WAITANGI TRIBUNAL

Wai 785

CONCERNING the Treaty of Waitangi Act 1975

AND the Northern South Island Inquiry

DECISION OF THE PRESIDING OFFICER

Introduction and procedural history

1. This decision concerns an application for an urgent interim recommendation and an urgent remedies hearing filed on 19 December 2012 by Paora Mokena, Russell Thomas, Emma Park, John Morgan, Melanie McGregor and Ropata Taylor, on behalf of 'mana whenua ki Motueka' (Wai 785, #2.821; #2.822). The application was accompanied by a memorandum of counsel (Wai 785, #2.823), a brief of evidence of Paora Mokena (Wai 785, #U19) and an amended statement of claim (ASOC) (Wai 1617, #1.1.1(a)).

2. The applicants seek:

   a) An urgent remedies hearing for resumption of certain lands under section 8HB of the Treaty of Waitangi Act 1975 ('the Act'); and

   b) An urgent recommendation that, pending the determination of the application for an urgent remedies hearing, the Crown ought not to proceed to implement the proposed settlements with Ngāti Toa Rangatira, Ngāti Tama, Ngāti Rarua and Ngāti Koata or introduce legislation to give effect to such settlements.

3. On 21 December 2012 the Deputy Chairperson, Judge Milroy, convened a teleconference to discuss timetabling matters. By subsequent memorandum-directions, Crown counsel and any interested parties were directed to respond to the application by 8 February 2013 and the applicants were directed to clarify which claim the ASOC was intended to amend (Wai 785, #2.824).

4. On 15 January 2013 Crown counsel filed a memorandum seeking clarification regarding this application, specifically requesting that clarification regarding the ASOC should be given by the applicants prior to the date for the Crown and interested parties' responses (Wai 785, #2.825). Crown counsel also advised parties of the indirect relationship of Andrew Irwin (counsel for the Crown on this matter) to me.

5. The Deputy Chairperson directed Camilla Owen and Francis Cooke, counsel for the applicants, to respond to the issue of my relationship to Mr Irwin and to clarify which claim the ASOC sought to amend (Wai 785, #2.826). On 30 January 2013 applicant counsel advised that they had no issue with my relationship to Mr Irwin. Counsel also

clarified that the ASOC filed was intended both to amend Wai 1617 and be processed as a new claim (Wai 785, #2.828).

6. On 4 February 2013 I advised parties that I considered my relationship to Mr Irwin was not sufficient to recuse myself as Presiding Officer and confirmed that I would therefore preside over this remedies application (Wai 785, #2.829).

7. On 8 February 2013 the Crown filed its response together with affidavits of Te Ruhi Moni Te Moana and Jane Margaret Fletcher (Wai 785, #2.832; #V8; & #V9).

8. Responses were also received from the following interested parties:

   a) Ngāti Rārua Iwi Trust (Wai 785, #2.830, 8 Feb 2013), accompanied by briefs of evidence of Roma Hippolite, Lorraine Shirley Eade, Rima Piggott, Fred Te Miha, Barry Mason, Arthur Phillips and Amoroa Luke (Wai 785, #V1; #V2; #V3; #V4; #V5; V6 & #V7);

   b) Ngāti Kōata Trust Board (Wai 785, #2.831, 8 Feb 2013);

   c) Rangitāne o Wairau Settlement Trust (Wai 785, #2.833, 8 Feb 2013), accompanied by a brief of evidence of Richard Cecil Bradley (Wai 785, #V10);

   d) Ngāti Tama ki te Tau Ihu Trust (Wai 723) (Wai 785, #2.834);

   e) The Trustees of Te Ātiawa ki te Tau Ihu Manawhenua Incorporated Society (Wai 616) (Wai 785, #2.835, 5 Feb 2013);

   f) Ngāti Toa Rangatira and Te Rūnanga o Toa Rangatira (Wai 785, #2.837, 11 Feb 2013); and

   g) Ngāti Apa ki te Ra To Trust (Wai 785, #2.838 & #2.839, 11 Feb 2013), accompanied by an affidavit of Agnes June Paia Riwaka-Herbert (Wai 785, #V12).

9. Parties were informed on 20 February 2013 that the ASOC filed by the applicants on 19 December 2012 would be processed as an amendment to the Wai 1617 claim (Wai 785, #2.840).

10. On 20 March 2013 counsel for the applicants filed affidavits of John Charleton (Wai 785, #V13) and Ropata Taylor (Wai 785, #V15), a second affidavit of Paora Mokena (Wai 785, #V14), and sought an extension to file submissions in reply (Wai 785, #2.845). Crown counsel and Mai Chen, counsel for Ngāti Rarua Iwi Trust (NRIT), objected to the extension sought and the additional evidence filed on 20 March 2013 (Wai 785, #2.846 & #2.847). An extension to 22 March 2013 was subsequently granted to the applicants, and applicant counsel filed submissions in reply that day (Wai 785, #2.850).

11. A judicial conference was held on 26 March 2013 in Wellington to hear from parties on the application. Submissions were principally presented by Mr Cooke for the applicants, Mr Irwin and Bridgette Martin on behalf of the Crown, and Ms Chen, accompanied by Kiri Allan and Baden Vertongen, counsel for NRIT. Jaime Ferguson, counsel for Ngāti Tama ki Te Tau Ihu (Wai 723) and Bridget Ross, counsel for Ngāti Toa Rangatira, also made brief submissions.

12. At the judicial conference Ms Chen filed a further memorandum objecting to the placing of the additional affidavits filed by applicant counsel on 20 March 2013 on the record of inquiry (Wai 785, #2.851). I directed that leave be granted to Crown counsel and counsel for NRIT to respond to the additional evidence by 9 April 2013. This was confirmed in subsequent memorandum-directions (Wai 785, #2.852).

13. Crown counsel filed a second affidavit of Jane Margaret Fletcher in response to the second affidavit of Paora Mokena (Wai 785, #V14) on 2 April 2013 (Wai 785, #V17).

Ms Chen then filed second briefs of evidence of Amoroa Luke and Rima Piggott on behalf of NRIT on 9 April 2013 (Wai 785, #V18 & #V19).

Background

The applicants' claim

14. The applicants are claimants for Wai 1617, the Ngāti Turanga-a-peke Lands (Morgan) Claim.

15. The initial statement of claim for Wai 1617 was filed on 1 September 2008 by Paul Morgan on behalf of Ngāti Turanga-a-peke. The land to which the claim related was stated as including the pā of West Whanganui, Te Taitapu, Te Matau, Waiharakeke, Manuka, Kaiteriteri and Te Kumara. The subject of the claim was stated as being historical actions of the Crown in breach of the Treaty, in particular the acquisition of Ngāti Turanga-a-peke lands.

16. The applicants' ASOC was filed contemporaneously with their application for an urgent remedies hearing. This amendment added Russell James Thomas, Emma Sky Park, John Te Rangi Okiwa Morgan, Melanie Hinekohu McGregor and Ropata Wilson Tamu Taylor as named claimants to the claim. These named claimants, the amendment notes, are all trustees of Ngāti Rarua Ātiawa Iwi Trust (NRAIT).

17. The group on whose behalf the claim is brought was also amended to become 'mana whenua ki Motueka', being 'those whānau and hapū who hold mana whenua in Motueka and the surrounding area, namely the hapū of Ngāti Turanga-a-peke and Ngāti Pareteata (Ngāti Rarua ki Motueka) and Puketapu, Ngāti Tawhirikura and Mitiwai (Te Ātiawa ki Motueka)' (Wai 1617, #1.1.1(a), para 3). More specifically, the ASOC stated that the 'mana whenua ki Motueka' claimant group 'are identified through the list of original owners set out in Schedule 2 of the NRAIT Empowering Act 1993. This list is the same people recognised by the Native Land Court in 1892/1893 as being the original customary owners of the land in Motueka at the time that land was acquired by the New Zealand Company in the 1840s' (Wai 1617, #1.1.1(a), para 2). In his brief of evidence accompanying the ASOC, named claimant Paora Mokena (Paul Morgan) also states that 'NRAIT is the same group as the mana whenua ki Motueka – that is, if you look at the list of original owners set out in Schedule 2 of the NRAIT Empowering Act 1993, they are the same people as were recognised by the Native Land Court in 1892/1893 as being the original customary owners of the land in Motueka at the time that land was acquired by the New Zealand Company in the 1840s' (Wai 785, #U19, para 8).

18. As further clarification on this point, it should be recorded that when I asked Mr Cooke at the judicial conference to specify the claimants on whose behalf the application for resumption was made, he responded: 'They are the individuals who can bring the claim in their own right and in their capacity as trustees of NRAIT on behalf of the beneficiaries identified in NRAIT's legislation, and that latter group is a critical group because it's NRAIT's function enshrined in its Act to act on behalf of those beneficiaries in terms of their property rights and advancing their property rights. But that is not say that the trustees themselves personally don't have an ability to bring a resumption order, and they are a claimant in that sense, but the more important grouping is the beneficiaries of the NRAIT Trust' (Wai 785, #4.3.39).

19. Accordingly the claimants, as identified in the ASOC and by Mr Cooke, are the beneficiaries of NRAIT as recorded in the Ngāti Rarua-Ātiawa Iwi Trust Empowering Act 1993. For ease of reference, for the remainder of the decision I refer to the Wai 1617 claimant group as 'the beneficiaries of NRAIT'.

20. The subject of the Wai 1617 claim was also amended by the ASOC to specify several Crown actions on which the Tribunal had reported in the 2008 report *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* ('the *Te Tau Ihu Report*'), namely:

    a) The Crown's failure to ensure the tenths reserve estate comprised a full tenth of land purchased for settlement;

    b) The Crown's failure to provide adequate occupation reserves in Motueka and Moutere to sustain the resident Māori population;

    c) The Crown's failure to except occupation lands from the tenths reserve;

    d) The Crown's failure to ensure the full tenths estate was retained;

    e) The Crown's vesting of the tenths reserve in itself as trustee;

    f) The Crown's imposition of a perpetual leasing regime; and

    g) The Crown's inclusion of occupation reserves in the trust estate, failure to restore ownership over the occupation reserves and failure to prevent the Public Trustee's assumption of control over these reserves from the turn of the twentieth century.

21. Although not mentioned in the ASOC, in their submissions the applicants list several additional Crown actions to which they say their claim relates. These additional Crown actions are:

    a) The Crown's failure to ensure whānau and hapū settlements were protected and reserved in accordance with Crown guarantees;

    b) The Crown's granting of land at Motueka (Whakarewa) to the Anglican Church without the consent of whānau and hapū, without proper consultation and in circumstances where more land was taken than was necessary for the stated purposes, and the Crown's failure to return this land when it was no longer required; and

    c) The Crown's mismanagement of the tenths and occupation reserves that were retained.

22. The applicants submit that the *Te Tau Ihu Report* 'determined that the Claimants' claim is well-founded and that the breaches of the Treaty of Waitangi deserve redress', and that the Tribunal should proceed directly to a consideration of the appropriate remedies for this claim.

The Te Tau Ihu (Northern South Island) Inquiry

23. In total 31 claims were heard as a part of the Te Tau Ihu Inquiry. These included separate claims by Ngāti Rarua, Te Ātiawa, Ngāti Tama, Ngāti Toa, Ngāti Koata, Rangitāne, Ngāti Apa and Ngāti Kuia. The Tribunal also heard a claim brought by the Wakatū Incorporation, and various hapū and whānau claims.

24. Wai 1617 was not heard as a part of the Te Tau Ihu Inquiry, which was conducted from 2000 to 2004 with the Tribunal's report being issued in 2008, two months after the filing of the applicants' initial statement of claim. None of the claims heard in the Te

Tau Ihu Inquiry were brought specifically on behalf of the NRAIT beneficiaries, or on behalf of 'mana whenua ki Motueka'.

25. What the claimants have done in their ASOC is rely on a number of Crown actions which the Tribunal did inquire into as a part of the Te Tau Ihu Inquiry in relation to the claims of other registered claimants. I will examine later in this decision whether, in the circumstances of this case, that can be done.

26. The findings of the Te Tau Ihu Tribunal relied on by the applicants are that:

a) The Crown failed to reserve a full tenth of the lands granted to the New Zealand Company as an endowment estate for the benefit of Te Tau Ihu Māori, in breach of its fiduciary obligations, the duties of active protection and good faith, and the principles of reciprocity and mutual benefit. This breached the Treaty rights of all Te Tau Ihu iwi with interests in the land granted to the company, namely Ngāti Rarua, Ngāti Tama, Te Ātiawa, Ngāti Koata, the Kurahaupo iwi (Rangitāne, Ngāti Apa and Ngāti Kuia) and Ngāti Toa;

b) The Crown failed to ensure occupation reserves at Motueka and Moutere were adequate to sustain the resident Māori population (Ngāti Rarua, Te Ātiawa and Ngāti Tama) in breach of the principle of active protection;

c) The Crown failed to ensure that the land making up the tenths trust reserve was not subject to alienation, in breach of the Article Two guarantee that lands would be retained by Māori for as long as they wished to retain them, and the Treaty duties of active protection, consultation and equity. This breach prejudiced Te Tau Ihu iwi with interests in the tenths reserve estate, namely Ngāti Rarua, Te Ātiawa, Ngāti Tama and Ngāti Koata;

d) The Crown's vesting of the tenths land in itself as trustee for the tenths beneficiaries was a breach of the Article Two guarantee of tino rangatiratanga, and the principles of partnership, active protection and reciprocity;

e) In imposing a perpetual leasing regime on tenths trust reserve land, the Crown breached Treaty principles;

f) The Crown's inclusion of occupation reserves within the tenths trust reserve was a serious omission and failure to protect Māori interests and, along with the failure to restore ownership over the occupation reserves or to prevent the Public Trustee's assumption of control over these reserves, was in breach of the Article Two guarantee of rangatiratanga and the duty of active protection. Ngāti Rarua, Te Ātiawa and Ngāti Tama were all prejudicially affected by this breach;

g) The granting of the Whakarewa lands in Motueka to the Anglican Church reduced the occupation reserves considerably, without proper consultation with the broader Motueka Māori community. The Crown failed to ensure that the terms of the school trust in relation to these lands were consistent with the tenths trust and for the exclusive benefit of the beneficiaries of this trust. Thus, the owners of the occupation reserves lost their land without payment or consent. The Crown thereby failed to actively protect the interests of the tenths beneficiaries, particularly those who were resident at Motueka, including Ngāti Rarua, Te Ātiawa, Ngāti Tama and the Georgeson whānau, in breach of the Treaty and to their obvious prejudice; and

h) While many of the tenths trust administrators were conscientious and well-intentioned, and preserved a valuable asset which has since been returned to Māori control, unduly low valuations and long-term persistence of inadequate rentals were a significant feature of the trust's administration and resulted in sustained prejudice to the beneficiaries of the tenths trust.

27. The applicants' position is that these findings of Treaty breach apply to, amongst others, beneficiaries of NRAIT. As a result, it is the applicants' submission that Wai 1617 is well-founded and can proceed to a determination of the appropriate remedies recommendations that should be made for the NRAIT beneficiaries. This position is disputed by the Crown, NRIT, Ngāti Tama ki Te Tau Ihu Trust, Te Ātiawa ki te Tau Ihu Manawhenua Incorporated Society, Te Rūnanga o Toa Rangatira and Rangitāne.

The applicants' initial submissions

28. The applicants' initial submissions were set out in the application for an urgent interim recommendation and an urgent remedies hearing, the application for binding resumption orders, and the accompanying memorandum of counsel (Wai 785, #2.821; #2.822; & 2.823). In those submissions applicant counsel state that in the *Te Tau Ihu Report*, the Tribunal determined that there were a number of well-founded claims for breaches of the Treaty of Waitangi relevant to the resident iwi of Motueka. It is further submitted that the Te Tau Ihu Tribunal found in support of NRAIT's claims regarding the Crown's failure to distinguish NRAIT lands from other perpetually leased lands under the Māori Reserved Lands Amendment Act 1997, and stated that the Crown had a responsibility to remedy the defects associated with the perpetual leases (Wai 785, #2.821). Applicant counsel therefore contend, based on the fact that the applicants' claim is well-founded, that the action to be taken to compensate for or remove the prejudice caused should include the return of Crown forest land at Motueka and Golden Downs identified in the resumption application (Wai 785, #2.823).

29. Applicant counsel submit that the Tribunal recommended that negotiations take place with the resident iwi to compensate them for the Crown's failure to return the Whakarewa lands. It is submitted that 'resident iwi' means the mana whenua ki Motueka and not the wider iwi group to which those people affiliate (Wai 785, #2.821). However, it is contended that the Crown has refused to negotiate with mana whenua ki Motueka to address discrete issues, such as its failure to return the Whakarewa lands and the prejudice suffered as a result of the perpetual leases. As a result, the proposed wider iwi settlements do not resolve these issues and deny the applicants' mana whenua status over their lands (Wai 785, #2.823).

30. It is submitted that the Crown is currently entering into settlements with Ngāti Toa, Ngāti Tama, Ngāti Rārua and Te Ātiawa which it intends to give effect to through legislation and which include lands subject to this remedies application (Wai 785, #2.821). Applicant counsel say that such action will irreversibly prejudice the applicants as the lands which are the subject of this application will be alienated from the applicants in perpetuity once settlement legislation is enacted. It is also submitted that this will eliminate the applicants' ability to obtain appropriate remedies as the applicants' rights to resumption over both memorialised lands and Crown forest lands will be removed (Wai 785, #2.822 & #2.823).

31. Applicant counsel further submit that there is no alternative remedy for the applicants to pursue (Wai 785, #2.823). Internal dialogue between iwi with the aim of the relevant lands being allocated to the applicants is not a realistic or reasonable expectation, and the Crown has refused to enter into dialogue with the applicants or provide redress for their well founded claim. Counsel also submit that the applicants can show support for their application and are in a position to receive redress from the Tribunal in the event binding recommendations are made (Wai 785, #2.823).

The Crown's submissions

32. The Crown opposes the application for an interim recommendation on the ground that the Tribunal has no jurisdiction to make the interim recommendation sought by the applicants. The Crown also opposes the application for a remedies hearing on the basis that the applicants have failed to satisfy the criteria for the holding of an urgent remedies hearing (Wai 785, #2.832, para 3).

Interim recommendation

33. Regarding the making of an interim recommendation, the Crown alleges that '[t]here isn't, and never has been, a situation where the Tribunal, in the context of challenges to Treaty settlements [...] has issued an interim recommendation prior to the release, or prior to the inquiry itself' (Wai 785, #4.3.39). Furthermore, for the Tribunal to make a recommendation of the nature requested the Tribunal would first need to be make a finding as to whether all or part of the claim is well-founded in terms of section 6(3) of the Act (Wai 785, #4.3.39). Crown counsel submit that the claim in the current application is that NRAIT will be prejudiced by the settlements under challenge. It is submitted that the Tribunal would first need to find that claim well-founded before any interim recommendation could be made (Wai 785, #2.832, para 55).

No well-founded claim

34. Citing paragraph 2.5(b) of the *Guide to Practice and Procedure of the Waitangi Tribunal*, Crown counsel state that '[t]he Tribunal will consider an application for an urgent remedies hearing "only if the applicants have a report of the Tribunal in which their claim or claims have been determined to be well-founded"' (Wai 785, #2.832, para 59). Crown counsel submit that 'neither "mana whenua ki Motueka" nor NRAIT has a report in which their claims have been determined to be well-founded' (Wai 785, #2.832, para 60). Crown counsel state that 31 statements of claim were inquired into by the Tribunal in the *Te Tau Ihu Report*. Of these, none were brought by 'mana whenua ki Motueka' or NRAIT (Wai 785, #2.832, para 61). The Crown submits that the applicants rely generally on the findings of the *Te Tau Ihu Report* as giving rise to their capacity to seek orders under section 8HB of the Act. The applicants fail to establish, however, that the 2008 report contains a well founded claim that is their own (Wai 785, #2.832, para 61).

35. Crown counsel expanded on this point at the 26 March judicial conference. They say that the absence of a well-founded claim is the 'single fact' that gives rise to the capacity to dismiss the application for an urgent remedies hearing (Wai 785, #4.3.39). It is submitted that NRAIT's claim is essentially a '*new* claim' (Wai 785, #2.832, para 61, emphasis in original), and, as such, is 'unsubstantiated' by Tribunal inquiry. Crown counsel argue that such a claim cannot be the basis for any order under section 8HB (Wai 785, #2.832, paragraph 67).

The applicant must be the claimant

36. The Crown submits that the 'statute itself' further clarifies who may seek remedies. Counsel argue that the Act is clear that the applicant must be the claimant, and that the claimant must be able to satisfy the Tribunal that 'he or she or any group of Māori of which he or she is a member, has an interest in the inquiry apart from an interest in common with the public' (Wai 785, #4.3.39).

37. It is the view of the Crown that only the 31 claimant groups that participated in the original Te Tau Ihu Tribunal inquiry have the capacity to seek an urgent remedies hearing as 'leave was reserved to them as parties' (Wai 785, #4.3.39). The Crown

holds that the Act 'most certainly doesn't invest any rights in hapū at all'. Counsel state that the statute refers to 'claimants and claims' only (Wai 785, #4.3.39).

No demonstration of support

38. The Crown opposes the applicants' assertion that their application for urgent remedies is supported by 'all of the families and hapū of Motueka' (Wai 785, #U19, para 54 & #2.832, para 88). Crown counsel argue that the application has not (as the applicants have alleged) been extensively debated at hui or other marae-based fora (Wai 785, #2.832, para 88), and that there is no demonstrated evidence of support for the application at any of the minuted AGMs or marae hui recorded as being held since 2011 (Wai 785, #2.832, para 91). The Crown submits that NRAIT have not sought to consult with its beneficiaries, and have instead relied upon its 'statutory mandate' in bringing these proceedings (Wai 785, #4.3.39).

39. Crown counsel contend that the level of support for the applicants' resumption application must be rigorously assessed before the Tribunal is able to recommend a remedy, and that confidence in this support will necessarily dictate the ability to gauge the level of prejudice suffered (Wai 785, #2.832, para 87). The Crown cites the *East Coast Settlement Report* (2010) to illustrate its proposition that 'numbers matter' in determining an application of this nature. Further, in the *Ngāti Tuwharetoa ki Kawerau Settlement Cross-Claims Report* (2003), Crown counsel submit that the Tribunal found that 'confidence in where the iwi stands' is a necessary 'pre-condition' to halting a proposed settlement (Wai 785, #4.3.39).

40. Crown counsel submit that they, and counsel for the interested parties to this application, have demonstrated that the 'iwi are behind the settlements'. The Crown submits that the majority of Ngāti Kuia, Rangitāne ki Wairau, Ngāti Apa ki te Rā Tō, Ngāti Toa Rangātira, Te Ātiawa and Ngāti Kōata have voted in support of the deeds of settlement and voted to approve the transfer of settlement assets to various post-settlement governance entities (Wai 785, #2.832, para 95). Ngāti Rārua and Ngāti Tama have now also signed their deeds of settlement – on 13 April 2013 and 20 April 2013 respectively (Wai 785, #2.854, paras 2-4).

No prejudice to applicants

41. It is submitted that the whānau and hapū that comprise 'mana whenua ki Motueka' will all benefit through the proposed settlements. This is because 'all beneficiaries of NRAIT will necessarily be beneficiaries of the Ngāti Rārua and/or Te Ātiawa settlement' (Wai 785, #2.832, para 76). Jane Fletcher, Deputy Director, Office of Treaty Settlements, states in her first affidavit that the beneficiaries of NRAIT are all descendants of Ngāti Rārua and Te Ātiawa ancestors. They may also benefit from other settlements if, for example, they affiliate to any of the other of the Te Tau Ihu iwi (Wai 785, #V9, para 55).

42. Crown submissions also note that the Crown has pursued settlement negotiations with NRAIT in relation to lease issues over Whakarewa lands held by the Trust, contrary to the applicants' submissions. NRAIT have already received an *ex gratia* sum of $5 million as a part of these negotiations to approximate the payment they might have received had the Trust been included in Schedule 5 of the Māori Reserved Land Amendment Act 1997 from the outset (Wai 785, #2.832, para 80).

Delay and prejudice to others

43. Ms Fletcher has informed the Tribunal that the Crown requires all eight iwi to have signed deeds of settlement before an omnibus bill can be introduced to the House. It is therefore submitted that the applicants' request for remedies will result in delay to all eight iwi groupings (Wai 785, #V9, para 52). Ms Fletcher states that these settlements are the result of many years of negotiations, and that the eight iwi are ready to settle (Wai 785, #V9, para 52). The Crown considers further delay to be unfair. It recognises that there is likely to be financial prejudice caused to iwi should they be further delayed in the implementation of their settlements (Wai 785, #V9, para 54).

44. The Crown cites the recent Ngāti Kahu remedies inquiry as indicative of the time needed to hear and then report back on such matters – some 19 months, in that instance (Wai 785, #2.832, para 103). The Crown also contends that the applicants have made this application only at the 'eleventh hour' (Wai 785, #2.832, para 98) and have had ample opportunity to do so earlier (Wai 785, #2.832, paras 98-100).

45. The Crown further submits that the negotiated settlements have been carefully calibrated in terms of scale and distribution between iwi. It has been Crown policy that the redress packages for Te Tau Ihu claims be relative to each other (Wai 785, #V8, para 44). It is therefore argued that any reallocation of redress would mean the demise of these settlement packages as 'all eight iwi would understandably seek to re-negotiate their settlements to ensure their settlements were not disproportionate to the redress provided to NRAIT' (Wai 785, #V8, para 48).

Alternative remedy

46. The Crown submits that NRAIT has an alternative remedy that would be reasonable in the circumstances for it to pursue. Crown counsel advise that the Minister of Māori Affairs is considering a review of the Māori Reserved Lands Amendment Act 1997, and that it is likely that NRAIT's concerns regarding the issue of perpetual leases will come within the scope of the proposed changes (Wai 785, #V8, para 12; #2.832, para 12; & #4.3.39). Furthermore, counsel for the Crown advise that the Te Tau Ihu settlements will not in any way impinge on NRAIT's ability to engage with Te Puni Kōkiri regarding the issue of perpetual leases (Wai 785, #2.832, para 78).

Relitigation of Wakatū (Wai 56)

47. The Crown submits that the current application amounts to an attempt on the part of the applicants to re-litigate the failed Wai 56 application for urgency. The Crown alleges that the applicants to the Wai 785 application are 'all linked to Wakatū Incorporation' (Wai 785, #2.832, para 107). In 2010, the Tribunal declined to hold an urgent inquiry into the Crown's decision not to negotiate the settlement of historical Treaty grievances directly with the Wai 56 applicants, the Wakatū Incorporation (Wai 785, #2.832, para 107). The Crown submits that the current application is less about NRAIT's perpetual lease issues, which have been the subject of ongoing discussions with the Crown, and is more about the applicants' desire that 'the Crown should have entered Treaty settlement negotiations with Wakatū Incorporation specific to Wai 56' (Wai 785, #2.832, para 112).

Haronga and the Ngāti Kahu Remedies Report

48. In response to arguments raised in the applicants' 22 March submissions and at the judicial conference (which are set out at paras 79-85), Crown counsel submit that the present application is expressly different from that encountered in *Haronga v Waitangi Tribunal* [2010] NZSC 98 ('*Haronga*'). Specifically, the Crown argues that *Haronga* is

distinguished from the current application on three grounds. Briefly these grounds are that:

a) The statement of claim filed in 1992 was expressly made on behalf of the Mangatū Incorporation;

b) The applicants were prejudiced by the Crown acquisition of lands expressly set out in their statement of claim; and

c) The Tribunal was asked to recommend that the Crown return those very lands to the Incorporation (Wai 785, #4.3.39).

49. Crown counsel submit that the above elements are missing in the current application as:

a) The applicants 'cannot and do not point to any statement of claim made on their behalf';

b) The applicants 'cannot and do not point' to any statement of claim that the 'claim prejudice' is in 'respect of the forest lands they now seek'; and

c) The applicants 'cannot and do not point to the statement of claim that sought the return of the lands' (Wai 785, #4.3.39).

50. Crown counsel further distinguish the current application from that which was the subject of the *Ngāti Kahu Remedies Report* (2013). Ngāti Tara had sought resumption of a property that was also claimed by Ngāti Kahu, and the Tribunal had already decided to hold an urgent remedies hearing for Ngāti Kahu (Wai 785, #4.3.39). The Tribunal had found that Ngāti Kahu had well-founded claims, and Ngāti Tara, a hapū of Ngāti Kahu, sought that the property be returned to them instead. The Crown argues that 'not one of the 31 claimants in the Te Tau Ihu Inquiry has sought resumption in the way Ngāti Kahu had' (Wai 785, #4.3.39). Since NRAIT do not have a well-founded claim, and since a remedies hearing is not currently in train to hear such claims, it is submitted that the position of NRAIT can be clearly distinguished.

Other issues

51. Crown counsel and counsel for NRIT sought leave to respond to the evidence filed by the applicants on 20 March 2013 (Wai 785, #V13 & #V14) and 25 March 2013 (Wai 785, #V15). In particular, the Crown wished to respond to the allegation that the Crown had been wrong in suspending its negotiations with Tainui Taranaki ke te Tonga Ltd (TTKTT) (Wai 785, #V14, para 45), and that the iwi trusts with which the Crown subsequently recommenced its negotiations in 2011 had insufficient mandate (Wai 785, #V14, para 45).

52. The Crown responded to this evidence by way of the second affidavit of Ms Jane Fletcher on 2 April 2013 (Wai 785, #V17).

53. Ms Fletcher rejects Mr Morgan's allegation that there was any impropriety in the Crown's decision to suspend its negotiations with TTKTT. The Crown submits that the Terms of Negotiation with TTKTT entered into in November 2007 expressly 'contemplated the suspension of negotiations' if any party commenced litigation. The Crown advises that the suspension of negotiations followed the decision of the Wakatū Incorporation to file High Court proceedings in May 2010 (Wai 785, #V17, para 9).

54. Ms Fletcher states that the decision to invite the individual iwi to re-enter negotiations in 2011 'stemmed from the Crown's desire to avoid further prejudice to the iwi and their members by further delay caused by the Wakatu litigation' (Wai 785, #V17, para 16).

55. Ms Fletcher further states that the Crown's decision to negotiate with the four Tainui Taranaki iwi directly was taken after 'all four iwi expressed their desire to negotiate on an individual basis towards iwi-specific settlements'. Furthermore, the invitation to negotiate was directed to the 'constituent iwi trusts' that had originally formed part of the 'umbrella of Tainui Taranaki ki te Tonga Ltd' (Wai 785, #V17, para 12).

Ngāti Rārua Iwi Trust's Submissions

56. Counsel for NRIT filed extensive written submissions in opposition to the application (Wai 785, #2.830) and also relied on the submissions made by Crown counsel (Wai 785, #4.3.39). In summary counsel submits that the foundations of the application are flawed and, having regard to the purpose of the Act, the approach taken by the applicants is unlawful (Wai 785, #4.3.39). As such, counsel submits that the application should be declined. Counsel also submits that *Haronga* is not authority for the general proposition that claimants seeking the return of Crown forest licensed (CFL) land are entitled to urgent hearings as of right. It is submitted that the Tribunal still retains discretion when determining such applications and should, when making such determinations, consider the factual context (Wai 785, #2.830, paras 50, 54-56).

No well-founded claim

57. Counsel for NRIT emphasises that the 'Tribunal's adjudicatory jurisdiction is only triggered upon a finding that the claim is well-founded' (Wai 785, #2.830, para 50). Counsel submits that the Wai 1617 claim (and its consequent amendment), relied on by the applicants, has not been considered or determined to be well-founded by the Tribunal. It is submitted that the applicants are instead seeking to rely on generic findings concerning CFL land from the *Te Tau Ihu Report* made in respect of other claims.

58. Counsel submit that the findings in the *Te Tau Ihu Report* which relate to NRAIT were either contemporary issues which will not be affected by the Te Tau Ihu iwi settlements (such as the perpetual leasing regime issues) or, in relation to the historic grievances, 'specifically distinguish between NRAIT and resident iwi' (Wai 785, #2.830, para 69). In relation to the wider findings of the *Te Tau Ihu Report* relied upon by the applicants regarding the Nelson and Motueka Tenths, it is submitted that such findings 'regarding the prejudice suffered by resident iwi do not form the basis of a distinct or severable claim by the applicants', as NRAIT is a 'statutory trust and cannot be understood to be a constituent hapū of either Ngāti Rarua or Te Ātiawa' (Wai 785, #2.830, para 70).

59. Referring to the applicants' reference to the position of Ngāti Tara (Wai 2000) in the recent remedies application brought by Ngāti Kahu, where the Tribunal found it was not fatal that Wai 2000 had not yet been determined to be well-founded, counsel for NRIT note that Ngāti Tara were not seeking to activate the Tribunal's adjudicatory jurisdiction but were rather seeking to be heard in the event that resumption recommendations were made (Wai 785, #2.830, paras 84-86). It is submitted that, in contrast to Ngāti Tara, the current applicants 'seek to rely on findings relevant to resident iwi to **found a claim** to CFL land' (Wai 785, #2.830, para 88, emphasis in original).

60. Counsel also submits that a claim must relate to CFL land before the Tribunal's jurisdiction under section 8HB(1) is activated. It is submitted that the Tribunal has not held that NRAIT hold mana whenua in the CFL land which is the subject of this application, nor have NRAIT's claims to CFL land been determined to be well-founded. Further, counsel argues that even assuming general land loss could be compensated by the return of any CFL land within the tribal district, NRAIT lacks a tribal area because it is not a tribal group. It is submitted that, unlike in *Haronga*, the applicants

lack a distinct claim to CFL land and are instead seeking to rely 'on the generic rights and interests of NRAIT beneficiaries arising from membership of their respective iwi' (Wai 785, #2.830, para 11). It is also submitted that unlike *Haronga*, the claim regarding CFL land was not made at the outset, but was rather amended at the '11th hour' (Wai 785, #2.830, para 12).

61. At the judicial conference Ms Chen, on behalf of NRIT, raised a further point with respect to the well-founded claim issue. Referring to Parliament's purpose in enacting the resumption provisions, Ms Chen makes reference to the following excerpt from paragraph 76 of the Supreme Court's decision in *Haronga*: '[t]he changes, which applied to claims in respect of licensed Crown Forest Land, gave greater protection to those who established their claims were well-founded. Rather than being dependent on a favourable response from the government to a recommendation of the Tribunal, claimants could seek recommendations from the Tribunal for a remedy which would become binding on the Crown if no other resolution of the claim was agreed.' Ms Chen says that this statement assists in clarifying 'what the purpose of this legislation is and what it actually does and the fact that, at the end of the day, there is a causal nexus required' (Wai 785, #4.3.39). Ms Chen also submits that it is clear from the wording of section 8HB(1) of the Act that such a nexus is required.

62. Counsel submits that 'taken to the logical conclusion, if the Tribunal were to accept the approach put forward by the applicants, that as long as it's a Māori group at the top of the South Island, as long as there's some sort of well-founded claim, as long as the identity of the claimants is irrelevant, as long as any hapū can "take advantage"... then you can put forward a claim for resumption', and that accordingly any individual could amend an existing claim to trigger the resumptive right and take advantage of a finding of a well-founded claim. It is submitted that it is conceivable that this would result in the potential re-litigation of every existing Tribunal finding. Ms Chen says that this was not the purpose of the resumption provisions, and that, consequently, what the applicants are suggesting 'is quite an unlawful approach to the whole purpose of the legislation that put in this part' (Wai 785, #4.3.39).

Significant and irreversible prejudice

63. Counsel also submits that the claimants will not suffer significant and irreversible prejudice if an urgent remedies hearing is not convened for the following reasons.

64. Firstly, in regards to the size of the group represented by the applicants and whether they can show clear support for the application, counsel for NRIT submits that the applicants have failed to provide any evidence to show support from NRAIT beneficiaries for the application. In contrast the evidence provided by Amoroa Luke, Lorraine Eade, Rima Piggot and Arthur Phillips, all beneficiaries of NRAIT, including 14 letters of complaint signed by 32 NRAIT beneficiaries, is referred to as showing that a mandate to bring the application was not sought by the applicants.

65. Counsel further submits that TTKTT has a clear mandate from iwi members to negotiate a settlement of their historic claims and this has not been withdrawn. In response to the applicants' contention that there had been a breakdown in negotiations with TTKTT, Ms Chen says that the evidence provided does not allow it to be characterised in this way (Wai 785, #4.3.39). Ms Chen submits that, in line with the Terms of Negotiation, the Crown was entitled to withdraw from negotiations once Wakatū commenced court proceedings. Ms Chen further submits that the Crown was entitled to recommence negotiations with the iwi rather than TTKTT because of the Letter of Agreement between TTKTT and the Crown (Wai 785, #V1(f)).

66. Finally in this regard, counsel submits that NRAIT is not an appropriate body to receive redress for historic Treaty breaches. It is submitted that NRAIT was established for a specific purpose and has not been through a mandating process to allow it to act on behalf of iwi. Further, counsel say that NRAIT is not a hapū group and its beneficiaries 'cannot be described as the "manawhenua ki Motueka"' (Wai 785, #2.830, para 129).

67. Counsel also refers to two matters referred to above, being that NRAIT is not able to establish a causal nexus to the CFL land over which it seeks resumption, and that NRAIT's allegations concerning the perpetual leasing regime are contemporary in nature and will therefore not be settled by the impending settlement of historical claims, as further reasons as to why the applicants will not suffer significant and irreversible prejudice if an urgent remedies hearing is not convened.

Alternative remedies

68. Counsel submits that there are alternative remedies available to the claimants. In particular, counsel notes that the Tribunal made specific recommendations in respect of NRAIT and the perpetual leasing regime in the *Te Tau Ihu Report*, and that the Crown subsequently negotiated a $5 million *ex gratia* payment to NRAIT in 2010 in recognition of their losses.

Ready to proceed urgently

69. Counsel for NRIT submits that 'significant volumes of highly specialised economic and customary interest evidence would be required' to determine the application, and the applicants have not demonstrated they hold such evidence (Wai 785, #2.830, para 153).

Prejudice to other iwi

70. Counsel for NRIT also submit that the Tribunal must take into account the potential effect of the considerable delay in the settlement of historic claims with Te Tau Ihu iwi that would occur should this application be granted. Counsel submits that this prejudice is comprised of a number of aspects, including financial loss, delay to the cultural revitalisation of Ngāti Raruatanga and the risk of further divisions amongst the iwi. It is submitted that if an urgent remedies hearing is granted and binding resumption orders are made, all settlements with Te Tau Ihu iwi will unravel, 'putting at risk $35 million in settlement redress and the cultural revitalisation of affected iwi' (Wai 785, #2.830, para 20).

Other interested parties' submissions

Ngāti Kōata Trust Board

71. Counsel for the Ngāti Kōata Trust Board note that Ngāti Koata are an interested party in these proceedings, and advise that they will participate in a collective response, unless they deem it necessary to participate in their own right to avoid prejudice (Wai 785, #2.831).

Rangitāne o Wairau Settlement Trust

72. The Rangitāne o Wairau Settlement Trust opposes the application (Wai 785, #2.833). Counsel submits that Rangitāne 'settled on the basis of a clearly understood relativity between iwi' which, if interfered with, would bring the settlement process of the Te Tau Ihu iwi into question (Wai 785, #2.833, para 5.2). In regards to the prejudice to Rangitāne, counsel submits that Rangitāne's mana would be depreciated if that

relativity was diminished. Further, it is submitted that any delays to settlement would have a significant financial cost to Rangitāne.

Ngāti Tama ki te Tau Ihu Trust (Wai 723)

73. The Ngāti Tama ki te Tau Ihu Trust opposes the application (Wai 785, #2.834). In particular, counsel for the Trust submits that the mandate to speak on behalf of Ngāti Tama ki Te Tau Ihu in respect of its interests in Motueka is held by the Trust; the applicants do not have authority to do so. It is also submitted that neither 'mana whenua ki Motueka' nor NRAIT were parties to the Wai 785 Inquiry and therefore cannot seek remedies on the basis of the findings contained in the *Te Tau Ihu Report*. Finally counsel submit that any delay to settlement will prejudicially affect Ngāti Tama ki Te Tau Ihu.

The Trustees of Te Ātiawa ki te Tau Ihu Manawhenua Incorporated Society (Wai 616)

74. Te Ātiawa ki te Tau Ihu Manawhenua Incorporated Society opposes the application (Wai 785, #2.835), primarily on the basis that, it is submitted, 'the application is a direct attack on the mandate of Te Ātiawa to negotiate and settle' Te Ātiawa ki Te Tau Ihu claims (Wai 785, #2.835, para 3). Referring to the results of a recently held ratification poll (Wai 785, #V 11), it is submitted that the iwi firmly support the mandate of Te Ātiawa and the claims settlement progress. Finally, counsel note that the applicants do not specifically request that the Crown not proceed with the Te Ātiawa settlement, but submit nevertheless that the delay to other Te Tau Ihu settlements will have repercussions for Te Ātiawa.

Ngāti Toa Rangatira and Te Rūnanga o Toa Rangatira

75. Ngāti Toa Rangatira and Te Rūnanga o Toa Rangatira oppose the application and support the submissions of the Crown and Ngāti Rarua (Wai 785, #2.837). Counsel submit that the applicants are without a well-founded claim; they did not participate in their own right in the Te Tau Ihu Inquiry, nor are there any 'well-founded claims in the Te Tau Ihu report (or elsewhere) particular to them to which they can point' (Wai 785, #2.837, para 2.5). Consequently, it is submitted that the applicants cannot invoke s8HB of the Act. Further, counsel submits that the applicants have no mandate to speak on behalf of any customary descent group in the region, and, consequently, any assertion that they hold mana whenua in the relevant area 'is without foundation' (Wai 785, #2.837, para 2.9).

76. Counsel also contends that the applicants are re-litigating issues that the Tribunal has already determined in relation to proceedings brought by the Wakatū Incorporation. It is also submitted that a 'further delay... would have very significant impacts on Ngāti Toa' (Wai 785, #2.837, para 5.2), and that binding resumption recommendations would have a 'catastrophic' effect on the Te Tau Ihu settlements (Wai 785, #2.837, para 5.4). In this regard, it is submitted that 'the removal of some forest blocks from the settlements would lead to an imbalance in availability of redress which would lead to a 'collapse of the agreed bargains' (Wai 785, #2.837, para 5.4).

Ngāti Apa ki te Ra To Trust

77. Ngāti Apa ki te Ra To Trust 'takes no position in respect of the substance of the dispute' (Wai 785, #2.838, para 2), but submits that Ngāti Apa will be prejudiced if the proceedings lead to a delay in legislation giving effect to its settlement deed with the Crown.

The applicants' submissions in reply

78. The applicants' submissions in reply, which were set out in written submissions dated 22 March 2013 and expanded on in oral submissions at the judicial conference on 26 March 2013, responded to these matters as follows.

Well-founded claim and Haronga

79. Applicant counsel note that reliance has been placed on my decision regarding the Wai 56 urgency application by those opposing the current application (Wai 785, #2.850). Counsel submit, however, that the Wai 56 decision concerned an application for an urgent inquiry, not an application for resumption orders, and was released prior to the Supreme Court's decision in *Haronga*. It is therefore submitted that this decision needs to be read in light of *Haronga*, particularly in regards to the Supreme Court's emphasis that a different approach is required when use of the Tribunal's adjudicative functions is sought.

80. From the Supreme Court's findings in *Haronga*, applicant counsel submit that what is central is (Wai 785, #2.850, para 27):

    a) Whether the Tribunal has recognised that claims for breach of the Treaty are well-founded;

    b) Whether the claimants have the right to make an application for a resumption order under section 8HB given the Tribunal's findings; and

    c) Whether the ability to seek resumption is being removed in a manner that will cause prejudice.

81. It is submitted that these features are present in the current case, namely that the *Te Tau Ihu Report* recognised that the claims subject to the application were well-founded; the applicants are persons entitled to seek resumption under section 8HB; and the Crown's actions will dispose of the lands in a way that will prevent the Tribunal from adjudicating on the claim (Wai 785, #2.850, para 28).

82. Consequently, it is stated that 'the decision is indistinguishable from *Haronga*' (Wai 785, #2.850, para 29).

83. In response to the submissions made by NRIT that *Haronga* can be distinguished from the present case, applicant counsel submit that the argument that the *Te Tau Ihu Report* found that 'claims **by the iwi groups** were well founded mischaracterises those findings, and the meaning of s 8HB and s 6(3) of the Act as interpreted by the Supreme Court in *Haronga*' (Wai 785, #2.850, para 29.1, emphasis in original). It is submitted that the important consideration is whether the breaches of the Treaty were established as well-founded, 'not the identity of the particular claimant who established them'.

84. Counsel, however, accept that the Tribunal would have to dismiss an application for resumption by a group who had no interest in the land. Counsel submit that if a hapū grouping wishes to take advantage of a Tribunal finding that a claim of a Treaty breach is well-founded, they may make an application irrespective of the identity of the claimant who brought the claim. *Haronga*, it is submitted, made it clear that technicalities in relation to the claimants do not prevent the right to seek resumption (Wai 785, #2.850, para 29.2). As such, the observation in *Haronga* that Mangatū Incorporation had originally sought resumption is ultimately immaterial. Further, Mr Cooke submits that the wording of the Act makes it clear that claims are not established only as well-founded for the claimant. It is also argued that the provisions of section 8HD(1) of the Act, which specify who can be heard when a question arises in relation to licensed land in the course of an inquiry into a claim, give a right to a

claimant group not previously heard by the Tribunal to seek resumption of such land (Wai 785, #4.3.39). Applicant counsel also refer to the *Ngāti Kahu Remedies Report* and the Tribunal's comments regarding the position of Ngāti Tara as demonstrating that the applicants do not have to have previously advanced a claim before the Tribunal themselves in order to seek resumption (Wai 785, #2.850, para 31).

85. Accordingly, applicant counsel submit that what is critical is whether the Tribunal has found the claims of Treaty breaches to be well-founded. Referring to the *Te Tau Ihu Report* and the specific findings of the Tribunal outlined in the original application, counsel submit it is clear that the Tribunal has done so (Wai 785, #2.850, para 44). Counsel submit that '[t]hese claims give rise to the right of the beneficiaries of NRAIT to seek resumption orders under the Act. That is because the particular Crown forest lands are within the rohe of the mana whenua ki Motueka, and accordingly can be subject to such claims' (Wai 785, #2.850, para 54).

Withdrawal from negotiations with TTKTT

86. At the judicial conference, Mr Cooke submitted that *Haronga* indicated it is irrelevant to consider whether Treaty negotiations are continuing. However, Mr Cooke submitted that in the *Ngāti Kahu Remedies Report*, the Tribunal took into account who it was that broke off negotiations. Therefore if it is to be considered a relevant consideration at this stage, Mr Cooke submitted that it was the Crown which withdrew from negotiations with the mandated body (TTKTT) and then re-commenced with the individual iwi trusts. Applicant counsel also submit that there has been no mandate granted by mana whenua ki Motueka to the iwi who now seek to settle claims involving lands within mana whenua ki Motueka's rohe. Accordingly, in their written submissions counsel submit that the Crown 'cannot both refuse to negotiate, and resist an application for remedies on the basis it will interfere with settlement' (Wai 785, #2.850).

Prejudice to the applicants

87. Applicant counsel submit that the prejudice which will arise to the applicants if the application is not granted 'must be the most compelling consideration' (Wai 785, #2.850, para 57) as the Supreme Court in *Haronga* said this factor was close to being determinative in itself (Wai 785, #4.3.39). In this situation the Crown's actions will mean the land which is the subject of the resumption application will be disposed of to groups other than the applicants. Counsel submit that this will lead to irreversible prejudice, as the applicants will lose the right to adjudication. The suggestion that the applicants can seek interests in those lands through discussions with the iwi 'does not substitute for the right to obtain direct restoration of the land itself in accordance with the provisions of the Act' (Wai 785, #2.850, para 58)

Mandate of the applicants

88. In response to submissions that the applicants have failed to demonstrate support for this application, applicant counsel submit that 'NRAIT has the statutory mandate to pursue these proceedings on behalf of the beneficiaries' in accordance with the Ngati Rarua-Atiawa Iwi Trust Empowering Act 1993. Counsel submit that the Act 'clearly contemplates that NRAIT acts on behalf of the beneficiaries, including by taking action to protect their property rights' (Wai 785, #2.850, para 66). It is also submitted that this mandate continues in the absence of evidence that NRAIT is acting contrary to the wishes of beneficiaries (Wai 785, #2.850, para 69). Counsel refer to the affidavit of Ropata Taylor (Wai 785, #V15) filed in reply as showing that 'the question concerning the settlements and this application has been fully discussed and consulted on with the beneficiaries' (Wai 785, #2.850, para 67). Counsel reject the contention that Rima Piggott's resignation shows the trustees are proceeding contrary to the wishes of the beneficiaries (Wai 785, #2.850, para 68). At the judicial conference Mr Cooke

conceded a formal resolution regarding the application had not been put to the beneficiaries but that consultation and discussion took place around AGMs and hui.

89. Counsel also reject the argument that, in the *Te Tau Ihu Report*, the Tribunal was clear when its findings related to NRAIT and when they related to other iwi groupings. Applicant counsel say that the Tribunal's comments in this regard did not concern who may have a right to bring a resumption application, but rather concerned who might be best to negotiate with. Further, counsel contends that 'resident iwi' refers to the applicants' beneficiaries, and the Tribunal's recommendations do not alter the applicants' responsibility to advance the interests of their beneficiaries (Wai 785, #2.850, paras 63-64).

Prejudice to the settling iwi

90. Applicant counsel accept that, if granted, the resumption application would prejudice the iwi groups seeking settlement as it would interfere with those settlements. However, it is submitted that this does not justify declining the application (Wai 785, #2.850, para 71). In this respect, applicant counsel submit that the application will not prevent settlement per se but rather delay certain aspects; they also point out that these proceedings have already been delayed before. It is also submitted that:

    a) If resumption is successful then the lands should never have been included in the settlements anyway;

    b) The Crown and iwi have proceeded knowing a mandated group was not included in negotiations; and

    c) If granted, the application will not prevent some form of settlement being entered into.

The timing of the application

91. Applicant counsel submit there is no basis to the criticism raised by the Crown that this application has been brought at the last minute (Wai 785, #2.850). In this respect, applicant counsel submit that the applicants did not delay filing the application once the Crown and iwi reached agreement to include land within the rohe of mana whenua ki Motueka and the prejudice became apparent.

The jurisdiction of the Tribunal to make the interim recommendation sought by the applicants

92. In response to submissions of the Crown and interested parties that the Tribunal does not have jurisdiction to make the interim recommendations sought by the applicants, applicant counsel contend that the Tribunal clearly has jurisdiction under section 6(3) of the Act to make such a recommendation once a claim has been determined to be well-founded which, it is submitted, is the case here (Wai 785, #2.850, para 79).

93. Applicant counsel further submit that such a recommendation is required to remove prejudice as, if not made, the prejudice will be fatal in that the possibility of obtaining an adjudicative remedy will be removed. Applicant counsel submit that 'it is anticipated that further inquiries will be required before more comprehensive orders or recommendations can be made. The key point is here that the Tribunal needs to make a recommendation now that action be taken to remove particular prejudice, because in the absence of that recommendation the prejudice will be of a fatal kind, as it will destroy the possibility of obtaining an adjudicative remedy. To find that the Tribunal could not make such a recommendation on jurisdictional grounds would cut across the whole object of the Act... If the Tribunal is persuaded to grant the urgent remedies application precisely to ensure that the adjudicative rights of the applicant are not undermined, it almost goes without saying that it would be inappropriate for the Crown to proceed to dispose of the lands in issue and thus circumvent the Tribunal's function

under the Act. The resources of the Tribunal are stretched, and it will need to deal with the need for urgent adjudicative determinations if and when they arise. It needs to be able to advise the Crown when it regards it as appropriate to urgently determine such adjudicative applications, and to recommend to the Crown that it not proceed to undermine the position in the meantime' (Wai 784, #2.850, paras 80, 82-83).

94. Applicant counsel also refer to the Tribunal's interim report on the National Freshwater and Geothermal Resources Claim which, it is submitted, contained interim recommendations and demonstrates the ability of the Tribunal to make the interim recommendations sought (Wai 785, #2.850, para 81).

Relevant legislation and practice notes

95. The Tribunal's general power to make recommendations is set out in s 6(3) of the Act:

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

96. The Tribunal's jurisdiction to make binding recommendations in respect of Crown forest land is set out in s 8HB of the Act:

> **8HB Recommendations of Tribunal in respect of Crown forest land**
>
> (1) Subject to section 8HC, where a claim submitted to the Tribunal under section 6 relates to licensed land the Tribunal may,—
>
> (a) if it finds—
>
> (i) that the claim is well-founded; and
>
> (ii) that the action to be taken under section 6(3) to compensate for or remove the prejudice caused by the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission that was inconsistent with the principles of the Treaty of Waitangi, should include the return to Maori ownership of the whole or part of that land,—
>
> include in its recommendation under section 6(3) a recommendation that the land or that part of that land be returned to Maori ownership (which recommendation shall be on such terms and conditions as the Tribunal considers appropriate and shall identify the Maori or group of Maori to whom that land or that part of that land is to be returned); or
>
> (b) if it finds—
>
> (i) that the claim is well-founded; but
>
> (ii) that a recommendation for return to Maori ownership is not required, in respect of that land or any part of that land by paragraph (a)(ii),—
>
> recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land not be liable to return to Maori ownership; or
>
> (c) if it finds that the claim is not well-founded, recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land not be liable to return to Maori ownership.

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

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

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

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

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

(4) On the making of a recommendation for the return of any land to Maori ownership under subsection (1), sections 40 to 42 of the Public Works Act 1981 shall cease to apply in relation to that land

97. The Tribunal's *Guide to Practice and Procedure* sets out criteria that the Tribunal will apply in determining any application for a hearing on remedies to be accorded urgency and prioritised for hearing:

The Tribunal will consider an application for an urgent remedies hearing only if the applicants have a report of the Tribunal in which their claim or claims have been determined to be well-founded.

In considering whether to grant urgency to an application for a remedies hearing, the Tribunal has regard to a number of factors. Of particular importance is whether:

- the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice if a remedies hearing is not urgently convened;
- there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- the claimants can demonstrate that they are ready to proceed urgently to a hearing.

In assessing whether the claimants are suffering or are likely to suffer significant and irreversible prejudice if a remedies hearing is not urgently convened, the Tribunal may have regard to the factors set out in *Haronga v Waitangi Tribunal*, namely:

- the size of the group represented by the claimants, and whether the claimants can show clear support for their application from this group;
- the connection between the remedy or remedies sought to be awarded and the original Treaty breach or breaches, including, where the return of land is sought as a remedy, whether this land was the subject of the well-founded claim or claims from which the application arises; and
- where there are current negotiations between the Crown and a mandated settlement body to reach an agreed settlement of the well-founded claim or claims, whether the remedy or remedies sought are addressed by the negotiations, and whether the Tribunal's jurisdiction to hear the claimants on remedies is likely to be imminently removed by legislation as a result of these negotiations.

Where any claimants apply for the Tribunal to exercise its binding powers under sections 8A to 8HJ of the Treaty of Waitangi Act 1975 as a remedy for their well-founded claim or claims, the Tribunal shall have particular regard to whether, if

urgency is not granted for a remedies hearing, the Tribunal's jurisdiction to hear the claimants on remedies is likely to be removed by imminent legislation.

Prior to making its determination, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

Issues to be determined

98. This application for an urgent remedies hearing raises two questions for determination:

    a) Do the applicants have a well-founded claim that can form the basis of a remedies hearing?

    b) If they do, should a hearing on remedies for their claim be granted urgency, having regard to the factors set out in the Tribunal's Practice Note and relevant precedent?

99. If both issues are answered in the affirmative, a determination must also be made on whether the Tribunal has jurisdiction to make the interim recommendations sought by the applicants and, if it does, whether it should make such recommendations.

Discussion

Do the applicants have a well-founded claim?

100. As a starting point it should be noted that the general presumption is that any claim filed with the Tribunal will first be the subject of an inquiry by the Tribunal (whether individually or as a part of a hearing of a number of related claims). If the claim is determined to be well-founded as a result of this inquiry, the Tribunal will then consider the appropriate remedial steps that the Crown should take to address the treaty breach or breaches which have prejudicially affected the claimants. This point was emphasised by both Crown counsel and counsel for NRIT in their submissions, and is clearly in line with established Tribunal practice.

101. The general presumption that the Tribunal must first hold hearings to inquire into a particular claim prior to determining it to be well-founded and considering the appropriate recommendations is not, however, always applicable. Claims to the Tribunal are normally filed by individuals on behalf of groups – generally iwi, hapū or whānau – and when the Tribunal inquires into these claims its findings and recommendations are made in relation to the claimant group as a whole, not the individual named claimants that submitted and prosecuted the claim. The named claimants, however, retain the responsibility and right to prosecute the claim on behalf of the claimant group. In rare circumstances where the named claimant or claimants do not wish to pursue a remedies hearing before the Tribunal, but the group on whose behalf the claim was submitted does wish to take this action, representatives of that group have chosen to file a new claim making the same substantive allegations as the original claim and seeking to be heard on the appropriate remedies to be recommended to address those well-founded claims.

102. This was the situation that existed with a claim by the Mangatū Incorporation heard as a part of the Tribunal's Turanganui-a-Kiwa Inquiry (Wai 814). The original claim, Wai 274, was filed on behalf of the Mangatū Incorporation and Te Aitanga-a-Mahaki, and was heard and determined to be well-founded. In particular, one of the claims heard and determined to be well-founded concerned land on the Mangatū block acquired from the Incorporation in 1961 in circumstances which the Tribunal found breached the principles of the Treaty.

103. In 2008, Alan Haronga filed a fresh claim, Wai 1489, on behalf of the Mangatū Incorporation, which relied on these earlier findings of the Tribunal in relation to Wai 274 and sought that a remedies hearing be convened to consider whether the Mangatū block land should be recommended for return to the Incorporation.

104. In that case, the fact that Wai 1489 was a well-founded claim which did not require any further substantive inquiry was accepted by both Judges Coxhead and Clark, who considered successive applications for an urgent remedies hearing in relation to this claim. It was also accepted by the Supreme Court when the Tribunal's decision to decline an urgent hearing was reviewed. Commenting on the relationship between Wai 274 and 1489, the Supreme Court noted that '[a]lthough in form a separate claim, [Wai 1489] was in reality pursuing the original claim in Wai 274 for resumption of the land alienated in 1961' (*Haronga,* para 98). The Supreme Court went even further and stated that in their view Alan Haronga and the proprietors of Mangatū 'could simply have sought an urgent resumed hearing under the leave reserved in Wai 274 since that claim specifically sought restoration to the proprietors of Mangatu Incorporation of the land alienated in 1961' (*Haronga*, para 98).

105. Counsel for the applicants submit that the circumstances of the present case are indistinguishable from the *Haronga* case in this regard. Relying on *Haronga*, counsel submit that what is important is that the *Te Tau Ihu Report* determined the issues that are the subject of their claim were well-founded, under the claims brought by Ngāti Rarua and Te Ātiawa. Counsel submit that it follows that the applicants are persons entitled to rely on those findings and seek resumption. Counsel summarised the applicants' position on this point as being that the important consideration is whether breaches of the Treaty were established to be well-founded, not the identity of the particular claimant who established them. In making this submission counsel concedes that the Tribunal would have to dismiss an application for resumption by a group with no interest in the land or link to the claimant group or groups already heard and determined to have well-founded claims.

106. Linked to this submission, applicant counsel also refer to the findings of the *Ngāti Kahu Remedies Report*, in relation to an application for remedies by Ngāti Tara, as authority for the position that the claimant group do not have to have previously advanced a claim before the Tribunal themselves in order to seek resumption orders under the Act (Wai 785, #2.850, para 31).

107. By contrast, counsel for the Crown submit that both the *Haronga* and Ngāti Kahu cases are distinguishable from the present application.

108. Crown counsel submit that in the *Haronga* case the applicant, Alan Haronga, relied on a claim filed on behalf of the Incorporation (Wai 274) that concerned specific forest land and Crown actions, and sought the return of that land to the Mangatū Incorporation, which the Tribunal determined was well-founded. Here the Crown says there is no such claim of the applicants that claims a Treaty breach in respect of the forest lands they seek as a remedy. The Crown further submits that the Tribunal requires that the applicants must have a report in which their claim is well-founded, and that of the 31 claims inquired into by the Te Tau Ihu Tribunal, none of them related to the applicants. Crown counsel therefore submits that the absence of a well-founded claim is the 'simple fact' that enables me to dismiss this application, which relates to a new claim unsubstantiated by a Tribunal Inquiry.

109. Crown counsel also distinguishes the *Ngāti Kahu Remedies Report* from this application. In that case the Tribunal found that Ngāti Kahu had a well-founded claim. The iwi then sought, and were granted, an urgent hearing on remedies. Ngāti Tara, a

hapū of Ngāti Kahu, subsequently filed their own application for remedies in response, which they sought to be heard as a part of the Ngāti Kahu remedies hearings. In the present case, Crown counsel submit, none of the 31 claimants in the Te Tau Ihu inquiry have sought resumption as Ngāti Kahu did. As NRAIT do not have a well-founded claim, and as none of these 31 claimant groups have commenced a remedies hearing, NRAIT's position is clearly distinguishable. In other words, NRAIT could seek leave to participate in a remedies hearing initiated by others, but cannot initiate such a hearing itself, especially in the face of opposition from those whose claims were actually heard in the Te Tau Ihu inquiry.

110. NRIT concurred with the Crown and submitted that the Tribunal's adjudicatory function is only triggered by a well-founded claim (Wai 785, #2.830, para 50). Counsel submit that the Wai 1617 claim has not been considered or determined to be well-founded and the '[w]ider findings regarding the prejudice suffered by resident iwi do not form the basis of a distinct and severable claim by the applicants. NRAIT is a statutory trust and cannot be understood to be a constituent hapū of either Ngāti Rarua or Te Ātiawa. Taking the applicants' approach to its logical extreme, any Te Tau Ihu iwi member would have a right to adjudication [of an application for a remedies hearing] and Ngāti Rarua submit that cannot be what the Act or Supreme Court in *Haronga* intended' (Wai 785, #2.830, paras 70-71).

111. In relation to the *Ngāti Kahu Remedies Report* counsel for NRIT submit, in line with the Crown's submission, that Ngāti Tara were not seeking to activate the Tribunal's adjudicatory jurisdiction but seeking to be heard in the event resumption recommendations were made. By contrast, in the present case, the applicants seek to rely on findings relevant to resident iwi to found their own claim on behalf of their beneficiaries.

112. Considering these submissions, I agree with NRIT and Crown counsel that the applicants have incorrectly interpreted both the *Haronga* case and the *Ngāti Kahu Remedies Report* in their submissions on this point.

113. Firstly in respect to the *Haronga* case, the situation was very different to the present case. In *Haronga*, the Mangatū Incorporation had a claim (Wai 274) which was inquired into and determined to be well-founded. Alan Haronga and the shareholders of the Incorporation could rely on that claim and those findings in bringing a remedies application under an essentially identical claim, Wai 1489, filed on behalf of the same claimant group. Such a claim does not exist in the present case and in my view is a vital factor which cannot be dismissed as irrelevant.

114. In their submissions on *Haronga* the applicants conflate the question of whether remedies in relation to a well-founded claim may be sought by different *named claimants* from those who filed the original claim (as was the case in *Haronga*) with the question of whether such remedies can be sought by a different *claimant group* from that on whose behalf the claim was filed and determined to be well-founded (as is the case here). This is an important distinction. If an unheard claim is to be deemed to be well-founded without inquiry, there must be a direct link between the original claim and the remedies application, as there was in the *Haronga* case.

115. If this was not the case then, as stated by counsel for NRIT, any individual Te Tau Ihu iwi member could rely on the findings of the Tribunal's report to trigger a remedies hearing, seeking to receive remedies on their own behalf as an individual or sub-group within the original claimant group, not on behalf of the original group itself. This could potentially result in the relitigation of every Tribunal finding. I do not consider this consequence was intended by the legislation and is certainly not what the Supreme Court found in the *Haronga* case.

116. In relation to the *Ngāti Kahu Remedies Report*, I also consider that counsel for the applicant has misinterpreted the Tribunal's findings in that case.

117. NRAIT cited the position of Ngāti Tara in the Ngāti Kahu remedies inquiry as analogous to theirs in this application, and as a reason why they could properly initiate a remedies hearing in relation to their claim (Wai 785, #2.850, para 31-33). In fact, the Muriwhenua Tribunal found in the *Ngāti Kahu Remedies Report* that, despite being part of an iwi (Ngāti Kahu) with a well-founded claim, Ngāti Tara could not themselves show that their new claim (Wai 2000) was well-founded without an inquiry into the substance of this claim, which raised new issues which had not been inquired into by the Tribunal in its Muriwhenua inquiry as a part of the determination of Ngāti Kahu's claims. The Tribunal accordingly said it would be required to consider the Ngāti Tara position in relation to remedies only if it determined that it should make resumption recommendations under Ngāti Kahu's remedies application, as Ngāti Kahu had a well-founded claim. In that situation, Ngāti Tara would be heard as a 'competing group' in that remedies application (under, I infer, the right to be heard on resumption issues set out in sections 8C(1)(d) and 8HD(1)(d) of the Act). The Muriwhenua Tribunal plainly did not consider the Wai 2000 claim to be one under which Ngāti Tara could seek their own hearing on remedies until it had been determined to be well-founded (*Ngāti Kahu Remedies Report*, pp 104-105).

118. When read in relation to this present case, the Wai 1617 claimants are not in the same position as Ngāti Tara in the Ngāti Kahu remedies hearing. Had one of the iwi in the Te Tau Ihu inquiry with well-founded claims sought a remedies hearing, the NRAIT beneficiaries would have the right to apply to be heard on this application, and assert their own right to receive particular remedies sought on behalf of their own discrete group within the original claimant group. However, that is not the case in this inquiry. In fact, most Te Tau Ihu iwi have filed submissions opposing the NRAIT application. Therefore NRAIT cannot enter a remedies process as a competing group, as the Muriwhenua Tribunal acknowledged Ngāti Tara could.

119. Far more analogous to the position the applicants seek to assert is the position of Ngāti Kahu in relation to their own remedies application. In the Muriwhenua Inquiry, separate claims were filed on behalf of several Muriwhenua iwi, including Ngāti Kahu, but the principal claim heard and reported on, Wai 22, was brought collectively on behalf of all five Muriwhenua iwi. When Ngāti Kahu sought to be heard on remedies several parties submitted to the Tribunal that, as the Muriwhenua iwi claims had been heard and determined to be well-founded collectively, Ngāti Kahu did not itself have a well-founded claim that it could rely on to seek a remedies hearing. Considering this issue, the Tribunal panel found as follows (Wai 45, #2.389):

> Counsel for Ngāti Kahu argued at the most recent judicial conference that the Muriwhenua Wai 22 claim was analogous to proceedings involving multiple plaintiffs in the High Court who may bring proceedings jointly and severally. Counsel referred us to the High Court Rules and submitted that the claims of Ngāti Kahu are severable from the claims of the other Muriwhenua iwi and Ngāti Kahu are entitled to separate relief.
>
> It goes without saying that the High Court Rules are not directly applicable. However in 1998, following the release of the Muriwhenua Land Report, the Waitangi Tribunal spent two days in Auckland hearing submissions on the issue of remedies. It subsequently produced a document intituled "Determination of Preliminary Issues". At pages 8 and 9 the Tribunal said:
>
> > *"As we see it the claimants in this case are the people or iwi of Muriwhenua. Though they stand in different divisions, on the evidence outlined in the report*

*they constitute to the outside world a distinctive and blood related entity holding collectively, and **severally**, customary interest in the lands of the Muriwhenua district."* (Emphasis added).

We accept that the interests of the Muriwhenua iwi were held collectively and severally. We are satisfied that particularly in relation to Wai 22 the claims of Ngāti Kahu are able to be severed from the claims of the other four Muriwhenua iwi.

120. As can be seen from the summary of the Te Tau Ihu Tribunal's relevant findings at paragraph 26 above, the Tribunal's findings were that the Crown's treaty breaches prejudicially affected particular iwi. This prejudice was often expressed collectively. For example, that Crown's actions in relation to the management of the tenths reserves prejudicially affected all beneficiaries of the reserves, being the iwi of Ngāti Rarua, Te Ātiawa, Ngāti Tama and Ngāti Koata. Similarly, Crown actions in relation to the occupation reserves and Whakarewa acquisition were found to have affected the resident Māori population in Motueka, being Ngāti Rarua, Te Ātiawa and Ngāti Tama. The interests of the different Te Tau Ihu iwi were well-defined before the Tribunal and, were one of these iwi to seek a hearing on remedies in relation to these issues, it would be no bar to them that the prejudice caused by Crown treaty breaches was expressed as affecting groups of iwi collectively.

121. The interests of the beneficiaries of NRAIT in the relevant Tribunal findings are, however, a step removed from the original claims determined to be well-founded in the *Te Tau Ihu Report*. The NRAIT beneficiaries are, as set out in their trust deed, the descendants of those Māori determined by the Native Land Court in 1892 and 1893 to be the customary owners of Motueka lands at the time of their acquisition in the 1840s. This beneficiary list was intended, as the deed and empowering Act show, to represent all those with customary interests in the land. However, in its report the Te Tau Ihu Tribunal described the trust deed's use of the Native Land Court determination as 'a dubious basis for defining the members of the Motueka hapū with customary rights in 1853', noting (in response to submissions of claimants from Te Ātiawa) that '[i]t may be that many Te Ātiawa whānau have been improperly excluded by reliance on the 1893 list' (*Te Tau Ihu Report*, p 1263). The beneficiary definition also excluded any descendants of Ngāti Tama tipuna, who the Tribunal found had customary interests in Motueka which were unrecognized by the Native Land Court in 1892 and 1893. The NRAIT beneficiaries therefore represent a particular grouping of Ngāti Rarua and Te Ātiawa iwi members, but one that does not represent all those with mana whenua in Motueka, or even necessarily all those of Ngāti Rarua and Te Ātiawa with mana whenua in Motueka.

122. The interests and claims of this particular group in the Motueka region in relation to the historical issues for which the applicants now seek redress were not put to the Tribunal during the Te Tau Ihu hearings, and they are not readily discernible from any of the evidence inquired into and reported on in this Inquiry. To the extent that the Tribunal turned its mind to the interests of the NRAIT beneficiaries in relation to the historical claims of Ngāti Rarua and Te Ātiawa, it was only to note that redress for historical claims regarding the Whakarewa lands should appropriately be settled with the iwi resident at Motueka, including Ngāti Tama, not with NRAIT (*Te Tau Ihu Report*, p 1262). This, as noted by applicant counsel, should not be viewed as a final determination of whether the claims set out in Wai 1617 should receive particular redress, but does show that at the time of the *Te Tau Ihu Report* the Tribunal could not see a distinct claim or interest held by the NRAIT beneficiaries separate from the claims of the Motueka iwi, namely Ngāti Rarua, Te Ātiawa and Ngāti Tama.

123. The Tribunal considered and made findings in relation to NRAIT specifically only in relation to issues regarding the treatment of the perpetual leases over Whakarewa arising from its 1993 empowering legislation (which the Tribunal found should be

brought into alignment with similar legislation relating to the Wakatū Incorporation). Crown actions in relation to Motueka lands were otherwise described as affecting resident iwi.

124. The Wai 1617 claimants now assert that the NRAIT beneficiaries have a particular claim to redress for the Crown's historical breaches cited in their statement of claim. Further inquiry into their claim is required to establish the particular interests of NRAIT beneficiaries, as opposed to the interests of Ngāti Rarua, Te Ātiawa and Ngāti Tama, in Motueka. These interests were not put to the Tribunal in the Te Tau Ihu inquiry, either as a separate claim, or as a distinct part of a broader claim. Further inquiry is therefore required to determine whether this claimant group has a well-founded claim in relation to the creation and management of occupation and tenths reserves in Motueka, in particular the relative prejudice caused to them as a claimant group as opposed to the wider resident iwi of the area. The same is true of the issues in relation to the alienation of the Whakarewa lands. Further inquiry is also required to determine the prejudice caused to the claimants in relation to the tenths reserve lands more broadly. Such inquiry would rely in part on evidence already presented to the Te Tau Ihu Tribunal, but would also require further submissions and evidence from the claimants clarifying the particular interests and claims of the NRAIT beneficiaries in relation to the Crown's actions in order to establish their claim as well-founded. The claimants could only, in my assessment, show a distinct and severable claim based on the Tribunal's existing inquiry and report in relation to the issues arising from the Trust's 1993 empowering legislation, which they do not appear to seek to prosecute under the Wai 1617 statement of claim or ASOC, presumably as a result of the partially completed settlement negotiations in relation to these issues between the Crown and NRAIT.

125. As a result of the above discussion, I consider that the present case is clearly distinguishable from *Haronga* and the findings of the *Ngāti Kahu Remedies Report* in relation to Ngāti Tara. The NRAIT claim (Wai 1617) has not been heard or determined to be well-founded, and is not so plainly severable from another well-founded claim or claims that no further inquiry into its substance is necessary. Such an inquiry must happen before the Tribunal can make a determination as to the appropriable remedies that should be recommended in relation to it.

126. For these reasons, the applicants do not have a well-founded claim and their application is declined on this basis. Accordingly, I do not need to go on to consider whether their application for an urgent remedies hearing meets the requirements for urgency. However, for completeness I make the following assessment of the submissions made on this issue, especially as a number of points would be relevant had the applicants sought an urgent substantive inquiry into whether Wai 1617 is well-founded, rather than on remedies to be recommended in relation to it.

Application for an urgent remedies hearing

127. The factors applied in determining whether or not to grant urgency, as set out in the Tribunal's *Guide to Practice and Procedure*, are reproduced at paragraph 97 above. While these factors will not always be the sole considerations in determining whether urgency must be granted to a hearing on remedies, they provide a strong guide as to whether an application poses such a significant issue that it must be prioritised for hearing by the Tribunal ahead of other claims awaiting inquiry and recommendations.

128. Of the three factors set out for consideration in the *Guide to Practice*, the most significant is the question of whether the applicants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice if a remedies

hearing is not urgently convened. It is on this question that most urgency applications turn.

Significant and irreversible prejudice

129. In assessing whether significant and irreversible prejudice will be caused to the applicants if they are not heard urgently on remedies, I must begin with the fact that the Tribunal's jurisdiction to further inquire into their claim will, if not heard urgently, be removed by legislation settling the historical claims of Ngāti Rarua and Te Ātiawa if these settlements are ratified by the iwi and passed into law by Parliament. The Supreme Court identified the prejudice caused to applicants by such removal, in the situation where they had a well-founded claim and sought the exercise of the Tribunal's binding powers as a remedy, as a powerful factor in favour of granting an urgent remedies hearing which '[p]roperly taken into account... is close to being determinative in itself' (*Haronga,* para 105). The applicants correctly identified this as applicable to their application, as settlement legislation is imminent and they seek as a part of the remedies recommended to them the return of CFL land in Motueka and Golden Downs. Were Wai 1617 to be well-founded, this would weigh significantly in favour of the applicants' contention that they are likely to be significantly and irreversibly prejudiced if a remedies hearing is not urgently convened.

130. As noted by Crown counsel, however, the Supreme Court's statement that imminent removal of the Tribunal's jurisdiction to determine remedies for a well-founded claim is 'close to being determinative' of an application for an urgent remedies hearing is not the same as saying that it *is* determinative. The Supreme Court weighed a number of additional factors in reviewing the Tribunal's decision in *Haronga* and these considerations, as well as any other relevant factors, must be taken into account in determining whether the applicants are suffering, or are likely to suffer, significant and irreversible prejudice if a remedies hearing is not urgently held.

131. The next factor to consider is the size of the group represented by the claimants, and whether the claimants can show clear support for their application from this group.

132. The claimant group on whose behalf the applicants have filed their claim, the beneficiaries of NRAIT, are the descendants of those Ngāti Rarua and Te Ātiawa tipuna identified by the Native Land Court as having customary rights in Motueka lands at the time of their acquisition in the 1840s. Ninety-four Ngāti Rarua tipuna and 14 Te Ātiawa tipuna are identified in the Trust deed. Their descendants are undoubtedly a claimant group of a reasonable size.

133. The support that the applicants have for their application from the claimant group they purport to represent has, however, been challenged by both the Crown and by NRIT and Te Ātiawa ki te Tau Ihu Manawhenua Incorporated Society.

134. At the judicial conference, Mr Cooke suggested that such questions of support would form a part of the remedies hearing itself, but were not a relevant consideration in determining whether or not to grant the application for urgency. He may be right that such issues would be a part of a remedies hearing, but a preliminary assessment of the support for the claim is also relevant in determining whether to grant an urgent hearing on remedies. If the Tribunal's resources are to be diverted from other inquiries to urgently hear an application for binding recommendations, the applicants must be able to satisfy the Tribunal that it is at least likely that they have the support of the people on whose behalf they seek to receive recommendations for the return of land and other assets. If such support were only considered at the hearing itself, the Tribunal could reprioritise its resources to hear an application for remedies, only for it to become clear at the hearing that the applicants lack any support from the claimant

group on whose behalf they seek to receive remedies. Such an outcome would frustrate claimant groups seeking to pursue remedies through settlement negotiations, and needlessly disrupt the Tribunal's hearing programme, delaying inquiry into other claims. Indications of support are therefore a relevant factor for the Tribunal to consider in determining an application for urgency.

135. Support from the claimant group for the application was described in the first brief of evidence of Paora Mokena as follows: 'The application is supported by all of the Claimants who are drawn from and represent all of the families and hapu of Motueka (the mana whenua). The issues relevant to the application, and the application itself, have been discussed and debated over time by the whanau and hapu at various hui and events, including the NRAIT AGM and Marae meetings at Te Awhina Marae, Motueka. In addition, the NRAIT trustees (some of whom are the Claimants under the amended statement of claim) have authorised this action, and those trustees are elected by the beneficiaries (the mana whenua) to represent their interests at the hapu level in Motueka" (Wai 785, #U19, para 54).

136. This was disputed in the briefs of evidence of Lorraine Eade, Rima Piggott and Arthur Phillips filed in support of NRIT's submissions opposing the application for an urgent remedies hearing.

137. Lorraine Eade states that '[a]s an NRAIT beneficiary, I have not been informed of or consulted on the Board's decision to make this application to the Waitangi Tribunal. I have not heard of any public hui where mandate was sought to take such action. I only became aware of this action prior to Christmas 2012, and after having to provide evidence at the High Court in Wellington in respect of similar proceedings by Wakatu Incorporation against the Crown. In particular, the NRAIT Board have not informed the beneficiaries of NRAIT, who necessarily are also members of either Ngāti Rarua Iwi Trust or Te Ātiawa, that this application would seek an urgent recommendation that the Crown cease to engage in Treaty settlement negotiations with Ngāti Rarua (or I understand, Te Ātiawa although I am not a beneficiary of Te Ātiawa). I have spoken to NRAIT beneficiaries that have now opposed the NRAIT application to the NRAIT trustees. I attached 14 complaint letters from NRAIT beneficiaries signed by 32 NRAIT beneficiaries that have been sent to the NRAIT trustees at LE3. In addition, I am one of 11 NRAIT trustees that have sought a Special General Meeting of NRAIT to oppose this application before the Waitangi Tribunal. I attached the notification of these NRAIT beneficiaries that have sought a Special General Meeting in accordance with section 11 (b) of Schedule 3 of the Ngati Rarua-Atiawa Iwi Trust Empowerment Act 1993 at LE4' (Wai 785, #V2, paras 18-22). Copies of the specified documents are included in Ms Eade's brief of evidence. The letters from NRAIT beneficiaries opposing the application are all prepared from the same text, and state that '[t]he Trustees decided to apply to the Waitangi Tribunal without adequately consulting us as beneficiaries. The NRAIT website has communicated some of the reasons for the Trustees' decision, but this decision was still made without our consent or approval. We do not agree with the Trust's application – either its merits or its strategy.'

138. Rima Piggott, chairperson of Te Awhina Marae in Motueka, trustee of NRIT and former trustee of NRAIT, stated in her brief of evidence that one of the reasons for her resignation as an NRAIT trustee in January 2013 was that 'I do not believe that NRAIT ensured that this application was supported by the NRAIT beneficiaries' (Wai 785, #V3, para 10). She further stated, in relation to a presentation made to NRIT on NRAIT's remedies application by Mr John Charleton in December 2012, that 'Mr Charleton stated that NRAIT had discussed the option of making applications for resumption orders of Crown Land for some years. He stated that this had been discussed, and minuted, in the last five NRAIT AGMs. I attended the NRAIT Annual General Meeting in 2011. I do not recall the NRAIT trustees informing the NRAIT

beneficiaries that they would be applying for resumption orders of CFL Lands. The minutes of the NRAIT AGM 2011 are attached at RP2' (Wai 785, #V3, para 18). The attached minutes bear out Ms Piggott's statement that no proposal or discussion of a remedies application was minuted as a part of the 2011 AGM.

139. Arthur Phillips, Chairman of the Komiti Whakapapa for Ngāti Rarua and a beneficiary of NRAIT, stated in his brief of evidence that 'NRAIT did not come out and ask us as beneficiaries about the Tribunal application. I only found out about it through Hemi Toia and Molly Luke at Ngāti Rarua Iwi Trust (NRIT) after the application had been filed. I did not see a panui that came from NRAIT – neither did my whānau. Wakatu at least consulted us when they made their Tribunal application. There was no consultation here' (Wai 785, #V6, paras 27-28).

140. In response to these briefs of evidence and the submissions of NRIT as to the support for the application, the applicants filed a brief of evidence of John Charleton in which he, as Chief Operating Officer for NRAIT, set out the consultation on the application which had occurred. Mr Charleton states that, in his view, beneficiary approval for the remedies application was received at an NRAIT Special General Meeting on 17 July 2010, when those present approved that the NRAIT trustees 'continue negotiating with the Crown on all other outstanding historical and contemporary treaty matters' (Wai 785, #V13, para 29). The minutes of this SGM are attached to Mr Charlton's affidavit. Reading the statement quoted by Mr Charleton, the proposal approved by those in attendance was raised in relation to ongoing negotiations between NRAIT and the Crown concerning the perpetual leases over the Whakarewa lands. There is no specific mention of negotiations, or an application to the Tribunal for remedies, in relation to any other historical claims of NRAIT or CFL land.

141. The timeline established by Mr Charleton's brief shows that the issue of CFL land and a potential remedies application on behalf of NRAIT beneficiaries was first raised in an NRAIT Special General Meeting on 7 October 2011. Some disagreement with such an application was raised by one beneficiary in attendance, and the potential application was otherwise generally discussed with no proposal put to the meeting for a vote (Wai 785, #V13(e)).

142. The application was next discussed in a meeting of NRAIT trustees on 17 September 2012. At this meeting the trustees present agreed to the preparation and filing of 'a contemporary claim to the Waitangi Tribunal and an urgent application for orders relating to Crown Forest Lands within Motueka and the surrounding area'. It was also agreed that the trustees would 'prepare and implement a communications strategy to inform NRAIT beneficiaries and other interested stakeholders (for example, the iwi trusts and wider community) of NRAIT's proposals.' In their submissions on this evidence, Crown counsel noted that at the conclusion of the meeting the Chair 'reiterated the confidentiality of the preceding discussions undertaken and paperwork distributed and requested all parties privy to such respect such confidentiality' (Wai 785, #V13(c)).

143. The issue of CFL land was next raised at a Special General Meeting on 5 October 2012, with the trustees' concern around the transfer of the CFL land as a part of the forthcoming iwi settlements being discussed, and it being stated that 'NRIT and NRAIT should hold discussions to come to an agreement on the [Ngāti Rarua] settlement' (Wai 785, #V13(f)). The urgent remedies application agreed to at the earlier trustees meeting was not discussed, so far as the minutes disclose.

144. The final discussion of the application shown in Mr Charleton's brief of evidence is in the minutes of a meeting of NRAIT trustees on 7 December 2012, where the remedies application was discussed and conditionally approved by the trustees. The minutes

show that '[i]t was decided that the application in final draft needs to [be] sighted and viewed and will be submitted in all the trustees' names. Te Atiawa and Ngati Rarua are to be informed prior to lodging the resumption" (Wai 785, #V13(a)).

145. An additional response to the evidence filed by NRIT was made in the brief of evidence of Ropata Taylor, an NRAIT trustee and trustee of Te Āwhina Marae o Motueka Trust, who stated that 'I have been actively engaged in a number of consultative hui with the mana whenua families about our dissatisfaction with the settlements over the years. For the last five years, this has been a significant issue discussed at our marae on the evening preceding the NRAIT AGM. Often these conversations crossed over into the AGM, as can be seen in our minutes over the years. I refer to the affidavit in reply of John Charleton in this regard. As part of our Matariki celebrations in 2012, we held a dedicated hui in our wharenui on these issues. When the Chair of Te Ātiawa Iwi Trust came to Motueka in 2012 to meet with the mana whenua families, we discussed it. When the Chair and Trustees of Ngāti Rarua Trust met with us in Nelson in 2011, we discussed it. Throughout, we have expressed our concern about our property rights, incursions by Iwi into our territory, and our consideration of a resumption order for the Crown Forests. For this reason, I am surprised that it has been implied that the beneficiaries of NRAIT have not been aware that NRAIT intended to pursue our rights through the Tribunal. I was present, participated in and can vouch for the numerous hui and consultations on these matters' (Wai 785, #V15, paras 34-35).

146. A further brief of evidence of Rima Piggott responding to the evidence of John Charleton was subsequently filed by counsel for NRIT. In this brief Ms Piggott states that the minutes of the 7 December 2012 trustee hui 'affirm my view, that the nature and impacts of the NRAIT application were not adequately conveyed to the NRAIT Board trustees, let alone the beneficiaries.... The draft application prepared by the NRAIT legal counsel to the Waitangi Tribunal seeking urgent recommendations that Crown ought to not to [sic] implement the proposed settlements with Ngāti Rārua or any other iwi and seeking an urgent remedies hearing were not provided, or explained in any detail, to the NRAIT trustees' (Wai 785, #V19, paras 6, 7.2). Ms Piggott also states: 'I further note that in the NRAIT Board teleconference on 17 September 2012 that Mr Charleton attended, a central component to the any [sic] action proposed to be taken by NRAIT in the Waitangi Tribunal was communication and consultation with respective iwi represented by the Trust .... I agree that I was on the teleconference when the resolution was passed and further state that I agreed in the context that was set out in the minutes; that all Iwi NRAIT represented would be consulted with' (Wai 785, #V19, paras 20, 22).

147. In their reply submissions to the Crown and other parties, the applicants submitted that support for the application could principally be shown by the fact that the trustees of NRAIT have a statutory mandate to pursue legal action on behalf of the Trust's beneficiaries. The statutory mandate they refer to is contained in clause 5(l) of the Trust deed, which is set out in schedule 3 of the Ngati Rarua-Atiawa Iwi Trust Empowering Act 1993, and states that the trustees have the power '[t]o institute, initiate, take or defend and compromise or abandon any legal proceedings or other claims involving the property, rights or affairs of the Trust or the iwi members who are beneficiaries of the Trust'. In relation to the importance of this mandate, the applicants submitted that (Wai 785, #2.850, paras 65-69):

> [I]t is said that not all the beneficiaries of NRAIT agree with the stance that is being taken, and evidence has been filed suggesting disagreement with the approach that is being adopted. In particular the evidence of Rima Piggott, a former NRAIT Trustee, suggests that the Trustees are proceeding in the absence of full beneficiary support.

This suggestion can have no substance given the specific functions of NRAIT arising from its Act, and its Trust Deed that the Act enshrined. This clearly contemplates that NRAIT acts on behalf of the beneficiaries, including by taking action to protect their property rights. It accordingly has the statutory mandate to do so – the analogy is with a body mandated to undertake Treaty negotiations. The mandate exists, and is stronger in the present case because it arises by virtue of statute.

Obviously if the Trustees of NRAIT were proceeding contrary to the desires of the beneficiaries that would be a different matter. But that cannot be said in the present case. The affidavits filed in reply from Messrs Morgan, Taylor, and Charleton respond to that point. Mr Taylor explains the steps that NRAIT has taken under the statutory mandate, including other litigation advancing the beneficiaries interest. In paragraphs 30-35 of his affidavit in reply he explains how the question concerning the settlements and this application has been fully discussed and consulted on with the beneficiaries. All the evidence filed in reply demonstrates that NRAIT's approach is part of a long standing policy in this regard that is well known to the beneficiaries to this end.

The reality is that Ms Piggott's resignation as a Trustee is itself evidence of the true position. The views that she has did not carry the day and she has resigned. The evidence also suggests that her disagreement was not clearly articulated prior to her resignation. So it is very difficult to accept that this can be taken as evidence that the Trustees are proceeding contrary to the desires of the beneficiaries.

But in the end, the key point is that NRAIT has the statutory mandate to pursue these proceedings on behalf of the beneficiaries. In the absence of evidence that the Trustees are doing so contrary to the wishes of the beneficiaries, the mandate continues.

148. Taking into account the evidence and submissions presented by the parties, I do not consider that the applicants have shown sufficient evidence that they have the support of the claimant group on whose behalf the application for an urgent remedies hearing is made. There are competing accounts of whether the application was discussed and supported at hui and meetings of the NRAIT beneficiaries. Such discussions, especially when they occur at and around hui, may not be formally recorded, as is raised by Mr Taylor in his brief of evidence. But what the available minutes of the meetings disclose is that some discussion of an application for remedies being made occurred, with disagreement on this matter being recorded and no expression of support from the beneficiaries being sought. The minutes of trustee meetings record an intention to 'implement a communications strategy to inform NRAIT beneficiaries of NRAIT's proposals' for a remedies application, but there is no evidence that this strategy was carried out, or that the proposals gained support from the beneficiaries through it. Letters from 32 beneficiaries expressing their opposition to the remedies application were filed as a part of the brief of evidence of Lorraine Eade. Eleven requests from NRAIT beneficiaries seeking a Special General Meeting to discuss the remedies application were also filed as a part of this brief of evidence, which Ms Eade states are made with the intention of opposing the application. These are both indications that a number of beneficiaries do not support the application, and are the clearest indication put to the Tribunal by any of the parties as to the beneficiaries' views on the application.

149. It must be considered that, as trustees, the applicants have been elected to represent the views of the beneficiaries of the Trust, and have the power under their Trust Deed to commence legal action in relation to the rights or affairs of the beneficiaries. I agree with the applicants that, in the absence of evidence to the contrary, their election as trustees and the powers contained in clause 5(l) of the Trust deed may be relied on as indicating support and authority for trustees to apply to the Tribunal on behalf of the beneficiaries. However, in this instance there is evidence that the trustees may not have the clear support of the beneficiaries in relation to this action. Parties have

submitted evidence that a number of beneficiaries oppose the application. Such opposition cannot simply be dismissed as examples of a dissenting minority without some evidence that the beneficiaries who have stated their opposition are in fact in a minority.

150. Further, the fact that members of Ngāti Rarua and Te Ātiawa – including beneficiaries of NRAIT – have elected to give a mandate to NRIT and Te Ātiawa ki te Tau Ihu Manawhenua Incorporated Society to negotiate the full and final settlement of their historical Treaty claims must also be considered to bring the much more general mandate to commence legal action contained in the NRAIT deed into question in relation to the support of NRAIT's beneficiaries for these proceedings.

151. As evidence of opposition by beneficiaries to the application exists, the applicants must necessarily be able to show some evidence of support from the people they represent, rather than simply relying on their statutory mandate as trustees. They have not done so. The only evidence of the views of the beneficiaries they have put forward is the motion approved at the 17 July 2010 Special General Meeting to 'continue negotiating with the Crown on all other outstanding historical and contemporary treaty matters'. For the reasons set out in paragraph 140, this is not persuasive evidence of support for the urgent remedies hearing presently sought.

152. In this instance, a resolution put to an AGM or SGM to bring this application to the Tribunal would have provided some clarity on this issue. This has not occurred, and the expressions of opposition to the application filed by beneficiaries of NRAIT, along with the mandate given by beneficiaries to iwi representative bodies to negotiate the full and final settlement of historical Treaty claims, must accordingly be considered as indicating that the applicants may not have the support of the claimant group on whose behalf they bring their application for an urgent remedies hearing. This weighs against granting the application.

153. The next factor for consideration is the nexus between the remedy or remedies sought to be awarded and the original Treaty breach or breaches, and in particular whether the land which the applicants seek to receive was the subject of the well-founded claim or claims from which their application arises.

154. The claimants seek recommendations under s 8HB that the Crown vest in them 'all or part' of a number of CFL lands, namely Motueka 15 and 16, Motueka 15 South, Golden Downs East, Golden Downs West, Golden Downs West 11, Golden Downs West 14 and Golden Downs West 12A and 12C.

155. In the ASOC filed for Wai 1617, the applicants state that 'the Claimants have a distinct and exclusive mana whenua interest in the Crown Forest Licensed Motueka Lands and a shared mana whenua interest in the Crown Forest Licensed Lands situated in western Te Tau Ihu' (Wai 1617, #1.1.1(a)). They do not otherwise specify a link between these lands and the Treaty breaches on which they seek to rely. The application for an urgent remedies hearing states simply that the Wai 1617 claimants will be prejudiced if, as is proposed, the Motueka lands are transferred by settlement to the iwi entities representing Ngāti Tama, Ngāti Raura and Te Ātiawa, and the Golden Downs lands are transferred by settlement to the iwi entities representing Ngāti Toa, Ngāti Tama, Ngāti Raura and Te Ātiawa. This transfer, the applicants submit, 'will result in the wrongful dispossession of the mana whenua ki Motueka to their lands' (Wai 785, #2.821, para 25).

156. In their response on this point, the Crown submitted that '[t]he applicants have failed to identify any statement of claim that seeks as redress the return of the Crown forest lands they now seek. This matters. In *Haronga* there was a distinct claim (Wai 274)

that concerned specific forest land, which specifically sought the return of that land to a specified entity (the Mangatū Incorporation) and that claim was specifically found to be well-founded. Here the applicants have not pointed to any specific claim that was inquired into by the Tribunal, let alone a claim that seeks the return of the forest lands they now seek, let alone a claim that they actually made themselves' (Wai 785, #2.832, para 69).

157. NRIT also questioned the link between the CFL land sought as a remedy and the treaty breaches in respect of which the applicants assert they have a well-founded claim, submitting that '[u]nlike *Haronga*, the claimants have no specific or distinct claim to CFL land and instead rely on the generic rights and interests of NRAIT beneficiaries arising from membership of their respective iwi' (Wai 785, #2.830, para 11). The applicants' contention that mana whenua ki Motueka have particular mana whenua interests in the forest lands, separate from those of Ngāti Rarua and Te Ātiawa as iwi, was also challenged in the brief of evidence submitted by Barry Mason, former NRIT chair and current chair of Te Hauora o Ngāti Rarua Limited, who stated that '[i]n relation to the Crown forest lands areas, no Motueka group ever had manawhenua over those forest lands above and beyond any other Ngāti Rarua whānau or hapū' (Wai 785, #V5, para 21).

158. I agree with the Crown and NRIT that the applicants have not been able to show a direct link between the Crown forest lands that they seek to have vested in them and the treaty breaches on which they seek to rely. This lack of a direct relationship between the applicants' claim and the remedy they seek is another factor weighing against the likelihood of significant and irreversible prejudice being caused to the claimants if a remedies hearing is not urgently held.

159. The final factor specified in the Tribunal's Practice Note to be considered in assessing whether the applicants are suffering or are likely to suffer significant and irreversible prejudice if a remedies hearing is not urgently convened is whether the remedy sought is addressed by current negotiations between the Crown and a mandated settlement body.

160. In his submissions at the judicial conference, Mr Cooke commented that under the Supreme Court's ruling in *Haronga* ongoing settlement negotiations relating to the land sought as a remedy should not be considered a relevant factor in assessing whether an urgent remedies hearing should be granted. While he did not make detailed submissions on this point, Mr Cooke appeared to be referring to paragraph 98 of the *Haronga* decision. In this paragraph the Court found that, where a claimant group has withdrawn a mandate previously given to a body to represent them in settlement negotiations with the Crown (or, it is suggested, where the Treaty breaches raised by the claimant group have not been addressed by these negotiations), these negotiations are irrelevant for the purposes of assessing whether or not an urgent remedies hearing should be granted in relation to that group's claim. While the Court stated that no particular form of withdrawal of mandate is required, that such a withdrawal of mandate has occurred must be established as a matter of fact by the applicant if current settlement negotiations are to be disregarded by the Tribunal. Such negotiations are not, as Mr Cooke appeared to submit, an irrelevant consideration in and of themselves – they only become irrelevant if the claimant group has withdrawn from negotiations. The question I must ask before considering the impact of such negotiations on the application is whether such a withdrawal has occurred in this case.

161. The applicants' main argument on this point addresses the question of whether withdrawal of mandate has occurred. In NRAIT's submission, the Crown has withdrawn from negotiations with the body mandated to settle their claims, TTKTT. This body was mandated to negotiate settlement of the claims of Ngāti Raura, Te

Ātiawa, Ngāti Tama and Ngāti Koata, including the claims of the Wakatū Incorporation, whose shareholders include members of these four iwi. Each iwi was represented by individual trusts – NRIT, Ngāti Tama ki Te Tau Ihu Trust, Te Ātiawa ki te Tau Ihu Manawhenua Trust and the Ngāti Koata Trust – who were shareholders in TTKTT along with the Wakatū Incorporation. In 2010, when the Wakatu Incorporation elected to take action in the High Court concerning these negotiations, the negotiations were suspended. In 2011 the Crown invited each of the four iwi trusts to re-enter settlement negotiations, while 'reserving' the ability of Wakatū Incorporation to continue their High Court action. The history of these negotiations is set out in the affidavits filed by Jane Fletcher (Wai 785, #V9 and #V17).

162. The applicants submit that in choosing to negotiate settlements with each individual iwi body, the Crown had withdrawn from negotiations with a body mandated to settle the claims of the NRAIT beneficiaries. This is an inaccurate reading of the mandate held by the separate iwi trusts. Each of these trusts sought a mandate to represent their individual iwi in negotiations, as noted in the Deed of Mandate included in the brief of evidence of Roma Hippolite (Wai 785, #V1(d)). In the case of NRIT, Lorraine Eade states in her brief of evidence that their mandate to represent their particular iwi has been repeatedly tested throughout negotiations (Wai 785, #V2, para 15). In these circumstances it is reasonable for the Crown to take the position that, having been mandated to represent their iwi's claims under the collective of TTKTT, the iwi trusts were also mandated to represent these claims in individual negotiations. By continuing negotiations with each iwi making up TTKTT, they have not withdrawn from settlement negotiations with TTKTT, but continued them on an individual basis with each mandated iwi representative included in that body.

163. The claimant group, namely the beneficiaries of NRAIT, have also not withdrawn the mandate of the individual iwi bodies for Ngāti Rarua and Te Ātiawa to represent them. While the applicants have filed a claim that seeks to separate out their particular claim issues from those of these two iwi bodies, as stated above they have not been able to demonstrate that they have the support of their claimant group in doing so. This affects whether the simple act of filing a claim inconsistent with ongoing negotiations can be seen as a withdrawal of mandate for a proposed settlement body to represent the claimants, as was the case in *Haronga*. Where it is not shown that the applicants are supported by the claimant group they represent, some further evidence must be shown that the claimant group have withdrawn a mandate previously given to a body to represent them in settlement negotiations. The applicants here have provided no such evidence.

164. The ongoing settlement negotiations between the Crown and, separately, Ngāti Rarua and Te Ātiawa, are therefore relevant considerations in determining this application for urgency. The settlement negotiations with Ngāti Tama and Ngāti Toa, who also continue to have a Crown-recognised mandate to represent their iwi members, are also relevant to the remedies that the applicants seek.

165. The deeds of settlement prepared in relation to Ngāti Rarua, Te Ātiawa and Ngāti Tama all include a recitation of the breaches made by the Crown in relation to each iwi in the creation and management of the tenths reserves, the Motueka occupation reserves, and the Whakarewa grant. The deed of settlement for Ngāti Toa includes a recitation of the breaches made by the Crown in relation to this iwi in the creation and management of the tenths reserves. While I have not been pointed to redress contained in the proposed settlements linked directly to individual Treaty breaches that occurred in relation to the reserves and Whakarewa, their noting in the historical account and Crown apology in the deeds indicates that the redress is intended to address these treaty breaches generally. While these claims are proposed (so far as I have been informed) to be settled with general redress, rather than redress specific to

these Treaty breaches, I note that the remedies that the applicants seek are also sought on a general basis, rather than because of a specific link between the forest lands sought and the Treaty breaches concerned.

166. It is also a consideration that the proposed settlements align with the Tribunal's recommendations for the negotiation of Treaty redress. The Tribunal found in the *Te Tau Ihu Report* that settlement of historical Treaty breaches in the Northern South Island was appropriately a matter to be addressed by the Crown with Te Tau Ihu iwi (*Te Tau Ihu Report*, pp 1439-1445). The Tribunal also recommended that contemporary issues relating to the leases over the Whakarewa lands should appropriately be addressed by the Crown and NRAIT, and the Crown have commenced separate negotiations with NRAIT on this issue, with a partial settlement consisting of a $5 million *ex gratia* payment to NRAIT already having been reached. Leave was reserved for claimant groups before the Tribunal to return to the Tribunal with respect to remedies, but it is relevant that the Crown have gone on to negotiate settlement with the claimant groups that the Tribunal found to be those who should receive redress for the treaty breaches found in the inquiry.

167. In weighing the effect of the current negotiations on whether significant and irreversible prejudice will be caused to the applicants if an urgent remedies hearing is not granted, it is important that (a) the redress the applicants seek is proposed to be returned as a remedy for the treaty breaches concerned; (b) the redress is proposed to be made to different group from that represented by the applicants; and (c) the groups with whom redress has been negotiated are those groups that the Te Tau Ihu Tribunal recommended should negotiate and receive redress for these breaches. The first and third points weigh against a finding that significant prejudice will be caused to the applicants if a remedies hearing is not granted. The second point goes towards their argument of prejudice, but is the least significant of the considerations on this ground – while the remedies sought will not go to the group that the applicants themselves assert should be the sole recipients of it, it will go to groups of which they are a part, and they will share in the benefit of it.

168. Weighing all of the factors above, I am not persuaded that significant and irreversible prejudice will be caused to the applicants if an urgent remedies hearing is not granted. The applicants are correct that the remedies they seek will be removed from the Tribunal's jurisdiction if their application is not heard urgently, which is a significant factor weighing in favour of a finding that their claimant group are likely to significant and irreversible prejudice, and granting their application. The size of the claimant group they represent, comprising several hapū of Ngāti Rarua and Te Ātiawa, is also a factor in favour of granting an urgent hearing on remedies. However, the fact that they have been unable to demonstrate that they have the support of this claimant group to seek a hearing on remedies; the lack of a direct nexus between the remedy sought and their claim; and the fact that the redress is proposed to be returned by settlement to groups of which the applicants are a part, in line with the Tribunal's recommendations for settlement, weigh conclusively against any finding that significant and irreversible prejudice will be caused to the claimant.

Alternative Remedies

169. Turning to the question of whether there are alternative remedies available to the claimants, I agree that there is no alternative remedy to address the redress that they seek, namely for the forest assets to be returned to NRAIT beneficiaries specifically. In terms of the Whakarewa lease issues, to the extent that this may be a part of their claim, I agree with the Crown and NRIT that the ongoing settlement negotiations in relation to this issue are an alternative remedy that the applicants can and should pursue.

Readiness to Proceed

170. As to the question of whether the applicants are ready to proceed to an urgent remedies hearing, I agree with counsel for NRIT that a hearing of the Wai 1617 claim would require significant fresh argument as to whether the rights of the NRAIT beneficiaries in relation to Motueka lands and the tenths reserves are such that particular redress should be made to them separate from redress made to the beneficiaries' iwi. I have found above that this goes to the question of whether their claim is well-founded, and requires a substantive hearing, contrary to the applicants' view that this question should be determined as a part of a remedies hearing. In any event, this evidence would be required should the matter be heard urgently. The applicants have not filed with the Tribunal any of the technical research or tangata whenua evidence that would be required were they to seek to establish the particular interest they claim, other than the briefs of evidence filed in support of their application. Nor have they indicated that such research and evidence is readily available. Nor have they directed the Tribunal to any existing evidence on the Te Tau Ihu Record of Inquiry that would form a part of any determinations on this issue. For these reasons, I understand that fresh research and evidence would be required to prepare for the hearing sought by the applicants, that they have not indicated that this material has been prepared or can readily be prepared, and that accordingly they would require time to complete such research and evidence before they were ready to proceed to an urgent hearing.

Additional Relevant Considerations

171. Two further points were raised by parties as relevant considerations in determining whether an urgent remedies hearing should be granted.

172. The first, raised by Crown counsel and NRIT, is that the applicants have delayed bringing this application 'until the eleventh hour'. They submit that this was noted as a relevant consideration in relation to urgency in *Haronga*, where the Supreme Court found that the applicants' claim there was 'not a case of a claimant coming forward belatedly with something unforeseen', and that this favoured granting urgency. The Crown submits that the applicants could have raised their claim for particular remedies with the Tribunal much earlier, as it has been clear since at least February 2009 that settlements in Te Tau Ihu would be made with iwi, and that separate redress for historical issues would not be available to NRAIT. The applicants dispute this, submitting that they were only pushed to file their application once it became clear that negotiations with TTKTT would not be resumed after the release of the High Court judgment in the Wakatū proceedings in June 2012, and that the settlements with the separate Te Tau Ihu iwi would include the Crown forest lands the applicants say should be vested in NRAIT and its beneficiaries.

173. I agree that this point is relevant to determining whether an urgent remedies hearing should be granted. I also agree with the Crown that the applicants have delayed filing these proceedings, when they knew or ought to have known at a much earlier stage that redress for the historical treaty breaches they rely on would be made to Te Tau Ihu iwi, with no separate redress going to NRAIT beneficiaries other than in relation to the contemporary Whakarewa leasing issues. This was clear, as recorded at page 1440 of the Tribunal's report, even at the outset of negotiations. If it was not clear then, it should have been when the Hon. Christopher Finlayson, Minister in Charge of Treaty of Waitangi Negotiations, specified in 2009 that settlements of historical treaty breaches in Te Tau Ihu would be with iwi. While the applicants' submission is that they did not know the Crown forest lands at Motueka and Golden Downs would be included in these settlements, they must have been alerted of this fact at the very latest when

Ngāti Rarua, Te Ātiawa, Ngāti Tama, Ngāti Koata and the Crown initialled proposed deeds of settlement in October 2011. That the applicants delayed filing a claim asserting their separate interests in Te Tau Ihu until just before deeds of settlement were to be finalised with iwi is an additional factor weighing against granting urgency.

174. The second additional point, raised both by counsel for various Te Tau Ihu iwi trusts and by the Crown, is the prejudice that would be caused to iwi were an urgent remedies hearing to be granted. These parties submit that, were the Tribunal to grant an urgent remedies hearing for Wai 1617, it would prejudicially affect the current negotiations between the Crown and iwi by delaying the conclusion of these settlement negotiations. In relation to this delay, the applicants submit that '[s]uch delay is regretted, but it is not as if delay has not occurred already. Moreover, this process will ensure that any settlement of Treaty grievances are of an enduring nature, and do not create further injustices and claims in their stead' (Wai 785, #2.850, para 17). The iwi bodies take a different view of the prejudice caused to them by the delay. Ngāti Rarua submit that such delay would cause a direct financial or economic loss to the iwi, a delay to the cultural revitalisation of Ngāti Raruatanga, and risk iwi divisions. Ngāti Tama submit that such a delay will cause prejudice to their iwi that 'can be measured financially and commercially, through the loss of interest earned on the settlement amount and the loss of commercial and development opportunities. It will also have spiritual and emotional impact on iwi members, particularly kaumatua, who have already waited many years and experienced the disappointment of long delays in the settlement process' (Wai 785, #2.837, para 4(i)).

175. I accept the iwi representative bodies' submissions that, were a remedies hearing to be granted to the Wai 1617 claimants, it would delay current negotiations for the settlement of the Treaty breaches with Te Tau Ihu iwi. This delay would have a detrimental effect on all of these iwi. This delay would be for a minimum of a year, which experience shows is the shortest time within which the Tribunal can prepare for, hear and issue a report on appropriate remedies for a claim. This would have a financial effect on the iwi concerned, but more importantly would prolong the time they must wait for a full acknowledgment and provision of redress, both cultural and economic, recognising the prejudice they have suffered as a result of treaty breaches. I do not accept the applicants' submission that these iwi have brought such prejudice upon themselves by proceeding with negotiations knowing a mandated group (TTKTT) was not included in negotiations; it is clear on the evidence presented that the mandates held by NRIT and Te Ātiawa ki te Tau Ihu Manawhenua Incorporated Society give them the authority to negotiate settlement of all historical claims of Ngāti Rarua and Te Ātiawa in the Northern South Island.

176. The prejudice that may be caused to other parties in particular by delaying settlement is a relevant factor for consideration in the determination of an application for an urgent remedies hearing, as the Supreme Court recognised in its discussion on this point in *Haronga*, although the Court noted that such prejudice 'cannot be determinative' (*Haronga*, para 108). I agree that this is not a determinative factor, but include it as a further consideration weighing against granting an urgent hearing on remedies.

Conclusion

177. Considering all of the relevant factors, I find that even had the Wai 1617 claimants been able to show that they had a well-founded claim, their application would not meet the threshold required for granting an urgent hearing on remedies. The lack of evidence of significant prejudice, the fact that the claimants are not completely prepared to commence an urgent hearing, the delay in filing their claim and application, and the prejudice that would be caused to other parties were an urgent

hearing to be granted, all lead me to the conclusion that an urgent remedies hearing should not be granted in these circumstances.

Decision

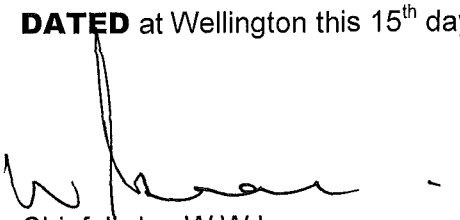
178. The applicants do not have a well-founded claim that would form the basis of a remedies application, and their application for an urgent remedies hearing is dismissed on this ground.

179. Even if the applicants' claim were well-founded, their application does not meet the threshold required for the Tribunal to hear it urgently ahead of other scheduled inquiries.

180. Having regard to these findings I do not need to consider the applicants' request for urgent interim recommendations.

The Registrar is directed to distribute a copy of this direction to counsel for the applicants, Crown counsel, and all those on the distribution list for Wai 785, the combined record for the Northern South Island Inquiry.

DATED at Wellington this 15th day of May 2013



Chief Judge W W Isaac
Presiding Officer
WAITANGI TRIBUNAL