel Mr Andrew noted as the fourth reason for the Crown's decision to negotiate with Ngāti Whātua o Ōrākei 'The importance of maintaining the momentum of settlements and achieving a comprehensive settlement in Auckland': paper 3.3.12, point 1.

23. The Crown knew that, in its negotiation with the Crown, Ngāti Whātua o Ōrākei were seeking to enhance their manawhenua. The

Crown knew that it had to respond to this aspiration, and particular items of redress were designed for that purpose: doc A34, pp 3–4; A67, DB40.

24. Rachel Houlbrooke, 'Ministerial Briefing: Ngāti Whātua o Ōrākei Negotiations', 24 February 2003, in David Taipari, Supporting Papers to Brief of Evidence (doc A33(a)), tab 3, para 2

25. Tiwana Tibble, the chief executive of the Ngāti Whātua o Ōrākei Māori Trust Board, agreed with Paul Majurey, counsel for Marutūāhu, that the relationship between Ngāti Whātua o Ōrākei and the Crown as parties to the negotiation of a Treaty a settlement effectively began with the letter dated 27 March 2002 from Ngāti Whātua o Ōrākei to the Office of Treaty Settlements: doc A38(a), DB5.

26. Peter Hodge, Office of Treaty Settlements internal memoranda, in Rachel Houlbrooke, supporting papers to brief of evidence (docs A67, DB13, DB14, DB16, DB21, DB23; A38(a), DB244–DB246)

27. Peter Hodge, 'Internal Memorandum: Ngāti Whātua o Ōrākei Cross-Claims: Reluctance to Engage with Cross-Claimants', 2 December 2003 (doc A66, DB246) paras 6–7

28. Documents A67, DB13, DB21

29. Hodge, (docs A66, DB244–246)

30. Hodge, (doc A66, DB246), para 10:

> 10. There are a number of reasons why Ngāti Whātua should engage with cross-claimants pre-AIP [agreement in principle] signing:
>
> . . . . .
>
> the risk of delay in the settlement process and changes being required to the conditional settlement offer (as the result of the Crown's consultation with cross-claimants or because the Crown accepts Tribunal recommendations flowing from a cross-claim challenge) is minimised. In an inquiry, a key issue for the Tribunal will be if Ngāti Whātua has engaged with cross-claimants;

31. Crown counsel, opening submissions, 12 March 2007 (paper 3.3.4)

32. Ngāti Te Ata, Te Kawerau ā Maki, Ngāi Tai ki Tāmaki, Ngāti Paoa, Waiōhua, Marutūāhu/Hauraki Māori Trust Board, Te Akitai, Te Taoū, Ngāti Tamaoho, Ngāti Wai, and Ngāti Whātua o Ōrākei.

33. Ngāti Te Ata, Te Kawerau ā Maki, Ngāi Tai ki Tāmaki, Marutūāhu/Hauraki Māori Trust Board, Te Taoū, and Ngāti Whātua o Ōrākei.

34. Crown's final day of hearing closing submissions (paper 3.3.12), point 1

35. We note that this was also substantially the view of the Crown's own most senior historian, Dr Donald Loveridge. In his report commissioned by the Office of Treaty Settlements entitled 'Ngāti Whātua o Ōrākei Claim: Appraisal of Evidence for Office of Treaty Settlements', 2 September 2003, he expressed the view that too little was known about land sales in the Auckland region for the Crown to concede Treaty breaches (p 10). His report makes many comments about the inadequate state of knowledge and the poor quality of the research that had been done. He said: 'All in all this is possibly one of the most complex areas in New Zealand as far as land sales go, and is also one of the most poorly documented and least studied' (pp 9–10); 'Stirling contributes nothing of substance to the debate with respect to Ngāti Whātua, and we still know relatively little about sales by other iwi' (p 10); 'It is most unfortunate that research in this part of the country has been driven by specific claims, rather than by the obvious need to understand and study developments in Tamaki and South Auckland as a single interactive process' (p 11, fn 16). In Rachel Houlbrooke, supporting papers to brief of evidence (doc A38(a), DB251).

36. Much referred to at the hearing was the document in which the Office of Treaty Settlements claims development manager, Tony Sole, advised the Minister in Charge of Treaty of Waitangi Negotiations that 'Cross-claim issues are relatively manageable' and that Ngāti Whātua o Ōrākei's mana whenua status 'does not appear to be challenged by other groups in the area': Tony Sole, 'Ngāti Whātua o Ōrākei and Ngāti Whātua of South Kaipara Mandate Process', ministerial briefing paper, 25 October 2002, in Rachel Houlbrooke, supporting papers to brief of evidence (doc A38(a), DB4), paras 48–50

37. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), pp 3–7; Rachel Houlbrooke, summary of evidence, 14 March 2007 (doc A38(b)), pp 3–4; During the hearing, Ms Houlbrooke stated (hearing recording, 15 March 2007, track 4):

> What I think is that, in this pre-AIP period, the Crown needs to have a reasonable level of understanding of the interests of others and one way of determining that is to write to people, to seek information, to assess the level of information we've got from within the broad body of information that's available and, yes, within that process we could have had meetings with people to allow them, face-to-face, to tell us about their interests, but until you've got to an agreement in principle, until there's redress to talk about, we don't know whether those interests are going to be affected or not. There's nothing to talk about.

38. A few meetings did take place between other tangata whenua groups and the Crown (see the Stories, ch 2), but they were in no case initiated by the Crown. The Crown's strategy of deploying Ngāti Whātua o Ōrākei to sort out other tangata whenua groups' interests in Tāmaki Makaurau before release of the agreement in principle failed (see ch 2, concern 5).

CHAPTER 4

Whakatau/Findings

Outline

In chapter 4, we set out our findings:

(a) in summary;
(b) in detail, as to process; and
(c) in detail, as to outcome.

Summary of Findings

In summary, our findings are these:

- The Office of Treaty Settlements did not balance the need to pursue and tend a relationship with Ngāti Whātua o Ōrākei in order to achieve settlement, with its Treaty obligation also to form and tend relationships with the other tangata whenua groups in Tāmaki Makaurau. The mode of dealing with the other tangata whenua groups left them uninformed, excluded, and disrespected.
- The explanation of the process for dealing with 'overlapping' claimants in the Office of Treaty Settlement's policy manual *Ka Tika ā Muri, Ka Tika ā Ma* (the *Red Book*) is summary and unhelpful. It deals only in broad principles, and gives no clear idea as to how they will be applied or achieved.
- The *Red Book*'s treatment of how cultural redress will be handled in situations where there is competition over sites and recognition provides no insight into how problems will be identified and addressed.
- The Office of Treaty Settlements' letter to other tangata whenua groups of 1 July 2003 offers them more hope: officials wanted to work with these groups '[t]hroughout the course of settlement negotiations' to arrive at 'a good understanding of [their] interests in the Auckland area'.[1]
- What the Office of Treaty Settlements actually did, however, was wholly inadequate. Neither the broad outlines of aspiration and principle in the *Red Book*, nor the expectations raised by the 1 July 2003 letter, were fulfilled. The office's performance also fell short of the standard required for a good administrative process in Treaty terms, and this is the standard that should apply.
- The draft settlement was not supported by a robust process, particularly as regards cultural redress. Non-exclusive redress was also offered when officials were in no position to assess the potential strength of others' claims to exclusive interests in those sites.
- The offer to Ngāti Whātua o Ōrākei of exclusive redress in maunga was purportedly on the basis of a predominance of interests. This approach was not adequately prefigured and is anyway inapplicable to cultural redress.
- The expression of the commercial redress in the agreement in principle is neither complete nor, in some key areas, clear, so it's not possible to know from that document what is on offer, nor how much it is worth.
- Because it is not possible to ascertain what Ngāti

Whātua o Ōrākei is being offered, the other tangata whenua groups cannot assess whether or not to rely on the Crown's assertion that it can do the same for others.

Te Warena Taua
Witness for Ngāi Tai ki Tāmaki Tribal Trust
told the Tribunal how in his view all the Tāmaki Makaurau people were related through their Waiōhua descent:
'. . . See, we enjoy a partnership with one another. But I can tell you what, these claims and cross-claims are seeing people walk straight past one another in the street. Not because of our own doing, but because of the grievances that we have, and having to come here today to put before the Tribunal and the Crown our stories – you have not heard ours yet, the cross-claimants'. I despise being called a cross-claimant. I despise being pitted against my own whanaunga.'[2]

Findings about Process

- Although we think that the Crown's large, natural group policy has a sensible underpinning, its implementation on the ground in Tāmaki Makaurau was not sensible. A more considered and rational approach was required to identify the best grouping for negotiation in Tāmaki Makaurau, and identifying such a grouping should always involve talking to all the tangata whenua groups who will ultimately be affected by a settlement in their area (see ch 2, 'Concern 6'). The strategy for identifying the best grouping should be informed by a full appreciation of the extremely negative effects on whanaungatanga if the approach chosen is wrong (see ch 1, 'Te Tino Rangatiratanga and Whanaungatanga', 'The Present Situation').
- Characterising the other tangata whenua groups in Tāmaki Makaurau as overlapping claimants instantly put the settling group, Ngāti Whātua o Ōrākei, in the top spot, and the others in a place where their interests are only relevant to the extent that they relate to the interests of the primary group. This approach will always alienate other tangata whenua groups. It is integral to their own sense of identity that they do not regard others' interests as being any more important than theirs (see Introduction, 'Terminology'; ch 2, 'Concern 7').
- Negotiating Treaty settlements is in itself a political act. It has resonance throughout the Māori world. It does not impact only on the group with whom the Crown is dealing. Mana and influence in their rohe go to the core of a group's Māori identity. Being chosen and recognised, being the subject of officials' efforts and attention and funding, being the subject of discussion and research – all these go to increase a group's mana. The Crown needs to recognise and manage this reality. It is not enough to say that the others' turn will come, because (a) there is no certainty as to how or when their turn will come; (b) they have every reason to believe that they may be waiting a very long time; and (c) the Crown is not putting resources into conveying reliable information about the path forward in a way that will assuage suspicion and resentment (see ch 1, 'Managing the Other Relationships'; ch 2, 'Concern 6').
- The Office of Treaty Settlements officers seem to be

oblivious to the impact their dealings with a group in settlement negotiation can have on relationships among Māori groups in the same area. The dealings themselves are significant, independently of what the outcome is. Sequestering themselves with one group and conducting secret negotiations on the basis of documents that others are not allowed to see of course arouses suspicion, and provides the seeds of resentment, both towards the mandated group and the Crown. Māori are anyway often suspicious of people in authority; they have often been adversely affected by things done by officials that they have not been properly informed about and have not understood. The way that the Office of Treaty Settlements is going about its business runs the risk that its representatives will be perceived as being in exactly the same category as, say, local government officials planning to take Māori land for a road. In these situations, perception is all. There is an onus on the Office of Treaty Settlements to manage perceptions, because perceptions affect relationships profoundly. Relationships are, after all, at least as much about emotions as they are about a rational application of the intellect (see ch 1, 'What Was at Issue?'; ch 2, 'Concern 1').

Roimata Minhinnick
Witness for Ngāti Te Ata:
Kathy Ertel (leading evidence): Has the relationship between Ngāti Whātua and Ngāti Te Ata been stressed by the process that the Crown's undertaken in developing the AIP [agreement in principle]?
Roimata Minhinnick: I think there's been a lot of unease, and I think that's been typical from these hearings. Our relationship with Ngāti Whātua used to be very strong, and my personal relationship with, for example, Grant [Hawke], I mean, we used to share pipis over my kitchen table with my kids laughing and playing, and that kind of relationship is certainly not the same now. I would say there is some tension, enormous tension, and it's kind of being played down really, but it's certainly in the back of everybody's mind, certainly ours . . .[3]

- It is not only perceptions that the Crown needs to manage. Because they are the group negotiating with the Crown rather than being an 'other group' in Tāmaki Makaurau, Ngāti Whātua o Ōrākei was routinely privy to the documents, correspondence, research, and maps to which others were only latterly and variously given access. Knowledge is of course power, but the Crown did not see it as its role to ensure that the other tangata whenua groups shared the power that knowledge brings: only the Crown and Ngāti Whātua o Ōrākei knew the whole agenda, and had access to all the material that informed the agenda. Not only were Ngāti Whātua o Ōrākei automatically given all relevant material, but they also had about 100 meetings with the Crown,[4] in which much information was of course exchanged. This put Ngāti Whātua o Ōrākei in a much stronger position than anyone else on the Māori side. The relative positions as regards information have been ameliorated to some extent by this Waitangi Tribunal process, in which documents were made available to all participants. It is not at all clear though when, or indeed if, the other groups would ever have been as fully informed without it (see ch 2, 'Concern 1').

Mark Stevens
Witness for Ngāi Tai ki Tāmaki:

. . . The Crown's prejudiced approach in determining settlement of the Auckland settlement area without due care, with inadequate and selective research, with little consideration for any independent Māori research, without the assistance of the Waitangi Tribunal, with a lack of consideration and indeed neglect for the overlapping claimant position, and without accurate maps which after four years are all of a sudden commissioned and which illustrate the negligence of the Crown approach.[5]

- The claimant group in negotiation with the Crown is in receipt of funding from the Crown, and none of the other tangata whenua groups receive any Crown funding. Nor is there any immediate prospect of their doing so. The Crown's position is that only groups that have been mandated to negotiate a settlement can receive funding, and this effectively excludes those groups the Crown defines as overlapping claimants. The availability of funding only to the group negotiating with the Crown is an important point of distinction between that party and others. It enables them to purchase advice and information, and to be on more of an equal footing with the Crown. It seems again to mark out one group for favour and privilege, while the others are in a lower tier, with no obvious access to the first tier (see ch 2, 'Concern 7').
- Handling the information in the negotiation between Ngāti Whātua o Ōrākei and the Crown as though the context was a commercial one, and subject to commercial conventions as regards confidentiality misrepresented the true nature of the bargaining process. What is really at stake in a Treaty negotiation is whether the parties can arrive at an accommodation between Treaty partners that will restore a damaged relationship. In its fundamental nature, it is not a cut-and-thrust commercial arrangement. To use the conventions of commercial dealing is to promote a fiction as an excuse for secrecy (see ch 2, 'Concern 2').
- In order to deal confidently with the Crown, the other tangata whenua groups will want to feel that the Crown is as informed about, and as interested in, their interests as those of the group with which the Crown is settling. The Crown has already preferred one group to another to the extent that it has chosen to negotiate with it. It rubs salt into the wound if the Crown's only interest in the other groups is to talk about how their interests relate to those of the mandated group: they want to be valued in their own right first (see ch 1, 'Managing the Other Relationships'; ch 2, 'Concern 1', 'Concern 7').

Te Warena Taua
Witness for Te Kawerau ā Maki:

We got to tell [the Crown] what we thought about what they thought because they never came to us to ask about what we thought, and that's how it happened – and we've really been playing chase up or chasing them and finding out that someone got a letter and we say we didn't get a letter so let's write to them. It has had a huge impact on a group like ours who has got no funding to maintain our claims to this point even . . .[6]

- In previous cross-claim settlement inquiries, the Tribunal has consistently advised the Office of Treaty Settlements to engage *early* with other tangata whenua groups.[7] 'Engaging', in this context, does not mean writing letters. Certainly, it does not mean only writing letters. Meeting with people may cost more time and money, but when it comes to talking with Māori

about their customary interests it is the *only* form of communication that demonstrates respect for what they have to say, and for the preferred Māori way of saying it: kanohi ki te kanohi. Even in the 21st century, Māori remain primarily oral people. Written communication should only complement face-to-face communication. It cannot substitute for it (see ch 1, 'What Was at Issue?'; ch 2, 'Concern 1').

- We saw a lack of awareness of the Crown's obligation to comply with tikanga. There were no powhiri involving other tangata whenua groups when the Crown came into Tāmaki Makaurau, and no hui with them even when the Crown was contemplating the offer of exclusive rights in maunga to Ngāti Whātua o Ōrākei. To leave proper engagement with other tangata whenua groups until after everything had been arranged with Ngāti Whātua o Ōrākei is itself a breach of tikanga, because it fails to acknowledge their mana and status as tangata whenua. The Crown pointed to the involvement of John Clarke as indicating its awareness of tikanga concerns. But there was only one piece of evidence about Mr Clarke's contribution, and this suggested that his role was mainly to add facility in te reo Māori to the Crown's side in discussions with Ngāti Whātua o Ōrākei.[8] Much more attention to tikanga is comprised in the Crown's Treaty duty when the kaupapa is Treaty negotiations and settlements (see ch 2, 'Tikanga', 'Concern 4').
- The Office of Treaty Settlements' policy for dealing with 'overlapping claims' is to require those asserting an interest to discuss them in the first instance with the mandated group. This is a policy that needs to be carefully managed to have a prospect of successfully resolving cross-claims. As practised at present, it has every appearance of simply brushing off the interests of those whose perception differs, or may differ, from that of the Crown and the mandated group. In Tāmaki Makaurau, the Crown's insistence on getting other tangata whenua groups to discuss their contrary views with Ngāti Whātua o Ōrākei in the first instance had the following consequences:

— It reinforced the perception that Ngāti Whātua o Ōrākei were in the primary position.

Mark Stevens
Statutory Manager of Ngāi Tai ki Tāmaki Tribal Trust:
The Crown's negotiation process, when it begins negotiations with a claimant, automatically relegates other claimants in a settlement area into a subservient role, and with little or no due care or good faith sends them a letter in reply regarding any overlapping issues . . .[9]

— It made explicit the subordination of the other tangata whenua groups as regards access to the Crown: the Crown was prepared to deal directly with Ngāti Whātua o Ōrākei as a matter of course, but other groups were dispatched to deal with Ngāti Whātua o Ōrākei as the port of first (and sometimes only) call.

— In interposing Ngāti Whātua o Ōrākei between themselves and the other tangata whenua groups in Tāmaki Makaurau, the Crown put at risk its Treaty relationship with those other groups. It appears from the evidence filed late that the Crown did not step in to assist communication with the other tangata whenua groups even when officials knew that Ngāti Whātua o Ōrākei were not discharging this responsibility, which they signed up to in the terms of negotiation. Even when the other groups complained to officials about how Ngāti Whātua o Ōrākei were not responding to them, the Crown maintained what was effectively a pretence that Ngāti Whātua o Ōrākei would do this work.

Tiwana Tibble
Chief Executive of Ngāti Whātua o Ōrākei, questioned by Paul Majurey (right), Counsel for Marutūāhu:
Paul Majurey: In the terms of negotiation, and I'm referring to clauses 17–19, you'll recall won't you, that Ngāti Whātua agreed to be involved in early engagement with cross claim groups. You recall that?
Tiwana Tibble: Yeah in terms of what that actually meant at the time, I think we learnt as we worked through it, the different kind of steps. So the term you use is not as specific as we know it to be now.[10]

— Getting Ngāti Whātua o Ōrākei to front the joint views of Ngāti Whātua o Ōrākei and the Crown about interests in Tāmaki Makaurau again made it seem as though Ngāti Whātua o Ōrākei and the Crown were together in an alliance, and all the other groups were outside it (see ch 2, 'Concern 5').

- The Crown undertook in the terms of negotiation (clause 19) to 'carry out its own consultation with cross-claimant groups.' We consider that the Crown's Treaty duty to other tangata whenua groups goes beyond a duty of consultation (see ch 2, 'How the Office of Treaty Settlements conceives of its task').However, what the Crown actually did was much less even than consultation. Prior to the release of the agreement in principle, it sent one long, complicated letter, and that was its only initiative (see ch 2, 'Concern 5'). Throughout, other tangata whenua groups tried to get the Crown to engage with them, but substantially the Office of Treaty Settlements resisted these overtures. The Stories included in chapter 2, 'Te Ara/Process' make this plain.
- Implicit in the Crown's Treaty settlement policy is the hope that other tangata whenua groups will compromise their own interests and support the mandated group in its settlement endeavours. This hope would have a prospect of fulfilment if, simultaneously with its dealings with (in this case) Ngāti Whātua o Ōrākei, the Crown had worked with the other tangata whenua groups to agree a strategy for them to address *their* Treaty grievances with the Crown. This would involve agreeing to the other groups forming part of a grouping for negotiating purposes that met their aspirations for identity and alliance rather than insisting on the Crown's 'strong preference' for a grouping that accorded with its perceptions (see ch 2, 'Concern 6').
- The Office of Treaty Settlements' lack of interest in coming to grips with whether the Treaty claims of the other tangata whenua groups are well-founded undermines confidence in the process being based on analysis and principle, and reinforces fears that the decisions being made are arbitrary, and possibly influenced by factors (like the personal mana of individuals) that are hard to control (see ch 2, 'Concern 3', 'Concern 4').
- Assessments of Ngāti Whātua o Ōrākei's customary interests underpinned the agreed historical account's statements about Treaty breach, and the offer to them of exclusive redress – especially maunga. Nevertheless the Crown did not acknowledge the customary implications of what it was doing; did not recognise the necessity to involve other tangata whenua groups; relied on historical material that was inadequate; did not disclose the methodology for dealing with conflicting customary information; and did not have or obtain sufficient expertise to make decisions about customary interests (see ch 2, 'Coming to grips with customary interests in Tāmaki Makaurau').
- The process that the Crown ran to develop the agreed historical account with Ngāti Whātua o Ōrākei was not fully described in evidence. Thus we do not know what principles and guidelines were in place to assist staff in making difficult judgements. We were

not pointed to any. Nor was the extent of supervision clear. Therefore we were concerned that the judgement of young and inexperienced members of staff seemed influential. Quality assurance included the involvement of senior historians like Dr Donald Loveridge and Professor Tom Brooking. However, the evidence did not explain how Dr Loveridge's very critical appraisal of key research was responded to, and his assessment was not among the materials sent to Professor Brooking. Nor was the Minister told of Dr Loveridge's misgivings. Was this because they were addressed somehow? We do not know. In the end, we certainly could not agree with the Crown that its was a robust methodology – although, if the evidence had been comprehensive (describing who did what, when), we may have been persuaded that it was. That said, the Crown had every opportunity to put in all its information, and the fact that there was none that filled the gaps we saw supports an adverse inference (see ch 2, 'The agreed historical account process').

- Our inference from the material we saw was that the Crown's focus in its negotiation with Ngāti Whātua o Ōrākei was on reaching an accommodation on history that the parties could live with. Finding a way to agree was, it seemed to us, more important than methodological soundness. It may be that this is what settling requires. If that is so, then it should be admitted. The agreed historical account should not have any pretensions: it is not an objective history, it is a vehicle for agreement en route to settlement. At present, the agreed historical account appears to be an authoritative historical account, and its statements about Ngāti Whātua o Ōrākei carry negative implications for other tangata whenua groups that are not easily reversed (see ch 2, 'The agreed historical account process').
- How can the Office of Treaty Settlements measure the importance of and effect on Ngāti Whātua o Ōrākei of the Crown's actions and omissions without knowing about and comparing what was going on with their immediate neighbours? We do not think it can. The Crown's explanation of the connection between the three parts of the Crown apology makes plain that each settlement involves an assessment by the Crown of the extent of the Treaty breaches and prejudice suffered by the settling group. Inevitably, that assessment makes a judgement about the Treaty breaches and prejudice suffered by other groups with competing claims. Yet the Crown consistently denied this. It maintained that it could gather 'adequate' information about other groups and their Treaty claims in order to offer redress to Ngāti Whātua o Ōrākei for its Treaty grievances. It said that all it was doing was pre-empting the provision of certain kinds of redress in future to other groups; but it was not pre-judging anyone else's Treaty claims. That assumes that Ngāti Whātua o Ōrākei's experiences with the Crown are completely unrelated to other groups' experiences, or that the groups' inter-related accounts all match perfectly, such that there is no multiplicity of account nor any dissent among groups as to who held which rights, and so on. That is just not possible. In reality, we think that the Crown does form a view on the relative strengths of the competing groups' claims, but does not acknowledge the fact because of the implications for its process if it did comply with the rules of natural justice (see ch 2, 'Coming to grips with customary interests in Tāmaki Makaurau'; ch 3, 'Agreed historical account').
- Initiating face-to-face meetings only after the ingredients of a settlement with Ngāti Whātua o Ōrākei have been agreed is the worst way possible to establish a positive connection with other tangata whenua groups. As soon as there is a settlement on the table, those groups have something to *object* to, to react *against* – and this with no prior history of positive, affirming interactions. This is a context that renders almost impossible the establishment of a connection of trust between the other tangata whenua groups and the Crown (see ch 1, 'The Present Situation').

- In order to feel confident that their views are heard and understood, the other tangata whenua groups will want to be sure that the officials they are dealing with know who they are. This means that they will want to deal with the same officials consistently so that personal relationships develop. It also means that they will want the officials to be interested in, and understand, who they are in a Māori sense. They will want the Crown to make overtures, not simply respond when called upon. Officials must come to grips with the underpinning for the various assertions of customary rights that the other tangata whenua groups make. In order to do this, they should read relevant sources prior to the initial meeting, and then engage with the members of the group face-to-face about their stories of origin, and their places and events of tribal/hapū identity. While it would not be expected that officials would be expert in whakapapa, they need to have engaged with enough of the Māori knowledge inherent in customary interests to really understand where people are coming from, and why the perceptions of the various groups differ. They also need to understand how that information feeds into the modern iwi political landscape (see ch 2, 'Coming to grips with customary interests in Tāmaki Makaurau').
- Regular update hui on the progress of negotiations and the topics being canvassed with the mandated group would help the other tangata whenua groups feel that they are in the picture. Their views could be sought in general, rather than only on (for example) specific items of redress. Gradually, officers would come to know which members of the group are expert about what, who can be relied on to know people or information, who is good at keeping in touch. This is how familiarity and trust is built over time. These are essential elements of a relationship (see ch 2, 'Concern 1').
- The Crown says that it is open to receiving information that would lead to changes in the agreement in principle, and it is premature for the Tribunal to get involved. However, the evidence before the Tribunal suggests that the Office of Treaty Settlements did little that was constructive with the information supplied by other tangata whenua groups when it was first solicited. For the most part, it was no more than a pretence of engagement with those groups and their information. These behaviours have understandably undermined confidence that any further submissions of information will be differently received (see ch 2, 'Concern 3').
- Releasing the agreement in principle without giving the other tangata whenua groups any warning of (at least) the possibility of offering Ngāti Whātua o Ōrākei exclusive cultural redress in maunga was a mistake. We now know that the Crown had many reasons for wanting to keep the whole proposed settlement confidential (see ch 2, 'Concern 2', in particular, the reference to documents filed late), but these were not sufficiently compelling to justify its overlooking its duty to the other tangata whenua groups. That duty included respect for their mana in the areas to be offered exclusively to Ngāti Whātua o Ōrākei, and keeping them informed. As it is, the Crown's conduct has been destructive of its relationship with these groups.
- The Crown faced the difficulty, in dealing with the other tangata whenua groups in Tāmaki Makaurau, that one or two of them were not united. Engaging with a group for which a number of people claim to be speaking – and who do not necessarily agree – is certainly a challenge. However, the Crown must find a better answer to this problem than holding the whole group at arm's length, and being even more than usually reluctant to engage with them. This is what we saw in the Crown's response to Te Taoū and Ngāi Tai ki Tāmaki, for example. We think that the Crown needs to devise a strategy for dealing with groups that lack leadership and cohesion, so that it can

demonstrate that it is engaging with the group's interests even when it is hard to engage productively with the group's spokespeople.

Findings about Outcome

- The policy of enshrining in the agreed historical account only matters that relate to the mandated group and the Crown, as if these players were somehow apart from and unaffected by the rest of the world, is a denial of the reality of history in Aotearoa. Whatever Ngāti Whātua o Ōrākei was doing with the Crown in the past, there was always another interwoven story about its neighbours and relatives, and what they were doing. A failure to come to terms with and reflect this reality in the settlement downplays the importance of context, and affronts the mana of others who were also important actors. It also affects the rangatiratanga of Ngāti Whātua o Ōrākei: who they are has fundamentally to do with the other tangata whenua groups in Tāmaki Makaurau (see ch 3, 'Agreed historical account').

Dr Michael Belgrave ***Historian, witness for Marutūāhu, in response to questioning by Crown Counsel, Peter Andrew:***
I think that the preamble [of the agreed historical account] does allow, and I think the preamble is valuable in doing that, does allow claimants to lay out their traditions and histories. One of the difficulties of the process about that, is that for reasons that make perfect sense in the negotiations, the claimants cannot refer to others. And that creates, I think, a real constraint, because if we are talking about a process of rangatiratanga – of recognising claimants' tino rangatiratanga, or their rangatiratanga under Article 2 – then that is actually about their relationships with others, as much as it is about their relationships with a specific piece of land. So, that key aspect of people's identity is immediately stripped out of a process that reduces it just to claimants saying who they are, without the ability to do that in a broader way. And that is one of the reasons why we think that if you can get that process of negotiation over custom shifted back earlier, then it may be highly appropriate, because it has been negotiated and discussed, for claimants to say things that could in other circumstances be highly controversial in the preamble.[11]

- The logical consequence of the policy of mentioning only the settling group in its agreed historical account with the Crown is troubling. Why? If we take the present agreed historical account as an example, the applicants before us certainly disagreed with the version of history agreed between Ngāti Whātua o Ōrākei and the Crown. When they come to negotiate settlements with the Crown, they will want their agreed historical accounts to say something different. If the agreed historical accounts with all the settling groups reflect their different realities, it raises the spectre of a raft of different histories recorded in many agreed historical accounts. Obviously, they cannot all purport to be authoritative. It seems to us that the true function of the agreed historical account in each settlement needs to be acknowledged: it is an account that primarily expresses the view of the settling group, but in terms that are not too objectionable to the Crown (see ch 2, 'Testing historical material for the agreed historical account'). Thus, it is more accurately characterised as an accommodation between the parties in the context of a settlement negotiation, rather than a robust history. If this were expressed, it would relieve the

anxieties of the other tangata whenua groups whose historical accounts differ from the settling group's.

- Although the Office of Treaty Settlements insists that the contents of the draft settlement in the agreement in principle remain open to change, no one really believes it. That is because we all know that when we have been working towards something for three or more years, and we finally have something to show for it (in this case the agreement in principle), we are already emotionally and intellectually committed to its content. As human beings, we know this surely and deeply. We may be prepared to change it, but usually only very reluctantly. And because the agreement in principle is an agreement between the Crown and Ngāti Whātua o Ōrākei, the very act of working together to defend their joint achievement will inevitably promote further bonding between those parties. The 'us and them' scenario between the Crown and Ngāti Whātua o Ōrākei on the one hand, and the other tangata whenua groups on the other, is exacerbated. This was evident at the hearing (see ch 2, 'Testing historical material for the agreed historical account'; ch 3, 'The Crown's openness to changing its mind about redress').
- The examples the Crown pointed to of the Crown agreeing to change draft settlements in response to overlapping claimants' protests[12] have all occurred in the wake of a Waitangi Tribunal hearing and recommendations of the Tribunal. The Crown's dealings with overlapping claimants without Tribunal involvement do not inspire confidence in the Crown's willingness to respond to those claimants' concern without that kind of incentive. Cabinet itself has approved the terms of the agreement in principle, and would need to approve any changes to them. The Ngāti Whātua o Ōrākei negotiating team would also need to agree to any change to the terms of the agreement in principle being made in the deed of settlement. Accordingly, we consider that it is the parties' intention and expectation that the redress proposed in the agreement in principle will be the settlement redress unless something substantial upsets that plan. This is why this Tribunal does not accept the Crown's submission that our involvement is premature.
- Another reason for the Tribunal to be involved now is that although the Crown says it will receive new information, the Office of Treaty Settlements will apply its current policy to that information. Thus, if what the information does is effectively challenge the policy, there is no prospect that it will change the outcome. The Crown has indicated no willingness to rethink its policies regarding 'overlapping' claimants (or in fact in any other area). Its stance before us at hearing was that, although there may have been small oversights along the way (like not sending a document to one of the other tangata whenua groups), overall there was nothing wrong with the Crown's approach.
- The question that the Office of Treaty Settlements posed itself in order to decide whether to grant exclusive redress to Ngāti Whātua o Ōrākei with respect to maunga was whether Ngāti Whātua o Ōrākei's were the predominant interests in the maunga.[13] We think this is often the wrong question where cultural redress is concerned,[14] but *always* the wrong question where there are multiple interests in maunga. That is because maunga are iconic landscape features for Māori. They are iconic not because of their scenic attributes, but because they represent an enduring symbolic connection between tangata whenua groups and distinctive land forms. Sometimes, these land forms are the physical embodiment of tūpuna.[15] Thus, associations with maunga are imbued with mana and wairua that occupy the spiritual as well as the terrestrial realm. Maunga express a group's mana and identity. This connection and expression is an integral part of Māori culture. Great caution must be exercised in dealing with such places simply as land assets, or in accordance with any determination of predominance

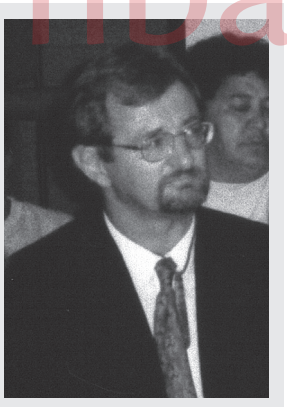
not generated by those who hold the interests. Where there are layers of interests arising from the connection with the maunga of different groups through time, how is it possible to grade those interests? What is being evaluated for that purpose? Where values are spiritual, emotional, ancestral and symbolic, we think that granting redress on the basis of an assessment of 'predominance' is a crude and insensitive approach. The various interests differ in kind as well as intensity, and are not susceptible to a qualitative assessment of any sort – certainly not one that is made by outsiders.

Dr Michael Belgrave
Historian, witness for Marutūāhu, in response to questioning by Crown Counsel, Peter Andrew:
Michael Belgrave: 'Predominance' is a little unclear still. I mean my understanding of 'predominance' is basically if you sold the land, and we have no record of a complaint by anyone else, then that gives you a predominant interest. There is no definition. There is no real strict definition of 'predominance' that I can see in the paperwork.
Peter Andrew: But there is an opportunity for you now – you, obviously claimant groups – to express concern to the Crown about those sorts of issues, isn't there?
Michael Belgrave: I have to feel, I mean I have to feel that in this process you're standing in front of a juggernaut that is going at 120 miles per hour trying to wave a red flag.
Peter Andrew: Just a minute on that, Ngāti Whātua first approached the Crown in 1999, and you would accept although negotiations did not start till 2003, that it has taken quite a considerable period of time to get just this far, to an agreement in principle, hasn't it?
Michael Belgrave: It's taken a huge amount of time, and in that time, particularly from the commencement of negotiations in 2003, everyone else has been shut out of the agenda of the negotiations as it affected them. Everyone else has been unaware that Ngāti Whātua went into those negotiations with a piece of research that states its customary traditions over Tāmaki, but does not actually recognise the existence of alternative customary traditions. I am not saying that that research should have assessed the different traditions, but it should have acknowledged them. So without that basic information of what is going on, other claimants are really completely shut out. The Crown is saying 'go and negotiate with other claimants', and I ask the question 'why should they take that seriously?' They [Ngāti Whātua o Ōrākei] have got the ear of the Crown, and they are saying to other claimants 'just give us this information, we will look after your interests'. And, I do have to admit that in terms of the, you know, the Crown has taken some notice of that in terms of the areas it has defined for exclusive redress. But it has not provided a process where claimants can meaningfully engage with that material until now. And our argument is that is far too late. Cabinet has been told, on the basis of the evidence before us, there are no other customary interests we have to take into account.[16]

- Two aspects of the Office of Treaty Settlements' approach to granting exclusive cultural redress we found very surprising. With respect to the allocation of exclusive cultural redress in maunga, the Office of Treaty Settlements witness seemed to think that a fair distribution was called for. We know of no connection between tikanga, the spiritual and emotional connection between Māori people, their iconic landscape features, and fairness. Secondly, we were surprised by the view that groups that had connections with tribes outside Tāmaki Makaurau could get their exclusive cultural redress elsewhere, leaving the local sites for Ngāti Whātua o Ōrākei. This was clearly expressed by Crown counsel in submission as a justification for the cultural redress that had been offered to Ngāti Whātua o Ōrākei.[17] Again, we know of no tikanga underpinning this approach. Moreover, we thought it surprising that the theory could be advanced in support of exclusive cultural redress for Ngāti Whātua o Ōrākei in Tāmaki Makaurau, when (like the other tangata whenua groups) Ngāti Whātua o Ōrākei form part of a larger tribal grouping with interests outside Tāmaki Makaurau (see ch 3, 'What do the applicants object to?' : 'Exclusive cultural redress').
- The use of 'predominance of interests' as a basis for

giving exclusive rights in cultural sites to one group – even when other groups have demonstrable interests that have not been properly investigated – is a Pākehā notion that has no place in Treaty settlements. Where there are layers of interests in a site, all the layers are valid. They derive from centuries of complex interaction with the whenua, and give all the groups with connections mana in the site. For an external agency like The Office of Treaty Settlements to determine that the interests of only one group should be recognised, and the others put to one side, runs counter to every aspect of tikanga we can think of. It fails to recognise the cultural resonance of iconic sites, and the absolute imperative of talking to people directly about what is going on when allocation of exclusive rights in maunga is in contemplation (see ch 2, 'Coming to grips with the customary interests in Tāmaki Makaurau'; ch 3, 'What do the applicants object to?: Exclusive cultural redress').

Graeme Murdoch
Historian witness for Te Kawerau ā Maki, in response to questioning by Crown Counsel, Peter Andrew:



Peter Andrew: It seems clear from what you are saying you accept the Crown has a responsibility to settle well-founded Treaty claims of Ngāti Whatua in Tamaki?
Graeme Murdoch: Yes I do accept that. But I suppose I should add that I accept that they should have all the evidence on the table and that they should know, particularly when it comes – as you'll see in my evidence I make quite a lot of emphasis about the cultural redress properties. It is all very well producing an agreed historical account, which at the end of the day is a powerful document, but when it comes to actually meddling with mana and with current kaitaikitanga then it's a much more dangerous thing and I think they need to have far greater knowledge in front of them to do that. I made the point that normally a judge in the Land Court or the Tribunal would do that.[18]

- There is inconsistency between the Office of Treaty Settlements' policy statements about redress in situations where there are 'overlapping' claims, and the redress offered to Ngāti Whātua o Ōrākei in the agreement in principle. The notion of a 'predominant interest' justifying exclusive redress is indicated in the *Red Book* only in relation to commercial redress. Yet Ngāti Whātua o Ōrākei have been offered maunga as cultural redress on this basis (see ch 3, 'What do the applicants object to?': 'Exclusive cultural redress'). The *Red Book* states that properties made available for commercial redress are generally regarded as substitutable. It makes no such statement about cultural redress properties. Yet the Office of Treaty Settlements told us that other tangata whenua groups can obtain cultural redress in properties outside Tāmaki Makaurau, in other parts of their rohe.[19] The *Red Book* states that a right of first refusal (a form of exclusive redress) is not usually available on a property in an area subject to unresolved 'overlapping' claims. Ngāti Whātua o Ōrākei have been offered rights of first refusal over multiple properties in such an area. Moreover, the Office of Treaty Settlements' evidence about the nature of Ngāti Whātua o Ōrākei's interests is inconsistent. We were told that the right of first refusal area was not one in which Ngāti Whātua o Ōrākei are recognised as having exclusive interests. Yet in documents from the Office of Treaty Settlements to their Minister, Ngāti Whātua o Ōrākei's interests in the right of first refusal area are described as being exclusive (see ch 3, 'Commercial redress does not denote exclusive cultural interests'). If it is difficult for the Tribunal to

discern the true position after a hearing and close examination of hundreds of pages of evidence and supporting documents, other tangata whenua groups have little hope of knowing what is what.

- The agreement in principle offers to Ngāti Whātua o Ōrākei non-exclusive redress in North Head Historic Reserve, Taurangi (Big King Recreation Reserve), Te Kopuke (Mount Saint John Domain), Owairaka (Mount Albert Domain), Ohinerau (Mount Hobson Domain), Otahuhu (Mount Richmond Domain), and possibly the Defence Force land at Kauri Point, Kauri Point Domain, Mount Victoria, Rangitoto and Motutapu. The problem with this is:

  — The offer is made even though the Office of Treaty Settlements is in no position to assess the potential strength of others' claims to exclusive interests in those sites (see ch 2, 'Coming to grips with the customary interests in Tāmaki Makaurau', 'Testing historical material for the agreed historical account'; ch 3, 'What Do the Applicants Object To?: Exclusive cultural redress').

  — The grant of non-exclusive interests to Ngāti Whātua o Ōrākei precludes other groups subsequently having an exclusive interest in those sites included in a Treaty settlement. This means that the Crown, in the context of its negotiation and settlement of Ngāti Whātua o Ōrākei's claims, has effectively judged the likely strength of the other tangata whenua groups' connections with those sites with no real engagement either with the groups or with their customary interests (see ch 2, 'Coming to grips with the customary interests in Tāmaki Makaurau'; ch 3, 'What Do the Applicants Object To?: Non-exclusive cultural redress').
- The expression of the commercial redress in the agreement in principle is neither complete nor, particularly in relation to rights offered in respect of the North Shore Naval Housing land, clear, so it is not possible to know from that document what is on offer, nor how much it is worth. The Crown's assessment that the rights to North Shore Naval Housing land have no value is neither plausible nor helpful to the other tangata whenua groups in Tāmaki Makaurau (see ch 3, 'Insufficient information to analyse proposed redress', 'Lack of certainty about operation of North Shore Naval land redress', 'Uncertainty about other agreement in principle proposals').
- Because it is not possible to ascertain what Ngāti Whātua o Ōrākei is being offered, the other tangata whenua groups cannot assess whether or not the Crown is right when it says it retains assets to do the same for others, should their claims prove to be comparable (see ch 3, introduction to 'Commercial redress, including the rights of first refusal and the sale and leaseback arrangement').
- Whatever advantages are inherent in the offer to Ngāti Whātua o Ōrākei as a result of its being the first settlement in Tāmaki Makaurau, there is currently no policy to (a) fund other tangata whenua groups to ascertain from experts what those advantages are, and what they might be worth; or (b) compensate the other tangata whenua groups for these advantages when they come to settle with the Crown; or (c) take account of any increase in value of the non-cash components of the redress in the intervening period between the settlement with Ngāti Whātua o Ōrākei and subsequent settlements; or (d) take into account the increased price of land when the opportunity to purchase land comprises part of the commercial redress in those future settlements (see ch 3, introduction to 'Commercial redress, including the rights of first refusal and the sale and leaseback arrangement', 'The Crown's negotiating position has mitigated the 'first cab off the rank' advantage').
- The Crown has said that it will review paragraph 64 of the agreement in principle. This is the paragraph that would remove protective memorials on all land within the Ngāti Whātua o Ōrākei Right of First Refusal

Area. It is our clear view that this paragraph should not form part of any settlement that does not settle all tangata whenua interests in Tāmaki Makaurau. As the Office of Treaty Settlements acknowledged at the hearing, the area within which Ngāti Whātua o Ōrākei has a right of first refusal is not one in which they have exclusive customary interests (see ch 3, 'Removal of protective memorials').

- Although others have customary interests in the Ngāti Whātua o Ōrākei Right of First Refusal Area, Ngāti Whātua o Ōrākei's right of first refusal is not framed so as to take account of those: they have exclusive rights there in respect of any of the Crown's properties that become surplus. This has consequences for groups who may have cultural ties to those sites. The Crown has not accounted for this possibility in its framing of redress for Ngāti Whātua o Ōrākei (see ch 3, 'Cultural concerns about exclusive commercial redress').

Notes

1. Rachel Houlbrooke, 'Re: Treaty Settlement Negotiations between the Crown and Ngāti Whātua o Ōrākei', 1 July 2003, (doc A38(a), DB10), para 2
2. Te Warena Taua, on behalf of Ngāi Tai ki Tāmaki, hearing recording, 13 March 2007, track 2
3. Roimata Minhinnick, on behalf of Ngāti Te Ata, hearing recording, 13 March 2007, track 2
4. Closing submissions for Marutūāhu (paper 3.3.23), para 7; Tiwana Tibble, on behalf of Ngāti Whātua o Ōrākei in response to questioning by Paul Majurey, hearing recording, 13 March 2007, track 4
5. Mark Stevens, on behalf of Ngāi Tai ki Tamaki Tribal Trust, hearing recording, 13 March 2007, track 2
6. Te Warena Taua, in response to questioning by Peter Andrew, hearing recording, 13 March 2007, track 2
7. Waitangi Tribunal, *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (Wellington: Legislation Direct, 2003) p 78.
8. Document A67, DB22
9. Mark Stevens, oral evidence, hearing recording, 13 March 2007, track 2
10. Tiwana Tibble oral evidence on behalf of Ngāti Whātua o Ōrākei, hearing recording, 13 March 2007, track 4
11. Associate Professor Michael Belgrave, oral evidence on behalf of Marutūāhu, hearing recording, 13 March 2007, track 1
12. The examples related to the provisions about Kaputerangi and part of the Matahina Forest in the Ngāti Awa Deed of Settlement, and the removal of four cultural properties as redress in the Ngāti Tama/Maniopoto Settlement: see Crown closings (paper 3.3.21) paras 6.1–6.3
13. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), paras 160, 168
14. In *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (pp 69–70) the Tribunal said that while the Crown's 'dominant interest' paradigm might be a rational basis upon which to deal with competing claims to Crown forest assets, awarding interests in cultural sites is a different thing entirely, and should proceed on a different basis:

> . . . When it comes to cultural redress, and the relationship of communities to culturally significant and sometimes tapu areas close to their tūrangawaewae, . . . the Crown's approach to awarding interests in contested areas must be even more scrupulous . . . Although the Tribunal in The Ngāti Awa Settlement Cross-Claims Report approved the rationale for the Crown's policy with respect to cross-claims to commercial redress [which was one based on predominance of interests], it should not be inferred that the same or similar approach to cultural redress will be found to be compliant with Treaty principles.'

15. Ancestors
16. Michael Belgrave, on behalf of Marutūāhu, hearing recording, 13 March 2007, track 1
17. Crown's closing submission (paper 3.3.21) paras 7.10 and 7.11
18. Hearing recording, 13 March 2007, track 4
19. Crown's closing submission (paper 3.3.21) paras 7.10 and 7.11

CHAPTER 5

Ngā Whakaaro mō te Tiriti/Treaty Breach and Prejudice

Our Jurisdiction

Section 6 of the Treaty of Waitangi Act 1975 sets out the Tribunal's jurisdiction. We must determine whether the acts or omissions complained of were inconsistent with the principles of the Treaty, and whether those acts or omissions caused prejudice. If the claims are well-founded, the Tribunal may recommend to the Crown that action be taken to remove the prejudice or to prevent other persons from being similarly affected in the future. Those recommendations may be in general or specific terms, and should be practical.[1]

The findings set out in chapter 4 establish that the Crown erred both in its process and in the outcome of the process.

The Crown's conduct was inconsistent with the principles of the Treaty of Waitangi in the following ways.

Failure to Fulfil the Duty to Act Reasonably, Honourably, and in Good Faith

The Crown failed to fulfil its duty to act reasonably, honourably, and in good faith[2] as follows:

- The Crown's policy for dealing with what it called overlapping claimants, set out in the *Red Book* and the Office of Treaty Settlements' letter to claimants of 1 July 2003, promised a level of interaction with other tangata whenua groups and their information that was not forthcoming. The level of interaction promised was anyway too limited to be effective for these purposes.
- The Crown's main way of interacting with other tangata whenua groups was to write to them seeking their customary information. This gave the impression that there was a process for assessing that information, but in fact the information, when provided, fell into a vacuum. It is not at all clear that officials, who were focused on dealing with Ngāti Whātua o Ōrākei in negotiations with them, really ever came to grips with the material tendered. In the *Lands* case, Justice Richardson observed that:

> The responsibility of one Treaty partner to act in good faith and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant fact and law to be able to say it had proper regard to the impact of the principles of the Treaty.[3]

We think that the Crown was under such an obligation here to be fully informed before making material decisions affecting Māori, but it did not fulfil that obligation to the other tangata whenua groups in Tāmaki Makaurau.

- It was the Crown's policy that, when overlapping claimants asserted interests, the mandated group would deal with them. Thus, it was Ngāti Whātua o Ōrākei's

job to deal with the other tangata whenua groups in Tāmaki Makaurau. As it transpired, Ngāti Whātua o Ōrākei did not want to perform this task. The Crown knew this, but it did not intervene to change a practice that was clearly not working. It took no steps even to do what it said it would in the terms of negotiation, namely 'consult' with 'overlapping' claimants in the pre-agreement in principle period.[4]

- The Office of Treaty Settlements did work internally to assess some of the claims and histories proffered by other tangata whenua groups and to work out into which 'large, natural group' of settling claimants they could be fitted. Typically, they did not involve the people concerned in any of their deliberations, nor did they tell them about the views officials had formed about their claims and histories, even when those views affected their actions.
- In responding to the overtures and requests of other tangata whenua groups in Tāmaki Makaurau, the Office of Treaty Settlements was generally uncooperative. Officials responded mainly to groups that had persistent lawyers. This general reluctance to engage with those other tangata whenua groups extended into the conduct of this inquiry. The office took a narrow view of the documents it ought to provide and made available some relevant documents only after the hearing and upon direction by the Tribunal. It is difficult to avoid the conclusion that the office has been less than open in its dealings with the Tribunal. This impression is confirmed by the fact that it appears from the content of documents filed late that the sole official who gave evidence for the office answered some questions at the hearing in ways that were misleading.

Failure to Give Effect to the Principle of Active Protection

The principle of active protection expresses the Crown's obligation to take active steps to ensure that Māori interests are protected.

In the negotiations in Tāmaki Makaurau, all of the Crown's focus was on Ngāti Whātua o Ōrākei, with the result that the interests of the other tangata whenua groups were overlooked, downplayed, and sidestepped. They may also have been misjudged. We do not know this, because we have not ourselves conducted an inquiry into the relative merits of the historical Treaty claims of Tāmaki Makaurau tangata whenua against the Crown.

In training all its resources on Ngāti Whātua o Ōrākei alone, the Crown had insufficient regard for, or understanding of, the whanaungatanga of Ngāti Whātua o Ōrākei and the other tangata whenua groups in Tāmaki Makaurau. The importance of whanaungatanga relates to the guarantee of te tino rangatiratanga in article II. It emphasises the need for the Crown to:

- understand the relationships (arising both from whakapapa and from politics) between all the groups;
- act wherever possible to preserve amicable tribal relations;[5] and
- act fairly and impartially towards all iwi, not giving an unfair advantage to one, especially in situations where inter-group rivalry is present.[6]

We add that, if the Crown were to continue down the path prefigured in the agreement in principle, this settlement would, we think, certainly create new grievances for the other tangata whenua groups. We adopt these words from the Tribunal's *Taranaki Report*:

> the settlement of historical claims is not to pay off for the past, even were that possible, but to take those steps necessary to remove outstanding prejudice and prevent similar prejudice from arising; for the only practical settlement between peoples is one that achieves a reconciliation in fact.[7]

We think that, in focusing as it did on its relationship with Ngāti Whātua o Ōrākei, the Crown forgot that it has the same sort of obligation to *all* groups. If its well-intentioned conduct towards one creates further grievances for others, then the process has gone awry. Instead of achieving reconciliation in fact, we are heading in the other direction.

Prejudice

The principal prejudice in this inquiry arises from damaged relationships. Instead of supporting the whanaungatanga that underpins rangatiratanga, the Crown's actions have undermined it. Te taura tangata is the braid of kinship that binds the tangata whenua groups of Tāmaki Makaurau to each other, and to the whenua. While the situation arising from an unfair process that has created two tiers of tangata whenua in Tāmaki Makaurau persists, te taura tangata will continue to unravel.

In summary, the other tangata whenua groups in Tāmaki Makaurau are prejudiced because:

- Their relationships with their Ngāti Whātua o Ōrākei whanaunga have deteriorated, and there is no obvious means of restoring the damaged ties that bind.
- The ability of the other tangata whenua groups to act as, and be recognised as, tangata whenua and kaitiaki in Tāmaki Makaurau has been diminished. (Their interests will be worse affected if the settlement proceeds, because of their indefinite relegation to a second tangata whenua tier in Tāmaki Makaurau.)
- They have lost confidence in the Crown, and doubt their ability to establish a positive relationship with the Office of Treaty Settlements.
- They have invested mental, emotional, and financial resources in engaging with the Office of Treaty Settlements and (to a lesser extent) Ngāti Whātua o Ōrākei in a process that had no intention of delivering to them.
- There is no currently viable strategy for dealing with the other tangata whenua groups, and this leaves them in limbo with respect to the settlement of their own Treaty claims.

Notes

1. See the preamble and section 6(4) of the Treaty of Waitangi Act 1975.
2. The Tribunal said in its *Report of the Waitangi Tribunal on the Orakei Claim*, 3rd ed (Wellington: GP Publications, 1996) at page 207 that: 'The Treaty signifies a partnership between the Crown and Maori people and the compact rests on the premise that each partner will act reasonably and in utmost good faith towards the other.' In this passage, the Tribunal drew on the language of the judges' decision in the *Lands* case (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA)). In the later case *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301 (CA), at page 304, the then president of the Court of Appeal, Justice Cooke, summarised the views of the judges in the *Lands* case by saying that the bench there had unanimously held that 'the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably, and honourably towards the other'.
3. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 682 (CA)
4. Terms of negotiation, cl 19
5. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), pp 87–88
6. Waitangi Tribunal, *Maori Development Corporation Report* (Wellington: Brookers Ltd, 1993), pp 31–32
7. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 315

CHAPTER 6

Whakahau/Recommendations

Outline

This chapter is organised as follows:

(1) introductory discussion;
(2) recommendations to remove the prejudice in the current situation; and
(3) recommendations to prevent others being similarly affected in the future.

Introductory Discussion

We thought long and hard about what to do about the situation that confronted us in Tāmaki Makaurau. Conceiving of a path forward has not been easy. We were faced with drivers that were very difficult to reconcile. On the one hand, we do not want to get in the way of the Crown settling with Ngāti Whātua o Ōrākei. It seems wrong to us that Ngāti Whātua o Ōrākei should suffer for the defects in the Crown's process. Although, as regards the protection of the interests of other tangata whenua groups, Ngāti Whātua o Ōrākei probably made the Crown's job of delivering a good process harder, ultimately it is the Crown's process. It is the Crown's responsibility to manage the self-interest of a settling group so that the interests of other tangata whenua groups are not unfairly jeopardised. We now confront the difficulty of doing justice to other tangata whenua groups without adversely affecting Ngāti Whātua o Ōrākei, given that they are now in expectation of receiving the benefits of settlement which come to them via a faulty process. If Ngāti Whātua o Ōrākei gets all that the Crown has offered to them, how will the interests of the other tangata whenua groups be protected? And what will be the value of a settlement that is so flawed?

We explored the possibility of recommending that the settlement with Ngāti Whātua o Ōrākei should proceed with modifications, and recommending that the Crown also take steps immediately to bring the other tangata whenua groups into a settlement programme as a 'large natural group'. The problem with this is that if you take out of the offer to Ngāti Whātua o Ōrākei the redress that really concerns us, there is really nothing much left.

We have no issue with the quantum of the proposed settlement between the Crown and Ngāti Whātua o Ōrākei. The quantum is a matter entirely for them. What concerns us is the unfairness to the other tangata whenua groups inherent in both the cultural and commercial redress now on offer to Ngāti Whātua o Ōrākei.

Fairness

There are two factors that we think heighten the need for fairness in this settlement context. We have referred to them both before:

- The Crown provides redress and not compensation for losses. This means that people's satisfaction with what they get is not a function of a numerical

calculation; it flows from pragmatism, from a sense that within the limits of what is achievable politically, justice has been done, and they have been dealt with fairly.

- In Tāmaki Makaurau, the Crown has chosen to settle separately with tangata whenua groups that are closely related to each other. The importance of protecting the relationships between these groups exacerbates the need for the content of the settlements to be demonstrably fair.

As to fairness, we have identified these key areas of concern in the proposed settlement with Ngāti Whātua o Ōrākei:

- The Crown is unwilling to admit, and therefore lacks a strategy for managing, the advantages that will flow to Ngāti Whātua o Ōrākei as a result of its settlement being the first in Tāmaki Makaurau.
- It is not clear whether the Crown really does have at its disposal the commercial assets that will enable it to replicate the kind of commercial redress it is offering to Ngāti Whātua o Ōrākei, and if it does not there is doubt as to whether it can deliver fair settlements to other tangata whenua groups in Tāmaki Makaurau.

(These risks are, of course, interrelated, because if our fear about the second area of risk is well-founded, it means that Ngāti Whātua o Ōrākei would derive a further benefit from going first.)

- The Crown proposes recognising cultural interests of Ngāti Whātua o Ōrākei through exclusive and non-exclusive cultural redress that will make it impossible to grant non-exclusive and exclusive redress to others in a number of significant sites. This is unfair because the others' interests are not as well known or understood as Ngāti Whātua o Ōrākei's, but the Crown's ability to recognise them appropriately when they are known will be compromised by the earlier settlement.

We discussed these risks in Chapter 3: Ngā Hua/Outcome. With respect to the proposed commercial redress, we do not have enough evidence before us to identify and value what is on offer to Ngāti Whātua o Ōrākei, and therefore what is left for the other tangata whenua groups. We think it important that the risk that what is on offer to Ngāti Whātua o Ōrākei cannot be replicated is taken seriously. There needs to be a full analysis by the Crown and other tangata whenua groups before the settlement with Ngāti Whātua o Ōrākei goes any further.

Put plainly, it is imperative that the Crown is in a position to do for other Tāmaki Makaurau tangata whenua groups what it is offering to do for Ngāti Whātua o Ōrākei. This view is consistent with the two principles by which the Crown says it is guided in reaching decisions on overlapping claims.[1] The second of these is its 'wish to maintain, as far as possible, its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims.'[2]

In the Tāmaki Makaurau situation, there can be no doubt that:

- tangata whenua groups will be in a good position to compare closely their claims and the Crown's response to them by way of redress in settlement; and
- they will expect to be dealt with even-handedly: this is a legitimate expectation.

In order to maintain the integrity of its settlement programme – and simply in order to be fair – the Crown needs to ensure that it meets these expectations.

In addition to fairness, the cultural redress on offer puts tikanga in issue in this inquiry.

Cultural redress

It is plain that cultural redress has a rationale different from that of the other major components of a settlement package. Stated simply, cultural redress serves the vitally important function of recognising the tangata whenua status of mandated groups and, therefore, their special relationship with features of the natural landscape of their

area. While that relationship could be recognised independently of the Treaty settlement process, and already is to some extent,[3] it is clear that the incorporation of cultural redress in a Treaty settlement will make the arrangement far more meaningful and satisfying for a claimant group. Importantly too, in the context of settlements that do not and cannot compensate for the grievances being settled, cultural redress could well provide the unique 'sweetener' for a proposed settlement package. In light of this, it is vitally important that cultural redress not be deployed in a manner contrary to tikanga Māori.

Exclusive cultural redress

In the agreement in principle, the Crown proposes granting to Ngāti Whātua o Ōrākei exclusive interests in the maunga Maungakiekie (One Tree Hill), Maungawhau (Mount Eden), and Puketāpapa (Mount Roskill). Exclusive interests are also to be granted in the Pūrewa Stewardship (coastal) area. The exclusive redress is purportedly based on Ngāti Whātua o Ōrākei's predominance of interests in those sites.

We do not know whether the interests of Ngāti Whātua o Ōrākei in these three maunga are 'predominant' in relation to the interests of others and, as we have said, we think this is the wrong approach to adopt when there are multiple interests in maunga. We do not think that it has a basis in tikanga.

It was plain on the evidence before us – and available also to the Office of Treaty Settlements – that, as regards the three maunga, there are multiple interests. The interests are multiple both in number and in kind. This is a consequence of the intensive occupation of Tāmaki Makaurau by Māori over the centuries, and the different groups' fluctuating levels of influence and activity in different places over that time. In situations like this, we believe that the grant of redress should take into account and reflect the multi-layered nature of these multiple interests. It is true that, because the Treaty of Waitangi was signed in 1840, breaches of the Treaty can only date from that time. Māori history did not begin then, though, and in dealing with cultural redress the Crown must confront the reality of layers of interests accreting over centuries. Even if Ngāti Whātua o Ōrākei's interests were predominant in 1840, this is not a basis for the award to them of exclusive interests in cultural sites. The analysis of relationships and movements district-wide is a detailed and sophisticated one, and changes since 1840 are also relevant. Contemporary Māori politics are material too.

Aa a matter of policy, the Office of Treaty Settlements consults with other tangata whenua groups only after the agreement in principle with the mandated group is in existence. A consequence is that redress is agreed between the Crown and the mandated group without meaningful input from other affected Māori. As we have said, we agree neither with this policy nor the mode of its implementation. But certainly, where such a policy exists, the Office of Treaty Settlements should never grant exclusive interests in taonga of iconic status unless it can be completely confident that the interests of the mandated group are the only interests it needs to take into account. We think it unlikely that there could be such confidence in respect of any group in Tāmaki Makaurau, but in any event certainly not yet. This is because only Ngāti Whātua o Ōrākei's interests and preferences have thus far been the subject of intensive scrutiny.

The response of the Office of Treaty Settlements to this view may be that the agreement in principle enshrines a draft proposal only, and there can be no harm in that. The offer itself will flush out any contrary views.

Such a response comprehends neither the sensitivities around interests in maunga, nor the delicate interplay between interests and mana in relationships between tangata whenua groups themselves. A draft settlement that recognises the interests of one group only and exclusively, carries the implication that the interests of the others are such that they can either be ignored or denied. This sets one group above the others, and against the others, as

regards the mana and wairua inherent in the maunga, and this is quite simply a bad thing to do. It causes destructive feelings of envy and resentment that are not easily allayed. It also adversely affects the relationship between the Crown (which through the Office of Treaty Settlements, its Minister, and Cabinet, supports the proposal of redress)[4] and the other tangata whenua groups. To us, therefore, it is clear that even to propose such redress at this stage is a mistake.

We think that, in Tāmaki Makaurau, there are no maunga about which it could confidently be said that only one group has interests. There are layered interests in respect of all the maunga. We express no view on the relative strength of the associations. We do not think it necessary to do so, but moreover we do not want to do so. We have had fewer than four days' hearing, and the historical evidence raises as many questions as it answers. Quite simply, we do not know enough. Neither does the Office of Treaty Settlements.

Non-exclusive cultural redress

The agreement in principle offers non-exclusive redress in the sites identified in its clauses 21, 22 and 35. Our concern is that, upon further investigation, it may be that these are areas in respect of which other tangata whenua groups have interests that ought to be acknowledged through the grant of exclusive redress. Right now, the Crown is fully informed about the interests and preferences of Ngāti Whātua o Ōrākei, but not those of the other groups. In our opinion, the Crown will only be in a position to decide whether any group should receive non-exclusive redress in these places *after* it has determined that no group should receive exclusive redress. Such a determination can only be made safely and fairly once there has been a correspondingly intensive investigation of the interests of the other groups in these places, and engagement in settlement negotiation to ascertain where the groups' respective settlement priorities lie.

We think it is vital that the nature and extent of the interests of the other tangata whenua groups in these culturally important sites is fully understood before Ngāti Whātua o Ōrākei is granted non-exclusive interests that precludes the granting of exclusive interests to others.

Can the problems be sorted out by hui?

Counsel for Marutūāhu, Paul Majurey, asked the Tribunal to recommend that the Crown immediately place the Ngāti Whātua o Ōrākei negotiation on hold, and:

> Urgently undertake the necessary steps to remedy the prejudice that has permeated these negotiations, for example hui-a-iwi, and independent research (Māori and historical) on 'overlapping claimant' interests.[5]

We were attracted to the idea that hui-a-iwi be used as a means of sorting out understandings about the customary interests in Tāmaki Makaurau, and their modern expression.

But to be meaningful, Ngāti Whātua o Ōrākei would need to be there too. All of the tangata whenua groups in Tāmaki Makaurau would need to participate for a hui process to yield results. While the draft settlement with Ngāti Whātua o Ōrākei remains on the table, we do not think that hui of the sort that are required can succeed.

Right now, there is no incentive for Ngāti Whātua o Ōrākei to participate in the kind of frank and open exchange on these issues that would enable them to be worked through to a conclusion that all could live with. Ngāti Whātua o Ōrākei has too much at stake. Inevitably, we think – and we imply no fault on Ngāti Whātua o Ōrākei's part when we say this – they will want to defend the status quo (their draft settlement and special recognition by the Crown). Equally inevitably, the other tangata whenua groups will want their competing histories honoured, and the settlement re-crafted to reflect their realities These two sets of objectives are too far apart to be

capable of resolution through hui; if anything, hui might even damage relationships further. It is simply too late in the process for there to be any reasonable expectation that Tāmaki Makaurau Māori themselves could sort out the settlement-related take that were presented to us.

Nor, actually, did we think that now is necessarily the right time for the commissioning of further research into the interests of the other tangata whenua groups. We have already commented on shortcomings in the process of gathering together and analysing the histories that underpin the traditional interests of Tāmaki Makaurau Māori. We think that the stage needs to be set for the involvement in settlement negotiations of all the other tangata whenua groups, and then an assessment made of:

- what information there is about all the interests;
- whether that information has been properly addressed and discussed (we do not think that, thus far, it has);
- what process would best serve for addressing and discussing it; then
- whether more information is required; and
- what information it is, and who can provide it.

Thus, although we think there will be a role for hui down the track, we think that the time is not now. Institutional changes in approach need to be set in place first, and these are suggested in our recommendations.

The first step, unfortunately, is that this draft settlement really must be stopped in its tracks.

This does not mean that the draft settlement with Ngāti Whātua o Ōrākei has no future. Rather, we see a scenario in which that draft settlement is held in abeyance while another draft settlement (or possibly draft settlements[6]) with which it is intrinsically linked is negotiated. Once the Crown has negotiated a draft settlement with the other tangata whenua groups, they can all be looked at together so that the Crown can then work out with those groups:

- a proper recognition of cultural interests by way of redress relating to the sites located in the area covered by the draft settlement between Ngāti Whātua o Ōrākei and the Crown; and
- fair access to the commercial redress available.

What happens now?

We think that the Crown must afford the other tangata whenua groups in Tāmaki Makaurau that appeared before us the opportunity to enter into a negotiation and settlement relationship with the Crown. This is because we believe the Crown cannot say right now with any confidence that it knows enough about all the groups' relative interests to be awarding exclusive rights to any, nor to be precluding the possibility that exclusive rights may need to be awarded to any. Nor can the Crown say with any confidence that its offer of commercial redress to Ngāti Whātua o Ōrākei does not undermine its ability to benefit the other groups similarly, because:

- it has not valued what it is offering to Ngāti Whātua o Ōrākei;
- it does not know whether other properties comparable to those in the North Shore Naval housing area can be made available to other claimants; and
- it has not taken into account whether the offer of areas of rights of first refusal to Ngāti Whātua o Ōrākei will overlap with sites of cultural significance to the other tangata whenua groups.

Our recommendations now follow.

Recommendations to Remove Prejudice in the Current Situation

(1) The draft settlement with Ngāti Whātua o Ōrākei should now be put on hold, until such time as the other tangata whenua groups in Tāmaki Makaurau have negotiated with the Crown an agreement in principle, or a point has been reached where it is

evident that, best endeavours notwithstanding, no agreement in principle is possible.

(2) As a matter of urgency, the Crown should do all it can to support the other tangata whenua groups in Tāmaki Makaurau so that they can enter into negotiation with the Crown to conclude their own Treaty settlements as soon as possible.

(3) This will involve the Crown in:

— providing information and financial support to enable the groups to obtain mandates from their constituencies to enter into settlement negotiation with the Crown about their claims in Tāmaki Makaurau;

— agreeing that these groups together constitute a large natural grouping for the purposes of settling their Treaty claims in Tāmaki Makaurau – provided that this approach meets with the preferences of the groups themselves;[7] and

— giving them priority over other groups whose entry into settlement negotiation had been planned.

(4) In the process of working with the other tangata whenua groups in Tāmaki Makaurau, the Crown will need to do the work on all the customary interests that was not done preparatory to the draft agreement in principle with Ngāti Whātua o Ōrākei.

(5) Once all the areas of interest and influence are on the table, it will be possible to sort out:

— whether cultural redress involving the grant of exclusive interests in any maunga is appropriate (we think this is unlikely, but want to leave open the opportunity for tangata whenua groups to hui on this issue to determine what their tikanga dictates);

— an appropriate distribution of the commercial redress available;

— recognition of all the groups in all their areas of influence through exclusive and non-exclusive cultural redress; and

— historical accounts of the groups' interactions with the Crown that either (a) properly recognise each other's existence and differing accounts; or (b) state that each reflects that group's reality, and is not intended to be reconciled with the others' accounts.

(6) With respect to commercial redress, we recommend that the Crown funds the other tangata whenua groups in Tāmaki Makaurau to enable them to analyse the redress on offer to Ngāti Whātua o Ōrākei, and form a view on what other available commercial redress is comparable.

Recommendations to Prevent Others Being Similarly Affected in Future

These recommendations go to the practice and policy of the Office of Treaty Settlement as set out in its policy documents.

The Office of Treaty Settlements' policy manual for negotiating Treaty settlements is set out in the *Red Book*. As we have said, the book does address overlapping claims, but to a minimal extent. Its focus is on the relationship between the settling group and the Crown. That focus is an important and proper one, but so is the focus on the tangata whenua groups with whom the Crown is not for the time being settling.

We recommend:

(7) that Crown policy and practice with respect to managing relationships with groups other than the settling group is explained more fully in the *Red Book*; and

(8) that the *Red Book* is amended so as to make policy and practice as regards tangata whenua groups other than the settling group both compliant with Treaty principles, and fair.

We now outline the areas where we consider that the Crown needs to amend its practice and policy.

(a) Who to engage with?

Before agreeing to enter into discussions about terms of negotiation with any tangata whenua group, the Crown should first hold hui in the region to discuss:

- the connections between the people;
- the possibilities for groupings of people; and
- the path forward for those with whom the Crown will not be negotiating for the time being.

(b) What kind of engagement?

The Office of Treaty Settlements needs to identify early the other tangata whenua groups that will be affected by the settlement, and commit to a programme of hui that will continue throughout the negotiation.

Communication should not be by letters alone; letters should be used only to supplement face-to-face communication.

The Office of Treaty Settlements needs to take the initiative with the other groups: it has the information about the negotiation; it has the resources; it needs to make the running with all affected groups, and not only with those who are well-informed and responsive.

The Office of Treaty Settlements' focus should be on building relationships. This involves getting to know the groups and the individuals within them sufficiently to be able to identify where their various strengths lie, and get a feel for how the groups function.

Engagement is not only a means of getting to know what the other groups want in relation to the settling group.

The Office of Treaty Settlements should not wait until after the redress has been agreed in principle with the settling group. This is too late to form a relationship with the other groups.

(c) What is the customary underpinning?

The Office of Treaty Settlements needs to make a commitment to understanding the customary underpinning of the tangata whenua groups' positions.

In order to do this, officials will need to engage with Māori sources of knowledge, both written and oral. Sometimes it may be necessary to seek external advice on customary interests. This will usually be Māori advice; it needs to be local and specific, and not general.

With respect to customary matters, officials need to engage with and understand concepts of layers of interests, rather than 'predominance' and ranking.

(d) What information should be available?

The Crown needs to be honest about the true nature of Treaty settlement negotiations. To what extent do the conventions of commercial confidentiality really have a part to play?

The Office of Treaty Settlements needs to work out and state what kinds of information must be withheld. Such information should be kept to a minimum; officials should proceed on an ethic of openness.

The Office of Treaty Settlements needs to avoid getting into situations where, for instance, historical reports are 'owned' by anybody. The principle should be that if material of that kind is to be relied upon in settlement negotiations, it is available to all.

(e) How to manage the mana implications of negotiations?

Negotiating Treaty Settlements is a political act. It has implications for the mana of all concerned. The Office of Treaty Settlements needs to develop techniques to manage the implications of choosing to deal only with one group in an area. This will involve communicating with other stake-

holders (especially local authorities) about what is happening, why it is happening, and what it means for local understandings. This will take time and resources.

(f) Who should be funded?

Currently, the Crown provides funding only to the group with whom it is for the time being negotiating. In certain circumstances, it will be appropriate for the Crown also to fund other tangata whenua groups to:

- commission historical research on key issues; and
- obtain advice on certain legal and/or commercial matters that affect them.

(g) Whose job is it to engage with the other tangata whenua groups?

Ultimately, it is the Crown's job to manage the effects on other tangata whenua groups of their negotiations and settlement with the settling group.

Sometimes it will be appropriate to assist the settling group to manage its relations with its neighbours and relations. In this case, the Crown should take a backseat role, but not entirely hands-off. It must remain in touch with the management of those relations, because ultimately it is responsible. It must ensure that:

- it understands what is going on;
- its own relationship with those groups is not jeopardised; and
- the price of obtaining a settlement is not too high in terms of damaged intra- and inter-tribal relations.

It is important for the Crown to manage the perception that it is leaving the engagement to the settling group because it does not want to engage with the other groups itself.

Generally it will work better to focus the engagements between the settling group and other tangata whenua groups on:

- developing understandings about areas of influence;
- working out ways of dealing with areas where there are multiple interests.

It is unlikely to work well if the only topic of engagement is ascertaining the other groups' views on the settling group, its view of its claims, and what it is likely to be offered by the Crown.

(h) What are the principles underpinning the Crown's engagements?

The Office of Treaty Settlements needs to sort out, and the policy needs to reflect, the extent to which the Crown is seeking to understand whether the claims of both the settling group and other tangata whenua groups are well-founded.

The policy needs to answer these questions:

- What does the Office of Treaty Settlements need to know about the claims of all the claimant groups affected by the proposed settlement?
- Does the Office of Treaty Settlements evaluate and compare them?
- If not, why not? If so, how?
- What should be said about other tangata whenua groups in relating past interactions of the Crown and the settling group?
- How do the answers to these questions bear on the negotiation and settlement with the settling group?

(i) What is the role of the notion of predominance of interests?

The Crown's settlement policy needs to make plain how and why predominance of interests is a paradigm that has

a place with respect to commercial redress, but has no place in determining cultural redress.

Notes

1. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua* [the *Red Book*], 2nd ed (Wellington: Office of Treaty Settlements, [2002]), p 59
2. Ibid
3. See, for example, the agreements relating to consultation or management of particular sites that have been reached in different parts of New Zealand between tangata whenua groups whose Treaty grievances have not been settled and local councils and/or central government agencies.
4. In the documents filed on 25 May 2007, the Crown included a heavily excised copy of the document (doc A67, DB44) by which the Prime Minister, Minister of Finance and Minister in Charge of Treaty of Waitangi Negotiations approved the commercial and financial redress proposed in the agreement in principle. The proposed cultural redress had been approved by Cabinet earlier, and it had also been agreed that the three Ministers would approve the final financial and commercial redress proposal. (doc A65, attachment 7)
5. Marutūāhu closing submissions, 16 March 2007 (paper 3.3.23), para 16
6. Ideally, in order to save time, the other tangata whenua groups in Tāmaki Makaurau would co-operate to fit together into one grouping for the purposes of settling with the Crown. Whether or not that will prove possible remains to be seen; it is to be determined by those groups and the Crown.
7. The suggestion of Te Warena Taua (witness for Te Kawerau ā Maki and Ngāi Tai ki Tāmaki) that all the groups together form a grouping as Waiōhua-descended people seemed sensible to us. In response to questions about the possible size of such a grouping, Mr Taua said that he thought that a Waiōhua 'confederation' would number about 9000 from 9 or 10 different groups. However, we think that the decision as to grouping for negotiation and settlement purposes must be one that meets the groups' own conception of identity and affiliation.