IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-2033
[2022] NZHC 843

UNDER	the Judicature Amendment Act 1972 and Part 30 of the High Court Rules
BETWEEN	NGĀTI WHĀTUA ŌRĀKEI TRUST Plaintiff
AND	ATTORNEY-GENERAL First Defendant

Hearing:	9 February – 30 April 2021 (weekdays except 12, 15–19 February, 1–5 March, 1–2, 5–6, 14–16, 19–20, 29 April 2021) with additional submissions on 21 and 24 May, 5, 12 and 17 November 2021 and 21 and 28 January 2022
Appearances:	J E Hodder QC, J W J Graham and R M A Jones and E Kapa-Kingi for the plaintiff and for Te Runanga o Ngāti Whātua and Ngāti Whātua o Kaipara, interested parties D A Ward, G H Allan, Y Moinfar-Yong and N J Ellis for the first defendant P F Majurey for the second defendant A H C Warren, R A Siciliano, D T K Ketu, K M Katipo for Ngāi Tai ki Tāmaki Trust, interested party N R Coates, L A V Underhill-Sem and A O Houia-Ashwell for Te Ākitai Waiohua Settlement Trust, interested party M K Mahuika, T N Hauraki and C Conroy-Mosdell for Ngāti Pāoa Iwi Trust, interested party T D Smith and J M Te Rata for Ngāti Kuri Trust Board and Ngāi Te Rangi Settlement Trust, interveners
Judgment:	28 April 2022

JUDGMENT No 4 OF PALMER J

This judgment was delivered by me on Thursday 28 April 2022 at 10 am.
Pursuant to Rule 11.5 of the High Court Rules.
…………………………
Registrar/Deputy Registrar

AND	MARUTŪĀHU RŌPŪ LIMITED PARTNERSHIP Second Defendant
	TE RŪNANGA O NGĀTI WHATUA Interested party
	NGĀTI WHĀTUA O KAIPARA Interested party
	NGĀTI PĀOA IWI TRUST Interested party
	NGĀI TAI KI TĀMAKI TRUST Interested party
	TE ĀKITAI WAIOHUA SETTLEMENT TRUST Interested party
	NGĀTI KURI TRUST BOARD Intervener
	NGĀI TE RANGI SETTLEMENT TRUST Intervener

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I Summary

[1] Ngāti Whātua Ōrākei seek a declaration from the Court that they have ahi kā and mana whenua in relation to specified land in central Tāmaki Makaurau (Auckland) at tikanga.[1] They also seek declarations about how that means the Crown must act in relation to that land when settling claims of other iwi of breaches of the Treaty of Waitangi. Ngāti Whātua o Kaipara and Te Rūnanga o Ngāti Whātua support Ngāti Whātua Ōrākei. Ngāti Pāoa, Ngāti Kuri and Ngāi Te Rangi support aspects of the Ngāti Whātua Ōrākei case. Other iwi from the Marutūāhu Rōpū, Ngāi Tai ki Tāmaki and Te Ākitai Waiohua oppose the Ngāti Whātua Ōrākei claim to ahi kā and mana whenua. The Crown opposes the Ngāti Whātua Ōrākei claim altogether.

[2] The 11-week hearing at the Auckland High Court involved oral evidence from 35 pūkenga (experts in tikanga), experts in history, tribal witnesses and Crown officials. Two successive Ministers of Treaty of Waitangi Negotiations provided affidavits. The documentary evidence is also extensive. There was a hikoi from Ōrākei for the opening of the Ngāti Whātua Ōrākei case. Kiingi Tuuheitia and Waikato-Tainui attended for the opening of the Ngāi Tai ki Tāmaki case. The hearing was live-streamed and I deliver this summary of the judgment orally. The issues are ground-breaking and concern history, tikanga, the Treaty settlement process, and the extent to which the Court should intervene in all of those arenas.

A The Ngāti Whātua Ōrākei claim

[3] The claim of Ngāti Whātua Ōrākei is based on evidence by Te Kurataiaho Kapea, Taiaha (Lance) Hawke, Margaret Kawharu, Ngarimu Blair, Tāmati Kruger, Paul Meredith, Charlie Tawhiao, Dr Vincent O'Malley and Professor David Williams, and published and unpublished scholarly works, including those by Professor Sir Hugh Kāwharu. I set out a lengthy summary of the story of Ngāti Whātua Ōrākei as they express it, directed towards showing their mana whenua in the Tāmaki isthmus based on their tribal history, traditions and tikanga. The tribal history, traditions and tikanga of Ngāti Whātua Ōrākei do not need approval or disapproval by the Court. Neither do

[1] Ngāti Whātua Ōrākei is a collective entity, of course. But I prefer not to refer to Ngāti Whātua Ōrākei, or other iwi or hapū, as "it". I refer to an iwi or a hapū as a singular "they" in this judgment.

the tribal histories and traditions and tikanga of other iwi, aspects of which I outline later.

[4] From the descendants of the waka Māhuhu and Kurahaupō at Muriwhenua, tūpuna of Ngāti Whātua Ōrākei migrated to the north of the Kaipara, acquiring the name Te Taoū in battle. Around the 1600s, they came into conflict with Ngā Iwi on the south of the Kaipara Harbour. They were led by Haumoewārangi, who was killed with his daughter Rangiteipu. Kāwharu then led the Raupatu Tīhore of Ngā Iwi (the stripping conquest) from the Kaipara to Tāmaki. Kāwharu was eventually killed. A generation on, Ngāti Whātua and Te Taoū conquered Ngāi Iwi and settled in South Kaipara, with dominion from Maunganui Bluff to Kaipara Harbour.

[5] Around 1740, Kiwi Tāmaki of Te Waiohua, based in Maungakiekie (One Tree Hill), had undisputed mana over many people and several settlements in Tāmaki Makaurau, including mana whenua in relation to the area over which Ngāti Whātua Ōrākei claim it today. Kiwi Tāmaki launched a surprise attack on Ngāti Whātua in Kaipara. Te Taoū and other Ngāti Whātua hapū, led by Tuperiri, attacked Waiohua. Wahaakikai killed Kiwi Tāmaki at Paruroa (Big Muddy Creek). Later, Te Taoū took pā in from the southern shores of Waitematā to Kohimarama, then Tokapurewha, Whakatakaka, Ōrākei, Taurarua, Maungakiekie and then in Māngere. Ngāti Whātua Ōrākei say this was a comprehensive raupatu that resulted in a total change to political dominance in Tāmaki Makaurau.

[6] The name Ngāti Whātua, originally the name of one hapū, was adopted as a name for all hapū from Maunganui Bluff to Tāmaki in the 1800s. Te Taoū, Ngāoho and Te Uringutu are the three hapū comprising Ngāti Whātua Ōrākei.

[7] A section of Te Taoū under Tuperiri stayed in Tāmaki occupying Maungakiekie (One Tree Hill), Onewa, Te Tō (Freeman's Bay), Onehunga, Ōrākei, the upper Waitematā, Māngere and Ihumātao. Ngāti Whātua Ōrākei say an integral part of the raupatu was establishing new links with those whom Te Taoū had conquered. The children of Tuperiri married into Te Waiohua, in particular into Ngāti Te Ata. They have connections through marriage with Ngāti Pāoa. Ngāti Whātua Ōrākei accepts that some Waiohua people survived, stayed and intermarried with Ngāti Whātua

Ōrākei but maintains they did so under the political influence of Ngāti Whātua Ōrākei. They say they held sway from Maunga-nui Bluff to the Manukau Heads and eastwards to the Tāmaki River. By the beginning of the 19th century, their main residences were at Ihumātao and Māngere but they had significant cultivations at Ōkahu Bay and along the shores of the Waitematā. Early European encounters attest to the dominance of Te Kawau, as leader of Ngāti Whātua Ōrākei, in Tāmaki Makaurau west of the Tāmaki River.

[8] From 1821, Ngāpuhi attacked iwi in Tāmaki Makaurau, including Ngāti Pāoa and Ngāti Whātua, with many muskets. From 1826, Ngāti Whātua Ōrākei made a strategic withdrawal from the Tāmaki isthmus, as had other iwi. They relocated to Waikato but maintained their customary connections with the area over which they claim mana whenua. Ngāti Whātua Ōrākei began their permanent return to the Tāmaki isthmus in late 1835, protected by the long-standing alliance between Te Kawau and Te Wherowhero of Waikato.

[9] By the spring of 1837, Ngāti Whātua Ōrākei were planting gardens at Horotiu (Queen Street) and Remuera. A chapel was built at Ōrākei and hui were held, including at Ōrākei and Ōkahu Bay, to coordinate defence and cultivations. Other iwi also returned to the Tāmaki isthmus but Ngāti Whātua Ōrākei say they did not return not to the area over which Ngāti Whātua Ōrākei claim mana whenua. Ngāti Pāoa were in the Hauraki Gulf. Ngāi Tai ki Tāmaki were to the east in Maraetai and had interests in Clevedon and Papakura and some of the Hauraki Gulf islands. Ngāti Te Ata, Ngāti Tamaoho and Te Ākitai Waiohua ringed the southern shore of the Manukau Harbour up to the western Māngere peninsula. Te Kawerau ā Maki were to the west in Waitakere and had a pā at Onewa and claims to occupational rights on the North Shore, alongside Ngāti Pāoa and Ngāti Whātua Ōrākei. Ngāti Whātua Ōrākei say they continue to recognise the interests of these iwi in modern times.

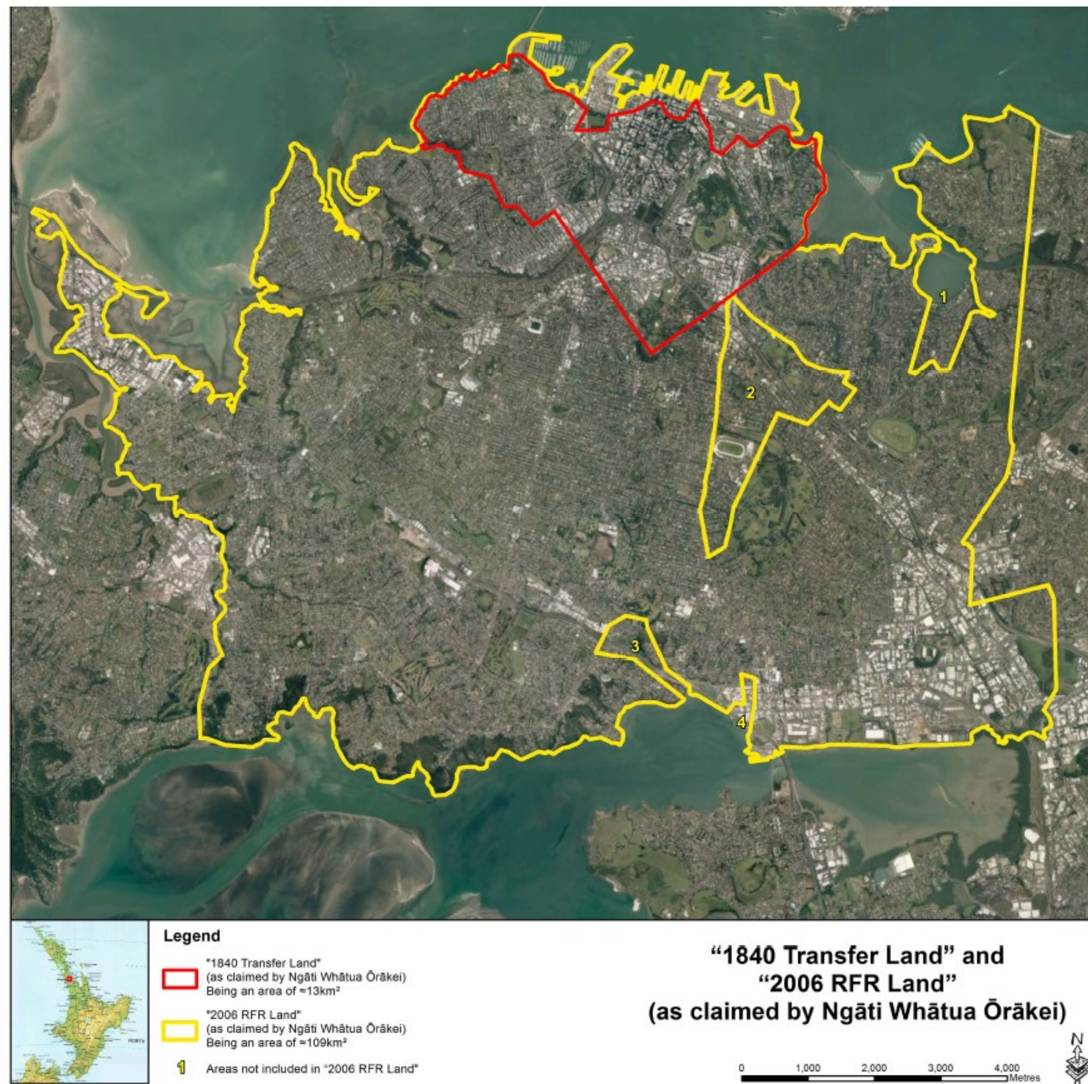
[10] By 1840, Ngāti Whātua Ōrākei say they had resumed the exercise of political authority from their principal kāinga between Māngere and Onehunga through Maungakiekie to the Waitematā, with Te Kawau permanently based at Ōrākei. Te Kawau signed the Treaty of Waitangi in March 1840. He was eager to form an alliance with the Crown including for protection and trade purposes. In April 1840 he sent a

delegation to invite Lieutenant-Governor Hobson to relocate the capital to the shores of the Waitematā, which was accepted. In September and October 1840, Ngāti Whātua Ōrākei transferred 3,500 modern acres of land to the Crown, starting from the river Mataharehare at what is now Hobson Bay, and continuing along the Waitematā to the river Ōpoutūkeha (or modern Cox's Bay) and then from both points to the summit of Maungawhau (Mt Eden). This transfer enabled the establishment of what is now the heart of Auckland city, which was formally established on 18 September 1840.

[11] Ngāti Whātua Ōrākei transferred two further blocks to the Crown in 1841 and 1842: 13,000 acres from Ōrākei, down what is now Manukau Rd, to Maungakiekie then to Puketāpapa (Mt Roskill) to the portage at Te Whau in 1841; and 200 acres of a triangle from Royal Oak, Three Kings to Maungakiekie. Ngāti Whātua Ōrākei say these were all tuku whenua, requiring utu or reciprocity, the start of a mutually beneficial and enduring relationship with the Crown. Ngāti Whātua Ōrākei further transacted land directly with Pākehā settlers and transferred land at Pukapuka to Kati, Te Wherowhero's brother and at Remuera/Epsom to Wetere of Ngāti Maoho, Ngāti Tamaoho and Ngāti Te Ata.

[12] By the 1850s, Ngāti Whātua Ōrākei had only 700 acres at Ōrākei. They say they expressed loyalty to the Crown, supplied produce and worked on building projects, formed an alliance with the Anglican Church, encouraged dispute resolution through the courts, acted as an intermediary between the Crown and the Kiingitanga, and hosted the 1860 Kohimarama Conference. But the Crown failed to reciprocate. By the mid-1860s Ngāti Whātua Ōrākei and others were becoming disillusioned and disheartened with any alliance with the Crown. In 1866, and again in a comprehensive judgment in 1869, the Native Land Court confirmed the rights of Ngāti Whātua Ōrākei over the Ōrākei Block and roundly rejected the claims of Heteraka Takapuna of Ngāi Tai ki Tāmaki. Ngāti Whātua Ōrākei did their best to stop the loss of land but it continued. By early 1950 they were virtually landless due to sustained compulsory and sometimes unethical acquisitions by the Crown. In 1952, the Crown forcibly evicted the remaining Ngāti Whātua Ōrākei inhabitants from their homes and burnt their village and meeting house at Ōrākei.

[13] On the basis of their tribal historical narrative and traditions, Ngāti Whātua Ōrākei claim mana whenua in Tāmaki Makaurau, in the area depicted in Map 1.



Map 1: The area over which Ngāti Whātua Ōrākei claim mana whenua

[14] Ngāti Whātua Ōrākei do not seek ownership of the land but a declaration of their mana whenua in terms of tikanga. Ngāti Whātua Ōrākei say this is their heartland or core rohe, since Tuperiri's raupatu in 1740, where they have maintained their ahi kā and mana whenua to this day. The claim of Ngāti Whātua Ōrākei is based on several take, or rights and responsibilities to land: take raupatu from the rauapatu and take tupuna from intermarriage, followed by ahi kā roa – keeping the fires lit, or inter-generational occupation, use and permanent control. Ngāti Whātua Ōrākei say their mana whenua is not shared with other iwi. Ngāti Whātua Ōrākei recognise many

groups have important historical and customary interests in certain parts of the area and acknowledge their obligations to acknowledge and look after those interests at tikanga. But Ngāti Whātua Ōrākei say no other group have a credible basis for an equivalent claim to mana whenua in this area at tikanga. This, say Ngāti Whātua Ōrākei, is entirely consistent with the relevant general principles of tikanga Māori. Mr Hodder QC, for Ngāti Whātua Ōrākei, seeks a declaration accordingly.

B Responses to Ngāti Whātua Ōrākei

[15] The Marutūāhu Rōpū is a confederation of five closely related iwi of the Tainui waka: Ngāti Maru, Ngaati Whanaunga, Ngāti Tamaterā, Ngāti Pāoa and Te Patukiriri. They are independent iwi who cherish their mana motuhake. They are mobile maritime peoples, moving between settlements and cultivations connected by moana (the sea or water). Marutūāhu Rōpū claim their iwi have customary interests or mana in central Auckland.

[16] Marutūāhu Rōpū do not challenge the identity of Ngāti Whātua Ōrākei being centred at Ōrākei. But they dispute a number of aspects of the historical narrative of Ngāti Whātua Ōrākei. For example, in their traditions, a wedding gift from Waiohua accounted for the arrival of Ngāti Pāoa on the isthmus and Ngāti Pāoa and Marutūāhu had their own tradition of their raupatu of Waiohua. Ngāti Pāoa lived in many pā and kāinga in Tāmaki through the 18th and 19th centuries until the battles with Ngāpuhi. Ngāti Whātua was protected while sheltering in the Waikato in the 1820s by Marutūāhu, who returned first to the isthmus. Ngāti Whātua Ōrākei was given permission by Ngāti Pāoa to settle at Ōrākei. Marutūāhu Rōpū called as witnesses: Tipa Compain, Terrence McEnteer, Liane Ngamane, William Peters, David Taipari, Harry Mikaere, Hauāuru Rawiri, Walter (Wati) Ngamane, Dr Korohere Ngāpō, Morehu Wilson and Professor Michael Belgrave. I record with sadness that Liane Ngamane and Morehu Wilson have passed away since the hearing.

[17] Mr Majurey, for Marutūāhu Rōpū, acknowledges that the tikanga of Ngāti Whātua Ōrākei does not admit of shared customary interests or mana in central Auckland. But he submits this is not the tikanga of any other Tāmaki tribe in the proceeding. In Marutūāhu tikanga, even marae and urupā are often shared. He

submits the absence of recognition by any iwi of the mana whenua of Ngāti Whātua Ōrākei is significant in terms of tikanga. It is unsafe to rely on the decisions of the Native Land Court. He submits it is open to the Court to find that the Ngāti Whātua Ōrākei claim of exclusive ahi kā and mana whenua is not made out over every inch of the claim area.

[18] Several of the issues with the historical narrative of Ngāti Whātua Ōrākei that are raised by Marutūāhu Rōpū rely on the location of activities and settlements of Ngāti Pāoa as one of their constituent iwi. But Ngāti Pāoa Iwi Trust appears separately in these proceedings. While Ngāti Pāoa has close whakapapa connections to Marutūāhu, Pāoa himself was not a descendant of Marutūāhu. By the beginning of the 19th century, the largest settlements of Ngāti Pāoa were in Tāmaki but they were driven out by the attacks by Ngāpuhi in the 1820s. On their return, Ngāti Pāoa made a peace pact with Ngāti Whātua Ōrākei, sealed by marriage settlements and gifts, at Ōkahu Bay in the 1830s. They settled around the eastern coast from Mission Bay and St Heliers to the Panmure Basin. In the 1860s, loyal to the Kiingitanga, they were rendered almost landless. Ngāti Pāoa called Ted Andrews, Glen (Joe) Tupuhi and Hayden Solomon as witnesses.

[19] Mr Mahuika, for Ngāti Pāoa, submits it is not the case that where one iwi of Marutūāhu were, all were. He submits it is not correct as a matter of fact or tikanga that the Marutūāhu collective subsumes the interests of Ngāti Pāoa or can claim significant interests in Tāmaki independently of Ngāti Pāoa. Mr Mahuika submits it is solely or primarily through the interests of Ngāti Pāoa that the Marutūāhu Rōpū claims an interest in the 1840 transfer lands and the land over which Ngāti Whātua Ōrākei claims mana whenua. Ngāti Pāoa oppose the position of Marutūāhu Rōpū.

[20] Ngāti Pāoa support the rights declarations sought by Ngāti Whātua Ōrākei to the extent they are consistent with the Kawenata Tapu and Conciliation Agreement which Ngāti Pāoa and Ngāti Whātua Ōrākei entered at Ōkahu Bay in January 2017, in a tikanga consistent process. Ngāti Whātua Ōrākei acknowledges that Ngāti Pāoa has "lead mana whenua interests" in the east of Auckland and on the North Shore. Ngāti Pāoa recognises that Ngāti Whātua Ōrākei has "lead mana whenua interests" in central Auckland. No one disavows the Kawenata or questions its validity at tikanga. The

evidence is that Ngāti Pāoa and Ngāti Whātua Ōrākei have reached agreement at tikanga over their respective mana whenua. Ngāti Pāoa does not deny that Ngāi Tai ki Tāmaki and Te Ākitai Waiohua have interests that extend into the area over which Ngāti Whātua Ōrākei claim mana whenua but leaves that to them to address.

[21] Ngāi Tai ki Tāmaki trace their ancestry from ancient pre-waka peoples known as Patupaiarehe, among others, and welcomed the Tainui waka, some crew members of which settled among them. They say the historical narrative is far from certain with conflicting evidence about several issues. They suggest the killing of Kiwi Tāmaki and raupatu was an intra-tribal fight between close relatives who both held their interests in Tāmaki through their Te Waiohua whakapapa. They question whether Ngāti Whātua Ōrākei maintained undisputed control over the Tāmaki isthmus after the attacks. They say the Ngāti Rau hapū remained on the isthmus throughout the period of Ngāpuhi attacks. They say there is uncertainty about the significance of the return of Ngāti Whātua Ōrākei to Tāmaki under the mana of Te Wherowhero. They say they continue to exercise kaitiaki responsibilities in the area at issue, which is the heartland of Ngāti Tai ki Tāmaki based on whakapapa. Ngāi Tai ki Tāmaki called four witnesses: James Brown, Te Warena Taua, Dr Te Kahautu Maxwell and Peter McBurney.

[22] Mr Warren (as he then was), for Ngāi Tai ki Tāmaki, submits the definition of ahi kā and mana whenua over every inch of whenua claimed by Ngāti Whātua Ōrākei cannot be sustained. If any tribe dominated following the death of Kiwi Tamaki, it was the forebears of Heteraka Takapuna and his relatives who descended from Hua o Kaiwaka and Ngāi Tai ki Tāmaki. Many tribes have and share mana whenua in the area. The concept of ahi kā has naturally evolved over time to meet the changing circumstances of Tāmaki Makaurau. Take tupuna and take whanaungatanga were most important in Tāmaki Makaurau. In central Auckland, because of the geography and whakapapa, application of the principles of tikanga have created shared mana whenua.

[23] Te Ākitai Waiohua descend from Ngā Oho, Ngā Riki and Ngā Iwi. Their eponymous ancestor, Huakaiwaka lived at Maungakiekie in the 17th century with a primary pā site at Maungawhau where his son, Kiwi Tāmaki was born. Te Ākitai acknowledges Te Taoū defeated Kiwi Tāmaki around 1740 though there is dispute

over the date. The defeat was a skirmish between close cousins and did not extinguish Te Waiohua who survived and re-established themselves in South Auckland, in and around Māngere in the 19th century. The return of Ngāti Whātua Ōrākei to Tāmaki in the 1830s would not have been possible without the protection of Te Wherowhero. Initial purchase histories should be given little weight. Ms Coates, for Te Ākitai Waiohua, submits that because of Crown actions, they lost their voice and profile in Tāmaki without clear rangatira representation, rendering the iwi virtually invisible to many third parties. Te Ākitai called evidence from Moka Apiti, Nigel Denny, David Wilson Takaanini, Karen Wilson and Mark Derby.

[24] Ms Coates submits that, while subsequent intermarriage gave Ngāti Whātua Ōrākei a take in the whenua, Waiohua continued to have underlying mana through an ancestral dimension, which allows them to have mana whenua. Te Ākitai Waiohua continues to maintain an ongoing relationship to the land and their customary interests in Tāmaki, with mana and take tupuna and the equivalent of ahi kā roa within the area over which Ngāti Whātua Ōrākei claim mana whenua. Ms Coates submits the effect of the declarations sought by Ngāti Whātua Ōrākei would be to expunge the mana whenua interests of all other iwi, including Te Ākitai, from the face of the Tāmaki isthmus.

[25] Te Ākitai Waiohua says that rights and interests in Tāmaki are more complex than one hapū being able to lay an impenetrable blanket with fixed and absolute boundaries of mana whenua and ahi kā over a vast area that has the effect of subordinating and/or ousting the customary interests and Treaty settlement opportunities of other iwi and hapū. Te Ākitai Waiohua say that exclusivity is not a necessary corollary of mana and the evidence highlights that shared mana whenua not only exists but is common in Māori society. Te Ākitai Waiohua see the world through their connections and relationship to land and people; an inclusive way of being, best expressed through whakapapa, whanaungatanga and manaakitanga.

[26] The Crown submits that Ngāti Whātua Ōrākei has not established the content of their asserted tikanga rights, either in terms of defining the exact nature of the tikanga concepts, such as the inherently exclusive nature of mana whenua, or their consequences at tikanga. Dr Ward submits different iwi hold different perspectives on

tikanga and may describe interests in different ways. There is a lack of specificity as to what is meant by Ngāti Whātua Ōrākei tikanga. There is an absence of consensus on the nature and characteristics of mana whenua. The characteristics of ahi kā are unclear. Given the contested nature of these concepts, and the plaintiff's claim to exclusivity, the Crown submits it would not be appropriate or even possible, for the Court to declare that Ngāti Whātua Ōrākei holds mana whenua and ahi kā in central Auckland.

[27] Ngāti Kuri and Ngāi Te Rangi intervene in this proceeding because of the impact it will have on the Crown's approach to the potential recognition of their rights and interests regarding other iwi in their respective rohe. They submit mana whenua is the ability to exercise authority over access to a territory and resources. As the highest and most powerful form of interest that defines and governs all other interests it is not divisible. But they do not take a position on tikanga as it applies in Tāmaki Makaurau.

[28] I outline in the judgment the positions on which the historian experts and the pūkenga, or tikanga experts were able to agree. I do not consider the agreed positions of the historians materially impact the positions of the parties about the historical narrative, but I take them into account with added evidential weight. Each of the pūkenga was an impressive witness, making careful responses drawing on deep knowledge. I consider that, collectively, the expert evidence of the pūkenga about tikanga is authoritative.

C Tikanga

[29] As Dr Te Kauhautu Maxwell says, "the fact that tikanga has its origins with the gods gives it validity and tapu sanctity".[2] As Tāmati Kruger says, "tikanga Māori is a set of binding principles, beliefs and traditions practised collectively by Māori whānau, hapū and iwi since time immemorial".[3] Margaret Kawharu quotes the Rt Rev

2 Brief of evidence of Te Kahautu Maxwell, 13 October 2020 [Maxwell Brief] at [124]. The first citation of a source is a full citation. Subsequent citations are in short form. There is a full bibliography at the end of the judgment.

3 Brief of Evidence of Tāmati Kruger, 2 June 2020 [Kruger Brief] at [38]–[39].

Manuhuia Bennet as saying that "tikanga", or custom, was the "right person, doing the right thing, in the right way".[4] The judgment provides further explanations.

[30] There are no differences between the parties as to the need to understand tikanga holistically as an interlocking set of reinforcing norms. Tikanga revolves around values and a value system. As the Waitangi Tribunal has said, "[t]ikanga is both a consequence and a source of Māori identity."[5] In a very real sense, then, tikanga is fundamental to "constituting" an iwi or hapū. It is essential to their identity along with, for example, their tribal histories, traditions and places. Without their tikanga, an iwi or hapū are not who they are. It follows that tikanga is quintessentially developed by each iwi or hapū, in the exercise of their rangatiratanga. There are different versions of which principles would be regarded as "core" to tikanga, as we heard in this case. Importantly, as circumstances change over time, norms evolve in response. Tikanga and its practice can change over time. None of the pūkenga disagreed with that. Tāmati Kruger describes tikanga as "ongoing and continuously updating".[6] And, as Dr Te Kahautu Maxwell says, "[t]ikanga is a way of life".[7] As Tāmati Kruger says, "[i]t is difficult to commit an account of tikanga to writing because … Māori traditions are predominantly aural and practical".[8] Tikanga loses something when reduced to writing. It even loses something when explained orally, in the abstract. Tikanga is performed, more than stated.

[31] The parties disagree on the degree of difference between the tikanga of different iwi and the extent to which tikanga Māori is common across all iwi and hapū in Tāmaki Makaurau and elsewhere. The position agreed by the pūkenga determines the point. There were and are fundamental philosophical underpinnings, described as tāhuhu he aratohu, that guide iwi approaches to tikanga and allow for some shared understandings and mutual interactions. However, the tikanga of an iwi or hapū is shaped by the historical narrative of that iwi and hapū, including the impact of colonisation and other events and circumstances over time. The evidence is that

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4 Brief of Evidence of Margaret Kawharu, 2 June 2020 [Kawharu Brief] at [20] and [241].

5 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 3.

6 Kruger Brief at [56].

7 Maxwell Brief at [93].

8 Kruger Brief at [40].

tikanga Māori rests on core principles that are common across most iwi and hapū. As Dr Te Kahautu Maxwell says, the core values are "like a whāriki; a woven mat, they must go together for tikanga to stand up".[9]

[32] Based on my (quite lengthy) review of the legal authorities and submissions, I consider it is clear that the law that accompanied Māori to Aotearoa was constituted by tikanga. Many aspects of it are law in New Zealand now: Māori customary law, made by iwi and hapū, governing behaviour of iwi and hapū and those who belong to them. As such, it is a "free-standing" legal framework recognised by New Zealand law. It does not necessarily cease governing an iwi or hapū just because the courts or Parliament or even other iwi suggesting otherwise.

[33] Tikanga is often assumed, recognised and referred to by New Zealand legislation. Like the common law made by courts, the legal effects of tikanga can be overridden by legislation. But even Parliament cannot change tikanga itself. Iwi do that, exercising their rangatiratanga. Similarly, one iwi cannot override the tikanga of another iwi without impinging on their rangatiratanga. Tikanga was recognised by English common law that accompanied the Crown to New Zealand, as were other sources of law. It is recognised by New Zealand common law today. As governing values for iwi and hapū, tikanga informs the common law. But it can be even stronger in legal effect than that. Tikanga can determine the outcome of a court's application of a statute or the common law, as it has in some cases. It can be a direct source of legal rights enforced by the courts.

[34] Tikanga governs matters of process as well as substance. There are ways of resolving disputes about tikanga which are consistent with tikanga and ways which are not. Recourse to courts without agreement between the parties is not obviously tikanga-consistent. As a matter of tikanga, of course, tikanga-consistent dispute resolution processes must be preferred to non-tikanga-consistent court resolution of disputes about tikanga. Indeed, resolution of a dispute about tikanga by tikanga-consistent processes may be more enduring than a ruling by a court. Tikanga-consistent dispute resolution may involve several or many discussions on marae over

[9] Maxwell Brief at [97].

a long period. Tikanga may require a discussion of a dispute over a long period of time compared to Pākehā dispute resolution. A court must be wary of claims by one group or another that resolution is not possible in the time taken so far.

[35] I accept that it would be a brave court that attempts to reconcile or prioritise tikanga that truly differs between iwi or hapū, especially if that reconciliation is not tikanga-based. An attempt to do so may well not be accepted at tikanga. It may not be tika. But, as Mr Mahuika says, tikanga does not end when an issue is taken to court. A court decision that pays due regard to tikanga could, perhaps, sometimes free a logjam in relationships and enable further iterations of tikanga-consistent discussions. Because tikanga is law, iwi and hapū may seek legal remedies relying on recognition of tikanga by the courts in particular cases. I accept Mr Hodder's submission that the Court's declaratory jurisdiction is able to include the making of formal declarations of legal status and rights, including customary rights, and of corresponding obligations. There may be a variety of different ways by which a court could seek to resolve a dispute over tikanga that may be consistent with tikanga, including appointment of pūkenga. Where all relevant parties agree through tikanga-based processes, the authority of the Court might be useful in granting remedies regarding an issue of tikanga. If they do not agree, it is more difficult.

[36] If tikanga-consistent resolution of a dispute about tikanga is not feasible, then recourse to a court may be appropriate as a matter of law. That necessarily follows from tikanga being part of New Zealand law. The quintessential function of courts is to determine disputes about law. That may include determining disputes about tikanga. As arose in discussion with Mr Warren and Mr Mahuika in closing submissions, in some ways litigation is now the modern alternative to resolution by battle which used to be, but is no longer, available to break a deadlock over tikanga.[10] I do not rule out a court doing so where a dispute genuinely requires resolution, as an ultimate alternative to battle. Whether such a decision is tika, and consistent with tikanga, is another matter.

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[10] Notes of Closings 253/23–254/16, 260/15–261/5.

[37] Just because a Court can do something does not mean it should. One reason for judicial caution is that legal precedents in case law will not be authoritative as to the content of tikanga. This flows from the ongoing capacity for tikanga to change and for there to be differences in tikanga, and the application of tikanga, between iwi and hapū. Iwi and hapū create, determine and change tikanga through exercising their rangatiratanga. Courts do not and cannot make, freeze or codify tikanga. If a court approaches tikanga in a particular case, it must recognise tikanga on the basis of the evidence before it for the purpose of that case. What is recognised by a court cannot change the underlying fact or validity of tikanga in its own terms. A second reason for caution derives from the inherently difficult task of transcending culturally-specific mindsets. In recognising tikanga, common law courts must hold "in check closely" any unconscious tendency to see tikanga in terms of the English law heritage of New Zealand common law. They must be open to seeing tikanga on its own terms, as a distinct framework. A court's caution in approaching tikanga must be heightened when the content of tikanga is disputed within an iwi or hapū or between iwi or hapū.

[38] The parties differed on the standard to which tikanga must be proved, whether to the usual standard for civil law cases, of the balance of probabilities, or to some other standard. The prospect that a court might find the tikanga of an iwi or hapū has or has not been established "on the balance of probabilities" seems inapt. I accept that it is not consistent with tikanga itself. And I accept that tikanga in fact is established by a dynamic consensus, evidenced by the ongoing practice of an iwi or hapū. Given that, it seems to me that a court simply has to be satisfied, on the evidence before it, that such a consensus prevails at any given time. That is consistent with how New Zealand courts approach the recognition of other forms of law, such as foreign law. It is consistent with academic commentaries and with some other cases. I doubt there is much practical difference between proving on the balance of probabilities that a consensus exists in an iwi or hapū about tikanga, and a court simply being satisfied of that. The crucial point is that the finding expressed by the Court is effectively about tikanga as determined by the iwi or hapū.

D Mana whenua in Tāmaki Makaurau

[39] Making findings of fact about historical issues in the 1700s and 1800s at this distance is fraught. Tikanga and traditional tribal histories can differ from each other and competing views can validly be held and can differ over time. Any accounts of historical events may differ when recounted for different purposes, whether, given orally on the basis of tribal narratives or written down by professional historians. This is evidence of human qualities of different people focussing on different things at different times for different purposes. The Courts are used to evaluating evidence by witnesses of fact and expert witnesses in all spheres. I have evaluated and critically analysed each piece of evidence presented by the expert and other witnesses in the context of its consistency or inconsistency with the other relevant evidence. I do not regard the evidence of professional and tribal historians as necessarily any more or less credible or reliable than each other. As Professor Michael Belgrave says, "[t]here is no such thing as a definitive history".[11]

[40] As the historian experts agree, I consider the accounts of the witnesses who gave evidence in the Native Land Court in 1866 and 1868 to be relevant evidence of what witnesses of fact were understood (including by translators) to have said at a time closer to the relevant events than we are now. I consider appreciably less weight is due to the conclusions drawn by the judges in those hearings, who did not hear from all the relevant potential witnesses, or even iwi, in the context of the most intense conflict between the Crown and iwi, particularly with Waikato-Tainui and affiliated iwi in Tāmaki Makaurau.

[41] In the judgment I review a number of issues regarding the historical narratives and traditions in light of the evidence about tikanga. The evidence and submissions suggest the Ngāti Whātua Ōrākei tribal historical narrative and tradition is clear, coherent, and consistent in terms of the tikanga of Ngāti Whātua Ōrākei. The objections of Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki and Te Ākitai Waiohua are different tribal historical narratives and traditions. More information would be required to reconcile some aspects of their objections to the historical narrative and tikanga of Ngāti Whātua Ōrākei: the timing and nature of the

[11] Notes of Evidence (NOE) 2153/5.

raupatu in the mid-18th century; whether Te Taoū maintained undisputed control thereafter; whether Marutūāhu iwi other than Ngāti Pāoa had cultivations and settlements in the area at issue in the 18th and 19th centuries; whether Te Ākitai Waiohua survived the raupatu with their tribal structures substantially intact; whether Ngāti Rau maintained a presence in the area at issue during the 1820s and 1830s and the significance of that; and the effect of iwi returning to the isthmus with the protection of Te Wherowhero.

[42] Whether Ngāti Whātua Ōrākei, Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki and Te Ākitai Waiohua wish to reconcile their tribal histories and traditions and whether it occurs in a tikanga consistent manner, is up to them. It seems to me to be better explored on a marae than by a Court. I do not attempt to reconcile the different historical narratives and traditions in the judgment.

[43] Marutūāhu Rōpū, Ngāi Tai ki Tāmaki and Te Ākitai Waiohua also object to the claim by Ngāti Whātua Ōrākei that their conception of ahi kā roa and mana whenua is valid in terms of the tikanga of other iwi and at tikanga Māori. At the heart of the dispute over the claim of Ngāti Whātua Ōrākei to ahi kā roa and mana whenua is whether mana whenua is an exclusive or non-exclusive concept at tikanga. It is also directly related to the commonality of tikanga regarding mana whenua across iwi and hapū.

[44] The evidence of the pūkenga and other witnesses called by Ngāti Whātua Ōrākei is clear and consistent in their account of take raupatu, reinforced by take tupuna, followed by ahi kā roa in creating mana whenua. It is clear and consistent in saying that mana whenua is generally exclusive, except in fringe or contested areas or by agreement; it is not shared, particularly in a group's heartland or core rohe. Ngāti Whātua Ōrākei say their tikanga is entirely consistent with tikanga Māori more generally. Ngāti Pāoa supports that in the terms noted above. So do Ngāti Kuri and Ngāi Te Rangi.

[45] I have no doubt that mana whenua, as the strongest "interest" at tikanga in the "heartland" or ūkaipō of an iwi, and central to their identity, is currently a real and robust aspect of the tikanga of Ngāti Whātua Ōrākei and some, perhaps many, but not

necessarily all, other iwi. This is consistent with the evidence of the independent pūkenga called by Ngāti Whātua Ōrākei from outside Tāmaki Makaurau: Tāmati Kruger, Paul Meredith and Charlie Tawhiao. The evidence supporting this in terms of the tikanga and tribal narrative and traditions of Ngāti Whātua Ōrākei is given by their own witnesses and is consistent with the published and unpublished writings of the late Professor Sir Hugh Kawharu.

[46] As Mr Majurey emphasises, Sir Hirini Mead's definition of mana whenua suggests acknowledgement of the mana whenua of an iwi is important to its validity at tikanga. With the exceptions of the Kawenata Tapu with Ngāti Pāoa, and acknowledgement of Ngāti Whātua Ōrākei at Ōrākei, their neighbouring iwi in these proceedings do not recognise or acknowledge the mana whenua of Ngāti Whātua Ōrākei over the whole area over which they claim it. I take the evidence from Ngāti Whātua Ōrākei to be saying that recognition by other iwi is not a pre-requisite for Ngāti Whātua Ōrākei to have mana whenua in terms of their own tikanga. Whatever effects a Court declaration might have, including regarding the legal incidents of mana whenua, it is difficult to see how it could purport to constitute or require recognition of mana whenua by another iwi if that would be inconsistent with their own tikanga and/or their own tribal traditions and history. That would be inconsistent with the nature of tikanga and its relationship to the law declared by courts.

[47] Counsel for Marutūāhu Rōpū, Ngāi Tai ki Tāmaki and Te Ākitai Waiohua (who came to be known as Te Toru in the hearing) point to the evidence of their pūkenga that, for them, mana whenua can often be shared and is not an exclusive concept. There are also other authoritative statements, by Sir Edward Taihakurei Durie and the Waitangi Tribunal that doubt the nature of mana whenua in general. The evidence in these proceedings shows that mana whenua can be exclusively held by one iwi or hapū and that it can be shared. Importantly, the pūkenga collectively agree that tikanga is shaped by the historical experiences of an individual iwi. No doubt mana whenua is more easily shared for some iwi than others, in light of their experiences.

[48] No one here argues that mana whenua obviates the other layers of customary interests of other iwi at tikanga. As acknowledged by Ngāti Whātua Ōrākei, the obligations arising from having mana whenua include a tika consideration of, and

looking after, others' customary connections. That might involve discussions of how best to protect an urupā, acknowledgment that the history of another iwi in that area will not be forgotten, or even agreeing that land within their heartland could be provided to another iwi, akin to a tuku whenua. But at the same time, the evidence is that it can be valid at their own tikanga for an iwi such as Ngāti Whātua Ōrākei to conceive of mana whenua as the strongest tikanga interest, held by one iwi, overriding aspects of the interests of other iwi while simultaneously owing responsibilities in respect of those interests. It is valid at their tikanga, shaped by their historical experiences, including the impact of colonisation.

[49] The pūkenga called by Te Toru were clear and consistent about the underpinning principles of their tikanga and the implications for the claim by Ngāti Whātua Ōrākei. It may be that there are subtle distinctions between tikanga and the application of tikanga through different iwi traditions and history, as Mr Mahuika submits. Or there may be a distinction between the underlying values and principles of tikanga and what manifests if a tribe adheres to them, applying those principles, as Mr Warren submits. But either way, I accept the evidence of Harry Mikaere, James Brown, David Wilson Takaanini and Dr Korohere Ngāpō that the tikanga and tribal histories and traditions of Ngāti Maru and Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki and Te Ākitai Waiohua do not accept that their interests in Tāmaki Makaurau are subject or inferior to the mana whenua of Ngāti Whātua Ōrākei.

[50] I see no reason why the tikanga or application of tikanga by Ngāti Whātua Ōrākei and the other iwi may not differ regarding mana whenua. The High Court and Court of Appeal have recognised that there can be variability in the nature of mana whenua. And the learned authors of *Te Mātāpunenga* say:[12]

> The phrase mana whenua has been held to link political responsibilities (the protection of people, particularly members of a tribal group under traditional leadership) and other land-related authority. However the inherent ambiguity of the expression mana whenua has made its use and that of the complementary expressions noted above a vexed issue, with the appropriateness of their use challenged by Māori and other commentators.… According to some accounts, this mana may be shared by a number of separate

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[12] Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) [*Te Mātāpunenga*] at 178.

> tribal entities, but others would deny that such divided sovereignty is permissible.

[51] So, the tikanga, tribal history and tradition of some iwi, including Ngāti Whātua Ōrākei, include mana whenua as the strongest form of tikanga interest that can be and is held by one iwi in Tāmaki Makaurau. The tikanga and tribal histories and traditions of other iwi, such as Ngāti Maru and Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki, and Te Ākitai Waiohua, does not recognise that.

[52] The Court has discretionary jurisdiction to grant declarations about tikanga. I am satisfied the evidence demonstrates that Ngāti Whātua Ōrākei has mana whenua based on take raupatu and ahi kā over the area in which they claim it, according to their own tikanga and based on their tribal historical narrative and tradition. Ngāti Whātua Ōrākei seeks a declaration of its rights at tikanga and law. The issues have been sufficiently traversed to support that. I would be inclined to make such a declaration but on the basis that it speaks only of the tikanga and historical tribal narrative and traditions of Ngāti Whātua Ōrākei. My preliminary view is that such a declaration would not unduly cut across other proceedings or legislation, which decide different issues. Such a declaration might be worded as follows:

> Ngāti Whātua Ōrākei currently have ahi kā and mana whenua in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau, with all the obligations at tikanga that go with that, according to the tikanga and historical tribal narrative and tradition of Ngāti Whātua Ōrākei.

[53] I reserve leave for the parties, and particularly Ngāti Whātua Ōrākei, to make further submissions, if they wish, on whether the Court should exercise its discretion to make a declaration in those or similar terms.

[54] Marutūāhu Rōpū, Ngāi Tai ki Tāmaki, and Te Ākitai Waiohua do not seek declarations regarding their tikanga. They oppose the declaration sought by Ngāti Whātua Ōrākei that goes further than the tikanga of Ngāti Whātua Ōrākei. I am satisfied, on the basis of the evidence I have heard, that Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki and Te Ākitai Waiohua do not accept, based on their tikanga and tribal histories and traditions, that their interests in Tāmaki Makaurau are subject or inferior to the mana whenua of Ngāti Whātua Ōrākei. On that basis, I am not prepared to make a declaration that suggests their tikanga, tribal histories and

traditions are consistent with those of Ngāti Whātua Ōrākei, which might be inferred from the declaration sought by Ngāti Whātua Ōrākei. But the parties may also consider that a single declaration about the tikanga of Ngāti Whātua Ōrākei leaves too much room open for inferences about their positions. Accordingly, I also reserve leave for the parties, and Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki and Te Ākitai Waiohua in particular, to make submissions on whether I should make a declaration along the following lines:

> The tikanga and historical tribal narratives and traditions of Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki, and Te Ākitai Waiohua do not currently recognise that Ngāti Whātua Ōrākei have ahi kā and mana whenua, as those concepts are conceived of by Ngāti Whātua Ōrākei, in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau.

[55] I observe that the conflicts between iwi in these proceedings over these issues are long-standing. I am sure the means of resolving them are available, at tikanga, to them. I note that counsel for every iwi participating in the hearing stated they would prefer a tikanga-based settlement. They may consider the Court can assist to facilitate a tikanga-based resolution process, given my observations in part V regarding such options as appointment of one or more pūkenga by consent. I reserve leave for any iwi participating in these proceedings as parties or interested parties to make a joint application for such assistance with any of the disputed issues of applying tikanga canvassed in this judgment. I also reserve leave for them to apply for a declaration by the Court to reflect a joint position about any of these disputed issues, reached by a tikanga-consistent process, to be recorded by the Court.

E Treaty Settlements and overlapping interests today

[56] Part VII of the judgment outlines the experience of Ngāti Whātua Ōrākei with Bastion Point protests and its Ōrākei claim to the Waitangi Tribunal. The claim was filed in 1984, the Tribunal reported in 1987 and implementing legislation was passed in 1991. In 1993, Ngāti Whātua Ōrākei lodged a broader claim with the Waitangi Tribunal alleging historical breaches of the Treaty by the Crown and started direct negotiations with the Crown in 2003.

[57] In 2006, Ngāti Whātua Ōrākei and the Crown signed an Agreement in Principle (AIP) to settle these claims. The proposed settlement involved financial redress as

well as cultural redress including vesting in a joint management body maunga such as Maungakiekie (One Tree Hill), Maungawhau (Mt Eden) and Puketapapa (Mt Roskill) and the body advising on the managment of Owairaka (Mt Albert Domain), Ohinerau (Mt Hobson Domain), Te Kopuke (Mt St John Domain), and Taurangi (Big King Recreation Reserve). There were to be statutory acknowledgements of the cultural, spiritual, historical and traditional association of Ngāti Whātua Ōrākei with the latter four sites plus Otahuhu (Mt Richmond Domain), North Head Historic Reserve and defence land at Kauri Point. There would also be a 100 year right of first refusal for Ngāti Whātua Ōrākei over surplus lands of the Crown and other agencies in the area over which they claim mana whenua.

[58] Concerns about the implications of the AIP prompted a claim to the Waitangi Tribunal by Ngāti Te Ata, Ngāi Tai ki Tāmaki, Marutūāhu, Te Kawerau ā Maki and those Te Taoū not descending from Tuperiri. The Tribunal conducted an urgent inquiry and issued its findings in June 2007. The Tribunal strongly criticised the Crown's approach in taking an explicit view of the strength of the customary interests of Ngāti Whātua Ōrākei. It said that "for an external agency like the Office of Treaty Settlements to determine that the interests of only one group should be recognised, and the others put to one side, runs counter to every aspect of tikanga we can think of".[13] It recommended the draft settlement be put on hold.

[59] In 2008, the new Minister for Treaty of Waitangi Negotiations, Hon Christopher Finlayson, turned for advice, about settling claims in Tāmaki Makauru, to the first Minister to hold that portfolio, the Rt Hon Sir Douglas Graham. Sir Douglas proposed an option, requiring "considerable courage, a generosity of spirit and a desire to work together in the common interest", of putting mana whenua to one side and renegotiating the AIP. Accordingly, and impressively in terms of the negotiations that must have been required, in February 2010 the Crown and 13 iwi and hapū entered into a Collective Agreement which was reflected in a Deed in 2012 and legislation in 2014. It vested specified maunga and motu of Tāmaki Makaurau in the iwi and hapū collectively. The maunga are co-governed by them and the Auckland Council. The iwi and hapū have a RFR for 170 years where properties are chosen on the basis of a

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[13] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) [Waitangi Tribunal *Tāmaki Makaurau Report*] at 96–97.

rotating carousel. In the course of negotiations, the Crown told iwi and hapū that it would not agree to one iwi having a veto over redress it would offer to individual iwi for their iwi-specific settlements. The Ngāti Whātua Ōrākei settlement was renegotiated and other iwi also now have settlements with the Crown and implementing legislation.

[60] At the heart of the issues that give rise to these proceedings is how, in negotiating the settlement of historical claims under the Treaty of Waitangi with one iwi, the Crown should approach the overlapping interests of other iwi. I heard extensive evidence about the Crown's policy about overlapping interests, the *Red Book*, which is outlined in Part VII of the judgment. I heard about proposals on this topic by the Iwi Chairs Forum. In December 2021, after the hearing, I received the Crown's latest revised policy on overlapping interests, on which all parties had the opportunity to make submissions.

[61] I also heard detailed evidence about the Crown's offers of Treaty redress to Ngāti Pāoa, the Marutūāhu Rōpū and Te Ākitai Waiohua, and how it dealt with the overlapping interests of Ngāti Whātua Ōrākei, including their claim to mana whenua. The Supreme Court has ruled that Ngāti Whātua Ōrākei could pursue its claim for declarations as to its rights, but it could not challenge the proposed transfers of specific properties to other iwi, which would be implemented by legislation. They have been treated in these proceedings as illustrative examples of the application of the Crown's overlapping interests policy. I have also heard about the Waitangi Tribunal's 2019 report regarding the application of the Crown's policy in Hauraki.

F Tikanga obligations in settling Treaty claims

[62] In part VIII of the judgment I start by considering submissions about three parameters of the Court's jurisdiction in relation to the declarations Ngāti Whātua Ōrākei seek about the legal obligations of the Crown in relation to tikanga. First, I find that the complex multi-faceted nature of Treaty settlements does not necessarily cloak government decisions from the constitutional process of judicial review for unlawfulness or from declarations of legal right but bears on what relief should be granted. Second, I do not transgress the Supreme Court's finding, that Ngāti Whātua

Ōrākei cannot challenge the decisions to legislate to transfer particular properties. Third, I consider that the Court has jurisdiction, probably confined to determining issues of law, to correct errors of law in Crown guidance and to correct manifestly unreasonable decisions to issue guidance. I note that individual examples of the application of a policy are not the policy itself.

[63] I make a series of findings about the law as it relates to tikanga, the Crown's powers, the Treaty of Waitangi, law, the overlapping interests policy, and the Treaty settlement context in Tāmaki Makaurau.

[64] Tikanga governs and binds iwi and hapū and is developed over time by iwi and hapū. The Crown is not an iwi or hapū. The Crown is not bound to follow tikanga in and of itself and does not develop tikanga. Neither does tikanga directly modify the common law or statutes which bind the Crown. In turn, common law and statutes do not directly modify tikanga, though they can provide for its effects and incidents in New Zealand's legal system.

[65] There is a respectable argument that the Crown's power to enter settlements with iwi and hapū of its breaches of the Treaty of Waitangi is primarily a prerogative power, linked to the Crown's exercise of its prereogative power to enter the Treaty of Waitangi in 1840. Otherwise, it reflects the rights and powers of the Crown as a natural person. Either way, the Crown exercises a power that cannot override rights and liberties prescribed by law, whether they be conferred by statute, common law or tikanga. Tikanga and the Crown's residual or prerogative power are are systems of internal self-regulation. Neither interferes with the legal effect of the other.

[66] There can be little doubt that article two of the Treaty of Waitangi encompasses the Crown's protection of tikanga. Tikanga is integrally woven with rangatiratanga; the two dimensions give life to each other. The Crown's undertaking to protect rangatira, hapū and tāngata katoa in the exercise of tino rangatiratanga in article two inherently extends to their operation of tikanga. The nature of the Crown's obligations in relation to tikanga, when they arise under the Treaty, are the orthodox obligations as held by the Courts since the *Lands* case in 1987 and accepted and endorsed by successive executive administrations and Parliaments.

[67] I identify three orthodox principles of the Treaty as particularly relevant to the Treaty settlements context here. Where Treaty obligations legally bind the Crown, the Crown will have legal obligations in relation to tikanga, to act reasonably and in good faith, with mutual cooperation and trust, and to actively protect tikanga. Whether there are such legal obligations, and what exactly they require, depends on the statutory and factual context in which the issue arises. The context of Treaty settlements also directly invokes the duty to provide redress, and right to receive redress, for breaches of the Treaty. It is the primary reason for the Crown's Treaty settlement endeavours. And it may cut against aspects of the other duties. There may be circumstances in which the balance of Treaty considerations means the Crown has to make a decision in relation to Treaty settlements that is inconsistent with the tikanga of one iwi or another.

[68] The Treaty of Waitangi is still currently thought not to give rise to free-standing obligations in and of itself in New Zealand law. In the context of this case, whether that is so makes little difference, due to the principles of statutory interpretation and administrative law. Depending on the context, the Treaty of Waitangi can potentially bear directly on the interpretation of a statute and can sustain judicial review of the treatment of tikanga on the grounds, for example, of illegality, failure to consider a relevant consideration, or unreasonableness. Whether those grounds would be available in any particular case depends crucially on the context.

[69] If there is any bare context in which it is apt for the Treaty of Waitangi to be a mandatory relevant consideration for the Crown, it is where the Crown seeks to fulfil its duty under the Treaty of Waitangi to provide redress for its own past breaches of the Treaty of Waitangi. The duties of active protection of tikanga and of acting reasonably and in good faith, with mutual cooperation and trust in relation to tikanga, will likely bear on Crown decisions affecting tikanga interests in a Treaty settlement context. Accordingly, depending on the context, the Crown will need to take reasonable steps to understand, recognise and respect the tikanga of iwi or hapū, and the Crown will need to actively protect the ability of iwi and hapū to exercise their tikanga.

[70] There is nothing in my analysis that suggests that Treaty obligations relating to tikanga in a Treaty settlement context apply only to the Crown. Iwi and hapū can also owe obligations under the Treaty of Waitangi. It is a small step from existing case law to acknowledge that, depending on the context, the Treaty of Waitangi may require iwi and hapū to assist the Crown to discharge its Treaty duty to other iwi and hapū to provide redress for Treaty breaches, by engaging in tikanga-consistent processes with those iwi and hapū about the status of relevant properties at tikanga.

[71] I agree with the submissions of virtually all counsel that the notion of the honour of the Crown and the United Nations Declaration on the Rights of Indigenous Peoples do not add materially to the Crown's duties under the Treaty of Waitangi in relation to tikanga as outlined above. Only in extreme circumstances, where other constitutional principles are at play, might the honour of the Crown assist a Court. New Zealand endorsed the Declaration on the basis it does not intend to supplant Treaty principles as the way in which New Zealand attempts to settle grievances. That adds further weight to my interpretation of the context of Treaty settlements as requiring consistency with Treaty principles. But it does not add substantively to the content of those principles in relation to the issues considered in these proceedings.

[72] In its 2007 *Tāmaki Makaurau Report* into the 2006 AIP process, the Waitangi Tribunal considered the Crown had not taken adequate account of tikanga in offering exclusive redress to Ngāti Whātua Ōrākei on the basis of a predominance of interests when other iwi had demonstrable tikanga interests that not had not been properly investigated. The Crown took the Tribunal's report seriously. But it appears to have responded primarily to what it saw as the Tribunal's rejection of assessing relative weighting of tikanga interests, rather than the more general message of the importance of it understanding tikanga. The Crown properly took the position that it was not for it to adjudicate or act as video referee in contests of mana whenua. But the problem with the overall Crown reaction to the Tribunal's 2007 Report was that it did not adopt a practice or policy of assigning anyone with expertise to understand and advise it on the tikanga implications of its decisions.

[73] The context of the negotiating principles and guidelines in the Crown's *Red Book* cements the Crown's general legal Treaty obligations in relation to tikanga in

dealing with overlapping interests in Treaty settlements. The *Red Book*, in both its 2018 and latest versions, contains much useful guidance for the Crown. It also envisages the Crown making assessments of the implications of tikanga interests, as Crown witnesses indicate it does. These assessments and judgements inherently require understanding of tikanga. They are tikanga interests.

[74] Yet the language of the 2018 *Red Book* is striking in its determined avoidance of references to tikanga or tikanga interests. It did not mention the word tikanga or tikanga concepts such as mana whenua. The 2021 version of the *Red Book* pays greater attention to tikanga than did its predecessor. That would not be difficult. But it does not explicitly acknowledge the legal requirement on the Crown to consider tikanga, including the implications of mana whenua or other tikanga-based interests, and that it may not act unreasonably having regard to tikanga, in order to act consistently with the Treaty of Waitangi. Not spelling out that requirement in the Crown's policy runs the risk of prejudicing overlapping tikanga interests of iwi and hapū.

[75] The implications of time are difficult for everyone in this process. If the Crown has breached the Treaty, its obligation is to provide redress, the sooner the better. But time has a different significance in tikanga. The Crown is obliged by the Treaty to allow reasonable time for disputes regarding overlapping tikanga interests in Treaty settlement negotiations to be resolved, depending on the particular circumstances of a particular settlement, having regard to tikanga. It is inherently difficult to provide for in a policy.

[76] Engaging as early as practicable with the overlapping iwi or hapū would help, as the Crown's policy says. So would engaging before a commitment has been made to a particular property by the negotiating parties. Inventive negotiators may be able to devise ways of parking particular disputed properties pending future tikanga-consistent resolution, while allowing the wider settlement to proceed. The Crown says it is willing to facilitate discussions, act as observers, and provide logistical support to iwi negotiations if that is what iwi want. A process, such as that proposed by the Iwi Chairs Forum, that involves independent facilitation by pūkenga, might be promising. The Waitangi Tribunal's recommendations in the *Hauraki Report* should be taken

seriously. And, no doubt, the Court would be available to assist with such processes, if the parties so wish. I also return to the notion that iwi and hapū have responsibilities under the Treaty to engage in tikanga-consistent processes about the status of relevant properties at tikanga. Depending on the context, refusing to do so may breach the Treaty of Waitangi.

[77] I make only seven points about tikanga and Treaty settlements in Tāmaki Makaurau:

(a) First, I accept that the context of the 2011 Treaty settlement between the Crown and Ngāti Whātua Ōrākei, and the 2012 Act, affirm and reinforce their obligations to act consistently with the Treaty of Waitangi.

(b) Second, I do not consider the context of the 1840s gifting of land by Ngāti Whātua Ōrākei to the Crown adds materially to the legal duties of the Crown.

(c) Third, the Collective Agreement, Collective Deed and Collective Act do not affect who has mana whenua, or what that means, at tikanga in Tāmaki Makaurau.

(d) Fourth, I do not need to comment on the Crown's "no veto" position communicated to iwi before the Collective settlement was agreed.

(e) Fifth, the Crown has not taken into account a fully informed understanding of the implications of its decisions for the tikanga interests of all iwi and hapū.

(f) Sixth, the Crown would be well advised to seriously consider the constructive recommendations of the Waitangi Tribunal in the *Hauraki Report* and the Iwi Chairs Forum about how to improve its approach to overlapping interests in Treaty settlements, if it has not already done so.

(g) Finally, the Crown as well as iwi and hapū, would also be well-advised to establish mutual relationship management processes and structures to enhance the health of their ongoing relationships, to the extent their resources permit.

[78] As mentioned earlier, the application of tikanga including the nature and extent of mana whenua in Tāmaki Makaurau, is contested between different iwi. Given that, making the declarations sought by Ngāti Whātua Ōrākei would provide a misleading impression of what the Court considers is a proper understanding of tikanga in Tāmaki Makaurau or with the implications of tikanga for Treaty settlements in Tāmaki Makaurau. I also find that tikanga does not legally bind the Crown in itself so it follows that I do not consider the declarations sought by Ngāti Whātua Ōrākei regarding the obligations of the Crown would be accurate statements of the law. But the parties may consider my judgment gives rise to alternative declarations that should be made.

G Result

[79] I decline to make the declarations as sought by Ngāti Whātua Ōrākei. I reserve leave for any of the parties or interested parties, if they wish:

(a) to make submissions on whether the Court should make a declaration along the lines that:

> Ngāti Whātua Ōrākei currently have ahi kā and mana whenua in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau, with all the obligations at tikanga that go with that, according to the tikanga and historical tribal narrative and tradition of Ngāti Whātua Ōrākei.

(b) to make submissions on whether the Court should make a declaration along the lines that:

> The tikanga and historical tribal narratives and traditions of Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki, and Te Ākitai Waiohua do not currently recognise that Ngāti Whātua Ōrākei have ahi kā and mana whenua, as those concepts are conceived of by Ngāti Whātua Ōrākei, in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau.

(c) to make submissions on whether the Court should make any alternative declarations about legal obligations in relation to tikanga in the context of Treaty settlements, along the lines that:

> The duties of active protection of tikanga and of acting reasonably and in good faith, with mutual cooperation and trust in relation to tikanga, will bear on Crown decisions affecting tikanga interests in a Treaty settlement context.
>
> Accordingly, depending on the context, the Crown will need to take reasonable steps to understand, recognise and respect the tikanga of iwi or hapū, and the Crown will need to actively protect the ability of iwi and hapu to exercise their tikanga.
>
> Depending on the context, the Treaty of Waitangi may also require iwi and hapū to engage in tikanga-consistent processes with other iwi and hapū about the status of relevant properties at tikanga.

(d) to apply jointly for the Court's assistance to facilitate a tikanga-based resolution process to address any of the disputed issues of applying tikanga canvassed in this judgments or to apply jointly for a declaration by the Court to reflect a joint position about any of these disputed issues, reached by a tikanga-consistent process.

[80] Any of the further submissions should be filed and served within three months of the date of this judgment. I reserve leave for any of the parties or interested parties to request a teleconference to discuss any issues arising before that. There is no time limit on the leave reserved to seek Court assistance. Costs are reserved.

[81] I close this judgment by quoting the Waitangi Tribunal in the *Ngāti Awa Raupatu Report*:[14]

> In seeking solutions, it is important to bear in mind that Māori society is fundamentally about relationships. It is not enough to resolve the immediate problem. The people must continue to live together, and the more important task is to rebuild the relationships based upon whakapapa and respect for the mana of each group.

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[14] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngāti Awa Raupatu Report* (Wai 46, 1999) at 136.

II The parties and issues

A These proceedings

[82] In 2015, Ngāti Whātua Ōrākei applied for judicial review of decisions of the Minister for Treaty of Waitangi Negotiations to transfer land in Tāmaki Makaurau to Ngāti Pāoa in settlement of their Treaty of Waitangi claims. In 2017, the High Court struck out the claim.[15] The Court of Appeal dismissed the appeal of Ngāti Whātua Ōrākei on the basis the relief sought would interfere with parliamentary proceedings.[16] In 2018, the Supreme Court allowed a further appeal "with the result that Ngāti Whātua Ōrākei can largely pursue its claim for declarations as to its rights".[17] However, Ngāti Whātua Ōrākei could not challenge the proposed transfers of specified properties, which would be implemented by legislation.

[83] Ngāti Whātua Ōrākei repleaded their claim and, in the fourth amended statement of claim, now seek declarations that:

> (a) Ngāti Whātua Ōrākei have ahi kā and mana whenua in relation to 2006 RFR Land and the 1840 Transfer Land.
>
> (b) When applying the Overlapping Claims Policy in a way which relates to and/or may affect any land within the area of the 2006 RFR Land and the 1840 Transfer Land, the Crown must act in accordance with tikanga, and in particular Ngāti Whātua Ōrākei tikanga.
>
> (c) Crown development of Proposals to include the land in the 2006 RFR Land and the 1840 Transfer Land in a proposed settlement with iwi who do not have ahi kā in respect of that land, must be made in accordance with tikanga, and in particular Ngāti Whātua Ōrākei tikanga.
>
> (d) In order to comply with tikanga in that situation when contemplating or developing Proposals, or making decisions under its Overlapping Claims Policy to offer any interest in land within the 2006 RFR Land or the 1840 Transfer Land as part of a proposed Treaty settlement with an iwi other than Ngāti Whātua Ōrākei, and whether involving s 120 of the Collective Act or not, the Crown must:
>
> > (i) appropriately consult with Ngāti Whātua Ōrākei as the iwi having ahi kā;

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15 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516 [*Ngāti Whātua Ōrākei* (HC strike out)].

16 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 554, [2018] 2 NZLR 648.

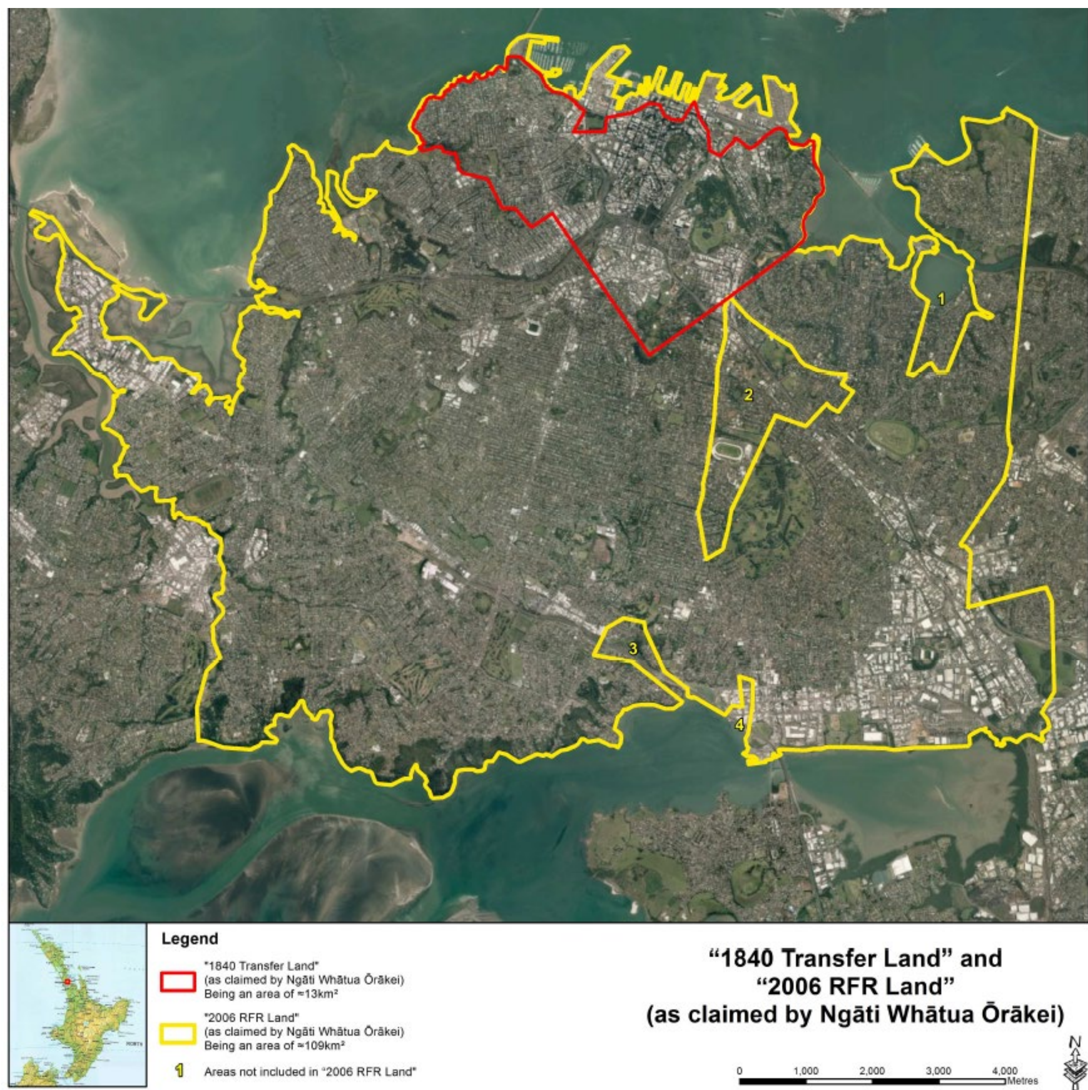
17 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 [*Ngāti Whātua Ōrākei* (SC)] at [3].

(ii) acknowledge the ahi kā of Ngāti Whātua Ōrākei as the iwi having ahi kā;

(iii) decline to include the land in the proposed settlement if there is evidence that the transfer of the land would unjustifiably erode the mana whenua of Ngāti Whātua Ōrākei as the iwi having aki kā; and

(iv) decline to include the land or recognise an interest in land in the proposed settlement where the land has previously been the subject of a gift to the Crown, unless Ngāti Whātua Ōrākei, the gifting iwi, has provided its consent to the transfer.

[84] For ease of reference, I reproduce **Map 1** that is in the Summary above. It shows the area over which Ngāti Whātua Ōrākei claim mana whenua in these proceedings: the area with yellow boundaries.



Map 1: The area over which Ngāti Whātua Ōrākei claim mana whenua

[85] This area was often referred to during the hearing as the "2006 RFR land" because it was the area over which Ngāti Whātua Ōrākei and the Crown agreed in principle in 2006 that Ngāti Whātua Ōrākei would have a right of first refusal (RFR). The subsequent Treaty settlement between Ngāti Whātua Ōrākei and the Crown did not refer to this area. I do not use this label since it conveys an inaccurate sense of the origin and timing of the claims of Ngāti Whātua Ōrākei over the area. Rather, I refer to it as "the area over which Ngāti Whātua Ōrākei claim mana whenua" or, sometimes, as "the area at issue" for short. The 1840 Transfer Land referred to in the declarations sought is a subset of this area, marked in red. It was transferred by Ngāti Whātua Ōrākei to the Crown in 1840, as explained further below.

B The parties

[86] Ngāti Whātua Ōrākei originally filed these proceedings in August 2015. There are and have been several defendants to the proceedings:

(a) The Crown is the first defendant.

(b) The Ngāti Pāoa Iwi Trust was soon joined as the second defendant in September 2015 and filed a statement of defence. On 21 January 2017, Ngāti Pāoa and Ngāti Whātua Ōrākei signed a Kawenata Tapu in a tikanga process. In May 2019, Ngāti Pāoa withdrew their opposition to Ngāti Whātua Ōrākei and was granted leave to be made an interested party in the proceedings, rather than a defendant. They oppose Marutūāhu Rōpū, of which they are usually a part.

(c) Marutūāhu Rōpū is the post-settlement governance entity for five Marutūāhu iwi: Ngāti Pāoa; Ngāti Maru; Ngāti Tamaterā; Ngaati Whanaunga; and Te Patukirikiri. Marutūāhu Rōpū was initially accorded intervener status but, by consent in March 2016, Wylie J directed that Marutūāhu Rōpū be joined as a defendant.[18]

[18] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2016] NZHC 347.

(d) Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiōhua Inc was joined as a defendant in August 2019 but withdrew from the proceeding by consent in October 2020. This was on the basis they were exploring their whanaungatanga with Ngāti Whātua Ōrākei, instead of litigation. Ngāti Whātua Ōrākei discontinued the proceedings against them.

[87] Because of the issues at stake, other iwi were served and several applied, and were granted leave, to participate in the proceedings as interested parties:

(a) Ngāi Tai ki Tāmaki Trust (Ngāi Tai ki Tāmaki) and Te Ākitai Waiohua Settlement Trust (Te Ākitai Waiohua) are interested parties because the oppose the claims of Ngāti Whātua Ōrākei to mana whenua in Tāmaki Makaurau.

(b) Ngāti Whātua o Kaipara and Te Rūnanga o Ngāti Whātua are interested parties and support the position of Ngāti Whātua Ōrākei.

(c) Ngāti Kuri Trust Board and Ngāi Te Rangi Settlement Trust have intervened because of the impact this proceeding will have on the Crown's approach to the potential recognition of their rights and interests in relation to those of other iwi in their respective rohe.

[88] Te Whakakitenga o Waikato Inc applied to be joined as an intervener in May 2016. That application was adjourned pending determination of the respondents' applications to strike out the proceedings. They filed another application to be joined as an intervener in April 2017 at the Court of Appeal, but that application was declined. They did not seek intervener status in the Supreme Court but filed a memorandum in the Supreme Court dated 11 May 2018 setting out their position submitting, relevantly:[19]

> [W]here there are overlapping interests with another iwi, the provision of redress to an iwi by the Crown should:
>
> (i). be determined through a process that reflects tikanga;

[19] Te Whakakitenga o Waikato Memorandum of Counsel, 11 May 2018 at [3].

(ii). be commensurate with the relative customary interests of the iwi concerned;

(iii). be consistent with, and not prejudicial to, the rights and customary interests (including mana, rangatiratanga, mana whenua and mana whakahaere) of other iwi; and

(iv). not undermine the value and integrity of existing settlements.

[89] Te Whakakitenga indicated they were concerned that decisions the Crown had already made and redress it had proposed were going to "adversely affect the customary rights and interests of Waikato-Tainui". They offered their support for Ngāti Whātua Ōrākei in these proceedings, particularly in opposition to the strike out.[20]

[90] In addition:

(b) Ngāti Tamaoho indicated its interest in applying to be named an intervener in May 2019. However, in June 2019 they indicated they no longer wished to participate in the proceeding.

(c) Waiohua Tāmaki Alliance Ltd Partnership applied to be joined as an interested party or intervener in May 2016 but did not pursue the application.

(d) Te Warena Taua took some steps towards applying for Te Kawerau Iwi Settlement Trust to intervene in 2016 but did not pursue the application.

C The issues and hearing

[91] On 16 November 2020, I held an interlocutory hearing regarding, among other things, the issues at stake. All parties and interested parties filed statements of issues. Counsel agreed that the statements differed in expression but not in substance. On

[20] *Ngāti Whātua Ōrākei* (SC) at [73].

that basis, as a general and preliminary guide, I expressed the issues at a high level as follows:[21]

(a) Has Ngāti Whātua Ōrākei maintained ahi kā and mana whenua in the specified land?

(b) What relationships do the other iwi and hapū parties and interveners have with that land at tikanga?

(c) How do Crown obligations to Ngāti Whātua Ōrākei arising from (a), given (b), impact on the Crown's application of its Overlapping Claims Policy in terms of:

(i) tikanga;

(ii) the Treaty of Waitangi;

(iii) the 2011 Treaty settlement between the Crown and Ngāti Whātua Ōrākei, which led to the Ngāti Whātua Ōrākei Claims Settlement Act 2012;

(iv) the Collective Treaty settlement between the Crown and iwi in Tāmaki Makaurau (including Ngāti Whātua Ōrākei) which led to the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014;

(v) the honour of the Crown; and

(vi) the United Nations Declaration on the Rights of Indigenous Peoples?

(d) Should the Court make the declarations sought, or other declarations?

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21 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 1)* [2020] NZHC 3120 [*Ngāti Whātua Ōrākei* (issues and pūkenga)] at [8].

[92] The parties have not disagreed with these issues, though some assumed more or less prominence during the hearing. The parties, interested parties and I all agreed that the witnesses giving evidence about tikanga and historical issues should be cross-examined in order to fairly dispose of the case.[22] I also granted leave, on application by Ngāti Whātua Ōrākei, for non-ministerial Crown witnesses regarding the application of its Overlapping Interests Policy to be cross-examined.[23]

[93] I declined an application by Ngāi Tai ki Tāmaki, Te Ākitai Waiohua and Marutūāhu Rōpū to appoint a pūkenga to advise the Court. The application was opposed by Ngāti Whātua Ōrākei and Mr Mahuika for Ngāti Pāoa submitted it would be of questionable utility given the extensive evidence.[24] With the benefit of the hearing, I am satisfied I heard ample expert evidence about tikanga from the pūkenga called by the parties: Tāmati Kruger; Dr Te Kauhautu Maxwell; Paul Meredith; Wati Ngamane; Dr Korohere Ngāpō; Hauāuru Rawiri; David Wilson Takaanini; Te Warena Taua; and Charlie Tawhaio. In retrospect, I consider it would have been beneficial to appoint an independent pūkenga to conduct the conference of tikanga experts, and an independent chair of the historian experts.

[94] The hearing in the Auckland High Court began on 9 February 2021. The Court sat on 37 days over 11 weeks, with interruptions for heightened COVID-19 alert levels and other reasons, including to mark the death of Shaun Hindt of the High Court Registry. It was an eventful hearing. On 9 February 2021, Ngāti Whātua Ōrākei led a hīkoi of 300 people to the Court from Ōrākei, to support the opening of their case. On 7 April 2021, Kiingi Tuuheitia and Waikato-Tainui made a visit of similar size to the Court to support the opening of the case of Ngāi Tai ki Tāmaki. All parties and interested parties had access to a livestream of the hearing, including at marae. The hearing concluded on 29 April 2021, almost exactly a year before I have been able to deliver this judgment in the No 1 Auckland High Court.

[95] The hearing focussed on expert evidence about tikanga and history, as well as the contemporary actions and policies of the Crown. I heard oral evidence from 35

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22 At [10].
23 At [24].
24 At [40].

witnesses and received affidavits or briefs of evidence from 38 witnesses. There were nine witnesses for Ngāti Whātua Ōrākei; six for the Crown; 11 for Marutūāhu Rōpū; three for Ngāti Pāoa; five for Te Ākitai Waiohua; and four for Ngāi Tai ki Tāmaki. One witness, Moka Apiti, gave a brief of evidence for Marutūāhu, Te Ākitai and Ngāi Tai ki Tāmaki. There are 3,096 pages of Notes of Evidence and 585 pages of the transcript of the closing submissions. The parties filed around 960 pages of written closing submissions and appendices and then further written submissions about the implications of cases issued after the hearing and about the Crown's revised Overlapping Interests Policy.

[96] The issues in this case are important and, in several respects, ground-breaking. They concern issues of history, of tikanga, of the Treaty settlement process, and the extent to which the Court should intervene in all of those arenas. As I said at the close of the hearing, it was a privilege to hear this case.

III Ko Ngāti Whātua Ōrākei tēnei

[97] Ngāti Whātua Ōrākei seeks declarations about tikanga and law that rest, in part, on events in the 18th and 19th centuries. To set this out adequately and respectfully, this first section of the judgment outlines the tribal history and tradition of Ngāti Whātua Ōrākei as told by their witnesses and supported by other evidence, particularly the expert evidence of Te Kurataiaho Kapea, and in the closing submissions of Ngāti Whātua Ōrākei.[25] The other witnesses who gave evidence and were relied upon by Ngāti Whātua Ōrākei in relation to the historical narrative are: Margaret Kawharu; Ngarimu Blair; Professor David Williams; Dr Vincent O'Malley; and Paul Meredith.

[98] The story of Ngāti Whātua Ōrākei told here by Ngāti Whātua Ōrākei is not a full tribal history. It is directed by Ngāti Whātua Ōrākei towards showing their mana whenua in the Tāmaki isthmus. But because it is the foundation of their case, and the history is important in its own right, it deserves to be set out at some length. The tribal

[25] Brief of Evidence of Te Kurataiaho Kapea (English translation), 2 June 2020 [Kapea Brief]; Ngāti Whātua Ōrākei Closing Submissions, 19 April 2021 [Ngāti Whātua Ōrākei Closing]. The footnotes are those in the submissions of Ngāti Whātua Ōrākei. The headings are mine. The Court will post on the Courts of New Zealand website the Notes of Evidence (NOE), Notes of Closings and written closing submissions. The parties may post their briefs of evidence on their websites if they wish.

history and traditions of Ngāti Whātua Ōrākei does not have, and does not need, approval or disapproval by the Court. Neither do the tribal histories and traditions of other iwi. Later, I address the implications of conflicts between tribal histories and traditions, and tikanga. The parties were given the opportunity to review draft excerpts of the judgment relating to historical tribal narratives for accuracy.

A Origins

[99] All tribes trace their descent to Hawaiki. When Ngāti Whātua thinks about Hawaiki, they remember Tāwhaki, Whakatau Pōtiki and Rongomai. Tāwhaki climbed to the heavens and retrieved the sacred baskets of knowledge and ancient incantations from Rēhua-i-te-rangi. It is from Tāwhaki that Ngāti Whātua takes its divine authority. Whakatau Pōtiki was raised under the sea by a deity named Rongotakawhiu. On becoming an adult, Whakatau Pōtiki returned to land – he was the greatest warrior of Hawaiki. It is from Whakatau Pōtiki that Ngāti Whātua takes its supernatural authority and its prowess in war. Rongomai is the captain of the waka Māhuhu-ki-te-rangi and was responsible for transporting these Polynesian genealogies to New Zealand. From Tāwhaki came Wāhieroa, followed by Rāta, then Tūwhakararo, then Whakatau Pōtiki and then Rongoma.

[100] The principal waka of Ngāti Whātua are:

(a) *Māhuhu-ki-te-rangi*, which came from Waeroti, Waerota, Mataterā. Rongomai was the captain, Whakatau Pōtiki was the priest. It landed at Pārengarenga, travelled up to Waiapu (East Cape) and returned to Muriwhenua (the Far North), and then crossed to the West Coast and landed at the Kaipara Harbour at Tāporapora. It ultimately returned to Muriwhenua. From Rongomai came Tikiwharawhara and then Māwete.

(b) *Kurahaupō*. To Ngāti Whātua, Pōhurihanga was the captain of this waka. Whatutāhae is his daughter. Through Whatutāhae, Ngāti Whātua has a strong connection to this waka. Whatutāhae married Māwete. The line continued with Toroa, Te Iringa, Te Kura, Tōhē,

Tikiwharawhara II, Rerewā, Manumanu, Pepetaha, Ruawheke, Kahurau, and then Waihekeao who married Haumoewārangi.

(c) *Tākitumu*, according to Ngāti Whātua ancestors, stopped at the Kaipara, around Poutō. Its main man was Tangaroa. Together they fought against the people of Poutō, Te Kekehu. From Tangaroa came Maikirangiaterā, then Maikirangiatepō, Rākitaha, Te Rangipāhura, Te Ihioterangi, Rangitāwhakarere, Te Aweaweoterangi and Haumoewārangi, who married Waihekeao.

(d) *Tainui*, according to the ancestors, stopped at Ngunguru in the vicinity of Whangarei. Here they erected a house overnight. Three names from this event were bestowed on the children of Hotonui, being Tāhuhu, Kuramangotini and Tahinga. Over time, their descendants arrived at the Kaipara from the north and became the three hapū Ngāi Tāhuhu, Ngāti Kura and Ngāti Tahinga. There are also other connections to this waka, but they come from the south from Tāmaki into the Kaipara. They are the Ngā Iwi people.

(e) *Te Arawa me Tainui.* This is the Ngā Oho connection in Tāmaki, the line of descent from Ohomairangi (Ngā Oho). From Ngā Oho descend the Ngā Iwi people and then the people of Te Waiohua. Then descends Ngāti Whātua Ōrākei. The line of Ohomairangi (Ngā Oho) continued with Muturangi then Taunga, Atuamatua, Houmaitawhiti, Tamatekapua, Kahumatamomoe, Tāwakemoetahanga, Uenuku-mai-i-rarotonga, Hinemāpunia, Hikarairo, Kuranoke, Poutūkeko, Whatutūroto, Huakaiwaka of Te Waiohua, Huatau, Te Atairēhia of Ngāti Te Ata, Pouate and Te Hōreta. Te Hōreta was followed by both Mokorua and Te Tahuri. Mokorua married Tarahawaiki and was followed by Apihai Te Kawau. Te Tahuri married Tomoāure and was followed by Awarua.

B The great migration from Muriwhenua to Kaipara

[101] Māhuhu and Kurahaupō were at Muriwhenua – the genealogies of the two waka joined whilst they lived together in that area, and these people became Ngā Ririki and Ngāi Tamatea. They left that place to seek revenge for the death of Tauteka who was murdered by Ngāti Kahu-Moemate-ā-Ika. They arrived at Hokianga and Waimamaku. They then moved on to Waipoua Forest, Maunganui Bluff and Kaihu Valley. Ngā Ririki and Ngāi Tamatea settled in these three places.

[102] Whilst they were living at Waipoua Forest, Maunganui Bluff and Kaihu Valley, Haumoewārangi and his iwi were living at Poutō, the mouth of the Kaipara harbour. Haumoewārangi's elder brother Papapounamu travelled to Kaihu and there he saw their prowess at growing kūmara, taro and yam. Papapounamu returned to Haumoewārangi at Poutō and told him. In time, Haumoewārangi and his people went there to battle with Ngā Ririki. In these battles, Te Nganaia was killed and Haumoewārangi stayed in the area of Kaihu Valley.

[103] In due course, Te Nganaia's grandchildren raised a battle against Haumoewārangi and his people. Matuaahoaho and Kauteāwhā are the names of these grandchildren. At this battle, Toutara (of Haumoewārangi's people) was killed by Kauteāwhā. The name Te Taoū comes from this event, because Toutara was speared in the chest by Kauteāwhā.[26] From Te Nganaia came Tohakirangi and then Matuaahoaho. Te Nganaia was also followed by Whakaotirangi and then Kauteāwhā.

C Ngāti Whātua v Nga Iwi

[104] Around this time, being the 1600s, these people of Ngāti Whātua were living between Maunganui Bluff and Poutō, the mouth of the Kaipara Harbour. The people living on the other side of the Kaipara Harbour to Tāmaki were Ngā Iwi. Ngā Iwi descend from Ngā Oho. Ngā Oho are the descendants of the Te Arawa and Tainui waka. This is the time when Ngāti Whātua and Ngā Iwi met. Here began the first marriages, trials and tribulations between these two peoples.

[26] Tao in te reo Māori means spear, and ū means a woman's breast.

[105] Haumoewārangi is known for his prowess as a warrior. The power of Waihekeao is ancestral and through her comes great authority. Coming from Māhuhu, Kurahaupō, Ngāi Tamatea, Ngā Ririki is a source of great power.

(a) The first wife of Haumoewārangi was Waewaekura, of Ngā Iwi. They had an only child, Rangiteipu was her name.

(b) The second wife of Haumoewārangi was Waihekeao of Ngā Ririki. They had seven children. The majority of hapū from Maunganui Bluff to Tāmaki descend from these seven children.

[106] There was a time when Rangiteipu (or Rongoteipu) visited relatives in the area of Kaipātiki (Parakai). Haumoewārangi's home at that time was at Poutō. Rangiteipu was returning to Poutō via Ōtakanini, Aotea (Shelly Beach) and Kawau (South Head). At Kawau, Ngā Iwi were planting kūmara, a sacred event. Because Rangiteipu broke that tapu by coming upon those at Kawau, Ngā Iwi confiscated her belongings and sent her on her way.

[107] Rangiteipu arrived back at Poutō and told her father what Ngā Iwi had done to her. When those crops were ready to harvest, Haumoewārangi, his children and their people crossed over to harvest the kūmara of those gardens belonging to Ngā Iwi. They travelled on two waka. When the first waka was full of kūmara it left, with the boys of Haumoewārangi. Haumoewārangi and Rangiteipu were returning to the second waka when Ngā Iwi arrived and Haumoewārangi and Rangiteipu were slain. The name of the place where they were slain is Mānunutahi (Mosquito Bay).

[108] Waihekeao, Haumoewārangi's second wife, made a request to Kāwharu of Kāwhia Harbour to avenge the deaths of Haumoewārangi and Rangiteipu. Kāwharu agreed to the request. This request was possible because of Rangiteipu's Ngā Iwi genealogy. Kāwharu arrived and the Raupatu Tihore (the stripping conquest) began. Ngā Iwi were given a beating all the way from the Kaipara to Tāmaki. Kāwharu did not settle in Tāmaki, rather he returned to the Kaipara.

[109] On arrival back in the Kaipara, some of the Ngā Iwi had gathered on Moturemu. Moturemu was a strong fortress, an island with high cliffs. Kāwharu and his war party went there. Kāwharu used his tall body as a ladder, for his warriors to climb onto the island fortress. The people on the island fortress were killed and from this event came the name Te Tomokanga o Kāwharu (the ladder of Kāwharu).

[110] Ngā Iwi were not exterminated by Kāwharu. They were still living in the Kaipara but their strength had weakened. Kāwharu's sister had married into Ngā Iwi. Kāwharu went to visit his sister and to settle an insult made by Te Hūhunu. It was here that Kāwharu was deceived by Te Hūhunu's people, who killed Kāwharu.

[111] This sat as a great burden to Ngāti Whātua, the deaths of Haumoewārangi, Rangiteipu and Kāwharu by Ngā Iwi. Ngāti Whātua knew that the relationship between them and Ngā Iwi was beyond repair. Ngāti Whātua were unable to avenge those deaths. Ngāti Whātua turned to raise their children as great warriors. Some of these children were Tumupākihi, Poutapuaka, Te Atiakura, Hakiriri, Tikiwhakataha, Pani, Tete, and Hukatere among others.

[112] When these children became adults, they were pure warriors who were second to none. Two waka were built: Te Pōtae-o-Wāhieroa, and Te Wharau. Ngāti Whātua were aboard Te Pōtae-o-Wāhieroa. Te Taoū were aboard Te Wharau. They travelled to the South Kaipara and were successful in conquest over Ngā Iwi. All fortresses fell and Ngāti Whātua and Te Taoū settled in this area. And here the dominion was extended, now, no longer from Maunganui Bluff to Poutō, but from Maunganui Bluff to Kaipara Harbour. Hence the saying of Te Ikataoroa of Te Roroa:

> When Maunganui looks, it looks to Kaipara; when Kaipara looks, it looks to Maunganui.

D The 18th century raupatu or conquest of Tāmaki

[113] Whilst Ngāti Whātua and Te Taoū were living in this new home in South Kaipara, the conflict with Ngā Iwi continued; in particular the Ngā Iwi of Tāmaki, being Te Waiohua. Ngāti Whātua Ōrākei acknowledges that the renowned rangatira of Te Waiohua, Kiwi Tāmaki, had undisputed mana over a substantial population and several settlements in Tāmaki Makaurau, including his principal and formidable pā at

Maungakiekie.[27] At that time, around 1740, Te Waiohua had mana whenua over the area over which Ngāti Whātua Ōrākei claim mana whenua today.[28]

[114] Tension was growing between Waiohua and Te Taoū, as Te Taoū began pushing south into the rohe of Waiohua.[29] This tension was magnified irreversibly when, around 1740, Kiwi Tāmaki and his warriors travelled to Kaipara to attend the uhunga (ceremony to remove tapu over remains) of Tumupākihi, a Te Taoū rangatira at Waitūoro (close to Parakai).[30] When Kiwi Tamaki arrived, he launched a surprise attack killing hundreds of Ngāti Whātua, including the sister of Ngāti Whātua rangatira Tuperiri and Tumupakihi's son.[31]

[115] Tuperiri and Wahaakiaki, Tumupakihi's other son, managed to escape. Following this attack, they vowed to obtain utu against Kiwi.[32] A number of skirmishes followed. The survivors of Te Taoū fled to Te Mākiri (close to Te Awaroa/ Helensville). When Kiwi Tāmaki arrived there, he and Wahaakiaki had a battle of words:

> Kiwi: Tomorrow your breast bone will hang on the tree on Tōtara-i-āhua [One Tree Hill, also known as Maungakiekie].
>
> Waha: It will be like this, tomorrow your breast bone will hang on the pūriri tree on Maunga-a-Ngū [a hill at Te Awaroa/ Helensville].
>
> Kiwi: Kiwi will not die, unless Rēhua-i-te-rangi [a Māori god] says so.

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27 R C J Stone *From Tamaki-Makau-Rau to Auckland* (Auckland University Press, Auckland, 2001) [Stone *From Tamaki-Makau-Rau*] at 28; Brief of Evidence of Ngarimu Blair in Reply, 4 December 2020 [Blair Reply] at [67]; and Brief of Evidence of Vincent O'Malley, 2 June 2020 [O'Malley Brief] at [41].

28 Native Land Court *Ōrākei Block* (1869) 2 Ōrākei MB, Transcribed Version [Native Land Court *Ōrākei* MB 2] at 207; *Ōrākei Block* (1869) as reported in *Important Judgments Delivered in the Compensation Court and the Native Land Court 1866-1879* (Southern Reprints, 1994) [*Native Land Court Ōrākei Decision 1869*] at 53; S Percy Smith *The peopling of the North: notes on the ancient Māori history of the Northern Peninsula and sketches of the History of Ngāti-Whātua tribe of Kaipara, New Zealand* (Kiwi Publishers, Christchurch, 1998) [Smith *The Peopling of the North*] at 2; O'Malley Brief at [42]–[43].

29 Angela Ballara *Taua: 'Musket Wars', 'Land Wars' or Tikanga? Warfare in Māori Society in the Early Nineteenth Century* (Penguin Books, Auckland, 2003) [Ballara *Taua*] at 208; and O'Malley Brief at [43].

30 Ballara *Taua* at 208–209; and O'Malley Brief at [44].

31 Native Land Court *Ōrākei* MB 2 at 78–79; *Native Land Court Ōrākei Decision 1869* at 63; Paul Tūhaere *A Paper Giving an Account of the Genealogy of the Ancestors of Ngāti Whātua*, handwritten version [Tūhaere *Ancestors*] at 11; Paul Tūhaere "An Historical Narrative Concerning the Conquest of Kaipara and Tāmaki by Ngāti Whātua" (1923) 32 JPS 229 [Tūhaere "The Conquest"] at 231; O'Malley Brief at [44]–[45]; and Kawharu Brief at [70].

32 Stone *From Tamaki-Makau-Rau* at 40; Ballara *Taua* at 208–209; Tūhaere "The Conquest" at 231; and O'Malley Brief at [45]–[47].

[116] Kiwi Tāmaki returned to Tāmaki with his war party. Wahaakiaki and Waitaheke led Te Taoū across the Manukau to Awhitu, where they sacked a Waiohua pā. The strategy was to entice Kiwi Tamaki off Maungakiekie – and it worked. Kiwi and other important Waiohua chiefs were lured to Paruroa (Big Muddy Creek) where they came across Tuperiri's party. Te Taoū laid their strategy and Kiwi Tāmaki was killed by Wahaakiaki. Many Te Waiohua also died, hence the name Te Rangi Hingahingatahi (the Day That Many Fell). Ngāti Whātua Ōrākei say this signified the end of Waiohua as a dominant political force.[33] The breast-bone of Kiwi was taken to Maunga-a-Ngū, and hung on the pūriri tree. Te Taoū returned to Kaipara to rest, but not before Wahaakiaki took the pā at Māngere by surprise in revenge for the killing of his sister.[34]

[117] Tuperiri was angry with Wahaakiaki because of his sisters who had been killed by Te Waiohua. Tuperiri confronted Wahaakiaki. The confrontation was deescalated by Tuperiri's son Paewhenua. Peace was made – the pact between them was that all hapū would ascend to Tāmaki to fully conquer Tāmaki. All hapū gathered and ascended to Tāmaki.

[118] After learning Waiohua intended to reoccupy homes at Kohimarama, Te Taoū returned to the area over which Ngāti Whātua Ōrākei claim mana whenua, for a military effort. Te Taoū first arrived at Te Okā (Point Erin). They then continued along the southern shores of the Waitematā to Kohimarama, where the pā there was captured. After this, Te Taoū captured Tokapurewha, Whakatakaka, Ōrākei and Taurarua, then they turned inland via Pukapuka to Maungakiekie where Te Taoū captured the pā based there. Te Taoū, under Tuperiri then followed Waiohua to Māngere and captured the pā in that district.[35] At the conclusion of the conquest, Te Taoū stayed at Tāmaki and the other hapū returned to Kaipara.

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33 Native Land Court *Ōrākei* MB 2 at 179–180; *Native Land Court Ōrākei Decision 1869* at 63; Stone *From Tamaki-Makau-Rau* at 42; Ballara *Taua* at 209–210; Smith *The Peopling of the North* at 87; Kawharu Brief at [72]; O'Malley Brief at [48]–[50]; NOE 292/18–20 (Kawharu); and NOE 639/9–11 (Blair).

34 Native Land Court *Ōrākei* MB 2 at 80; *Native Land Court Ōrākei Decision 1869* at 63; Tūhaere *Ancestors* at 10; Smith *The Peopling of the North* at 89b; Kawharu Brief at [73]; and O'Malley Brief at [52].

35 Tūhaere "The Conquest" at 232; Smith *The Peopling of the North* at 90; Kawharu Brief at [74]; O'Malley Brief at [53]; Brief of Evidence of David Williams in Reply, 4 December 2020 [Williams Reply] at [30]; NOE 639/9–11 (Blair), and NOE 694/18–33 (Williams).

[119] Ngāti Whātua Ōrākei say this was a comprehensive raupatu that resulted in a total change to political dominance in Tāmaki Makaurau.[36] With Waiohua completely defeated, a section of Te Taoū under Tuperiri took control of the area over which Ngāti Whātua Ōrākei claim mana whenua and became the major political force in the area. Tuperiri took over Maungakiekie Pā, which was renamed Hikurangi. Tuperiri's sons Tarahawaiki and Whakaariki occupied Onewa. His half-brother Te Waitaheke lived at Te Tō (Freeman's Bay). Other settlements were established at Onehunga, Ōrākei, the upper Waitematā, Māngere and Ihumātao.[37]

E The connections established as a result of the raupatu

[120] An integral part of the raupatu was establishing new links with those whom Te Taoū had conquered. Tuperiri had four children: Tomoāure, Tarahawaiki, Paewhenua and Whakaariki. Tomoāure and Tarahawaiki married into Te Waiohua, in particular into Ngāti Te Ata. From Huakaiwaka (Te Waiohua) came Huatau then Te Atairēhia (Ngāti Te Ata), Pouate and then Te Hōreta. Te Hōreta was followed by both Mokorua and Te Tahuri. Mokorua married Tarahawaiki and was followed by Apihai Te Kawau. Te Tahuri married Tomoāure and was followed by Awarua.

[121] Te Tahuri and Tomoāure gifted Tauoma (Panmure) to a relative of Te Tahuri, Kehu. Kehu's husband was Te Putu of Ngāti Pāoa. This is the arrival of Ngāti Pāoa to Panmure, around 1780. At that time Tuperiri was living at Maungakiekie (One Tree Hill). Te Tahuri and Tomoāure were living at Māngere and Āwhitu. Tarahawaiki and Mokorua were living at Māngere, Puketāpapa and Āwhitu at times, and on the Waitematā at other times. Paewhenua and Whakaariki were living on the Waitematā.

[122] Another connection of Ngāti Whātua to Ngāti Pāoa is the marriage of Maihi Te Hīnaki to Rīria Kotakota of Te Mangamata, a hapū of Ngāti Whātua in the Kaipara. Further, their child Wēneti Maihi Te Hīnaki married Ihapera Mū of Te Uri o Hau

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36 Stone *From Tamaki-Makau-Rau* at 40; Ballara *Taua* at 208–209; Kawharu Brief at [71]; and O'Malley Brief at [47].

37 *Native Land Court Ōrākei Decision 1869* at 65–66; Smith *The Peopling of the* North at 89–91; Affidavit of Hugh Kawharu, 9 December 2002, in *Ngā Uri o Te Taoū Tribe Inc v Attorney-General* HC Auckland M.1079-00 and the Wai 388 claim at the Waitangi Tribunal at 5–6 [Kawharu Affidavit *Ngā Uri o Te Taoū*]; Kawharu Brief at [76]; O'Malley Brief at [53]; NOE 292/30–33 – 293/1–2 (Kawharu); and NOE 771/15–16 (Williams).

another hapū of Ngāti Whātua in the Kaipara. There are many families of Ngāti Whātua Ōrākei today who descend from these marriages. From Haumoewārangi came Rango then Moerangaranga, Taumutu, Ruarangi, Houtahi, Ruarangi II, Rīria Kotakota and then Wēneti Maihi Te Hīnaki. Rīria Kotakota married Maihi Te Hīnaki of Ngāti Pāoa. Wēneti Maihi Te Hīnaki married Ihapera Mū of Te Uri o Hau.

[123] The eponymous ancestor of Te Ākitai is Kiwi Tāmaki. He is a grandson of Huakaiwaka and his marriage to Rangihuamoa. Ngāti Whātua Ōrākei descend from Huakaiwaka and his other marriage to Rauwhakiwhaki. The marriage of Huakaiwaka and Rangihuamoa resulted in Ikamaupoho who was followed by Kiwi Tāmaki. The marriage of Huakaiwaka and Rauwhakiwhaki resulted in Huatau followed by Te Atairēhia, Pouate, Te Hōreta, Mokorua, and then Apihai Te Kawau of Ngāti Whātua Ōrākei.

F Ngāti Whātua and Ngāti Whātua Ōrākei

[124] Before the adoption of the name Ngāti Whātua, there was one hapū with the name Ngāti Whātua. They were the descendants of Kōieie, and their home was at Ōtakanini in the Kaipara. Kōieie was alive around 1750. The name of this hapū today is Ngāti Whātua Tūturu. From Haumoewārangi came Rango then Taumutu, Kōieie of Ngāti Whātua Tūturu, Tauhia and then Te Waru.

[125] The name Ngāti Whātua was adopted as a name for all hapū from Maunganui Bluff to Tāmaki in the 1800s. Before this time, Ngāti Whātua lived according to Māori traditions as hapū-based communities, with kinship ties between one hapū to another.

[126] Some of the hapū from Maunganui Bluff to Tāmaki who adopted the name Ngāti Whātua are: Te Roroa, Te Uri o Hau, Ngāti Kura, Ngāti Tahinga, Ngāi Tāhuhu, Ngāti Rango, Te Mangamata, Ngāti Whātua Tūturu, Te Taoū, Ngā Oho and Te Uringutu, along with others. Te Kurataiaho Kapea says that for a number of different hapū to have adopted the umbrella name Ngāti Whātua is a strange concept, because these hapū do not trace their lineage to one ancestor or one great waka.[38]

[38] Kapea Brief at [11].

[127] After the raupatu, Te Taoū chiefs married Waiohua women which reinforced Te Taoū ties to the land. This hapū became known as Ngāoho. The Ngāoho (or Ngā Oho) hapū of Ngāti Whātua Ōrākei is not the same entity as the 'first' Ngā Oho associated with Huakaiwaka and Waiohua.[39] The two are related because of the intermingling of whakapapa of Te Taoū and early Ngā Oho people, but the Ngāoho hapū that emerged following the raupatu is a distinct entity that identifies Tuperiri as the eponymous ancestor.[40]

[128] Ngāti Whātua Ōrākei accepts that some Waiohua people survived, stayed and intermarried with Ngāti Whātua Ōrākei. But those survivors who intermarried with Ngāti Whātua Ōrākei came under the political influence of Ngāti Whātua Ōrākei, which was part of the fabric of Māori society.[41] This is clear from the way they were amalgamated into Ngāti Whātua hapū under Te Uringutu.[42] Te Uringutu formed under the leadership of Tuperiri's son Tomoaure, who led those who had fled, then returned following the raupatu.[43]

[129] The three hapū of Te Taoū, Ngāoho and Te Uringutu were not separate or autonomous territorial groups. They were three hapū of Ngāti Whātua which lived and worked together.[44] The Waitangi Tribunal described the development of a distinctive Ngāti Whātua Ōrākei identity (which was different from those Ngāti Whātua still living further north) in this way:[45]

> Through common blood and shared destiny the combined group of Te Taoū, Ngāoho, and Te Uringutu came to live as one, on what is now greater Auckland.

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39 Kapea Brief at [28]; and NOE 1155/18–34– 1156/1–7 (Meredith).

40 NOE 1155/18–34–1156/1–7 (Meredith); and Ngāti Whātua Ōrākei Deed of Settlement of Historical Claims, 5 November 2011 [Ngāti Whātua Ōrākei Deed] at [8.5]; and NOE 292/7–8 (Kawharu).

41 NOE 292/7–14 (Kawharu).

42 I H Kawharu, *Ko te Mana Whenua o Ngāti Whātua o Ōrākei* (Wai 388 Draft, paper presented to the Crown, May 2003) [Kawharu *Ko te Mana Whenua*] at 4; and Kawharu Brief at [77].

43 *Native Land Court Ōrākei Decision 1869* at 65; Ballara *Taua* at 211; I H Kawharu *Dimensions of Rangatiratanga* (Hodge Fellowship, 1995-1996) [Kawharu *Dimensions*] at 39–40; Kawharu Affidavit *Nga Uri o Te Taoū* at 6; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report of the Waitangi Tribunal on the Ōrākei Claim* (Wai 9, 1987) [Waitangi Tribunal *Ōrākei Report*] at 17; Kawharu Brief at [77]; O'Malley Brief at [54]–[56]; Brief of Evidence of David Williams, 2 June 2020 [Williams Brief] at [35]–[37]; and NOE 640/1–4 (Blair).

44 Native Land Court *Ōrākei* MB 2 at 10; *Native Land Court Ōrākei Decision 1869* at 65; Kawharu *Dimensions* at 39–40; Kawharu *Ko te Mana Whenua* at 4; Williams Brief at [38]; and NOE 734/18–31 and 735/4–7 (Williams).

45 Waitangi Tribunal *Ōrākei Report* at 17; and O'Malley Brief at [55].

G Ngāti Whātua Ōrākei until the 1820s

[130] Following the conquest by Te Taoū, Ngāti Whātua Ōrākei remained largely undisturbed by neighbouring iwi in its central position in the area over which it claims mana whenua for the rest of the 18th century and early 19th century.[46] Tuperiri continued to occupy Maungakiekie (One Tree Hill) until his death in the late 18th century.[47] Ngāti Whātua Ōrākei accepts some Waiohua people survived, stayed and inter-married with Ngāti Whātua Ōrākei, but maintains they did so under the political influence of Ngāti Whātua Ōrākei.[48]

[131] By this time, Ngāti Whātua Ōrākei say they held sway over the whole of the west coast from Maunga-nui Bluff to the Manukau Heads, eastwards to the Tāmaki River, and (in respect of the interests of Ngāti Whātua o Kaipara) extending north to near Whangarei.[49] By the beginning of the 19th century, although the main Ngāti Whātua Ōrākei residences were at Ihumātao and Māngere, they had significant cultivations at Ōkahu Bay and along the shores of the Waitematā.[50]

[132] There are some records of European encounters at this time. In July 1820, Missionary the Rev Samuel Marsden, the first known Pākehā visitor to the Tāmaki region, met with Te Hinaki, a Ngāti Pāoa rangatira, and Te Kawau, a Ngāti Whātua rangatira. Ngāti Whātua Ōrākei say Marsden's description of the two chiefs is instructive; Te Hinaki was described as a chief of Mokoia, while Te Kawau told Marsden that the land upon the Waitematā belonged to him — a statement which Te Hinaki evidently did not contradict.[51] It was Te Kawau who escorted Marsden around the areas west of the Tāmaki river.[52]

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46 Native Land Court *Ōrākei* MB 2 at 25; *Native Land Court Ōrākei Decision 1869* at 65; and Kawharu Brief at [86].

47 Native Land Court *Ōrākei* MB 2 at 187; *Native Land Court Ōrākei Decision 1869* at 67; and O'Malley Brief at [63].

48 Ngāti Whātua Ōrākei Closing at [6.17].

49 S P Smith *Māori Wars of the Nineteenth Century* (Whitcombe and Tombs, Christchurch, 1910) at 19; and Kawharu Brief at [80].

50 Native Land Court *Ōrākei Block* (1869) 1 Ōrākei MB, Transcribed Version, [Native Land Court *Ōrākei* MB 1] at 209 and 222; Native Land Court *Ōrākei* MB 2 at 160 and 185; *Native Land Court Ōrākei Decision 1869* at 67; and O'Malley Brief at [65].

51 JR Elder (ed) *The Letters and Journals of Samuel Marsden, 1765-1838* (Coulls, Somerville, Wilkie and AH Reed for Otago University Council Dunedin, 1932) [Elder *Marsden*] at 271; and O'Malley Brief at [69].

52 Elder *Marsden* at 271; and O'Malley Brief at [69].

H Strategic withdrawal in the 1820s

[133] Following decades of peace, ongoing skirmishes with Ngāpuhi began to concern those in the broader Tāmaki isthmus.[53] In the 1820s, the isthmus was thrown into disarray when Ngāpuhi made repeated visits to Tāmaki heavily armed with new military technology in the form of muskets.

[134] The initial onslaught by Ngāpuhi took place in late 1821:

(a) Ngāpuhi first arrived in March 1821, under the leadership of their rangatira Koperu, and attacked Ngāti Pāoa at Mauinaina. Te Taoū were amongst those who helped drive Ngāpuhi away.[54]

(b) In October 1821 a taua, or war party, of up to 2,000, carrying as many as 1,000 muskets reached Tāmaki Makaurau.[55] Ngāpuhi found Ngāti Whātua's rohe relatively undefended. Some time prior to Ngāpuhi's arrival Te Kawau had departed the isthmus to jointly lead a large war party across the North Island, known as the Amiowhenua (circling of the land). Te Kawau was in what is now Wellington when Ngāpuhi arrived.[56]

(c) In November 1821, the Ngāpuhi taua attacked and destroyed the Mauinaina and Mokoia pā of Ngāti Pāoa. Ngāti Pāoa suffered heavy loss of life, including senior rangatira Te Hinaki.[57] The defenders of Mauinaina pā had five muskets to defend against the 1,000 of

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53 Kawharu Brief at [94].
54 Native Land Court *Ōrākei* MB 1 at 221; *Native Land Court Ōrākei Decision 1869* at 69; and Kawharu Brief at [97.1].
55 Ballara *Taua* at 217; and O'Malley Brief at [78].
56 Native Land Court *Ōrākei* MB 1 at 204 and 211; Native Land Court *Ōrākei* MB 2 at 16–17; Kawharu Brief at [97.2]; and O'Malley Brief at [80].
57 Native Land Court *Ōrākei* MB 1 at 204; Native Land Court *Ōrākei* MB 2 at 16–17; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Hauraki Report* (Wai 686, 2006) [Waitangi Tribunal *Hauraki Report 2006*] at 69; Kawharu Brief at [97.2]; O'Malley Brief at [81]; and Williams Brief at [51].

Ngāpuhi.[58] Ngāti Pāoa withdrew from the isthmus, seeking shelter further south in the Waikato.[59]

[135] Te Kawau had been named by Ngāpuhi as a particular target; his absence on the Amiowhenua likely spared Ngāti Whātua Ōrākei from a similar fate to Ngāti Pāoa.[60] Some Ngāti Whātua Ōrākei women had remained in Māngere, cultivating kumara. But upon hearing of the Ngāpuhi, they took shelter at Ikurangi on the northern side of the Manukau Harbour.[61] Following their success at Mokoia and Mauinaina, Ngāpuhi returned north. From 1822 to 1825, Ngāti Whātua Ōrākei remained in the area over which they claim mana whenua and moved seasonally. They continued to plant, fish, and store crops around the Waitematā.[62]

[136] With some Ngāpuhi rangatira worried about reprisals for their taua, some steps towards peace were made with a peace-making ceremony in the Bay of Islands in 1823 between Ngāpuhi and Waikato. As part of the peace-making, Ngāpuhi woman Matire Toha was married to Kati, the brother of Te Wherowhero of Waikato.[63] Kati, Matire Toha, and their party were hosted by Te Kawau on their return from the Waikato. Te Kawau greeted the party at Takapuna, supplied them with food from Ōkahu cultivations, and sheltered them for three days.[64]

[137] Unfortunately, the peace that was brokered was short lived. In 1824 a group of Te Uringutu were attacked by Ngāpuhi.[65] In 1825, Hongi Hika began assembling another taua to attack Tāmaki. Hearing of the incoming taua, Te Kawau assembled a party and headed north, but the battle took place at Te Ika-a-ranganui before he and his fighters reached the scene in Kaipara. Although Ngāti Whātua Ōrākei outnumbered the Ngāpuhi taua by about two to one, they possessed few muskets and were defeated. Many were killed in the battle.[66]

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58 O'Malley Brief at [82].

59 Ballara *Taua* at 219–220; Waitangi Tribunal *Hauraki Report 2006* at 46; O'Malley Brief at [83]; and Williams Brief at [51].

60 Stone *From Tamaki-Makau-Rau* at 93; and O'Malley Brief at [88].

61 Native Land Court *Ōrākei* MB 1 at 215; and O'Malley Brief at [80].

62 Native Land Court *Ōrākei* MB 2 at 32–34; *Native Land Court Ōrākei Decision 1869* at 71; Ballara *Taua* at 222; and O'Malley Brief at [87].

63 *Native Land Court Ōrākei Decision 1869* at 70; and O'Malley Brief at [90].

64 *Native Land Court Ōrākei Decision 1869* at 70–71; and O'Malley Brief at [91].

65 *Native Land Court Ōrākei Decision 1869* at 71; and O'Malley Brief at [94].

66 Ballara *Taua* at 225; O'Malley Brief at [95]; and Williams Brief at [42].

[138] From this point, Ngāti Whātua Ōrākei evacuated their rohe, with some venturing south to the Waikato and others to the Waitākere ranges or to the east of the Kaipara harbour.[67] The risk of continued Ngāpuhi attacks made it unsafe for anyone to remain at Tāmaki.[68] European explorers visiting Tāmaki at the time noted an absence of occupation during the late 1820s.[69] These invasions were not followed by permanent Ngāpuhi occupation. Ngāpuhi focus was on utu and glory, not on conquest.[70] Ngāpuhi never settled in Tāmaki.[71] As Dr Vincent O'Malley stated, if anyone was in Tāmaki in the early 1830s, it would have been in a "fleeting fashion".[72]

[139] Ngāti Whātua Ōrākei maintained their customary connections with the area over which they claim mana whenua. As Te Kawau said "my fires were continually being kindled at Ōrākei & Ōkahu".[73] Despite not living there at the time, Ngāti Whātua Ōrākei periodically returned to test the safety of Tāmaki,[74] fish on the Waitematā,[75] and even lived at times at Ōkahu Bay between raids.[76]

[140] Eventually the threat from Ngāpuhi subsided and a new equilibrium was restored.[77] In late 1835 Ngāti Whātua Ōrākei began their permanent return to the area over which Ngāti Whātua Ōrākei claim mana whenua.[78] Tāmaki Makaurau was effectively deserted at the time,[79] and Ngāti Whātua Ōrākei were the first iwi to return to the wider Tāmaki isthmus.[80] Their return was cautious, given tensions with

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67 Native Land Court *Ōrākei* MB 2 at 300–301; Native Land Court, *The Ōrākei Decision* at 73; Stone *From Tamaki-Makau-Rau* at 103 and 109–110; and Kawharu Brief at [97.11]–[97.12].

68 *Native Land Court Ōrākei Decision 1869* at 72; Stone *From Tamaki-Makau-Rau* at 103; and O'Malley Brief at [98]–[99].

69 At [101]–[103].

70 Waitangi Tribunal *Ōrākei Report* at 19; and Kawharu Brief at [100]–[101].

71 Native Land Court *Ōrākei* MB 1 at 67–68; James Belich *Making Peoples: A History of New Zealanders* (Allen Lane, Auckland, 1996) at 161; Kawharu Brief at [100]; Williams Brief at [42] and [141]; NOE 732/10– 33 (Williams); and NOE 2830/21–24 (McBurney).

72 NOE 1043/27–29 (O'Malley).

73 Native Land Court *Ōrākei* MB 1 at 211.

74 Brief of Evidence of Ngarimu Blair, 2 June 2020 [Blair Brief] at [55].

75 Native Land Court *Ōrākei* MB 2 at 112; Stone *From Tamaki-Makau- Rau* at 103; Ballara *Taua* at 229; O'Malley Brief at [99] and [107]; and NOE 63/6–9 (Kapea).

76 Kawharu Brief at [101].

77 *Native Land Court Ōrākei Decision 1869* at 74–75; and O'Malley Brief at [109].

78 Native Land Court *Ōrākei* MB 2 at 261; *Native Land Court Ōrākei Decision 1869* at 75–76; and NOE 83/8–9 (Kapea).

79 Native Land Court *Ōrākei* MB 1 67–68; *Native Land Court Ōrākei Decision 1869* at 74–75; and Williams Brief at [132].

80 Williams Brief at [132]; Williams Reply at [16]; Blair Reply at [84]; and NOE 1043/10–34–1044/1–20 (O'Malley).

Ngāpuhi and Ngāti Pāoa, but they were protected by the continuation of longstanding alliances between Te Kawau and Te Wherowhero of Waikato.[81]

[141] By the spring of 1837, Ngāti Whātua Ōrākei was planting gardens on the Waitematā side of the area over which Ngāti Whātua Ōrākei claim mana whenua, at Horotiu (Queen Street) and Remuera.[82] A chapel was built at Ōrākei, from equal contributions from the Anglican Church and Ngāti Whātua Ōrākei, and was dedicated perhaps as early as 1837.[83] Once re-established, Te Kawau invited Te Wherowhero to join Ngāti Whātua Ōrākei in gardening at Onehunga.

[142] One factor driving groups to return to the isthmus was missionary-driven peace talks. Hui were held in late 1835 and early 1836 involving Waikato, Ngāti Pāoa, and Ngāti Whātua Ōrākei.[84] Further hui were held throughout 1838. One of these was held at Ōrākei and Ōkahu Bay, to discuss coordination in defence and cultivation planning.[85] Paora Tuhaere's evidence at the Ōrākei hearing was that in 1838 permanent gardens and large houses were constructed on the Waitematā.[86]

[143] Of course, Ngāti Whātua Ōrākei were not the only iwi in the broader Tāmaki Makaurau region at this time:

(a) Ngāti Pāoa were predominantly based in the Hauraki Gulf, particularly Waiheke and Whakatiwai, Ōrere and other locations. They did not

81 Native Land Court *Ōrākei* MB 1 at 71; Native Land Court *Ōrākei* MB 2 at 115; *Native Land Court Ōrākei Decision 1869* at 75; Stone *From Tamaki-Makau-Rau* at 152; Ballara *Taua* at 231; Kawharu Brief at [103]–[104]; O'Malley Brief at [110]–[116]; Brief of Evidence of Hauāuru Rawiri, 13 October 2020 (English) [Rawiri Brief] at [41]; Brief of Evidence of Morehu Wilson, 13 October 2020 [M Wilson Brief] at [79]; Mark Derby and Tanja Rother *Te Ākitai Waiohua Customary Interests in three Auckland sites* (August 2020) [Derby and Rother *Te Ākitai Waiohua Customary Interests*] at 50; Tangata Whenua Consultation Hearing Commission *Report of Commissioners to Auckland City Council* (Auckland City Council, 1998) at 32; NOE 83/19–24 (Kapea); and NOE 1163/31–34–1164/1–5 (Meredith).

82 Native Land Court *Ōrākei* MB 2 at 118 and 289–290; Stone *From Tamaki Makau-Rau* at 175; and Kawharu Brief at [107].

83 Waitangi Tribunal *Ōrākei Report* at 31; and Kawharu Brief at [114].

84 Stone *From Tamaki-Makau-Rau* at 161–164; and Kawharu Brief at [104]–[105].

85 Kawharu Brief at [109.2].

86 Native Land Court *Ōrākei* MB 2 at 88; Stone *From Tamaki-Makau-Rau* at 182; and Kawharu Brief at [115].

return to Panmure/Mauinaina area following the Ngāpuhi raids, as this became tapu.[87]

(b) Further east were Ngāi Tai ki Tāmaki who predominantly lived in Maraetai but also had interests in Clevedon and Papakura and some of the Hauraki Gulf islands.[88] In particular, Ngāi Tai ki Tāmaki now claim exclusive rights over Motutapu.[89]

(c) Ngāti Te Ata, Ngāti Tamaoho and Te Ākitai ringed the extensive southern shore of the Manukau Harbour up to the western part of the Māngere peninsula. Te Ākitai had their main settlement at Pūkaki adjacent to that of Ngāti Whātua Ōrākei at Māngere and claimed rights from the vicinity of Ōtara south to Papakura. Their area of interest abutted with Ngāti Pāoa at the Ōtāhuhu portage.[90]

(d) Te Kawerau ā Maki occupied the forested mountainous western margin of the Tāmaki Isthmus, in particular the Waitakere region south of Taupaki. Te Kawerau ā Maki also laid claim to occupational rights in parts of the North Shore peninsula, alongside Ngāti Pāoa and Ngāti Whātua Ōrākei, and had fishing stations and a pā at Onewa on the northern shore of Waitematā.[91]

[144] Ngāti Whātua Ōrākei continue to recognise the interests of these iwi in modern times.

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87 Native Land Court *Ōrākei* MB 1 at 147; *Native Land Court Ōrākei Decision 1869* at 77; Stone *From Tamaki-Makau-Rau* at 306; Ballara *Taua* at 225; O'Malley Brief at [137]; Williams Brief at [50]–[51]; and NOE 2384/32–33 (McBurney).

88 RCJ Stone *Historical Report on the Auckland Metropolitan Area* (Crown/Congress Joint Working Party, 1992) at 66; and O'Malley Brief at [133].

89 Ngāi Tai ki Tāmaki Deed of Settlement Schedule: Documents at [3.2]; and NOE 2914/32–33, 2915/1–25, 2916/16– 34 and 2917/1–3 (Brown).

90 Kawharu *Dimensions* at 41; Alan La Roche *The History of Howick and Pakuranga* (The Howick & Districts Historical Society Inc, Auckland, 1991); and Williams Brief at [52].

91 Kawharu *Dimensions* at 40–41; O'Malley Brief at [132]; and Williams Brief at [54].

I Ngāti Whātua Ōrākei and the Crown

[145] As at 1840, following their return to Tāmaki, Ngāti Whātua Ōrākei had resumed the exercise of political authority over their rohe.[92] Their reach extended from their principal kāinga between Māngere and Onehunga through Maungakiekie (One Tree Hill) to the Waitematā side of the area over which they claim mana whenua,[93] with Te Kawau permanently based at Ōrākei.[94] As their preeminent kaumātua, Ngāti Whātua Ōrākei say Te Kawau answered to no one outside of his people of Tāmaki.[95]

[146] Lieutenant-Governor Hobson first visited Tāmaki Makaurau on 23 February 1840 to gather more signatures for the Treaty of Waitangi. Upon entering the Waitematā, Hobson was immediately impressed. He spent the next few days exploring the Tāmaki region, before he suffered a severe stroke. That necessitated other officials gathering further signatures for the Treaty.[96]

[147] Of the iwi in the Tāmaki Makaurau region, Ngāti Pāoa signed a copy of the text of the Treaty of Waitangi first on 4 March 1840.[97] This was arranged to be signed at Karaka Bay, so that members of Ngāti Pāoa at Waiheke and the Firth of Thames could travel to sign the Treaty.[98] Shortly after, on 20 March 1840, Te Kawau signed a copy of the text of the Treaty in te reo Māori at the settlement of Ngāti Whātua Ōrākei at Māngere-Onehunga. Other signatories were Te Reweti and Te Tinana, and W C

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92 I H Kāwharu *Ōrākei: A Ngāti Whātua Community* (New Zealand Council for Educational Research, Wellington, 1975) at 5; and Williams Brief at [32] and [141].

93 Native Land Court *Ōrākei* MB 2 at 66, 143–144, 190 and 293; *Native Land Court Ōrākei Decision 1869* at 79; Waitangi Tribunal *Ōrākei Report* at 19; Williams Brief at [43]; and NOE 728/30–34 (Williams).

94 Native Land Court *Ōrākei* MB 2 at 216–217; Native Land Court *Ōrākei* MB 2 at 51; Stone *From Tamaki-Makau-Rau* at 184 and 248; and Kawharu Brief at [118].

95 Reply affidavit of Hugh Kāwharu for the third defendant, 27 August 2003 at [7] in *Ngā Uri o Te Taoū Tribe Inc v Attorney-General* HC Auckland M.1079-00 and the Wai 388 claim at the Waitangi Tribunal; and Williams Brief at [85].

96 Native Land Court *Ōrākei* MB 2 at 119; O'Malley Brief at [140]–[141]; and Kawharu Brief at [120].

97 O'Malley Brief at [142].

98 Williams Reply at [25.3].

Symonds witnessed the signing on behalf of the Crown.[99] Despite signing in this location, Te Kawau was permanently based in Ōrākei at this time.[100]

[148] Te Kawau was eager to form an alliance with the Crown. Based on 20 years of personal encounters with Pākehā, Te Kawau understood the power and opportunities of the European culture.[101] Protection was also important, given the ongoing potential threat from Ngāpuhi,[102] Further, Ngāti Whātua were eager to participate in the trade that could come from closer association with the Europeans.[103] Margaret Kawharu says: [104]

> In early 1840, Te Kawau's cousin, Te Whatarangi (aka Waterangi), called a meeting of all chiefs of Tāmaki, Waitematā, and Kaipara to discuss how to best secure "peace and order and a cessation of war and strife". The lengthy discussions did not yield firm plans, but a matakite (seer) called Titahi (also known as Titai) had prophesised peace would only come to the Waitematā if the newly arrived Pākehā governor came here.

[149] On this basis, in around April 1840 Te Kawau sent his nephew Te Reweti with seven other chiefs from Tāmaki, and Symonds, to the Bay of Islands with the promise of land to convince Hobson to relocate the capital to the shores of the Waitematā.[105] This approach was accepted by Hobson.

[150] Over the coming months, Hobson began arrangements to move the capital to Auckland. In September 1840, after two days of negotiating with Ngāti Whātua Ōrākei rangatira, Ngāti Whātua Ōrākei transferred "3,000 acres" (3,500 modern acres) of north facing land on the Waitematā starting from river Mataharehare near Newmarket and continuing along the Waitematā to the river Ōpoutūkeha (or modern day Cox's Bay) and then from both points to the summit of Maungawhau (Mt Eden).[106]

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99 Native Land Court *Ōrākei* MB 2 at 119; Stone *From Tamaki-Makau-Rau* at 228; Kawharu *Dimensions* at 55; Kawharu Brief at [121]; Blair Brief at [62]; Williams Brief at [88]; O'Malley Brief at [144].

100 Native Land Court *Ōrākei* MB 1 at 216–217; Stone *From Tamaki-Makau-Rau* at 184 and 248; Kawharu Brief at [118].

101 Waitangi Tribunal *Ōrākei Report* at 21; Kawharu *Dimensions* at 55; and Williams Brief at [89].

102 Waitangi Tribunal *Ōrākei Report* at 21; Kawharu *Dimensions* at 55; and Williams Brief at [90].

103 Kawharu Brief at [119]; and NOE 748/24–31 (Williams).

104 Kawharu Brief at [119] citing Stone *From Tamaki-Makau-Rau* at 185.

105 Native Land Court *Ōrākei* MB 2 at 42; Kawharu Dimensions at 55; O'Malley Brief at [146]; and Williams Brief at [91].

106 Land Deed signed by George Clarke (Chief Protector of the Aborigines) and Kawau, Tinana, Reweti Tamaki and others (Chiefs of Ngāti Whātua) in respect of 3,000 acres between Mataharehare, Opou and Maungawhau (20 October 1840) [Land Deed, 20 October 1840].

Ngāti Whātua Ōrākei rangatira and George Clarke, the Chief Protector of Aborigines, walked the boundaries of this land and left large stones to mark the limits of what was included.[107] This land has come to be known as the 1840 Transfer Land in the Ngāti Whātua Ōrākei Deed of Settlement and these proceedings.

[151] Following this negotiation, on 18 September 1840 Auckland was formally established at a ceremony to raise a flagstaff at Horotiu. This ceremony was a significant affair; a 21-gun salute was fired, and Queen Victoria's health toasted, followed by a round of cheers and a celebratory luncheon. Over 100 Maori attended the ceremony where the Crown acknowledged the formation resulted from the Crown's agreement with Ngāti Whātua Ōrākei, and the Crown publicly affirmed the rights of Ngāti Whātua Ōrākei over the area.[108]

[152] On 20 October 1840 the transaction for the 1840 Transfer Land was confirmed. For what is now the most expensive land in the entire country, Ngāti Whātua Ōrākei received cash and goods valued at some £273. For Ngāti Whātua Ōrākei, the 1840 Transfer Land meant immensely more than the cash and goods it received from the Crown. For them, it was a tuku, which required utu, or reciprocity, more broadly and represented the start of a mutually beneficial and enduring relationship with the Crown.[109] Ngāti Whātua Ōrākei also saw the transaction as an invitation to share the land or a licence to occupy and did not understand that the Crown understood a sale as the transfer of exclusive ownership.[110] As Te Kawau later said "I did not sell it I gave to them".[111] From the perspective of Ngāti Whātua Ōrākei, the 1840 Transfer Land was a tuku whenua.

[153] The 1840 Transfer Land also represented a crucial development in the future of Auckland. As Margaret Kawharu stated:[112]

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[107] Stone *From Tamaki-Makau-Rau* at 248, 253 and 256; Kawharu *Dimensions* at 55; O'Malley Brief at [149]; Williams Brief at [92]; Blair Brief at [63]; and Kawharu Brief at [123].

[108] Stone *From Tamaki-Makau-Rau* at 254–256; Waitangi Tribunal *Ōrākei Report* at 22–23; O'Malley Brief at [153]; and Williams Brief at [92].

[109] Kawharu Brief at [125]–[126]; Williams Brief at [93]; NOE 314/1–5 (Kawharu); and NOE 1049/24–30 (O'Malley). The language used in the deed was "te utu mo taua wāhi wenua koia tenei".

[110] Waitangi Tribunal *Ōrākei Report* at 27; Kawharu Brief at [138]; Williams Brief at [99]; and NOE 1174/15–27, 1206/31–33 and 1207/1–27 (Meredith).

[111] Native Land Court *Ōrākei* MB 1 at 15.

[112] Kawharu Brief at [125].

> It is important to understand that this land transaction enabled the establishment of the town of Auckland which soon became the main European settlement, the leading commercial port and the seat of government in the colony.

[154] What followed was an influx of Māori and Pākehā into Auckland for the new trading opportunities. Many iwi that came from their heartland to Tāmaki stayed and cultivated at Ōrākei and Ōkahu, after seeking Ngāti Whātua's consent.[113] On 14 March 1841, when Hobson took up official residence in Auckland, Te Kawau formally welcomed Hobson at Ōkahu Bay in front of a thousand Ngāti Whātua and discussed Ngāti Whātua Ōrākei working with the Crown, saying:[114]

> "Governor, Governor, welcome, welcome as a father to me! There is my land before you." He waved his hands towards the upper reaches of the harbour. "Governor, go and pick the best part of the land and place your people, at least our people upon it!"

[155] Ngāti Whātua Ōrākei transferred two further blocks to the Crown in 1841 and 1842, in what they say were tuku whenua, as noted in Map 2 below:

(a) The first of these was on 29 June 1841 when a further 13,000 acres was given to the Crown. This block of land, known as the Waitematā to Manukau block began at Ōrākei in the east and ran down the road to Manukau (now Manukau Road) until it reached Maungakiekie (One Tree Hill). The Southern boundary ran from Maungakiekie to Puketāpapa (Mt Roskill) by Owairaka (Mt Albert) to the portage of Te Whau. The western boundary runs from the portage of Te Whau to the boundary of the land in the first Crown purchase and from there along the coast to the bay of Ōrākei.[115]

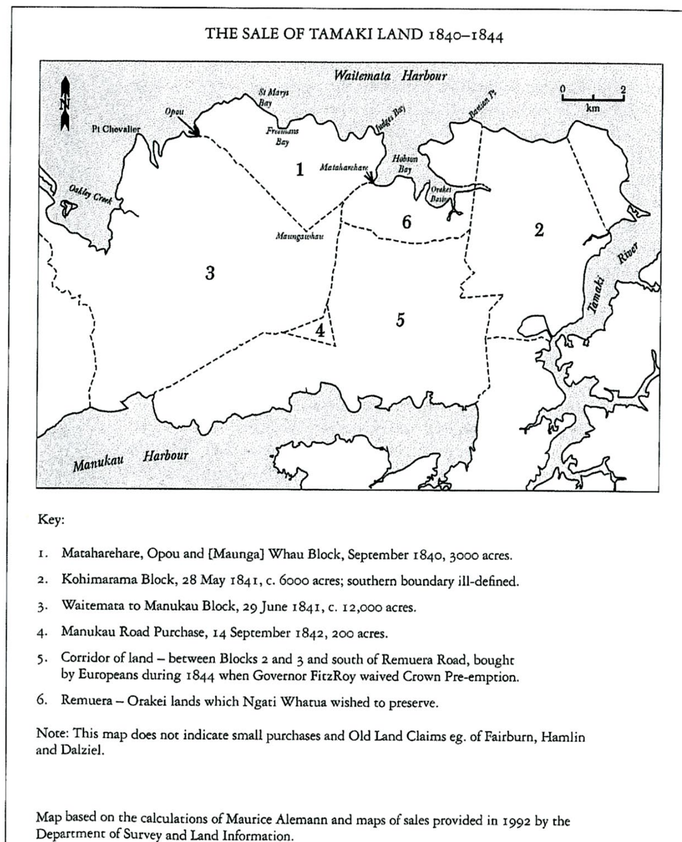
(b) The next transfer from Ngāti Whātua Ōrākei to the Crown was on 14 September 1842. This was for 200 acres and is a triangle between

113 Native Land Court *Ōrākei MB 2* at 91 and 93–94; and Kawharu Brief at [131].

114 Waitangi Tribunal *Ōrākei Report* at 23; and Kawharu Brief at [133].

115 Maurice Alemann "Early Land Transactions in the Ngatiwhatua Tribal Area" (Master of Arts, University of Auckland, 1992) [Alemann "Early Land Transactions"] at 111; Blair Brief at [65]; and O'Malley Brief at [159].

Royal Oak, Three Kings and the line towards Maungakiekie (One Tree Hill).[116]



Map 2: Further land transfers to the Crown in 1841 and 1842[117]

[156] Following the end of the Crown's right of pre-emption in buying land from Māori in 1844, Ngāti Whātua Ōrākei transacted directly with Pākehā settlers. By the end of 1845, settlers had acquired around 47,000 acres of land from Ngāti Whātua Ōrākei.[118] The Crown then reinstated pre-emption and from 1846 to 1855 the Crown acquired 59,000 acres of Ngāti Whātua land.[119] In 1841, Ngāti Whātua Ōrākei also transferred land at Pukapuka to Kati, Te Wherowhero's brother. Between 1842 and 1843 they also bestowed a triangular piece of land in Remuera/Epsom upon Wetere of Ngāti Maoho, Ngāti Tamaoho and Ngāti Te Ata.[120]

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116 Alemann "Early Land Transactions" at 112; Blair Brief at [66]; and O'Malley Brief at [160].
117 Stone *From Tamaki-Makau-Rau* at 300, see areas labelled 3 and 4.
118 Ngāti Whātua Ōrākei Deed at [2.52]; and Williams Brief at [100].
119 O'Malley Brief at [168].
120 Native Land Court *Ōrākei* MB 1 at 33 and 217; Native Land Court *Ōrākei* MB 2 at 36–37; *Native Land Court Ōrākei Decision 1869* at 83; Stone *From Tamaki-Makau-Rau* at 291–293; Kawharu Brief at [137]; and NOE 718/12–21 (Williams).

[157] In May 1844 was the hākari (feast) on the gifted lands at Remuera. At this event approximately 3,400 Māori attended from many different iwi with around 1000 Pākehā spectators and observers, including Pootatau Te Wherowhero and Governor Fitzroy. Ngāti Whātua Ōrākei say they were the hosts of this event, and a contemporary lithograph of this event shows that Te Kawau and Ngāti Whātua Ōrākei welcomed the Governor to the hākari.[121]

[158] In 1841 Ngāti Pāoa transacted a 6,000 acre block known as the Kohimarama Block, which extended from Mission Bay and St Heliers to the Panmure Basin.[122] The Ngāti Whātua Ōrākei assessment of the area over which they claim mana whenua, both in this proceeding and through the settlement process, aligns with this 1841 assertion of mana whenua by Ngāti Pāoa, and of the boundary line between Ngāti Whātua and the rohe of Ngāti Pāoa. By contrast:

(a) When Ngāti Pāoa were transacting the Kohimarama Block, Ngāti Whātua Ōrākei "drove [Ngāti Pāoa] away" when they had attempted to survey land over which Ngāti Whātua Ōrākei claimed mana whenua.[123]

(b) Both Paora Tuhaere and Te Kawau protested to the Crown when Wetere sold the land at Remuera that were gifted to him, with Te Kawau saying "I will not let my land go for him".[124]

(c) Ngāti Whātua Ōrākei protested the inclusion of Taurarua in the 1840 Transfer Land, which Ngāti Whātua Ōrākei said was excluded from this purchase. This protest lasted over two decades and involved Ngāti Whātua Ōrākei rangatira writing several letters to the Crown, raising the issue at the Kohimarama conference and petitioning the Crown regarding the land. It has never been returned.[125]

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121 Susan Cooper and Tony Batistich "The Great Māori Feast, Remuera" (10 November 2020) at 7, 9 and 12; and O'Malley Brief at [129].

122 Alemann "Early Land Transactions" at 110; and Williams Brief at [96].

123 Native Land Court *Ōrākei* MB 1 at 159; Native Land Court *Ōrākei* MB 2 at 141 and 271; and O'Malley Brief at [157].

124 R Stone *James Dilworth* (Dilworth Trust Board, Auckland, 1995) at 45–46; and Kawharu Brief at [139].

125 O'Malley Brief at [259]–[268].

(d) Paora Tuhaere applied to the Native Land Court for the return of lands at Pukapuka. At the Court he said that Pukapuka "was not an absolute gift for all time; it was intended the land should revert to the people who gave it".[126]

[159] By the 1850s, Ngāti Whātua Ōrākei had only 700 acres at Ōrākei which contained the last remaining marae and papa kāinga of Ngāti Whātua Ōrākei.[127]

[160] For the next 20 years Ngāti Whātua Ōrākei held up their side of the bargain. On top of the considerable land sales, Ngāti Whātua Ōrākei say they:

(a) expressed considerable and public loyalty to the Crown and the reigning governor;[128]

(b) supplied produce and worked on building projects with Pākehā settlers;[129]

(c) formed a close alliance with the Anglican Church;[130]

(d) encouraged those in within their own iwi to settle any differences through the courts;[131]

(e) through Te Kawau, would act as an intermediary between the Crown and the Kingitanga, often advocating support for the Crown;[132]

(f) were called on to host the Kohimarama Conference in 1860, with Paora Tuhaere stating to over 200 rangatira from across New Zealand that Ngāti Whātua Ōrākei is a "land-selling tribe" that has "always firmly adhered to [the Governor] and to the Queen's sovereignty".[133]

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126 "Te Pukapuka" *The New Zealand Herald* (New Zealand, 13 September 1890) at 3.
127 Waitangi Tribunal *Ōrākei Report* at 28; and Williams Brief at [104].
128 At 39; and at [105].
129 At 25; and at [101].
130 At 25; and at [101].
131 At 26; and at [102].
132 At 39; and at [105]; and O'Malley Brief at [181].
133 Ngāti Whātua Ōrākei Deed at [2.84]; O'Malley Brief at [177]; and Williams Brief [106].

[161] These actions were taken despite Ngāti Whātua Ōrākei holding concerns about the loss of their land. Te Kawau was concerned that if they were not involved in land sales, they would lose their mana, and so he persisted.[134] By the mid-1860s, Ngāti Whātua Ōrākei and other Māori were becoming disillusioned and disheartened with any alliance with the Crown.[135] As Te Kawau put it "I have been looking constantly for payment but have not got it".[136] Unfortunately for Ngāti Whātua Ōrākei, this would only worsen with the creation of the Native Land Court. That the Crown failed to reciprocate is not in dispute.[137]

J Ngāti Whātua Ōrākei and the Native Land Court

[162] The Native Land Court was established under the Native Lands Act 1862, with Francis Dart Fenton appointed its Chief Judge in 1865.[138] In effect, an individual would apply to the Native Land Court for a hearing to determine ownership over a block of land. The applicant would then present evidence to support their claim. Other Māori were able to come to court and offer their evidence in respect of that land. After hearing the evidence, the Court would determine who should receive title to the land.[139]

[163] The Native Land Court has been widely (and strongly) criticised as a breach of the principles of the Treaty of Waitangi. The Court was designed to undermine tribal structures and facilitate the alienation of land from Maori to ultimately benefit European settlers' interests in acquiring more land.[140] Ngāti Whātua Ōrākei agrees with this characterisation of the Native Land Court, in particular the effect of its judgments. However, Ngāti Whātua Ōrākei is reluctant to accept the suggestion that the evidence put before the Court should be disregarded as a historical source.[141] Ngāti Whātua Ōrākei submit that the hearing was procedurally sound and the evidence and

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134 Waitangi Tribunal *Ōrākei Report* at 28–29; and Williams Brief at [103].
135 Kawharu Brief at [158]–[159].
136 Native Land Court *Ōrākei* MB 1 at 15.
137 See generally: Kawharu Brief at [140], [146]–[147], [150]–[153] and [156]–[157]; and O'Malley Brief at [180] and [182].
138 Williams Brief at [115].
139 At [116].
140 O'Malley Brief at [197]; and Williams Brief at [113].
141 O'Malley Brief at [198]; Williams Brief at [118]; Kawharu Brief at [163]–[164]; NOE 1023/12–21 (O'Malley); and NOE 1143/14–18 and 1178/14–33 (Meredith).

judgment are highly relevant, historically accurate, robust, legally sound and cannot be ignored or disregarded.

[164] The 700-acre Ōrākei Block was considered twice by the Native Land Court. There are two key factors that drove this matter to the Native land Court. First, Ngāti Whātua Ōrākei were disheartened by the Crown's lack of support following the rapid loss of their land and so wanted security over their land at Ōrākei.[142] Secondly, Heteraka Takapuna began publicly questioning the rights of Ngāti Whātua Ōrākei in the land.[143]

[165] Ngāti Whātua Ōrākei say that Heteraka Takapuna was a person with reasonably unclear lineage who appeared to lack support from his iwi. Heteraka was born to a Ngāti Whātua mother, but made no claim to the land through his Ngāti Whātua lineage. He also claimed descent from Waiohua.[144] Ngāti Whātua Ōrākei say Heteraka is typically described as a Ngāti Pāoa rangatira. However, Ngāti Whātua Ōrākei says it appears that in all land transactions between Ngāti Pāoa and the Crown, Heteraka was never consulted by Ngāti Pāoa and often received nothing.[145]

[166] In the first Native Land Court hearing in 1866, following several letters published in newspapers,[146] Heteraka claimed the Ōrākei Block through Ngāti Tai. However, just before the hearing, in a separate Native Land Court hearing for islands in the Hauraki Gulf, Ngāti Tai rangatira Hori Te Whetuki challenged Heteraka's inclusion on the basis that his lands were confined to Tauoma and Takapuna.[147] Te Kawau and his people opposed Heteraka's claim. Both parties had legal counsel.[148]

[167] Heteraka argued that Ngāti Tai had lived on the land until driven off by Ngāpuhi, but then returned. He claimed responsibility for bringing the governor to Auckland. He did not know when Ngāti Whātua had taken up residence at Ōrākei.[149]

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142 Kawharu Brief at [159]; and O'Malley Brief at [182].
143 O'Malley Brief at [183].
144 At [185]–[186].
145 *Native Land Court Ōrākei Decision 1869* at 78; and O'Malley Brief at [185]–[186].
146 O'Malley Brief at [182]–[196]; and NOE 753/33–34–754/1-5 (Williams).
147 O'Malley Brief at [200].
148 At [199].
149 *Notes taken in hearing the First Ōrākei Claim* (1866) Native Land Court [Ōrākei Claim Notes 1866] at 1–4; and O'Malley Brief at [201].

However, Ngāti Whātua Ōrākei say that Heteraka made multiple demonstrably false or inconsistent statements:[150]

(a) He claimed Ngāti Pāoa sold the 1840 Transfer Land,[151] but the deed of transfer says it was Ngāti Whātua.[152]

(b) He claimed to have been living at Tāmaki since the time of Governor Fitzroy, even though he said was unaware of events such as the land transfers in Auckland because he was "at the Thames".

(c) He found Te Taoū living at Ōrākei when he had gone there to welcome the first Governor and had been told by their chiefs that Ngāti Pāoa had given them permission to occupy the land.

[168] In contrast, the witnesses for Ngāti Whātua Ōrākei consistently said that their interests arose from the raupatu and that they had remained since then, except for when they had to withdraw in the face of Ngāpuhi muskets.[153] In the 1866 hearing, Te Kawau said that Ngāi Tai ki Tāmaki were also primarily based in Howick,[154] which is consistent with their rohe in the present day.

[169] In 1866, the Native Land Court found that Heteraka's case had "entirely failed". The Court said it would:[155]

> … not have sufficient validity to warrant the putting those tribes in possession of unoccupied territory, much less would such claims justify the Court in ejecting other persons from an estate which, as is proved to its satisfaction, they have beneficially and undisputedly enjoyed from before the foundation of the colony.

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150 Ōrākei Claim Notes 1866 at 1–4; and O'Malley Brief at [201]; and NOE 1047/31–34 and 1048/1–8 (O'Malley).

151 Ōrākei Claim Notes 1866 at 3.

152 Land Deed, 20 October 1840.

153 Ōrākei Claim Notes 1866 at 17–19; O'Malley Brief at [202]; and NOE 1048/9–33, 1049/1–34 and 1050/1–7 (O'Malley).

154 Ōrākei Claim Notes 1866 at 18; and O'Malley Brief at [203].

155 O'Malley Brief at [204]; and *Ōrākei Block* (1866) Native Land Court as reported in *The Daily Southern Cross* (New Zealand, 10 December 1866) [Native Land Court *Ōrākei Decision 1866*].

[170] The Court held the "overwhelming balance of testimony" supported Te Kawau and any interests by Heteraka were of a "trivial and uncertain nature".[156]

[171] In the second hearing in 1868, the claimant was Te Kawau for Ngāti Whātua Ōrākei, who sought a certificate of title. Heteraka again claimed the entire Tāmaki isthmus,[157] but also on behalf of the Marutūāhu tribes (Ngāti Pāoa, Ngāti Maru, Ngaati Whanaunga and Ngāti Tamaterā). Other rangatira appeared for Tainui iwi (Ngāti Te Ata, Ngāti Tamaoho, Ngāti Naho and Ngāti Pou) and asserted similar rights to those claimed by Te Kawau.[158] Those rangatira applied on the basis of occupation and ancestry through Waiohua, but did not dispute the claims of Te Kawau. The arguments in this hearing were substantially similar to those heard in the first hearing.[159]

[172] In its judgment in 1869, the Court awarded the title to Te Kawau (and twelve others from Ngāti Whātua) on the basis that:

(a) Ngāti Whātua Ōrākei decisively defeated Waiohua in 1740 and then held undisputed possession of Tāmaki Makaurau.[160]

(b) When Ngāti Whātua Ōrākei strategically withdrew from the area over which they claim mana whenua, no other iwi claimed the land and so "as title was in 1826, so it would be when the history resumed in 1835".[161]

(c) Ngāti Whātua Ōrākei were the "dominant lords of the soil" in Auckland at 1840.[162]

[173] The Court criticised Heteraka's case as the weakest of the claims put forward and because it was difficult to ascertain its real character.[163] It noted that, due to

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156 *Native Land Court Ōrākei Decision 1866*.
157 Native Land Court *Ōrākei* MB 1 at 89; *Native Land Court Ōrākei Decision 1869* at 53; O'Malley Brief at [207]–[208] and [219]; and Williams Brief at [111].
158 Native Land Court *Ōrākei* MB 1 at 87; *Native Land Court Ōrākei Decision 1869* at 53; O'Malley Brief at [207] and [217]; and Williams Brief at [111].
159 O'Malley Brief at [208]–[209]; and Williams Brief at [111].
160 *Native Land Court Ōrākei Decision 1869* at 63–64; and Williams Brief at [131].
161 At 73; and at [132].
162 At 95; and at [129].
163 At 89.

numerous inconsistencies, the Court found that Heteraka's evidence left an "unsatisfactory impression".[164]

K Ngāti Whātua Ōrākei become landless

[174] Despite the recognition of their rights at the Native Land Court, the relationship between the Crown and Ngāti Whātua Ōrākei continued to deteriorate as the Crown sought to acquire the Ngāti Whātua Ōrākei papakāinga at Ōrākei. The Waitangi Tribunal reported that, in the early 20th century, the Government was under immense pressure to buy more Māori land throughout the North Island.[165] To facilitate this, the Government appointed a Commission to decide what land was "excessive to Māori needs and should be sold, and what parts the Māori should be allowed to keep".[166] Initially that Commission determined that none of the Ōrākei block ought to be sold. However, shortly after, the Crown set about acquiring the block anyway.[167] As the Reverend Māori Marsden observed, the people of Ōrākei "became displaced persons, without a country or land, a people without mana, a people who had lost their identity and their mauri".[168]

[175] Ngāti Whātua Ōrākei say they did their best to stop the loss of land. They made multiple applications and petitions to the Court and Crown for recognition of their rights in the whenua. In total there were eight actions to the Native or Māori Land Court, four to the then-named Supreme Court, two to the Court of Appeal, two in the Compensation Court, six appearances before various commissions of inquiry, and fifteen petitions to Parliament seeking restoration of tribal ownership of their land. At one point, Ngāti Whātua Ōrākei even built a palisade to protect their home.[169] However this was all in vain. Almost all of these were dismissed. Notably in one inquiry where a Judge of the Native Land Court found in favour of Ngāti Whātua Ōrākei, saying in 1930 that "the Ōrākei block should have been a tribal reserve

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164 At 91. Ngāti Whātua Ōrākei identify a substantial number of inconsistencies in Ngāti Whātua Ōrākei Closing at App C.
165 Waitangi Tribunal *Ōrākei Report* at 4.
166 At 4.
167 At 4.
168 Ngāti Whātua Closing at [6.102].
169 Kawharu Brief at [182].

protected from sales", the Crown simply ignored the finding and kept the report hidden from the public.[170]

[176] By contrast Ngāti Whātua Ōrākei say no other iwi protested these steps by the Crown.[171] That includes Marutūāhu, though they did protest, in the "invasion of Auckland", when one of their rangatira was arrested in 1851.[172]

[177] Compulsory acquisitions were made in 1950 under the Public Works Act 1928, contrary to the Treaty of Waitangi.[173] Sir Hugh Kāwharu observed that the Crown had an objective, and:[174]

> … the instrument wielded by the Crown to achieve its end was the razor-sharp Public Works Act which needed no other justification for its use than the public interest.

[178] The evidence of Taiaha Hawke is that, by the early 1950s, the people of Ngāti Whātua Ōrākei were virtually landless due to years of sustained compulsory and sometimes unethical acquisitions by the Crown.[175] Though many whānau remained on whatever land was left, in 1952 the remaining inhabitants were forcibly removed from their homes, including the family of Taiaha Hawke's father, Joe Hawke. Joe Hawke was 11 years old at the time when his papakāinga, his home, the Ngāti Whātua Ōrākei village and meeting house Te Puru o Tāmaki, were burnt to the ground by the Crown. The response to this at Bastion Point and elsewhere led to the contemporary Treaty of Waitangi settlement narrative in Tāmaki Makaurau, which is picked up in Part VII.

L The Ngāti Whātua Ōrākei claim to mana whenua in Tāmaki Makaurau

[179] On the basis of the above tribal historical narrative, Ngāti Whātua Ōrākei claim mana whenua in Tāmaki Makaurau, in the area depicted in Map 1 at a minimum. This is the land transferred by Ngāti Whātua Ōrākei to Governor Hobson in 1840 and other

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170 Waitangi Tribunal *Ōrākei Report* at 61, 71, 79, 91–92, 104, 110–111, 120–121, 216 and 218; Kawharu Brief at [171]–[172], [178]–[179], [182]–[183] and [194].
171 Kawharu Brief at [175].
172 O'Malley Brief at [243].
173 Waitangi Tribunal *Ōrākei Report* at 6, 97 and 107.
174 At 122, citing I H Kawharu *Land as Tūrangawaewae: Ngāti Whātua's destiny at Ōrākei* (New Zealand Planning Council, Planning Paper No 2, December 1979).
175 Brief of Evidence of Taiaha (Lance) Joseph Hawke, 2 June 2020 [Hawke Brief] at [33].

subsequent transfers in the 1840s, not including land transferred to the Crown by other iwi, such as the "Waikato triangle". Ngāti Whātua Ōrākei say this land is its heartland or core rohe. It has been present there since the raupatu around 1740 by Tuperiri and Te Taoū of Te Waiohua. Ngāti Whātua Ōrākei left temporarily from 1826 to 1834 due to the Ngāpuhi musket wars. But they say they did not lose, and have maintained, their ahi kā and mana whenua there, which continue to this day.

[180] The claim by Ngāti Whātua Ōrākei is founded on several take whenua, or rights and responsibilities to land, that are not mutually exclusive, at tikanga.[176] Take tūpuna are responsibilities to whenua deriving from continuous occupation and use of the land by a group's ancestors. By contrast, take raupatu are responsibilities to whenua derived through conquest or war, that displaces the people and their leaders who occupied the estate, extinguishes their rights of occupation and establishes a new group of occupiers. Margaret Kawharu describes the effect of raupatu as a change in political pre-eminence or political force.[177]

[181] Ngāti Whātua Ōrākei says that a raupatu involves the military defeat of a group followed by permanent occupation of that group's land, which in turn leads to ahi kā.[178] Mr Hodder submits that ahi kā or ahi kā roa is a fundamental take conferring rights and responsibilities over whenua. This is the concept of keeping the home fires lit – inter-generational and continuous occupation, use and permanent control of land. As Tāmati Kruger says, "ahi indicates the 'quality' of the particular take".[179] The different kinds of ahi describe the means by which a group maintains their connection with the land and discharges their obligations towards it.[180] Te Kurataiaho Kapea's evidence is that the significance of fire is traced to Māhuika, the god of fire, and that ahi kā is how one knows people are living in an area.[181] He says that if a victorious group stays in an area permanently after a raupatu, there is tinei ahi, extinguishing the

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176 *Te Mātāputenga* at 370. The core meaning of the word is the base or root of something. It has taken on a further specialised meaning of "right", especially in relation to land. "From Proto Central Eastern Polynesian *take* 'base, origin, source'". See also Kruger Brief at [102] suggesting "rights" as a European concept do not translate well to indigenous cultures because of their concentration on the individual.

177 NOE 292/5–293/2.

178 Ngāti Whātua Ōrākei Closing at [5.50].

179 Kruger Brief at [105].

180 At [105].

181 Kapea Brief at [54]–[55].

old fires of that place and te tahu ahi, sparking new fires.[182] If the new fires are maintained, that transitions into ahi kā. If they are continued, that transfers into ahi kā roa.

[182] Tāmati Kruger's evidence is that ahi kā roa, meaning permanency, is "the presiding principle that will legitimise mana whenua and take whenua".[183] He distinguishes ahi kā or ahi kā roa, a permanent presence, from ahi tahutahu (or ahi teretere), an occasional presence, and from ahi mātaotao, a rare presence like camping.[184] A cold fire could be relit with effort but ahi weto was a completely extinguished fire.[185] Tāmati Kruger emphasises that mana is not held "over" land or atua or people but only follows from actions fulfilling responsibilities to the land, atua or people.[186] Te Kurataiaho Kapea's evidence is that the mana whenua of an iwi goes hand in hand with their permanency in that place.[187]

[183] Ngāti Whātua Ōrākei say raupatu followed by ahi kā roa is what happened after the raupatu by Tuperiri and Te Taoū in Tāmaki Makaurau around 1740. By contrast, they say the attacks by Rautau and Ngāti Maru in the 1600s, and Ngāpuhi in the 1820s and 1830s, were not followed by ahi kā. Mr Hodder submits Ngāti Whātua Ōrākei has clearly occupied the area over which it claims mana whenua for several generations. He submits the modern Treaty settlement situation has undoubtedly affected the relevance of the need for recognition by neighbouring iwi, given the competing goal of securing valuable redress.

[184] Mr Hodder submits take raupatu was one of the very rare circumstances which may extinguish another group's tikanga connections and responsibilities to the land. Take raupatu does not in itself achieve a take tupuna, which would ordinarily be established through marriages with the defeated group. He points to Dr Ballara and Sir Edward Taihakurei Durie suggesting this was common and a way of securing peace

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182 NOE 111/12–23.
183 Kruger Brief at [106].
184 At [105].
185 NOE 1878/26–1879/7.
186 Kruger Brief at [115].
187 NOE 111/29-30 (Kapea).

and often forging a new tribal identity.[188] Tāmati Kruger's evidence is that inter-marriage after raupatu was not a source of mana whenua for the conquered.[189]

[185] Because Ngāpuhi did not settle in the Tāmaki Makaurau, Ngāti Whātua Ōrākei say the mana over the whenua did not change in the 1820s or 1830s.[190] They periodically returned to test the safety of Tāmaki, to fish and even lived at Ōkahu Bay. As Te Kawau said "my fires were continually being kindled at Ōrākei & Ōkahu".[191] In Paul Meredith's opinion, this meant that Ngāti Whātua Ōrākei maintained ahi kā, or at the very least ahi kōmau, meaning slumbering fire.[192] Ngāti Whātua Ōrākei submits that when determining mana whenua, the focus is not on establishing permanent occupation of one particular site, but of continuous use of the land.[193] The bases of Ngāti Whātua Ōrākei at the Manukau were not incompatible with their bases on the Waitematā.[194] By 1838, Ngāti Whātua Ōrākei was sufficiently established on the Waitematā to be in a position to host hui at Ōrākei and Ōkahu Bay, regarding defence and cultivation planning. As a matter of history and tikanga the predominant iwi established a 'domain' by virtue of its mana and political influence.[195] Occupation of every inch of a domain is not a precondition of mana or political influence.[196]

[186] Ngāti Whātua Ōrākei say the largely uncontested tuku whenua to the Crown in the 1840s further illustrate the mana whenua of Ngāti Whātua Ōrākei, reflected in only Te Kawau having the rangatiratanga to gift the land. They point to the 1844 hākari at Remuera. The boundary line of the area over which Ngāti Whātua Ōrākei claims mana whenua accords with Ngāti Pāoa's 1841 transaction of the Kohimarama Block. Ngāti Whātua Ōrākei says its challenges to other iwi undermining their mana whenua were further exercises of their mana whenua, whereas other iwi did not protest their tuku whenua.

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188 Ballara *Taua* at 20; and Edward Taihakurei Durie *Custom Law* (Treaty of Waitangi Research Unit, 1994) at 65.

189 Brief of Evidence of Tāmati Kruger in Reply, 4 December 2020 [Kruger Reply] at [31]–[32].

190 Native Land Court *Ōrākei* MB 1 at 67–68; James Belich *Making Peoples: A History of New Zealanders* (Allen Lane, Auckland, 1996) at 161; Kawharu Brief at [100]; Williams Brief at [42] and [141]; NOE 732/10– 33 (Williams); and NOE 2830/21–24 (McBurney).

191 Native Land Court *Ōrākei* MB 1 at 211.

192 Brief of Evidence of Paul Meredith, 2 June 2020 [Meredith Brief] at [77] and [164].

193 NOE 508/8–19 (Blair).

194 See for example Brief of Evidence of Michael Belgrave, 13 October 2020 [Belgrave Brief] at [773]–[774].

195 NOE 101/16–27 (Kapea).

196 NOE 1157/7–17 (Meredith); and NOE 1891/24–34 (Kruger).

[187] Ngāti Whātua Ōrākei says its mana whenua in this area is not shared with other iwi. Ngāti Whātua Ōrākei recognises many groups have important historical and customary interests in certain parts of the area over which it claims mana whenua.[197] Ngāti Whātua Ōrākei acknowledges that:[198]

> [T]he obligations arising from having mana whenua include a tika consideration of others' customary connections … consistent with the spirit, values and logic of tikanga across most and probably all groups.

[188] Ngāti Whātua Ōrākei acknowledges that it is the responsibility of those with mana whenua to acknowledge and look after such interests. But it says that "[n]o other group has a credible basis for an equivalent claim" to mana whenua in the same area, at tikanga.[199] Rather, resource-sharing arrangements merely acknowledge a whakapapa connection and affirm the host's mana whenua.

[189] Ngāti Whātua Ōrākei says that mana whenua is generally only shared in fringe, border or contested areas.[200] The primary position is that mana whenua is generally held exclusively. And mana whenua is not shared within a group's heartland, which Mr Hodder submits is clearly not foreign to opposing iwi.[201] If there is no heartland over which a group exercises exclusive mana whenua, there is no iwi.

[190] Ngāti Whātua Ōrākei says that Ngāti Whātua Ōrākei tikanga is entirely consistent with the relevant general principles of tikanga Māori. It has called evidence from its own witnesses in this regard, Te Kurataiaho Kapea, Taiaha Hawke, Margaret Kawharu and Ngarimu Blair. It relies on authoritative published and unpublished scholarly works including by Professor Sir Hugh Kāwharu and the expert evidence of historian Dr Vincent O'Malley and legal historian Professor David Williams. It relies on the evidence of the independent pūkenga it called from outside Tāmaki Makaurau: Tāmati Kruger, Paul Meredith and Charlie Tawhiao.

[191] By contrast, Mr Hodder submits that, with the exception of Dr Te Kahautu Maxwell, none of the tikanga witnesses of the opposing iwi have appropriately

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197 Ngāti Whātua Ōrākei Closing at [1.5].
198 At [4.6].
199 At [1.5].
200 At [5.62].
201 At [5.68].

qualified themselves to give opinion evidence or agreed to abide by the Expert Witnesses Code of Conduct.[202] He submits that much of the evidence of the Marutūāhu Rōpū witnesses, in particular, had not engaged with the evidence of Ngāti Whātua Ōrākei, contained submission, was not in their own words and appeared to have been the subject of common authorship. That is not to be expected in the High Court.

[192] Mr Hodder submits for Ngāti Whātua Ōrākei that denial by other iwi that tikanga Māori exists, and assertions that only local tikanga exists, is simply wrong.[203] Ngāti Whātua Ōrākei rejects the existence of a tikanga specific to Tāmaki. Mr Hodder also submits that the focus of Ngāti Whātua Ōrākei is on the Crown so if the Court considers it should avoid pronouncements on tikanga adhered to by other groups, it should still reach a conclusion on Ngāti Whātua Ōrākei tikanga, which it says is entirely consistent with the relevant general principles of tikanga Māori.

IV Responses to Ngāti Whātua Ōrākei

[193] This part of the judgment outlines the responses by other iwi and the Crown to the historical narrative of, and claim to mana whenua, by Ngāti Whātua Ōrākei. Because the other iwi are responding to the claim of Ngāti Whātua Ōrākei, rather than making claims themselves, I do not set out their tribal histories and traditions in as much detail. Rather, I deal with historical issues raised by each iwi, to the extent I can on the basis of the evidence before me. I make more general findings on issues relating to the historical narrative and mana whenua at tikanga in Part VI.

A The Marutūāhu Rōpū response to Ngāti Whātua Ōrākei

[194] The Marutūāhu Rōpū, or Marutūāhu confederation of iwi, comprises five closely related iwi of the Tainui waka: Ngāti Maru, Ngaati Whanaunga, Ngāti Tamaterā, Ngāti Pāoa and Te Patukirikiri.[204] Marutūāhu iwi are independent iwi who

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[202] At [5.15]. Te Warena Taua also qualified himself as an expert witness but I understand Ngāti Whātua Ōrākei does not accept that.

[203] At [5.3]–[5.4].

[204] Second Defendant's Statement of Defence to Fourth Amended Statement of Claim, 8 December 2019 at [3].

cherish their mana motuhake; they have fought each other at times.[205] Marutūāhu are also maritime peoples – highly mobile, moving between settlements, cultivations or marine resources during the different seasons. Moana (the sea or water) connects them and is influential in their relationship with the whenua. Joe Tupuhi and Ted Andrews refer to a pepeha regarding the northern and southern limits of the influence of Ngāti Pāoa as being from Matakana estuary in the north to Matakana Island in the south.[206] Wati Ngamane refers to a similar pepeha in respect of all Marutūāhu iwi, including Ngāti Pāoa.[207]

[195] Marutūāhu Rōpū do not challenge the identity of Ngāti Whātua Ōrākei being centred at Ōrākei, where they were located after 1840 and self-identify in their name.[208] Mr Majurey, for Marutūāhu Rōpū, acknowledges that does not preclude Ngāti Whātua Ōrākei from having customary interests/mana elsewhere. He submits no tribe in this proceeding challenges the recognition of Ngāti Whātua Ōrākei customary interests/mana in central Auckland.[209] Marutūāhu Rōpū do not claim they have a centuries' old permanent settlement in central Auckland.[210] But Marutūāhu Rōpū do claim their iwi have customary interests or mana in central Auckland.

[196] Ngāti Whātua Ōrākei submits that Maungawhau (Mt Eden) was abandoned around 1700 because it became tapu following the attacks by Rautao and Ngāti Maru on the coastal areas of the Waitematā, before the attacks by Tuperiri.[211] They rely in part on the evidence of Wati Ngamane.[212] Professor Michael Belgrave's evidence, for Marutūāhu Rōpū, notes that some of the stories from that time could evidence Rautao remaining in the area after his victory.[213] Professor Belgrave also notes that the traditions about occupation are "less clear", though he referred to customary evidence of such occupation.[214]

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205 Marutūāhu Rōpū Closing Submissions, 19 April 2021 [Marutūāhu Closing] at [78]; see also NOE 2275/21–34 (Belgrave).
206 "Pāoa Taringa Rahirahi mai Matakana ki Matakana" (Brief of Evidence of Ted Andrews and Joe Tupuhi, 13 October 2020 [Andrews and Tupuhi Brief] at [9]).
207 "Mai Ngā Kuri a Whārei ki Mahurangi" (Brief of evidence of Walter (Wati) Ngamane, 13 October 2020 [W Ngamane Brief] at [11]);
208 Marutūāhu Closing at [55].
209 At [36].
210 At [82].
211 Belgrave Brief at [778] and [781].
212 W Ngamane Brief at [76].
213 Belgrave Brief at [778]
214 At [779].

[197] There is some dispute between Marutūāhu Rōpū, Te Ākitai Waiohua and Ngāti Whātua Ōrākei over the implications for mana whenua of what some witnesses have described as the tuku whenua or wedding gift of Tauoma. Te Kurataiaho Kapea, called by Ngāti Whātua Ōrākei, and Mark Derby, a historian called by Te Ākitai Waiohua, emphasise the importance of a "wedding gift" tradition accounting for the arrival of Ngāti Pāoa on the isthmus.[215] This tradition holds that when Kehu of Ngāti Pāoa was married in 1780, a tuku whenua was made by Te Tahuri of Waiohua and her husband Tomoāure, to her and her husband of Tauoma (Panmure). Mark Derby's evidence indicates the gift is evidence of enduring Waiohua mana whenua in the area.[216] Ngāti Whātua Ōrākei criticise this account on the basis that, to the extent that any gift was given, it was done in reliance on the mana of Te Taoū, not Waiohua.

[198] The expert evidence of Morehu Wilson for Marutūāhu Rōpū, is that Ngāti Pāoa was located on the eastern side of the Tāmaki isthmus (Tikapa Moana – Waitematā) and Ngāti Whātua were to the west (Manukau).[217] His evidence is that Ngāti Pāoa and Marutūāhu had their own tradition of their raupatu of the Waiohua tribes. He says Ngāti Pāoa and Marutūāhu were never conquered by Ngāti Whātua and there was no need for any "wedding gift", as their tūpuna said at the 1868 Native Land Court hearing.[218]

[199] Morehu Wilson's evidence is that Ngāti Pāoa lived in many pā and kāinga in Tāmaki through the 18th and 19th centuries until the battles with Ngāpuhi at Mauinaina and Mokoia in 1821–1822. These places include, within the area at issue, Ōkā (Pt Erin), Te Tō (Victoria Park), Maungawhau (Mt Eden), Pukekawa (Auckland Domain), Waipapa and Taurarua (Parnell).[219] He also says each of the other Marutūāhu iwi (which he does not identify) had their own settlements and cultivations at these places or would live there at different times, including in coastal area during annual seasonal harvesting. Morehu Wilson's evidence is that:

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215 Kapea Brief at [51]; and Derby and Rother *Te Ākitai Waiohua Customary Interests* at 16.
216 Derby and Rother *Te Ākitai Waiohua Customary Interests* at 16.
217 M Wilson Brief at [49]–[50].
218 At [49]–[50].
219 M Wilson Brief at [58].

(a) He is not aware of independent primary evidence of the claim by Ngāti Whātua Ōrākei that they lived at Maungakiekie, Ōkahu, Onehunga or Waipapa in 1840.[220]

(b) There is a Ngāti Pāoa tradition that Ngaromānia, a Ngāti Pāoa rangatira, lived at Te Pupu o Kawau, a pā on the Tāmaki River, after the Ngāti Whātua raupatu.[221] Hauāuru Rawiri gave evidence that the murder of Ngaromānia was recorded before the arrival of Captain Cook at Whitianga in 1769, and on that basis Ngāti Pāoa believe the rangatira must have lived at Waimokoia after 1740.[222] Mr Hodder submits that this Pā was outside of the area over which Ngāti Whātua Ōrākei claim mana whenua.

(c) Ngāti Pāoa engaged in a number of battles in Tāmaki against neighbouring iwi in the 18th century through to 1840, which records their presence in the Tāmaki isthmus.[223]

(d) Ngāti Pāoa and Marutūāhu did not need the permission of Ngāti Whātua or any iwi to be in their ancestral waters and they shared locations for resource gathering in the isthmus with Ngāti Whātua through mutual recognition.[224]

[200] In his written closing submissions, Mr Majurey also cited, without further expanding on, particular evidence of Marutūāhu iwi "interests/mana" in central Auckland which I have reviewed in detail.[225] I note:

(a) Hauāuru Rawiri's evidence concerns, and does not distinguish between, "Ngāti Pāoa and Marutūāhu".[226]

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220 At [99].
221 At [63]–[64].
222 Rawiri Brief at [31].
223 M Wilson Brief at [66].
224 At [72].
225 Marutūāhu Closing at [83].
226 Rawiri Brief at [15]–[18].

(b) Morehu Wilson gives evidence of a tradition of Ngaati Whanaunga harvesting a beached whale near Tokaroa – Te Ara Pekapeka a Ruarangi (Meola Reef), that they saw from their settlement at Onetaunga, near Kauri Point on the North Shore.[227] But I have not been told when that is said to have occurred or the significance of the settlement being on the North Shore at tikanga.

(c) The evidence Morehu Wilson points to, by Heteraka Takapuna, Haora Tipa Koinaki, and Henare Te Paora in the second Native Land Court hearing in 1868, is either explicit that Ngāti Pāoa was the principal or chief Marutūāhu iwi or says all their claims were the same.[228]

(d) Tipa Compain supports the evidence of the other Marutūāhu witnesses at the first Native Land Court hearing in 1866.[229] These are largely general assertions that other Marutūāhu iwi "owned Auckland", in relation to the hearing about the Ōrākei Block.

(e) Dr Korohere Ngāpō, Harry Mikaere and David Taipari provide evidence of spiritual and historical associations and traditions of the Tainui waka, Ngāti Tamatera and other Marutūāhu iwi with waahi tapu and other sites in central Tāmaki Makaurau, including the Whare Tupuna Hotunui and Marutūāhu mauri at Pukekawa (the Auckland Museum).[230]

(f) Wati Ngamane's evidence is that Ngāti Maru, and other Marutūāhu iwi, lived in many pā and kāinga in Tāmaki Makaurau, including at Waipapa and Taurarua when Europeans arrived. He says that Taurarua which includes an area of Judges Bay, Parnell, close to Blackett's Point, was a Marutūāhu Pā.[231] Under cross-examination, Wati Ngamane conceded

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227 M Wilson Brief at [60].

228 At [119]; Native Land Court *Ōrākei* MB 1 at 96–97, 120 and 164.

229 Brief of Evidence of Tipa Compain, 13 Octover 2020 [Compain Brief] at TC1.

230 Brief of evidence of Korohere Ngāpō, 13 October 2020 [Ngāpō Brief] at [16]–[20], [23]–[28] and [34]; Brief of Evidence of Harry Mikaere, 13 October 2020 [Mikaere Brief] at [46]–[56]; Brief of Evidence of David Taipari, 13 October 2020 at [10], [25]–[27] and [33].

231 W Ngamane Brief at [109].

that was during the time of Rautao, a Ngāti Maru rangatira who had victories over Waiohua.[232] This would have meant that a raupatu and subsequent ahi kā roa by Ngāti Whātua Ōrākei would have overtaken Marutūāhu interests according to tikanga Ngāti Whātua Ōrākei. From at least 1848 through to 1871, Ngāti Whātua Ōrākei protested the inclusion of Taurarua, very near Ōrākei, in the Ngāti Pāoa 1840 transfer to the Crown, culminating in an 1871 petition filed by Pāora Tūhaere.[233] Wati Ngamane gave evidence that the Governor agreed to, but did not, reserve land at Blackett's Point in Parnell for Marutūāhu in 1842.[234]

[201] Marutūāhu Rōpū also contests the Ngāti Whātua Ōrākei claims about the way the land on the Waitematā side of the isthmus was used and by whom in the early 1800s more generally. Mr Majurey points to Professor Michael Belgrave's analysis of the Rev Samuel Marsden's visits to Tāmaki in 1820 in submitting that Marutūāhu had a collection of settlements heavily involved in agriculture in 1820 in Tāmaki, as did Ngāti Whātua in the Manukau. [235] But this evidence was of cultivations by Marutūāhu iwi at Mokoia and Ngāti Whātua at Manukau, which Ngāti Whātua Ōrākei does not dispute and neither of which is in the area over which Ngāti Whātua Ōrākei claim mana whenua. And the Rev Marsden said that in July 1820, Te Kawau claimed that the land upon the Waitematā belonged to him, in the presence of a rangatira from Mokoia.[236]

[202] Professor Michael Belgrave does not identify the "sporadic evidence", precise location of, or iwi affiliation of a "most likely much smaller" community on the upper reaches of the Waitematā" or the evidence for why there were "probably more". [237] Neither does he explain how that is consistent with his statement that "[w]hile there may have been settlements on the Waitematā, particularly seasonal settlements for fishing, these cannot have been of any significant size".[238] I do not consider Professor

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232 NOE 2378/14–29.

233 Ngāti Whātua Ōrākei Closing at [6.144]; citing O'Malley Brief at [259] which cites to Bruce Stirling *Ngāti Whātua O Ōrākei and the Crown, 1840-1865* (Commissioned by Ngāti Whātua o Ōrākei Corporate, 2002) at 60.

234 W Ngamane Brief at [88], [103]–[115].

235 Belgrave Brief at [204].

236 At [189].

237 At [204].

238 At [205].

Belgrave's evidence of this, or his characterisation of the Waitematā at the time as "a backwater", assists me. Seasonal settlements can be indicators of mana whenua in terms of the Ngāti Whātua Ōrākei use of that concept.[239]

[203] Professor Michael Belgrave notes the evidence of Marutūāhu witnesses before the Native Land Court who argued that Ngāti Whātua Ōrākei conquered the Manukau but not the Waitematā side of the isthmus.[240] He acknowledges there is evidence Tuperiri of Te Taoū occupied Maungakiekie after Kiwi Tāmaki's death. But he suggests an "alternative interpretation" of historical evidence is that Marutūāhu and Ngāti Whātua "faced away" from each other and towards different harbours; Ngāti Whātua looked to Kaipara and the Manukau; and Marutūāhu looked to the Waitematā and Hauraki. Professor Belgrave cannot identify evidence "that people are using the Waitematā as anything other than a seasonal food gathering place, certainly in 1820".[241] I am not inclined to proceed on the basis of Professor Belgrave's alternative interpretation, which was not proffered as the interpretation of Marutūāhu Rōpū, and which appears to me to involve too great an element of speculation for my purposes.

[204] Ngāti Whātua Ōrākei rely on the evidence of Professor David Williams, Ngarimu Blair and Dr Vincent O'Malley to suggest they were the first iwi to return to the wider Tāmaki isthmus.[242] Mr Majurey submits Ngāti Whātua was protected by Marutūāhu while sheltering in the Waikato in the 1820s. The evidence of Morehu Wilson, Hauāuru Rawiri and of Dr Korohere Ngāpō is that the Marutūāhu iwi returned to Tāmaki Makaurau around 1830, before Ngāti Whātua did.[243] I do not consider the sequence and exact timing of the separate returns to different areas in Tāmaki Makaurau makes much difference to the issues I am asked to determine.

[205] But competing claims about who gave permission to whom to settle might make a difference. Hauāuru Rawiri's evidence for Marutūāhu Rōpū about Ngāti Whātua settling at Ōrākei is that:

> Hei nui ngā hui i whakatū ai kia hohou te rongo ki waenganui i ngā iwi.

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239 See Ngāti Whātua Ōrākei Closing at [6.26] and [6.40]; and NOE 508/4-15 (Blair).
240 Belgrave Brief at [773] and 781].
241 NOE 2182/3-26.
242 Williams Brief at [132]; Williams Reply at [16]; Blair Brief at [84].
243 Ngāpō Brief at [30]; Rawiri Brief at [39]; M Wilson Brief at [77].

> I tonohia e Uruamo me Whatarangi te whakaae kia noho ai ki Orākei. Nā Kahukoti (Ngāti Pāoa) i whakaae kia hohou te rongo.
>
> I whakatūria ngā hui ki Puneke, Otāhuhu, Orere me te whanga o Okahu. Ko ngā tupuna katoa nō Ngāti Whātua Orākei, Waikato, Ngāti Pāoa me Marutūāhu.
>
> (There were many gatherings that were held to establish peace amongst the tribes.
>
> Uruamo and Whatarangi asked to stay at Ōrākei. Kahukoti (of Ngati Pāoa) agreed, to broker the peace.
>
> Meetings were held at Puneke, Otāhuhu, Orere and Okahu Bay. With all the ancestors from Ngāti Whātua Ōrākei, Waikato, Ngāti Pāoa and Marutūāhu.)

[206] Morehu Wilson says that at the third peace meeting at Orere, a party led by Uruamo of Ngāti Whātua arrived bearing gifts, intent on resuming the discussion of moving to Ōrākei. He says, consistently with Hetaraka's evidence in the Native Land Court:[244]

> Uruamo asked of Kahukoti, "are you not willing that we should kindle our fires at Orākei"?, to which Kahukoti replied "it is well, kindle the fires for us."

[207] In response, Ngāti Whātua Ōrākei point to Te Kawau's denial that Te Taoū asked Kahikoti leave to light at fire at Ōrākei, at the second Ōrākei Native Land Court hearing in 1868.[245] Mr Hodder submits that there is no evidence suggesting Ngāti Whātua Ōrākei needed permission to live at Ōrākei, they did not act in a manner suggesting that and neither did the Marutūāhu iwi, including by protesting the tuku of Ngāti Whātua Ōrākei to the Crown.

[208] Hauāuru Rawiri suggests Ngāti Pāoa signing the Treaty of Waitangi at Karaka Bay, St Heliers, and Ngāti Whātua signing at the Manukau Harbour is relevant.[246] It may be. But my understanding is that rangatira did not necessarily sign the Treaty only where they had mana whenua. More contextual information would be required to inform that question. Professor Michael Belgrave says there was intense conflict between iwi about which land would be available for sale in the 1840s by whom.[247]

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244 M Wilson Brief at [85]; and see Native Land Court *Ōrākei* MB 1 at 111 (Hetaraka), 157–158 (Kepa), 160 (Pukerewa).

245 Native Land Court *Ōrākei* MB 1 at 213

246 Rawiri Brief at [46]–[48].

247 NOE 2259/19–30.

[209] Mr Majurey acknowledges the minutes from Native Land Court hearings are a rich source of tribal traditions but submits it is unsafe for this Court to make findings on the correctness of the decisions themselves. Morehu Wilson says that the Native Land Court Ōrākei Block hearings in the 1860s clearly demonstrate "there was no accepted grand tradition of Ngāti Whātua being "masters of the isthmus" among the tribes of Tāmaki Makaurau.[248]

[210] In terms of tikanga, Mr Majurey submits none of other tribes in the proceeding agree Ngāti Whātua Ōrākei has exclusive mana in central Auckland. He acknowledges the tikanga of Ngāti Whātua Ōrākei does not admit of shared customary interests/mana in central Auckland. But he submits this is not the tikanga of any other Tāmaki tribe in this proceeding, including Ngāti Pāoa. In tikanga Māori there can be exclusive areas, such as marae, urupā and māra, but that is not a universal position. In Marutūāhu tikanga, even marae and urupā are often shared.[249] Mr Majurey points to the evidence of Te Warena Taua, Joe Tupuhi, Tāmati Kruger and David Wilson Takaanini as acknowledging the uniqueness or difference of Tāmaki with other areas of the motu.[250] He submits the country of Tūhoe or Tauranga moana is not like Tāmaki when it comes to the geographical and tribal landscape. Mr Majurey also points to respected written authorities regarding the concept of mana whenua and maintains that sources going the other way illustrate that tikanga is highly contextual in different places.

[211] Mr Majurey submits the absence of any iwi recognition of mana whenua of Ngāti Whātua Ōrākei is significant in terms of tikanga, relying on Sir Hirini Mead's text *Tikanga Māori*.[251] Mr Majurey submits that the recognition by Ngāti Pāoa Iwi Trust witnesses, Joe Tupuhi and Ted Andrews, of only Ngāti Whātua Ōrākei and Ngāti Pāoa having customary interests/mana in central Auckland is at odds with evidence (most of which Mr Majurey does not specifically identify) of: Hauāuru Rawiri and

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248 M Wilson Brief at [118].

249 For example, Wharekawa Marae, Mātai Whetū Marae, Manaia Marae; see W Ngamae Brief at [33]; 75 acres of shared urupā between Ngāti Marutūāhu Rōpū and Ngāti Tamatera in Tauranga Moana Te Waiohua urupā at Ōrākei, see NOE 2565/13–2566/10 (Taua).

250 NOE 2564/5–20 and 2567/3–15 (Taua); NOE 1336/24–29 (Tupuhi); NOE 1866/12–19 (Kruger); NOE 2945/2–22 (D Wilson).

251 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Rev ed, Huia Publishers, Wellington, 2016) [Mead *Tikanga Māori*].

Morehu Wilson in this hearing; Joe Tupuhi and Ted Andrew's evidence in the 2007 Waitangi Tribunal hearing; and the Ngāti Pāoa tūpuna in the 1868 Native Land Court hearing.

[212] The Marutūāhu Rōpū objections to the Ngāti Whātua Ōrākei claim are made on behalf of all the Marutūāhu iwi. Mr Majurey submits that the Court is well able to assess and weigh the evidence in the context of this case. He submits it is open to the Court to find that the claim by Ngāti Whātua Ōrākei to exclusive ahi kā and mana whenua is not made out over every inch of the claimed area.[252]

B The Ngāti Pāoa challenge to Marutūāhu

[213] These proceedings were sparked by the Crown's Treaty settlement offer to Ngāti Pāoa of properties in the area over which Ngāti Whātua Ōrākei claims mana whenua. As explained earlier, Ngāti Pāoa Iwi Trust was soon joined as second defendant and Marutūāhu Rōpū was joined as third defendant. But in January 2017, Ngāti Pāoa entered into a Kawenata Tapu with Ngāti Whātua Ōrākei. The purpose was to build and maintain Ngāti Pāoa's long term relationships with Ngāti Whātua Ōrākei and to work through specific issues in a tikanga-based way.[253] Accordingly, on 15 May 2019, Ngāti Pāoa applied and was granted leave to be made an interested party in the proceedings, rather than a defendant. The Marutūāhu Rōpū became the second defendant. As Mr Mahuika submits for Ngāti Pāoa, while Ngāti Pāoa and Marutūāhu Rōpū have tried to avoid a situation of open warfare, there is inevitably a level of conflict.

[214] Several of the issues with the historical narrative of Ngāti Whātua Ōrākei that are raised by Marutūāhu Rōpū rely on the location of activities and settlements of Ngāti Pāoa as one of their constituent iwi. But Ngāti Pāoa Iwi Trust appears separately in these proceedings. The Iwi Trust has been the post-settlement governance entity for Ngāti Pāoa since 2013, when 96 per cent of voting Ngāti Pāoa adults approved its establishment.[254] Mr Mahuika submits the Trust is the representative of Ngāti Pāoa. No one takes issue with that in these proceedings. It will receive and administer

252 Marutūāhu Closing at [32].
253 Ngāti Pāoa Opening Submissions, 4 February 2021, at [8].
254 Brief of Evidence of Hayden Solomon, 13 October 2020, [Solomon Brief] at [20].

settlement redress for Ngāti Pāoa from the Pare Hauraki Collective Redress settlement, the Marutūāhu Collective Redress settlement and the individual settlement of Ngāti Pāoa.[255] The Ngāti Pāoa Deed of Settlement was signed at the Wharekawa Marae, Whakitiwai, on 20 March 2021 during the hearing of these proceedings.

[215] Ratification of the Marutūāhu Collective Deed is currently held up by the view of the Ngāti Pāoa Iwi Trust that the Deed does not give due recognition to Ngāti Pāoa's interests in Auckland and overstates the interests of other Marutūāhu Rōpū iwi.[256] The Iwi Trust's relationship with the mandated negotiators for Ngāti Pāoa, Morehu Wilson and Hauāuru Rawiri, has soured in the last two to three years.[257] Morehu Wilson's evidence is that is partly because of differences of opinion about how best to approach the Marutūāhu collective settlement.[258] I do not need to get into those issues in this judgment.

[216] Ngāti Pāoa have their origins in Tainui history. As Joe Tupuhi and Ted Andrews explain, when the Te Arawa chief Pikiao came to Pirongia and married Rereiao from Waikato they had a son called Hekemaru who later married Heke i te rangi. The issue of Hekemaru and Heke i te rangi were a daughter, Paretahuri, and two sons, Mahuta and Pāoa.[259] Pāoa had a number of children named Toapoto, Toawhano (or Toawhana)[260] and Koura, by his first wife Tauhākari. Tauhākari was descended from Whaturoto and Huirae, of Ngā Iwi; a former tribe of Tāmaki. Whaturoto is recognised as the parent of Huakaiwaka (ancestor of Te Waiohua) and Huirae.[261] However, Pāoa left his home with Tauhākari at the village of Kaitotehe, adjacent to Taupiri Maunga and bordering the Waikato River. He moved to Hauraki where he wed Tukutuku, the daughter of Taharua (the great granddaughter of Marutūāhu and granddaughter of Tamaterā).[262] It is therefore through Pāoa's second marriage to Tukutuku that Ngāti Pāoa derives its close whakapapa connections to Marutūāhu.

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[255] At [23].
[256] At [39] and [43].
[257] Ngāti Pāoa Closing Submissions, 19 April 2021 [Ngāti Pāoa Closing] at [78], citing NOE 2098/22-2099/16 (M Wilson).
[258] NOE 2098//20–2099/16 (M Wilson).
[259] Andrews and Tupuhi Brief at [10].
[260] Both spellings are used, by Andrews and Tupuhi and M Wilson respectively.
[261] M Wilson Brief at [18].
[262] At [19].

[217] Pāoa is not himself a descendant of Marutūāhu. Mr Mahuika submits that gives Ngāti Pāoa a unique position amongst Marutūāhu iwi. At least part of the claims of the claims of Ngāti Pāoa in Tāmaki are derived from the connections Pāoa had with Waikato (and Waiohua), rather than Marutūāhu.[263] Mr Mahuika submits that the historical evidence can only refer to the Marutūāhu confederation, which is not the same as the Marutūāhu Collective, as it is known today for the purposes of settlement.[264]

[218] Joe Tupuhi and Ted Andrews give evidence of the tribal history of Ngāti Pāoa. The descendants of Pāoa formed numerous sub-tribes dominating the western shores of Tikapa Moana o Hauraki, the Hauraki Plains, and Piako River from Kerepehi to Tahuna, Te Hoe o Tainui, Patetonga, Waitakaruru, Pukorokoro, Hauarahi, Kaiaua, Whakitiwai, Hunua, Orere, and Clevedon.[265] They extended their footprint to the Tāmaki River and moved throughout the islands of Waiheke, Ponui, Rataroa, Pakatoa and the wider Gulf Islands of Tikapa Moana o Hauraki to Mahurangi.[266] By the beginning of the 19th century, the largest settlements of Ngāti Pāoa were in Tāmaki. They were forced to seek refuge in Waikato by the Ngāpuhi invasion in 1821.[267] A peace pact in the mid-1820s between Ngāpuhi and Te Rauroha of Ngāti Pāoa led to Ngāti Pāoa returning to their villages skirting the Gulf. They returned to Waiheke in 1833. Ngāti Pāoa made a further peace pact with Ngāti Whātua at Ōkahu Bay, sealed by marriage settlements and gifts in the 1830s, as mentioned above.[268]

[219] Five Ngāti Pāoa representatives signed the Treaty of Waitangi on 4 March 1840 at Waitematā. A further three signed at Coromandel on 4 May 1840, one at Mercury Bay on 7 May 1840 and seven Ngāti Pāoa rangatira signed at Waitematā on 9 July 1840. By then, Ngāti Pāoa were again well-established in Tāmaki, with settlements all around the eastern coast from Mission Bay and St Heliers to the Panmure Basin.[269] These are all outside the area over which Ngāti Whātua Ōrākei claims mana whenua

263 Ngāti Pāoa Closing at [59](b).
264 At [67].
265 Andrews and Tupuhi Brief at [11].
266 At [12].
267 At [21].
268 At [26].
269 At [18].

but, as I have said above, that is not dispositive of the location of mana whenua one way or the other.

[220] In the 1860s Ngāti Pāoa, loyal to the Kiingitanga, were rendered almost landless after an attack by colonial troops in the Firth of Thames and subsequent land confiscations by the Crown. Three tribal centres of Ngāti Pāoa today are based around Wharekawa Marae at Kaiaua, Makomako Marae at Pukorokoro near Miranda, and Waiti Marae, Tahuna. None of these are in the area over which Ngāti Whātua Ōrākei claims mana whenua.

[221] Joe Tupuhi and Ted Andrews note that the Marutūāhu tribes are closely linked, have consulted together and acted collectively.[270] But their evidence is that "Ngāti Pāoa has also always acted unilaterally and autonomously and even fought against the other Marutūāhu tribes from time to time".[271] Professor Michael Belgrave notes the irony in 1820 of Ngāti Whātua and Ngāti Pāoa getting on well with each other while there was conflict between Ngāti Pāoa and other Marutūāhu iwi.[272] The same might be said now. Each Marutūāhu iwi maintained and continues to maintain its own mana and retains the discretion to act independent or as part of the collective. I do not understand this to be disputed by Marutūāhu Rōpū.

[222] There is one point on which the witnesses of Ngāti Pāoa take a different view to Ngāti Whātua Ōrākei, regarding the 1869 Native Land Court decision.[273] Ted Andrews and Joe Tupuhi say Ngāti Pāoa disagrees with the Court's finding that the attack of Kapetaua of Ngāti Pāoa on pā at Ōrākei and Kohimarama was not a conquest and not the basis for claiming ongoing rights.[274] They point to the kōrero of Te Toangaroa (the dragging of the waka taua to the deep water of an outgoing tide) near what is now Mechanics Bay to protest mistreatment of Ngāti Pāoa rangatira by constabulary of other iwi, as related to Ngāti Pāoa making landfall as the ahi kā of that area. They say the ahi kā of Ngāti Pāoa has never gone out in these areas.[275] They

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270 At [35].
271 At [36].
272 NOE 2275/21–34.
273 Andrews and Tupuhi Brief at [30].
274 At [32].
275 At [32].

also "fiercely reject the proposition that Ngāti Pāoa interests are representative of a broader Marutūāhu interest in Tāmaki".

[223] The force of Marutūāhu Rōpū's response to Ngāti Whātua Ōrākei is somewhat blunted by the fact that Ngāti Pāoa Iwi Trust opposes the position of the Marutūāhu Rōpū,[276] and supports the rights declarations sought by Ngāti Whātua Ōrākei to the extent they are consistent with the Kawenata.[277] Mr Mahuika submits that the following key points emerge from the evidence:

(a) It is common ground that there are whakapapa connections shared by the iwi of Tāmaki. But it is simply not the case that where one iwi was, all were. Mr Mahuika submits "[t]his argument appears to be based on a desire to obtain redress in Tāmaki independent from, and even over the top of, the clear interests of Ngāti Pāoa".[278] Each iwi maintained and continues to maintain its own mana and iwi territories. The situation in Tāmaki Makaurau is complex but not unique. Whakapapa and whanaungatanga is not enough to give rise to a take or mana in relation to land. More is required, as Charlie Tawhiao said in relation to Mātaatua, and as Te Warena Taua conceded.[279]

(b) A take to land is required. Tāmati Kruger gave evidence of five examples of take to establish an interest in land: take kitea (discovering the land); take tipuna (heritage or whakapapa); take raupatu (conquest or war); take tuko iho (gift including through marriage); and take hoko (an exchange, though not a purchase in the Pākehā sense).[280] This was not contradicted, including in relation to Tāmaki. Take are not mutually exclusive but do not all provide the same intensity of responsibilities.

(c) Mr Mahuika accepts there is some dispute about it, but submits the evidence suggests mana whenua is the strongest interest in land.[281] He

276 Ngāti Pāoa Closing at [74].
277 At [197].
278 At [68].
279 NOE 1242/14-1243/12 (Tawhiao); NOE 2575/6-16 (Taua).
280 Kruger Brief at [98].
281 Notes of Closings 277/21–31.

relies, for example, on Charlie Tawhiao's evidence. Mana whenua can only be shared through agreement, most likely at the fringes or extremities of a group's core rohe.[282] Mana whenua will often be held by only one group in a particular area to the exclusion of others.[283]

(d) To establish mana whenua, a take to the land must be accompanied by occupation giving rise to ahi kā roa.[284] Ahi kā roa follows, and gives legitimacy, to any particular take. Ahi kā roa must be present to ensure the survival of an iwi and in that way defines an iwi.[285] A group has mana whenua if they occupy an area of land for a consistent period of time and fulfil their responsibilities to the land in a manner consistent with tikanga Māori and iho matua.[286] That contributes to the strength of the occupying group's mana. Mana whenua gives the right to invite others to share in the access to resources in particular localities and corresponding responsibilities.[287]

(e) Not all witnesses supported the distinction between mana whenua and other lesser interests. However, even where witnesses did not agree, they acknowledged that there are parts of Tāmaki that are particular to each iwi and those iwi have the strongest (and in some cases predominant and even exclusive) rights.[288]

(f) Tāmaki has complexities in its tribal landscape as a consequence of the movement of people through the area pre-1840 and the disruption caused by the Ngāpuhi incursions. This does not, however, mean it is different. There is a clear pattern of occupation across Tāmaki with different iwi acknowledged as being located in places and exercising predominant and even exclusive rights in those places. Even the map

282 NOE 1327/11-21 (Tupuhi); NOE 1838/4-7(Kruger).
283 Brief of Evidence of Paul Meredith in Reply, 4 December 2020 [Meredith Reply] at [27]; NOE 2058/18-2059/19 (Compain); NOE 2915/26-2916/-24 (Brown); NOE 2579/1-12 (Taua).
284 NOE 1244/1-34 (Tawhiao).
285 Kruger Brief at [106].
286 At [106].
287 Kawharu Brief at [26]; Kruger Brief at [109].
288 NOE 2578/19–2579/12 (Taua); NOE 2306/21-27 (Ngāpō); NOE 1625/16-1626/18 (Dreaver).

produced by Marutūāhu Rōpū and included in the Waitangi Tribunal's *Hauraki Report* shows individual iwi associated with different parts of the Tāmaki and Hauraki regions.[289] It shows Ngāti Pāoa associated with Waiheke and south of the area at issue here, Ngaati Whanaunga and Ngāti Tamatera in the east and south-east Tāmaki, Ngāi Maru in Waiheke and Patukiriri not being in Tāmaki at all. Similar patterns are show in other maps.[290]

[224] The Ngāti Pāoa Iwi Trust's position is that it is not correct, as a matter of fact or tikanga, that the Marutūāhu collective subsumes within it the interests of Ngāti Pāoa and can claim significant interests independently of Ngāti Pāoa.[291] Rather, they support the evidence of Mr Taipari, one of Marutūāhu Rōpū's witnesses, that "… when we come to do things in Tāmaki, we're Ngāti Pāoa …".[292] Unlike the other Marutūāhu iwi, at least part of the take of Ngāti Pāoa in Tāmaki is derived from their Waikato (and Waiohua) connections, rather than Marutūāhu Rōpū. Mr Mahuika submits that Ngāti Pāoa has by far the most significant and extensive interests of the Marutūāhu iwi across Tāmaki and the evidence supports that.[293] He submits that "[e]ven the other Marutūāhu iwi do not identify Tāmaki as being within their core territories".[294] Mr Mahuika submits it is solely or primarily through the interests of Ngāti Pāoa that the Marutūāhu Rōpū claims an interest in the 1840 transfer lands and the land over which Ngāti Whātua Ōrākei claims mana whenua.[295]

[225] Perhaps the most salient point about the position of the Ngāti Pāoa Iwi Trust is that they say they are not only defending the interests of Ngāti Pāoa in Tāmaki but also the terms of the Kawenata Tapu and Conciliation Agreement entered into by Ngāti Pāoa and Ngāti Whātua Ōrākei in January 2017. Evidence about this is given for Ngāti Pāoa by Hayden Solomon, the Kaiārahi of the Ngāti Pāoa Iwi Trust since 2017, and for Ngāti Whātua Ōrākei by Ngarimu Blair, Deputy Chairperson of the Ngāti Whātua Ōrākei Trust.

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289 Waitangi Tribunal *Hauraki Report 2006* at 36.
290 Stone *From Tāmaki-Makau-Rau* at 49; Kawharu *Dimensions* at 39.
291 Ngāti Pāoa Closing at [57].
292 NOE 2396/22–23 (Taipari).
293 Ngāti Pāoa Closing at [5], [56] and [59]. See Solomon Brief at [42].
294 At [66], citing Mikaere Brief at [56] and Blair Reply at [60].
295 At [56].

[226] The Kawenata arose out of tikanga discussions between Ngāti Pāoa and Ngāti Whātua Ōrākei about resolving differences in relation to redress the Crown offered to Ngāti Pāoa as part of its own settlement.[296] Ngāti Pāoa has similarly entered into Kawenata Tapu with other overlapping iwi, including Ngāti Te Rangi, Ngāti Ranginui, and Waikato-Tainui.[297] They are intended "to define the level of interests claimed and to build and maintain long term, inter-generational relationships on a tikanga basis".[298]

[227] The Kawenata Tapu and Conciliation Agreement (the Agreement) were agreed at the same site at Ōkahu Bay, near Ōrākei, at which the 1830s pact was reached.[299] The negotiators for Ngāti Pāoa were Morehu Wilson and Hauāuru Rawiri, who now appear as witnesses for Marutūāhu Rōpū. In the Kawenata, Ngāti Whātua Ōrākei acknowledges that Ngāti Pāoa has "lead mana whenua interests" in the east of Auckland and on the North Shore. Ngāti Pāoa recognises that Ngāti Whātua Ōrākei has "lead mana whenua interests" in central Auckland. The Kawenata Tapu, signed in te reo Māori and English on 21 January 2017, provides:

> **HE KAWENATA TAPU**
>
> **Whakarongo mai ngā tāngata katoa ki āku nei kupu**
>
> He oati tapu tānei i a Ngāti Pāoa me Ngāti Whātua Ōrakei ka whakapuakina ki te aroaro tapu o tō tātou Kaihanga. Koia te timatanga me te whakaotinga o ngā mea katoa. Ka pumautia tēnei kawenata tapu mō ō mātou tūpuna me ā mātou uri whakaheke, ka titikaha mātou ki tēnei kawenata, ka whakaū i ngā wā katoa, i ā mātou mahi, i ā mātou kōrero, ka pēnei;
>
> **Tuatahi**
>
> Ka pumau ki ngā mātāpono matua o te Tika, te Pono me te Aroha i ngā wā katoa
>
> **Tuarua**
>
> Ka tūtohu, ka whaikoha i ngā take whenua 'take matua me te take tautoko' ki roto o Tāmaki Makaurau
>
> **Tuatoru**
>
> Ka whāia, kia tiakina, kia kokiri i ngā take kia mahingātahi i runga i 'nga take matua, take tautoko mete whanaungatanga i runga i te whakaiti te kotahitanga me te whakaaro auaha.

296 Solomon Brief at [57].
297 At [59].
298 At [59].
299 Andrews and Tupuhi Brief at [27].

SACRED COVENANT

Declaration to all that

This is a sacred oath between Ngāti Pāoa and Ngāti Whātua Ōrakei who solemnly declare before God and our ancestors, to uphold this sacred covenant on behalf of our ancestors and descendants, that we will commit to this Covenant in all that we do and say, and in so doing will;

(Part 1)

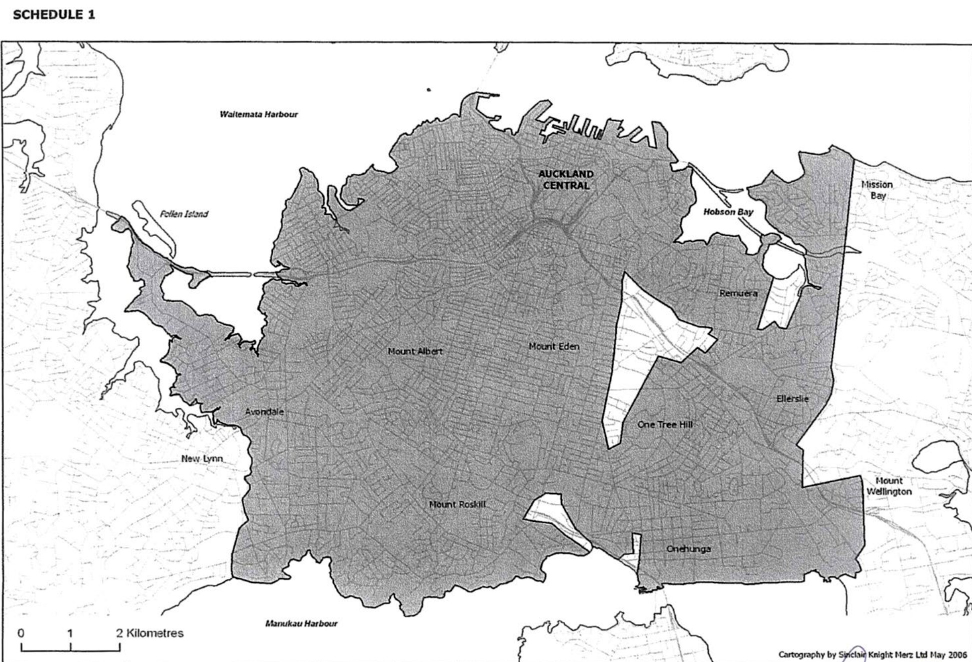
Adhere to the First Principles of Tika, Pono and Aroha at all times.

(Part 2)

Acknowledge and respect the 'Lead and Shared' interests both Iwi hold respectively in Tāmaki Makaurau

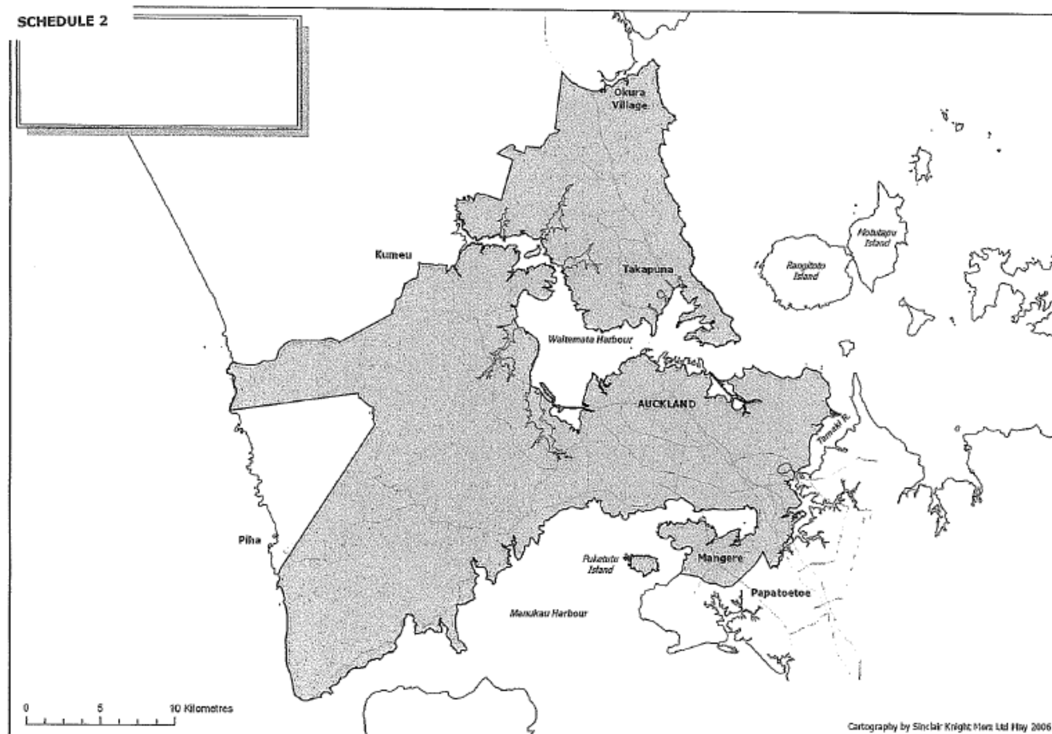
(Part 3)

Seek to foster and advance opportunities to work together based on Lead or Shared Interests and kinship, with humility, inclusiveness and innovation.



Map 3: Areas agreed between Ngāti Whātua Ōrākei and Ngāti Pāoa that Ngāti Whātua Ōrākei holds and exercises lead mana whenua

[228] The Agreement between Ngāti Pāoa and Ngāti Whātua Ōrākei recognises that each of them hold and exercise "lead mana whenua" over their "lead area of interest", over which the other "acknowledges their mana whenua is not lead", as in Map 3. In the Agreement the parties also recognise that "Ngāti Whātua Ōrākei holds and exercises mana whenua" over a wider area, as in Map 4 below.



Map 4: Areas agreed between Ngāti Whātua Ōrākei and Ngāti Pāoa that Ngāti Whātua Ōrākei holds and exercises mana whenua, though not "lead mana whenua"

[229] Ngarimu Blair discusses Taiaha Hawke's whakamārama in which he describes the Kawenata as the spiritual aspect of the relationship between the two iwi and the Conciliation Agreement as the aspect that operates in the physical world; together they bind the iwi.[300]

[230] Morehu Wilson, a witness for Marutūāhu Rōpū, gave evidence that there was a pause on implementation of the agreement following the January 2017 hui because making the agreement was very difficult for the leadership of Ngāti Pāoa.[301] But,

[300] Blair Brief at [325]–[326].
[301] M Wilson Brief at [123].

Ngāti Pāoa having agreed to the Kawenata, he stands by it. He makes the point that the Kawenata does not affect the evidence as to the traditions of Ngāti Pāoa and Marutūāhu. Under cross-examination, Morehu Wilson notes that the tikanga involved in signing of the Kawenata was shared by Ngāti Whātua Ōrākei and Ngāti Pāoa.[302]

[231] Hauāuru Rawiri also made several comments about the Kawenata:[303]

(a) the Court is not the right place to discuss the Kawenata, however he believes it is important context;

(b) Ngāti Pāoa leaders wanted to hold to the principles of "tika (what is right), te pono (honesty) and aroha (compassion) no matter what";

(c) issues between two tribes should be "taken back to the marae to find resolution";

(d) the Court does not adjudicate the issues between Ngāti Pāoa and Ngāti Whātua Ōrākei;

(e) the High Court action created a burden on the iwi's relationship and finances;

(f) Ngāti Pāoa were surprised by the legal action against them;

(g) Ngāti Pāoa agreed to the Kawenata and he stands by it; and

(h) the Kawenata does not impact on what has been laid down in the protocols and the historical accounts of Ngāti Pāoa and Marutūāhu.

[232] Mr Majurey, for Marutūāhu Rōpū, does not dispute the validity of the Kawenata Tapu.[304] He submits it does not demonstrate there is an agreed worldview that there is only one tribe with mana whenua and ahi kā in Tāmaki Makaurau, in the

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302 NOE 2090/21-24.
303 Rawiri Brief at [52].
304 Notes of Closings 160/11.

way Ngāti Whātua Ōrākei uses those terms. And he submits it is not a bar to the recognition of Ngāti Pāoa as one of the Marutūāhu iwi having mana whenua and ahi kā in central Auckland.[305]

[233] No witness from Ngāti Whātua Ōrākei or Ngāti Pāoa, including those who gave evidence for Marutūāhu Rōpū, disavowed the Kawenata and Conciliation Agreement. Accordingly, the evidence is that Ngāti Pāoa has recognised Ngāti Whātua Ōrākei has lead mana whenua interests in central Auckland to the extent outlined in the Kawenata and Agreement.[306] The evidence is that Ngāti Pāoa and Ngāti Whātua Ōrākei have thereby reached agreement at tikanga over their respective mana whenua. The expert evidence of Ted Andrews and Joe Tupuhi is that this does not mean either iwi do not have "footprints" in the other areas. As they say, "[o]ur footprints are all over this whenua (land) and we both have shared histories and relationships in these areas".[307]

[234] Mr Mahuika submits that Ngāti Pāoa does associate Ngāi Tai ki Tāmaki and Te Ākitai Waiohua with the wider Tāmaki area. Ngāti Pāoa does not deny that Ngāi Tai ki Tāmaki and Te Ākitai Waiohua have interests that extend into the 1840 transfer land the area over which Ngāti Whātua Ōrākei claim mana whenua.[308] Ngāti Pāoa says that is a matter for Ngāi Tai ki Tāmaki and Te Ākitai to address and prove and Ngāti Pāoa does not take a position on it.

C The response of Ngāi Tai ki Tāmaki

[235] Ngāi Tai ki Tāmaki trace their ancestry from ancient pre-waka peoples known as Patupaiarehe, led by Koiwiriki and his daughter Hinemairangi of Hunua, Papakura, Maraetai and Pakuranga.[309] They welcomed famous voyaging waka such as Tainui, some crew members of which disembarked to settle among the tāngata whenua, including Taikehu at Te Maungauika (North Head) and on Motutapu, which he named after part of his Hawaiki homeland. Taikehu took possession of the fisheries at Te Manuka (Manukau Harbour) by naming the fish Ngā tamariki toa o Taikehu.

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305 Notes of Closings 160/13–15.
306 Andrews and Tupuhi Brief at [28].
307 At [29].
308 Ngāti Pāoa Closing at [86]–[87].
309 Brief of Evidence of James Brown, 13 October 2020 [Brown Brief] at [24].

[236] James Brown, descendant of Te Whatataao (or Te Whatatau) and Hetaraka Takapuna, and Chair of the Ngāi Tai ki Tāmaki Trust, gave evidence for and about Ngāi Tai ki Tāmaki. His evidence is that, in early times, the entire Tāmaki isthmus was controlled by Te Waiohua, a collective of tribes sharing common ancestry from early Tainui waka people, including Hua Kaiwaka, Tāmaki Te Ao, Kupapa, Hikapou, Te Kohu, Potaka, Potukeka, Te Ika Maupoho, Hua Tau and others.[310] He says the links and relationships between Tainui and Waiohua form the basis of interests within Tāmaki Makaurau, including those of Ngāi Tai ki Tāmaki and Ngāti Whātua Ōrākei.[311]

[237] Ngāi Tai ki Tāmaki trace their lineage to:[312]

(a) the original ahi kaa ancestress Mahuika, through Matakamokamo and Matakerepō;

(b) the Tūrehu and Patupaiarehe of Hūnua and through to Waitakere;

(c) pre-migration sentinels such as Peretū, Uika, Tāmaki and his son Maruiwi;

(d) along with various Tini entities, Tini o Maui, Ruatāmore and Tini o Toi;

(e) Ngā Riki, Ngā Oho, the eponymous ancestor Te Whatataao (Te Whatatau); and

(f) from the descendants of the Tainui waka ancestral explorers for which many place names in Tāmaki Makaurau are named, such as Horotiu and Te Motutapu a Taikehu.

[238] Ngāi Tai ki Tāmaki includes individuals from: Ngāti Te Raukohekohe, Ngāti Kōhua, Ngāti Rangitawhia, Ngāti Taimanawaiti, Ngāti Taihaua, and Te Uri o Te Ao.[313]

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310 At [30]. The Ngāi Tai deed of settlement says that Tāmaki Te Ao was known as Takataka.
311 At [32].
312 Ngāi Tai ki Tamaki Closing at [4.3].
313 *Ngāi Tai ki Tāmaki Deed of Settlement of Historical Claims*, 7 November 2015 at cl 10.5.

[239] Mr Warren, for Ngāi Tai ki Tāmaki, submits the historical narrative is far from certain, with conflicting evidence about several issues. Mr Warren submits there is uncertainty about whether the killing of Kiwi Tāmaki and utu by Tuperiri on Te Waiohua constituted a raupatu between two unrelated tribes.[314] In this regard, Mr Warren relies on the evidence of Te Warena Taua as providing an alternative narrative of inter-tribal or intra-tribal fights between Tuperiri and Kiwi Tāmaki as close relatives who both held their interests in Tāmaki through their Te Waiohua whakapapa.[315] Te Warena Taua considers there was no such thing as the Ngāti Whātua raupatu of Tāmaki. I do not understand him to be disputing the battles. Rather he seems to be disputing the tribal identities of those involved, arguing that because they were closely related, there was no change in mana whenua. But no other witness takes this position. Apart from Te Warena Taua, the evidence of tribal historians and professional historians is consistent that Te Taoū led by Tuperiri was a separate political entity, with a separate identity, to Te Waiohua, led by Kiwi Tāmaki. I proceed on that basis.

[240] The more major historical issue over which Ngāi Tai ki Tāmaki differs from Ngāti Whātua Ōrākei is whether Ngāti Whātua Ōrākei maintained undisputed control over the Tāmaki isthmus after Tuperiri's attacks and whether it therefore did not constitute a raupatu at tikanga.[316]

[241] Peter McBurney, a historian called by Ngāi Tai ki Tāmaki, gives evidence suggesting that Te Taoū were not able to maintain undisputed control over the isthmus and wider district in the decades following Tuperiri's raupatu.[317] He points to the killing by Ngāti Pāoa of Tuperiri's sons and the Ngāti Pāoa defeat of Te Taoū and Ngāoho in battle at Orohe.[318] He suggests that what sent Waiohua people away from the isthmus was warfare amongst themselves.[319] Mr Hodder put to Peter McBurney in cross-examination that this is inconsistent with Peter McBurney's report on the History of Mahurangi and Gulf Islands Districts, where he described the raupatu as

314 Brief of Evidence of Peter McBurney, 13 October 2020 [McBurney Brief] at [37].
315 Brief of Evidence of Te Warena Taua, 14 October 2020 [Taua Brief] at [23]; NOE 2554/30–2555/10; NOE 2654/3.
316 McBurney Brief at [41].
317 At [37].
318 At [41]–[44].
319 NOE 2818-2819/21–26.

akin to revolution.[320] Peter McBurney says "I have to stand by it" but that his views have changed somewhat since then.[321]

[242] James Brown points to Hetaraka Takapuna's claim and evidence that while Ngāti Whātua may have won a number of skirmishes against iwi, including Ngāi Tai ki Tāmaki, it did not achieve or set out to achieve any raupatu and he says that Ōrākei is Waiohua land.[322] Mr Warren submits this was never considered by the Native Land Court, particularly by Chief Judge Fenton. It is difficult for me to consider now too, on the basis of the evidence before me.

[243] Dr Te Kahautu Maxwell gives evidence that Ngāi Tai ki Tāmaki oral history, including from his 93-year old uncle, Bill Maxwell, was that Ngāi Tai ki Tāmaki were never conquered.[323] He says they were not attacked because of their whakapapa and a "contract" with Ngāpuhi. There was depopulation of the area until resettlement, but he says the Ngāti Rau hapū of Ngāi Tai ki Tāmaki remained throughout.[324] I have no other information about this.

[244] Mr Warren also questions the unitary identify of Ngāti Whātua Ōrākei. He submits the group known as Ngāti Whātua Ōrākei did not exist before the 20th century. He points to a statement by Ani Pihema to the Waitangi Tribunal, reported in their 1987 *Ōrākei Report*, that "Ngāti Whātua Ōrākei" is of recent origin and that "te kei o Tainui" (the stern of the Tainui waka) is still their name for the area.[325] Ngāi Tai ki Tāmaki challenges the submission of Ngāti Whātua Ōrākei that their three hapū were not separate or autonomous territorial groups. Mr Warren submits the origins and make-up of the three hapū said to comprise Ngāti Whātua Ōrākei, Te Taoū, Te Uringutu, and Ngā Oho, derive from different but related sources of whakapapa and history.[326] Even the Native Land Court divided the Ōrākei Block along the lines of the three hapū.

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320 Peter McBurney *Traditional History Overview of the Mahurangi and Gulf Islands Districts* (Commissioned by the Mahurangi and Gulf Islands District Collective Committee, March 2010) [McBurney *Mahurangi Report*] at 148.
321 NOE 2815/20.
322 Brown Brief at [92]–[93].
323 Maxwell Brief at [157].
324 At [157]; NOE 2725/30–2726/10.
325 Waitangi Tribunal *Ōrākei Report* at 17.
326 Ngāi Tai ki Tamaki Closing at [3.34].

[245] I do not propose to dissect the identity of Ngāti Whātua Ōrākei in terms of its three hapū. Its contemporary identity is certainly asserted, and has been recognised, in many fora. I do not accept Te Warena Taua's evidence that "there's no such tribe called Ngāti Whātua ki Ōrākei".[327] Such distinctions between the identity of the three hapū are matters of tikanga Ngāti Whātua Ōrākei that are not in issue in this proceeding.

[246] Mr Warren submits there is uncertainty about the significance of the return of Ngāti Whātua Ōrākei under the mana of Potatau Te Wherowhero.[328] The evidence of Te Warena Taua is also that it was through their Te Waiohua connections that Ngāti Whātua were able to seek refuge in Waikato and to live at Ōrākei.[329] They were driven out by Ngāpuhi and brought back to Tāmaki by Potatau who placed Ngāti Whātua at various kāinga in Tāmaki, including at Ōrākei, under his mana in the 1830s.[330]

[247] Within the area over which Ngāti Whātua Ōrākei claim mana whenua, Ngāi Tai ki Tāmaki says they continue to exercise kaitiaki responsibilities to the point of significant decisions. The evidence of James Brown is that all of Tāmaki Makaurau is the heartland of Ngāi Tai ki Tāmaki, based on whakapapa.[331] More specifically, Ngāi Tai ki Tāmaki say:[332]

(a) They have ancestral interests in Pukekawa (Auckland Domain) and Horotiu (Auckland University). The Auckland High Court is on a Ngāi Tai ki Tāmaki pā site, Te Reuroa. Ngāi Tai ki Tāmaki still consider these sites as ancestral sites of Ngāi Tai ki Tāmaki and have the mana to that whenua.[333]

(b) They have interests in Maungakiekie (One Tree Hill) on the basis it was under the mana of Te Waiohua confederation of tribes, including Ngāi Tai ki Tāmaki hapū Ngāti Kohua and Te Uri o Te Ao. Ngāi Tai ki

327 NOE 2585/6–11 (Taua).
328 McBurney Brief at [54]; Taua Brief at [25]–[33].
329 Taua Brief at [30].
330 At [32].
331 NOE 2896/19–32.
332 Brown Brief at [34]–[46].
333 NOE 2903/27–2904/6 (Brown).

Tāmaki has an urupā on Maungakiekie known as Te Tupo o Te Tini where Te Tahuru, the mother of Kiwi Tāmaki, and many other Te Waiohua tūpuna were buried.

(c) Maungawhau (Mt Eden) was a significant Pā of Waiohua in Tāmaki Makaurau and includes many sacred sites such as Te Tuahu o Huakaiwaka (the alter of Huakaiwaka). Ngāi Tai ki Tāmaki and many other groups have an ancestral connection with Maungawhau through its occupation by Te Waiohua, not just Ngāti Whātua Ōrākei.

(d) The correct name of Puketāpapa (Mt Roskill) is Pukewiwi. Ngāi Tai ki Tāmaki have interests there. Ngāti Whātua Ōrākei also has ancestral connection to the area through occupation of the site by Te Waiohua.

(e) They have shared interests through Te Uri o Te Ao and Ngāti Kohua (Te Waiohua) to Mt Hobson, Mt St John, and Te Tātua-a-Riukiuta (Big King Reserve). Te Too (Freemans Bay) was the site of an old Waiohua pā with which Ngāi Tai ki Tāmaki had a close association. Pare Te Putu, mother-in-law of Princess Te Puea was born there. Ngāi Tai ki Tāmaki camped there, without need of any permission, as they brought produce by canoe from Maraetai to the city in the 1860s.

[248] In terms of tikanga Ngāti Whātua Ōrākei, Mr Warren submits that, by any objective assessment of the evidence, the definition of ahi kā and mana whenua over every inch of whenua claimed by Ngāti Whātua Ōrākei cannot be sustained. The tribal/traditional history of Tāmaki Makaurau, including the isthmus, is far more complex and nuanced than Chief Judge Fenton’s decision suggests.

[249] The position of Ngāi Tai ki Tāmaki is that the isthmus remained a contested area following the death of Kiwi Tāmaki. Ahi kā has not been maintained in the traditional way by any tribe in the area over which Ngāti Whātua Ōrākei claim mana whenua, for many generations. If any tribe dominated, it was the forebears of Heteraka Takapuna and his relatives, who descended from Hua o Kaiwaka, and Ngāi Tai ki Tāmaki. Ngāi Tai ki Tāmaki rejects the Ngāti Whātua Ōrākei claim to exclusive mana

whenua through raupatu and ahi kā and the assertion that mana whenua, based on ahi kā, is not compromised by other iwi interests and ancestral connections.

[250] Accordingly, Ngāi Tai ki Tāmaki say many tribes, including Ngāti Whātua Ōrākei, have and share mana whenua in the area at issue. Ngāi Tai ki Tāmaki says it is for each tribe to describe the nature and extent of their mana. Ngāi Tai ki Tāmaki acknowledge Takaparawhau/Ōrākei, where the Ngāti Whātua Ōrākei marae sits, consistent with its name, as the heartland of Ngāti Whātua Ōrākei.[334] Ngāi Tai ki Tāmaki acknowledges Ngāti Whātua Ōrākei are present in central Tāmaki Makaurau and acknowledges their excellent kaitiakitanga and carrying out of responsibilities.

[251] Furthermore, tikanga has evolved. Mr Warren submits the concept of ahi kā has naturally evolved over time to meet the changing circumstances of Tāmaki Makaurau. For Ngāi Tai ki Tāmaki today, relying on *Te Mātāpunenga*, ahi kā is better defined by a spiritual connection together with the fulfilment of cultural and legal responsibilities in a modern context.[335]

[252] Ngāi Tai ki Tāmaki say Ngāti Whātua Ōrākei is not the only tribe that exercises this form of ahi kā in the area over which they claim mana whenua today. They point particularly to the enduring Tainui links to the isthmus evident in whakapapa and history, such as iwi only being able to return in the 1830s under Te Wherowhero's protection and continued acknowledgement of Tāmaki Makaurau as Te Kei o Te Waka Tainui. They rely on the agreement by the pūkenga called by Te Toru that "each iwi at the tikanga conference have individual customary interests (mana whenua)".[336]

[253] Mr Warren submits that the evidential basis on which Ngāti Whātua Ōrākei asserts mana whenua is simply two Native Land Court decisions and little more than a general interpretation of ahi kā that gives no recognition to shared whakapapa connections between the people within Tāmaki Makaurau. Mr Warren submits ahi kā and mana whenua do not exist in a vacuum of other tikanga. They are part of a more sophisticated lattice of connections and obligations.[337] Take tupuna and

[334] Kruger Brief at [108] and NOE 1900/15-30 (Kruger).
[335] NOE 2567/3-15 and 2655/20-2656/10 (Taua) and 2743/22-31 (Maxwell).
[336] Te Toru Pūkenga Summary at [1].
[337] NOE 1867/19-1868/-15 (Kruger).

take whanaungatanga were most important in Tāmaki Makaurau and enabled closely related but distinct tribal groups access to resources across the wider district.

[254] The world view of Ngāi Tai ki Tāmaki necessarily encompasses whanaungatanga, whakapapa, shared responsibilities and aroha amongst other tikanga. Mana whenua is underpinned by whanaungatanga and shared rights and responsibilities with varying layers of customary interests at play. Mana whenua and ahi kā are what manifests if a tribe adheres to underlying principles of tikanga such as manaakitanga and whanaungatanga, by consistently doing the right thing.[338] In central Auckland, because of the geography and whakapapa, application of the principles of tikanga have created shared mana whenua.[339]

[255] Ngāi Tai ki Tāmaki acknowledges their view of history and tikanga is different to that of Ngāti Whātua Ōrākei and some other tribes before the Court. Mr Warren submits that the contest will no doubt continue as it has for three centuries and that most tikanga experts in this proceeding claim it should not be resolved by this Court.

D The response of Te Ākitai Waiohua

[256] Ms Coates, for Te Ākitai Waiohua, submits that because of Crown actions, Te Ākitai Waiohua lost their voice and profile in Tāmaki without clear rangatira representation, rendering the iwi virtually invisible to many third parties, as stated in their deed of settlement with the Crown.[340] Te Ākitai Waiohua rangatira, Pepene Te Tihi and Ihaka Takaanini died in Crown custody.[341] Another, Mohi Te Ahi a Te Ngu, was banished in the 1860s. This means the traditional history of Te Ākitai Waiohua has not been recorded in the way it has for others.[342] Absence of evidence is not evidence of absence.

[257] The expert evidence of Te Ākitai Waiohua kaumātua David Wilson Takaanini, a direct descendant of Ihaka Takaanini, is that Te Ākitai Waiohua descend from Ngā

338 Notes of Closings 247/7–11.
339 Notes of Closings 247/22–25.
340 Te Ākitai Waiohua Deed of Settlement of Historical Claims, 23 December 2020 at 9.
341 At 25.
342 Tony Walzl *Te Ākitai Waiohua Customary Interests Report* (presented and abridged by Te Ākitai Waiohua Iwi Authority) [Walzl *Te Ākitai Waiohua*] at 25.

Oho, Ngā Riki and Ngā Iwi.[343] Ngā Oho was the ancient tribe and original people of the land, who gradually split up but whose name is still used to describe the tāngata whenua of Tāmaki. Ngā Iwi came from Ngā Oho and has been used to describe all the groups who inhabited lands in and around Tāmaki. These early groups split from each other and formed new groups over time but are united by whakapapa. Te Ākitai Waiohua is a member of Waiohua, a confederation of groups and interests within Tāmaki, connected by whakapapa and association over time.[344]

[258] Huakaiwaka (or Hua o Kaiwaka), the eponymous ancestor of Waiohua, was recognised as a chief of Ngā Oho, Ngā Riki and Ngā Iwi.[345] He lived in the 17th century at Maungakiekie, where he also died. He had a primary pā site at Maungawhau and his territory covered all of Tāmaki.[346] His son, Te Ikamaupoho, married Te Tahuri and also lived at Maungakiekie.[347] Their son, Kiwi Tāmaki, was born at Maungawhau.[348] He became the paramount chief of Waiohua and the founding ancestor of Te Ākitai Waiohua.[349] He lived in Maungakiekie, moved seasonally to other pā, such as Te Pane o Mataaoho (Māngere Mountain), and was a dominant rangatira across Tāmaki.[350]

[259] David Wilson Takaanini's evidence is that Te Ākitai Waiohua acknowledge that the Te Taoū branch of Ngāti Whātua, led by Wahaakiaki, defeated Kiwi Tāmaki in battle around 1740 and this was central to the creation of Te Ākitai Waiohua and Ngāti Whātua Ōrākei as we know them today.[351] Ms Coates, for Te Ākitai Waiohua, notes there is dispute over exactly when the battle occurred, as do others. David Wilson Takaanini's evidence is that the defeat did not extinguish Te Waiohua, who survived with an unbroken line from Kiwi Tāmaki. For example, from Kiwi Tāmaki came Rangimatoru then Pepene Te Tihi, then Ihaka Takaanini, then Te Wirihana, then

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343 Brief of Evidence of David Wilson, 13 October 2020 [D Wilson Brief] at [10].
344 At [10] and [16].
345 At [15]; and see Walzl *Te Ākitai Waiōhua* at 50, Rawiri Brief at [27], McBurney Brief at [69], NOE 292/17–20 (Kawharu), NOE 531/17–21 and 598/31-34 (Blair), NOE 2572/25–30 (Taua), NOE 2794/28–2795/7 (McBurney).
346 D Wilson Brief at [17]; Stone at 28.
347 Walzl *Te Ākitai Waiōhu* at 26.
348 Blair Brief at [364].
349 D Wilson Brief at [20].
350 At [22].
351 At [23]–[24].

Periko Manutapuwaenui, then Te Hiko, then Joseph Wilson and now David Wilson Takaanini.

[260] David Wilson Takaanini's evidence is that the ancestors of Te Ākitai Waiohua re-established themselves in South Auckland, in and around Māngere, in the 19th century. Pūkaki is their marae. He says Rangimatoru, the son of Kiwi Tāmaki and Paretutanganui, married Moenoho from Ngāti Rongo (part of Te Taoū) and Ngāti Poataniwha.[352] He died at the battle of Orohe against Ngāti Pāoa, alongside Ngāti Whātua. David Wilson Takaanini's evidence is that if Waiohua had been conquered by Ngāti Whātua, their tūpuna would not have fought together.[353] Te Horeta, a rangatira of Ngā Iwi and Waiohua and direct descendant of Huakaiwaka, had a daughter Te Tahuhi.[354] She married Tuperiri's son Tomoaure.[355]

[261] Ms Coates submits that Waiohua dominance, which constituted mana whenua, was recognised in the 17th century.[356] While subsequent intermarriage gave Ngāti Whātua Ōrākei a take in the whenua, Waiohua continued to have an underlying mana through an ancestral dimension, that allows them to have mana whenua.[357]

[262] Te Ākitai say the battle between Kiwi Tāmaki and Wahaakiaki did not result in the extinguishment of the Waiohua people. They point to Mark Derby's evidence that the narrative portraying the wholesale raupatu of Waiohua by Te Taoū, dominated by the victor's perspective, is being increasingly challenged and a more nuanced history is coming to light.[358] This was a skirmish between close cousins and a revenge killing.[359] They point to Dr Vincent O'Malley's Report *Te Wherowhero* saying:[360]

> … as Russell Stone notes, the notion that Te Wai-o-Hua were 'extirpated' and became 'extinct' as a result of Te Taoū conquest – as Chief Judge Fenton

352 D Wilson Brief at [31].
353 At [35].
354 At [33].
355 Kawharu Brief at [77].
356 Notes of Closings 185/19–25.
357 Notes of Closings 186/15–187/12.
358 Derby and Rother *Te Ākitai Waiohua Customary Interests* at 13–14.
359 Te Ākitai Waiohua Closing Submissions, 19 April 2021 [Te Ākitai Waiohua Closing] at [75](b), citing Taua Brief at [23], Kapea Brief at [45]–[46].
360 Te Ākitai Waiohua Closing at [75](a), citing Vincent O'Malley *Pōtatau Te Wherowhero and Tāmaki Makaurau* (Waikato-Tainui College for Research and Development, October 2014) [O'Malley *Te Wherowhero*] at 8; Brief of evidence of Karen Wilson, 13 October 2020 [K Wilson Brief] at [106]; D Wilson Brief at [25].

promoted in his notorious Ōrākei judgment of 1868 – is today considered erroneous.

[263] Professor Stone actually said that Chief Judge Fenton had "repeated a misconception" because "what had been eliminated were not the former Tāmaki peoples themselves, but their previous hapū structures …".[361] He suggested that "[t]wo groups of remnants" returned in the later decades of the 18th century, Te Uringutu and Te Ākitai.[362]

[264] David Wilson Takaanini says that everyone had to get out of Tāmaki when it was invaded by Ngāpuhi taua.[363] Te Ākitai sheltered in the Waikato under the protection of Te Wherowhero. Ms Coates submits that Ngāti Whātua Ōrākei suffered a series of major defeats such that the historian Professor Stone concluded they were "destroyed as an iwi of power".[364] My reading is that Professor Stone was referring in that passage to Ngāti Whātua o Kaipara.

[265] Te Ākitai Waiohua returned under the protection of Te Wherowhero sometime between 1832 and 1835.[365] In a report for Te Ākitai Waiohua, historian Mr Tony Walzl, notes evidence that at least some of Te Ākitai first returned to Ōrākei with Apihai Te Kawau before moving to Pūkaki in Manukau around 1840.[366] During this re-settlement, there was seasonal movement of Tāmaki iwi to where they once had gardens and settlements.[367] Mr Walzl's evidence also suggests that, although some Te Ākitai may have returned to Ōrākei with Te Kawau, there was a Te Ākitai settlement at Pukaki in 1832 and others moved to Pūkaki around 1840 and up to the 1860s.[368] I do not understand Te Ākitai to be claiming mana whenua at Ōrākei in the sense that Ngāti Whātua Ōrākei conceive it.

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361 Stone *From Tāmaki- Makau-Rau* at 45.
362 At 46.
363 D Wilson Brief at [38]. And see Walzl *Te Ākitai Waiōhua* at 62.
364 Te Ākitai Waiohua Closing at [91](a), citing O'Malley *Te Wherowhero* at 12 which quotes Stone *From Tāmaki-Makau-Rau* at 102.
365 Derby and Rother *Te Ākitai Waiohua Customary Interests* at 50; and Walzl *Te Ākitai Waiohua* at 64.
366 Walzl *Te Ākitai Waiōhu* at 66, citing Native Land Court *Ōrākei* MB 2 at 221-2 (Te Hapimana).
367 Stone *From Tāmaki- Makau-Rau* at 182.
368 Walzl *Te Ākitai Waiōhu* at 66.

[266] Ms Coates submits the uncertain conditions and contested power over the isthmus made it difficult for Te Kawau to return in the 1830s, and would not have been possible without the protection of Te Wherowhero.[369] She submits that Dr Vincent O'Malley's report, *Te Wherowhero*, shows that the situation was more complicated than one iwi exercising exclusive mana whenua. She points to the evidence of Te Warena Taua that this was effectively the period in which any group ceased to hold ahi kā in the central Tāmaki area.[370] Ngāti Whātua Ōrākei point to Mark Derby's statement that, "by 1840, Tāmaki Māori acknowledged Apihai Te Kawau Te Tawa, who had strong support from Te Wherowhero, as their paramount chief and leader".[371] David Wilson Takaanini's evidence is that, during the 1840s, Te Wherowhero, Ihaka Takaanini and other leading chiefs were largely responsible for keeping Auckland safe from Hone Heke.[372]

[267] Ms Coates submits Te Kawau, who featured prominently in Tāmaki land sales in the central isthmus, had whakapapa connections to Ngāti Whātua, Te Waiohua and Tainui.[373] She submits initial purchase histories should be given little weight for the purpose of these proceedings. She submits the sales happened relatively soon after iwi returned to the isthmus and were a poor reflection of customary rights. Neither was the lack of protest at the time compelling, given the context of iwi re-establishing themselves and then being in conflict with the Crown.

[268] Ms Coates submits that placing great reliance on the Native Land Court decisions in the 1860s would perpetuate an incomplete and flawed narrative. She points to Dr Vincent O'Malley's acknowledgement that it is possible iwi with valid customary interests in the isthmus, outside the Ōrākei block, may not have participated in the hearings.[374] His evidence is that the Native Land Court was generally a "highly flawed mechanism for determining customary rights" which "often failed to reflect customary tenure fully or adequately".[375] Te Ākitai Waiohua disagree with Professor

[369] O'Malley *Te Wherowhero* at 12 and 25.
[370] NOE 2561/5-10 (Taua).
[371] Ngāti Whātua Ōrākei Closing at [6.164], citing Derby and Rother *Te Ākitai Waiohua Customary Interests* at 24.
[372] D Wilson Brief at [39].
[373] Te Ākitai Waiohua Closing at [96].
[374] NOE 1013/7–9 (O'Malley).
[375] O'Malley Brief at [198].

David Williams' evidence that the Native Land Court's Ōrākei reasoning was appropriate and conclusions robust.[376] That is because:

(a) Te Ākitai was not represented at the hearing as their key rangatira were incarcerated or banished;

(b) the proceeding expressly focussed on the Ōrākei Block not elsewhere on the isthmus;

(c) the Native Land Court was a highly flawed mechanism for determining customary rights and titles; and

(d) there has never been a full official inquiry into the extent of Tainui interests in Tāmaki.[377]

[269] Throughout all these events, David Wilson Takaanini's evidence is that Te Ākitai Waiohua continued to maintain an ongoing relationship to the land in Tāmaki. For example:[378]

(a) Te Ākitai Waiohua has connections and associations to all the maunga in Tāmaki;

(b) in the 1860s, Ihaka Takaanini supervised both Māori hostels at Onehunga and Mechanics Bay near Ōrākei;

(c) Te Iringa o Rauru in Symonds Street was the site of a tree where Rauru of Ngāti Whātua was killed in the mid-17th century which began the hostilities between the two tribes;

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376 Te Ākitai Waiohua Closing at [105], citing Williams Brief at [109].

377 Te Ākitai Waiohua Closing at [106]–[107], citing O'Malley *Te Wherowhero* at 4 and 85, Walzl *Te Ākitai Waiōhua* at 75, Te Ākitai Waiohua Deed of Settlement of Historical Claims, 23 December 2020 at cl [5.27]; NOE 1013/7–19 (O'Malley); O'Malley Brief at [198]; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Rēkohu – A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands* (Wai 64, 2001) [Waitangi Tribunal *Rēkohu Report*] at 144.

378 D Wilson Brief at [40]–[43].

(d) Te Tii Tutahi is the Waiohua name for Newmarket, a wāhi tapu where the umbilical cords of chiefly children of the Waiohua were buried;

(e) Te Ipupakore, off Mt Eden Road, was the main water well that supplied the Waiohua people at the Maungawhau Pā;

(f) Te Roto a Rangi, a small pool near what is now St Albans Church in Dominion Road, is named after Rangihuamoa, wife of Huakaiwaka and grandmother of Kiwi Tamaki; and

(g) Te Puna a Rangi, a water source located near the junction of Manukau Road and Mt St John Avenue, is also named after Rangihuamoa.

[270] Ms Coates points to recognition by a number of witnesses called by other iwi that Te Ākitai have mana within the area over which Ngāti Whātua Ōrākei claim mana whenua.[379] She submits Te Ākitai Waiohua are currently active kaitiaki and express their ahi kā across the isthmus, and maintain their customary interests and relationships with the whenua, to the extent they are able to do so in a highly regulated landscape that is pre-dominantly no longer Māori-owned. This includes protesting Te Akaranga Māori Association planting a tree at Te Tuahu i Huakaiwaka and a proposal to build a model pā on Maungawhau in 1927–29,[380] active expressions of kaitiakitanga through participation in a number of current forums, and recent engagement with resource consents on the Waitematā side of the area over which Ngāti Whātua Ōrākei claim mana whenua.[381]

[271] Ms Coates submits Te Ākitai Waiohua has deep hononga to areas in central Tāmaki going back to Ngā Oho, Ngā Riki, Ngā Iwi, Huakaiwaka and Kiwi Tāmaki. They see that as giving them standing in central Tāmaki. Te Ākitai Waiohua have take

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379 NOE 2905/4–10 (Brown); NOE 2052/17–20 (Compain); M Wilson Brief at [39]–[40]. NOE 2307/24–31 (Ngāpō); Taua Supplementary Brief, 1 April 2021, at [17]; NOE 2548/14–17 and 2558/22–2559/8 (Taua).

380 Derby and Rother *Te Ākitai Waiohua Customary Interests* at 74-75.

381 Waiohua-Tāmaki Alliance Limited Partnership, Tūpuna Taonga o Tāmaki Makaurau Trust, Tupuna Maunga Authority, conservation co-governance, Mana Whenua Kaitiaki Forum, Watercare Kaitiaki Forum, Auckland Transport, Auckland Tourism, Events and Economic Development, Eke Panuku Governance Mana Whenua Forum, Pile Mooring Redevelopment Kaitiaki Engagement Plan Forum, America's Cup Kaitiaki Engagement Plan Forum, and Independent Māori Statutory Board.

tupuna in the Tāmaki isthmus and, although they do not use the term ahi kā roa, they have maintained an equivalent presence in the isthmus as a matter of fact and tikanga.

[272] Ms Coates submits all this suggests, at the very least, a more complex picture than Ngāti Whātua Ōrākei exercising exclusive mana whenua from 1740 to the present day. She refers to the Waitangi Tribunal's characterisation of Tāmaki as "an intensively occupied part of the country, where constant habitation by changing populations of Māori as a result of invasions, conquests, and inter-marriage has created dense layers of interests".[382] Accordingly, the identity of Te Ākitai is tied to Kiwi Tāmaki and the whenua to which he and his ancestors belonged, which cannot be broken.[383]

[273] In terms of tikanga, Ms Coates submits the declarations sought by Ngāti Whātua Ōrākei are premised on exclusivity, individual authority and subordination of other interests. Rights cannot be divorced from responsibilities with respect to land and people at tikanga.[384] She submits the tikanga relied upon by Ngāti Whātua Ōrākei is not credibly upheld in light of the evidence. She notes a suggestion that the term "mana whenua" is not helpful in any context.[385] Ms Coates submits:[386]

> The effect of what is being sought by Ngāti Whātua Ōrākei generally, however, is to expunge the mana whenua interests of all other iwi, including Te Ākitai, from the face of the Tāmaki isthmus. Ngāti Whātua Ōrākei are attempting to use the law as a tool to subjugate the customary and tikanga based interests of others and make their expression in a Treaty settlement context subordinate to the exercise of Ngāti Whātua Ōrākei tikanga and authority and, ultimately, subject to Ngāti Whātua Ōrākei's whim.
>
> …
>
> Te Ākitai Waiohua says that rights and interests in Tāmaki are more complex than one hapū being able to lay an impenetrable blanket with fixed and absolute boundaries of mana whenua and ahi kā over a vast area that has the effect of subordinating and/or ousting the customary interests and Treaty settlement opportunities of other iwi and hapū.

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382 Waitangi Tribunal *Tāmaki Makaurau Report* at 12.
383 D Wilson Brief at [29].
384 Meredith Brief at [53].
385 Catherine Iorns Magallanes "The use of tangata whenua and mana whenua in New Zealand Legislation: Attempts at Cultural Recognition" (2011) 42 VUWLR 259 at 266-267; and Waitangi Tribunal *Rēkohu Report* at 28–29.
386 Te Ākitai Waiohua Closing at [7] and [183].

[274] Te Ākitai Waiohua say that exclusivity is not a necessary corollary of mana and the evidence highlights that shared mana whenua not only exists but is common in Māori society, pointing to the agreements between Ngāti Whātua Ōrākei and Ngāti Pāoa in the Kawenata Tapu, between Ngāi Te Rangi, Ngāti Pūkenga and Ngāti Ranginui in Tauranga moana. She points to the Arbitration Panel in the Central North Island Forest lands recognising substantive, medial and limited mana whenua in blocks between Ngāi Tuhoe, Ngāti Manawa, Ngāti Rangitihi, Ngāti Tuwharetoa, Ngāti Whakaue, Ngāti Whare, Raukawa and affiliated Te Arawa iwi/hapū.[387] Several Waitangi Tribunal reports and court decisions recognise shared mana whenua in Rēkohu, Ngāti Awa, Port Nicholson, Tararua and Pouākani.[388] Ms Coates submits that shared mana whenua is even implicit in the very construct of Ngāti Whātua Ōrākei with three constituent hapū having "joint" mana over their lands, associate with one marae and have shared responsibility for the people and their whenua.

[275] Te Ākitai Waiohua see the world through their connections and relationship to land and people; an inclusive way of being, best expressed through whakapapa, whanaungatanga and manaakitanga. Nigel Denny's evidence is:[389]

> Tāmaki is very different from other places where historically there has been only one key group that dominates the area through to modern times. In Tāmaki iwi live side by side in a complex network involving multiple layers of interest spreading across the whenua. The name Tāmaki Makaurau as the place 'desired by many' or 'of a hundred lovers' acknowledges this status.

[276] Te Ākitai acknowledges subsequent intermarriage of Ngāti Whātua Ōrākei with Waiohua gave Ngāti Whātua Ōrākei a take in Tāmaki but say the underlying mana of the Waiohoa people through their ancestral connections and their take to the land remained. Te Ākitai Waiohua maintained a whakapapa connection to the land through

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387 Central North Island Forests Land Collective Settlement Act 2008, sch 2.

388 Waitangi Tribunal *Rēkohu Report* at 26; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ngāti Awa Settlement Cross-Claims Report* (Wai 958, 2002) [Waitangi Tribunal *Ngāti Awa Cross-Claims*] at 135; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Port Nicholson Block Urgency Report* (Wai 2235, 2012) at 11; *Paewai v Tāmaki a Nui-A-Rua Taiwhenua (Kahungunu) – Rangitane o Tāmaki Nui-A-Rua Inc Society* 11 Takitimu Appellate MB 96 (11 ACTK 96) at 9; *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 [*Mercury* (HC)] at [10](d); and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on Auckland Railway Lands* (Wai 264, 1992) at 5 and 11.

389 Brief of Evidence of Nigel Denny, 13 October 2020 at [8].

strategic marriage with Ngāti Whātua after the battle between Kiwi Tāmaki and Te Taoū.[390] David Wilson Takaanini says: [391]

> Ngāti Whātua claim that these strategic inter-marriages cemented their rights and interests in the whenua. But this is like saying that they inter-married with us but not us with them. Whakapapa has two sides and you can't wipe out one. We see these marriages not only as a means of peace-making but as a way of continuing to connect us by whakapapa to the land that our tupuna held.

[277] Te Ākitai rejects the blanket claim of exclusive mana whenua that Ngāti Whātua drape over the isthmus. Ms Coates submits that if Waiohua mana whenua rights were completely extinguished in the isthmus, the concept of utu and the reciprocal obligation to rebalance mana, would have meant continued fighting. But instead Te Ākitai Waiohua tūpuna fought alongside Ngāti Whātua Ōrākei. The pre-eminent right according to tikanga Māori was and remains take tupuna rather than take raupatu, which was a weak form of right.[392] That Ngāti Whātua Ōrākei, by marrying into Waiohua, can now claim take tupuna, does not preclude Te Ākitai Waiohua also having rights and interests in the whenua on the same basis.[393]

[278] In contemporary Auckland, where little land is held by Māori, Te Ākitai Waiohua say it is predominantly at the marae where haukainga can exercise exclusive control or authority. Outside of the marae, one needs to navigate the many and varied interests that exist in a particular context.[394] The evidence, including their name, suggests the "heartland" of Ngāti Whātua Ōrākei is at Ōrākei where they have their strongest association.[395] This is the land Ngāti Whātua Ōrākei did not sell and over which the Bastion Point protest occurred. Pā sites are markers of where ancestors once resided but many groups, including Te Ākitai, can point to significant pā sites of their tūpuna including throughout the central isthmus.

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390 D Wilson Brief at [30].
391 At [34].
392 Waitangi Tribunal *Rēkohu Report* at 7; and Meredith Brief at [61] and [66]–[70].
393 NOE 296/4–9 (Kawharu).
394 D Wilson Brief at [45]–[50], NOE 2952/18–31 (D Wilson).
395 NOE 62/18–28 (Kapea).

E The Crown's comments

[279] Dr Ward, for the Crown, makes general submissions about the claim by Ngāti Whātua Ōrākei to mana whenua. He submits the Court may assess the lawfulness of the current Crown policy at issue without determining the true position of groups at tikanga in the 18th and 19th centuries.[396] He notes that even specialist courts, such as the Māori Land Court and Māori Appellate Court, are cautious in approaching claims to mana whenua, including claims to exclusive mana whenua, which the Māori Land Court has said are preferably dealt with on the marae.[397]

[280] Dr Ward submits that Ngāti Whātua Ōrākei has not established the content of their asserted tikanga rights, either in terms of defining the exact nature of the tikanga concepts, such as the inherently exclusive nature of mana whenua, or their consequences at tikanga:

(a) The evidence is that different iwi hold different perspectives on tikanga and may describe interests in different ways.[398] None of the "universally significant" principles of tikanga identified by the Ngāti Whātua Ōrākei witnesses include ahi kā, mana whenua, take tuku, tuku whenua and take hoko, or exclusive mana whenua.[399]

(b) There is a lack of specificity as to what is meant by Ngāti Whātua Ōrākei tikanga. Ngarimu Blair suggests it is simply the expression of tikanga concepts of general understanding across iwi.[400] Te Kurataiaho Kapea says it is "[w]hatever is determined by Ngāti Whātua Ōrākei" and declines to provide an example.[401]

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396 Attorney-General Closing Submissions, 19 April 2021 [Crown Closing] at [368].

397 *Tararua District Council* (1994) 138 Napier MB 85 (138NA MB 85) at 10.

398 NOE 2942/14–17 and 2945/13–22 (D Wilson); NOE 3076/20–26 (K Wilson); NOE 2376/5–14 (W Ngamane); NOE 2393/25–31 (Taipari); NOE 2567/8–15 (Taua); NOE 294/8–10 (Kawharu); NOE 73/17–29 (Kapea).

399 Kruger Brief at [54]–[58]; Kawharu Brief at [3]; Meredith Brief at [33]–[53]; NOE 703/12–15 (Williams).

400 NOE 426/19–23 (Blair).

401 NOE 45/8–24 (Kapea).

(c) There is an absence of consensus on the nature and characteristics of mana whenua:[402] whether it is an exclusive concept; whether it is proprietary in nature; whether recognition by others is requires; whether the concept of a "heartland" is generally understood and applied.

(d) The characteristics of ahi kā are unclear, for example in relation to how long it takes to lose an interest by not maintaining ahi kā and how a tribe can exercise ahi kā where it owns little of its traditional lands.[403] The nature and incidents of take tuku, tuku whenua and take hoko are unclear.

[281] The Crown's position is:[404]

> In summary, the evidence presented in this proceeding suggests the nature and incidents of "mana whenua", "ahi kā", and "tuku whenua" are highly contested. The plaintiff's evidence fails to clearly articulate the characteristics of these concepts, the criteria for their establishment, or their tikanga implications (in particular what constitutes an "erosion" of mana whenua [or] "offence" to Ngāti Whātua Ōrākei tikanga). Given the contested nature of these concepts, and the plaintiff's claim to exclusivity, the Attorney-General submits it would not be appropriate or even possible, for the Court to declare that Ngāti Whātua Ōrākei holds mana whenua and ahi kā in central Auckland. Nor can the Court be satisfied that the tikanga evidence establishes any general "rule" that can be said to govern interactions between iwi and the Crown in the negotiation and settlement of Treaty claims.

[282] Otherwise, in relation to the historical evidence, the Crown takes issue with Ngāti Whātua Ōrākei's characterisation of the 1840 transfers of land as tuku whenua and the implications of that. Dr Ward points to Ngāti Whātua Ōrākei's account of tuku not being accepted by other iwi.[405] He submits Ngāti Whātua Ōrākei would have been aware that transactions with the Crown would not have been purely tikanga transactions from the outset. And the Crown takes legal points regarding the effect of the alleged tuku whenua.

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402 NOE 1195/13–26 (Meredith); *Te Mātāpunenga* at 178; NOE 1199/26–28 (Meredith); Waitangi Tribunal *Rēkohu Report* at 28–29; and Crown Closing at [311]–[331].
403 Crown Closing at [332]–[334].
404 At [299].
405 At [397].

F The position of Ngāti Kuri and Ngāi Te Rangi

[283] Ngāti Kuri and Ngāi Te Rangi rely on the evidence of Charlie Tawhiao of Ngāi Te Rangi, called by Ngāti Whātua Ōrākei, regarding mana whenua at tikanga:

> 45 Overlapping claims and overlapping interests exist as a natural part of Maori reality. To be properly considered in the context of settling Treaty of Waitangi grievance claims they need to be considered within the context from which they are derived, that is within the context of tikanga Maori. Tikanga Maori requires that interests in land and territory be viewed as degrees of relationship of a people to that land or territory.
>
> 46 Although my whakapapa allows me to claim relationships with many hapū and iwi, I would not claim to have equally strong relationships with all of the hapū and iwi to whom I have whakapapa links. My primary cultural identity derives from my home marae and hapū, the place where I live and the place I will go to when I die. But at certain times, those wider whakapapa connections, no matter how old or distant, can be very important. For example, they can be revived in whaikōrero at a tangihanga to establish my relationship to the deceased. And in that way I am able to bring back to living memory our broader connections as iwi Māori.
>
> 47 The important point is that just as with whakapapa connections, not all interests in land and territory are equal. Mana whenua is the highest and most powerful form of interest that defines and governs all other interests. There can be no " layering" of mana whenua. There can, however, be layering of lesser interests over mana whenua interests, according to tikanga.
>
> …
>
> 51 The Waitangi Tribunal's notion of "layers of interests" and the Crown's interpretation of this as meaning that *all layers have equal merit,* is a gross oversimplification of these relationships.[406] Rather than layers of interests, cultural interests in this context exist as a complex series of relationships that exist alongside each other each with its own dimensions. To accept all interests as having equal value in tikanga terms demeans the very tikanga that underpins such interests. That tikanga places relationships to the natural universe including each other, above all else. A conflation of these cultural interests displaces the true nature and intent of those interests which is to preserve relationships between hapū and iwi and the whenua that defines them. Doing so provides a simple solution for the Crown but one that is least likely to correspond with reality.

[284] Mr Smith, for Ngāti Kuri and Ngāi Te Rangi, submits:[407]

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406 Waitangi Tribunal *Tāmaki Makaurau Report* at 95–96.

407 Ngāti Kuri and Ngāi Te Rangi Closing, 19 April 2021 [Ngāti Kuri and Ngāi Te Rangi Closing] at [15] (footnotes included).

> Mana whenua is the highest and most powerful form of interest that defines and governs all other interests.[408] Mana whenua is the ability to exercise authority over access to a territory and resources.[409] It is not divisible.[410]

[285] Mr Smith points to Charlie Tawhiao's evidence under-cross examination that the agreement between Ngāi Te Rangi, Ngāti Pūkenga and Ngāti Ranginui, to share mana whenua over Mauao, was a consensual accommodation and an exception to the general rule of the indivisibility of mana whenua.[411] They submit this is consistent with the findings of the adjudication panel on the Kaingaroa Forest licence dispute.[412] Neither Ngāti Kuri nor Ngāi Te Rangi take a position on tikanga as it applies in Tāmaki specifically.[413]

G Historical experts

[286] In my interlocutory judgment in these proceedings of 25 November 2020, I requested the historical witnesses to confer in order to produce a joint witness statement before the hearing about the matters on which they agree and disagree, and their reasons.[414] Before Christmas 2020, I further requested them (including Mr Taua and without client representatives) to endeavour to confer in the second half of January 2021.[415]

[287] On 17 February 2021, counsel for Ngāti Whātua Ōrākei provided a summary of the outcome of the historical experts' conference, prepared by Dr Vincent O'Malley, the historical expert called by Ngāti Whātua Ōrākei who attended. On 22 February 2021, counsel for Te Toru provided a similar document prepared by Mark Derby and agreed to by their historical experts, Peter McBurney, Professor Michael Belgrave and Te Warena Taua. In response to queries from counsel, I directed that the memoranda filed should be added to the common bundle, limited updating evidence should be

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408 Brief of Evidence of Charles Tawhiao, 2 June 2020 [Tawhiao Brief] at [46]
409 Brief of Evidence of Charles Tawhiao in Reply, 4 December 2020 [Tawhiao Reply] at [14].
410 Tawhiao Brief at [31]–[32].
411 NOE 1311/22–1312/19 (Tawhiao).
412 Moana Jackson, Tahu Potiki and Wayne Ngata *The Findings of the Adjudication Panel in the Mana Whenua Process* (Convened by the Central North Island Iwi for Te Kaingaroa a Haungaroa Crown Forest Licences, 26 June 2014).
413 Ngāti Kuri and Ngāi Te Rangi Closing at [12].
414 *Ngāti Whātua Ōrākei* (HC issues) at [41](a).
415 *Ngāti Whātua Ōrākei Trust v Attorney-General* CIV-2015-404-2033, 23 December 2020 (Minute No 11) at [6].

permitted, and cross-examination should be permitted regarding the substantive issues but not the process of the conferences.[416]

[288] In summary, the positions on which the historical experts could agree in relation to the historical narratives were:[417]

(a) Prior to 1820, the main permanent settlements in the area were at Mokoia, Mauinaina and in the Manukau area. Te Toru witnesses also considered there were no permanent settlements on the Tāmaki isthmus at the time.

(b) In the context of ongoing conflict across the Tāmaki district in the 1820s, Ngāti Whātua withdrew from the area:

(i) after 1826 (Ngāti Whātua Ōrākei witness); or

(ii) around 1826 for strategic reasons, as had other iwi (Te Toru witnesses).

(c) Multiple iwi re-located to the Waikato district temporarily.

(d) Tāmaki was not completely deserted then. Various groups (according to the Ngāti Whātua Ōrākei witness) or iwi groups (according to Te Toru witnesses) sporadically returned or remained while others were in Waikato.

(e) The return to the Tāmaki isthmus was a gradual one, with Ngāti Whātua settling at first in the Manukau area, before a gradual return to Tāmaki by the late 1830s (Ngāti Whātua Ōrākei witness) or in the late 1830s (Te Toru witnesses).

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416 *Ngāti Whātua Ōrākei Trust v Attorney-General* CIV-2015-404-2033, 3 March 2021 (Minute No 13) at [21].

417 Ngāti Whātua Ōrākei Memorandum of Counsel, 17 February 2021; and Te Toru Joint Memorandum of Counsel, 22 February 2021.

(f) Before 1840, in general terms, tribal boundaries were often fluid or poorly defined and sometimes intersected or overlapped. The parties living on the isthmus in the period immediately before 1820 generally had relatively close and cordial relations with one another.

(g) The October 1840 transfer by Ngāti Whātua Ōrākei to the Crown was a conditional transaction rather than an outright sale of land.

(h) The evidence given in the Native Land Court hearings on the Ōrākei block is relevant when assessing relationships within the specified area. Such evidence should be critically assessed like any other form of evidence.

(i) All historical sources have limitations and should be critically analysed and examined. Particular forms of evidence should not be privileged over others.

[289] I accept that the positions on which the historical experts have been able to agree have added evidential weight. I do not consider that what they agreed at the conference materially impacts the respective positions of the parties or interested parties about the historical narrative. I take them into account in arriving at my views on the historical narrative.

H Pūkenga

[290] In the judgment of 25 November 2020, as with the historical experts, I requested the pūkenga, the expert witnesses in tikanga called by the parties and interested parties, to confer in order to produce a joint witness statement before the hearing about the matters on which they agree and disagree, and their reasons.[418] Each of the pūkenga was an impressive witness, making careful responses drawing on deep knowledge. Collectively, their expert evidence about tikanga is authoritative.

[418] *Ngāti Whātua Ōrākei* (issues & pūkenga) at [41](a). Some of the expert historian witnesses also give their opinions on customary interests held by various iwi but, to the extent that those opinions depend on tikanga, I do not place great weight on them, compared with the evidence of the pūkenga who are experts in tikanga.

[291] Paul Meredith summarised what he, Tāmati Kruger, and Charlie Tawhaio, pūkenga called by Ngāti Whātua Ōrākei, considered had been agreed.[419] Dr Te Kauhautu Maxwell also prepared a summary, in two parts, as agreed by the pūkenga called by Te Toru: Dr Te Kauhautu Maxwell; Te Warena Taua; Hauāuru Rawiri; Wati Ngamane; Dr Korohere Ngāpō; and David Wilson Takaanini:[420]

(a) Part A contained a description of some of the concerns the experts had with the way the conference was run. I accept their advice that the Court must appoint a facilitator for such conferences to ensure set tasks are completed and attendees understand their roles and responsibility to the Court.

(b) Part B was a marked-up version of the summary prepared by Paul Meredith, including an added translation in te reo Māori. There were differences between the English summary prepared by the pūkenga called by Ngāti Whātua Ōrākei and those called by Te Toru. I describe here the responses to the questions regarding mana whenua in Tāmaki Makaurau.[421]

[292] Question 1: What are the fundamental principles of tikanga that apply to relationships between iwi and to the whenua in Tāmaki Makaurau, and elsewhere, including any principles relating to shared interests and whakapapa?

(a) The pūkenga called by Ngāti Whātua Ōrākei stated that "[i]n relation to relationships between iwi, consideration must be given to whakapapa and whanaungatanga". The pūkenga called by Te Toru expanded this to say that consideration must be given to "the fundamental principles of tikanga with particular regard to whakapapa and whanaungatanga".

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419 Tikanga summary attached to Ngāti Whātua Ōrākei Memorandum of Counsel, 17 February 2021 [Ngāti Whātua Ōrākei Pūkenga Summary].
420 Tikanga summary attached to Te Toru Memorandum of Counsel, 22 February 2021 [Te Toru Pūkenga Summary].
421 See NOE 2373/4–2374/26 (W Ngamane).

(b) The pūkenga called by Ngāti Whātua Ōrākei stated that "in the context of land i.e. He whenua te take, whakapapa and whanaungatanga are also relevant in considering the customary rights and interests to land derived from particular lineage and relationships (eg moenga rangatira, taumau ie. strategic marriages)". The pūkenga called by Te Toru added "the fundamental principles of tikanga with regard to whakapapa and whanaungatanga" and deleted "taumau ie. strategic marriages".

(c) All pūkenga "[a]greed that the fundamental principles of tikanga in relation to the whenua in Tāmaki Makaurau, and elsewhere are those that are collectively known as Take Whenua" and that these include: Take Tupuna; Take Ahi Kā; Taka Tapatapa Whenua; Ngā Karakia Uruuwhenua. The pūkenga all agreed Take Tuku Whenua and Take Raupatu were on that list but the pūkenga called by Ngāti Whātua Ōrākei placed them first and third respectively while the pūkenga called by Te Toru placed them last. All pūkenga agreed these should not be considered a finite list. The pūkenga called by Te Toru "[a]greed that an interrogation of these Take Whenua will assist in identifying those that have mana whenua or shared rights and interests".

[293] Question 3: Has tikanga applied in Tāmaki Makaurau since Māori first inhabited the Tāmaki isthmus or only from 6 February 1840? If the former, how does pre-1840 tikanga shape the relationships between iwi and to the whenua in Tāmaki Makaurau post 1840? All pūkenga:

> Agreed that tikanga and those take whenua have applied since Māori first inhabited the Tāmaki isthmus and that they existed pre and post 6 February 1840.
>
> As to the second question, it was agreed that the answer more so lies in investigating the historical and contemporary narratives of each tribe and their relationship to the land and each other. This will inform the relevant tikanga at play. Each individual iwi would need to speak to this.

[294] Question 5: If [Ngāti Whātua Ōrākei claims (a) exclusivity over the whenua described as the "2006 RFR land" as against all other iwi and (b) a veto over the whenua described as "1840 Transfer Land" as against all other iwi] what is the tikanga

that applies in Tāmaki Makaurau that supports such a claim? All pūkenga agreed (with one difference in wording marked up by the pūkenga called by Te Toru):

> If the answer is yes, the take whenua identified in Question 1 would need to be demonstrated with the support of historical narratives and evidence.
>
> Agreed that the notion of exclusivity could be expressed in tikanga, however it was maintained by the Tāmaki iwi present that ~~this was not exclusivity~~ [no one iwi has exclusive mana] in the Auckland CBD area, so such tikanga did not apply.

[295] Question 6: In terms of the tikanga that applies in Tāmaki Makaurau, what are the respective iwi interests/relationships of each of the iwi to the whenua described as the "2006 RFR land"? The pūkenga stated (with differences marked up by those called by Te Toru):

> Noted each iwi present claimed ~~a~~ mana whenua interest to the Auckland CBD area.
>
> Agreed that each iwi would have to demonstrate their ~~take whenua~~ [tikanga based interests] as described in Question 1 to substantiate that claim.
>
> Acknowledgement again of Pākehā settlement and colonisation in shaping historical and contemporary interests and relationships.
>
> Agreed important to ~~interrogate any~~ [refer to whakapapa, taunaha whenua, tapa whenua, pepehā, whakatauākī,] moenga rangatira (chiefly strategic marriages) as well as kōrero rangatira, kupu taurangi, kōrero ōhākī (noted sayings/promises/last words) in relation to the land.
>
> [The "2006 RFR land" no longer exists; it was negated by the Waitangi Tribunal Tāmaki Report 2007]
>
> Agreed that ~~any notion~~ [an interrogation] of [these Take Whenua will identify who has Mana Whenua or] shared [rights and] interests ~~and rights requires the mutual agreement of the parties involved~~.
>
> [If the court wishes to ascertain that individual iwi have Mana Whenua (interests) the court would need to carry out its own interrogation.]
>
> [It is not the responsibility of the individual iwi opposing this claim to again justify ourselves to the court, we had to prove that we held Mana Whenua to the Crown during the settlement process.]

[296] Question 7: Have the following tribes maintained ahi kā and mana whenua in the "2006 RFR Land": Ngāti Whātua Ōrākei; Te Ākitai Waiohua; Ngāi Tai ki Tāmaki; Te Kawerau a Maki; Ngāti Te Ata; Ngāti Tamaoho; the Marutūāhu Iwi (individually

and collectively); Waikato-Tainui? All the pūkenga (with differences marked up by those called by Te Toru):

> Agreed that it is for [each] iwi to provide their own historical narratives and evidence to validate their mana whenua and ahi kā.
>
> [If the court wishes to ascertain that individual iwi have Mana Whenua (interests) the court would need to carry out its own "interrogation".]
>
> [It is not the responsibility of the individual iwi opposing this claim to again justify ourselves to the court, we had to prove that we held Mana Whenua to the Crown during the settlement process.]

[297] Question 8 (or question 2 according to the pūkenga called by Te Toru): The status in tikanga of the "1840 Transfer Land". All the pūkenga (with one wording difference marked up by those called by Te Toru):

> Agreed iwi might claim and have interests post any transfer of land.
>
> Agreed it is important to examine whether the transferee/s of any land had such a right to do so in accordance with relevant tikanga including whether the land was theirs. Those take whenua listed in Question 1 would need to be examined to establish whether the transferee/s held ~~the~~ mana whenua.
>
> No agreement as to the nature of the transfer ie whether it was a tuku or hoko and what it entailed.

V Tikanga

A What is tikanga?

[298] Dr Te Kahautu Maxwell states:[422]

> Tikanga must have a base or a tūrangawaewae for it to stand up to the tests of validity. Tikanga is derived from the pakiwaitara, the creation stories a power delegated from the gods to the ancestors. The fact that tikanga has its origins with the gods gives it validity and tapu sanctity. For example, when Ngā Tama a Rangi held a wānanga (counsel) to separate their parents, this was the first example of a wānanga. When the sons of Rangi debated whether to separate their parents or not, this was the first example of whaikōrero. During this separation of Ranginui (Sky father) and Papatūānuku (Earth mother) it is said that Papatūānuku cried out in pain and bade farewell to Ranginui; this was the first example of karanga. The fact that these practices have their genesis in the creation stories is validation. The people validate tikanga, the marae, the hapū and the iwi. Iwi validate tikanga by adhering to the rule and practicing the tikanga in their own particular way that is unique to their iwi and their region.

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422 Maxwell Brief at [124].

[299] Tāmati Kruger put it this way: [423]

> Tikanga and kawa as ideologies ground themselves in Māori philosophy, or iho matua. Quite literally iho is the umbilical cord that connects a woman and her child. Matua suggests something that is chiefly, important and occurring before anything else. Iho matua, then, is the foundational nature of wisdom, insight and appreciation according to Māori traditions. It is not a coincidence that the ideas underpinning Māori philosophy relate to the importance of the connection between woman and child, and the creation of life. In Māori tradition, the creation of human life and all elements of the natural world are themselves grounded in an understanding of the origins of the cosmos. That knowledge system is also referred to as kawa, the same kawa as the protocols or practical expression of tikanga Māori. This connection represents an ongoing and enduring connection between the human and the natural worlds and the cosmological origins of Te Ao Māori.

[300] A number of witnesses referred to a simple but elegant explanation of tikanga by the Rt Rev Manuhuia Bennett, who was quoted by Margaret Kawharu:[424]

> There is a great deal of thought and writing around the concept of tikanga Māori but one of the simplest definitions I have heard of is from the Reverend Manuhuia Bennett, who said "tikanga", or custom, was the "right person, doing the right thing, in the right way,"[425] that is within a Māori cultural framework. A Māori cultural framework is always three dimensional.

[301] Tikanga can be understood to be a conception of behaviour that is tika or, as Tāmati Kruger explains:[426]

> 38 Broadly speaking, tikanga Māori is a set of binding principles, beliefs and traditions practised collectively by Māori whānau, hapū and iwi since time immemorial. The word tika means 'correct', 'just', 'decent' and 'honourable' in te reo Māori, and so tikanga is considered ideologically as the right way to do things, which accordingly guides and constrains all aspects of Te Ao Māori and Māori life including social relationships and ceremonies, moral behaviour, economic activity and so on. There are consequences for breaching tikanga, which are generally proportionate to the particular transgression.
>
> 39 The practice or practical expression of tikanga is sometimes distinguished from the guiding principles of tikanga itself. These protocols are referred to as kawa, and are always grounded in the principles of tikanga. Kawa are flexible and adapt over time to

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423 Kruger Brief at [44]–[45] (italics of Māori words omitted).

424 Kawharu Brief at [20] and [241]. Similar definitions are offered in the Andrews and Tupuhi Brief at [27]; Kruger Brief at [38]; Blair Brief at [328]; Meredith Brief at [30]; W Ngamane Brief at [18]; and NOE 2705/13–16 (Maxwell).

425 Alex Frame and Paul Meredith "Mock Fighting and Performed Reconciliation" in Peter Adds and others (eds) *Reconciliation, Representation and Indigeneity* (Universitätsverlag Winter GmbH Heidelberg, Heidelberg, 2016) 138.

426 Kruger Brief at [38]–[39].

> changing circumstances, though they are first and foremost coercive and normative in nature.

[302] The authors of *Te Mātāpunenga* say:[427]

> Tika has an outer or surface meaning of 'straight, direct, keeping a direct course', tied in with moral connotations of justice and fairness, including notions such as 'right, correct'. Ryan adds 'authentic, rights, bulls-eye' and 'realistic' to the list of English equivalents. Ultimately derived from Proto Eastern Oceanic *tika 'dart, throw a dart', the modern Māori word comes from Eastern Polynesian *tika 'straight, correct, right', senses which are also reflected in cognate terms in Mangarevan, Tahitian, Tuamotuan and Rarotongan.
>
> Tikanga is the nominalised form of tika. This word has connotations like 'rule, plan, method', extending through a general notion of any normal or usual way of being or acting, to perhaps three sets of related but to some extent separate ideas, 'reason, meaning or purport', 'custom' in a quasi-legal sense (as distinct from the more mundane meaning of 'habit', for which tikanga can also be employed), and 'authority, control, legal condition or criterion'. These same connotations can be found for cognates of tikanga in other Eastern Polynesian languages, e.g. Rarotongan, tika'anga 'right, authority, the proper thing to do; decision'.

[303] The evidence of Dr Te Kahautu Maxwell is that "tikanga determines the right way or the correct way of exercising your kawa".[428] Dr Korohere Ngāpō put it this way:[429]

> Tikanga Māori is an order of beliefs and practices of what is normal and right. Tikanga operates at the personal (private) or public (group) level. Tikanga provides a level of Māori ethics and what is acceptable to keep order in a hapū or iwi setting. Broadly speaking, tikanga Māori is connected to kawa that derives from the Māori atua. So, tikanga is a structure giving effect to fundamental principles to achieve balance. Tikanga can be interchangeable where kawa is rigid like the rising and setting of the sun.

[304] Hirini Moko Mead suggests in his text *Tikanga Māori* that tikanga can be considered in several different ways: as a means of social control and interpersonal relationships; in terms of ethics and moral judgements; as a normative system; as customary law (by lawyers); as an element of economic activity; as a means of rehabilitating prisoners; and an essential part of mātauranga Māori or Māori knowledge.[430]

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427 *Te Mātāpunenga* at 429 (italics omitted for words in te reo).
428 NOE 2705/4–26.
429 Ngāpō Brief at [9].
430 Mead *Tikanga Māori* at 6–8.

[305] In terms of a western conception, tikanga can be viewed as consisting of norms of behaviour which a hapū or iwi develop over time and which acquire such force that they are regarded by that hapū or iwi as binding. As the footnotes indicate, valuable books have been written on tikanga, in addition to the valuable evidence given in this case. I do not treat the subject at further length, but I do outline my understanding of salient characteristics of of tikanga relevant to this case, based on the evidence and submissions.

[306] First, there are no differences between the parties as to the need to understand tikanga holistically as an interlocking set of reinforcing norms. There may not be only one principle of tikanga which determines what is tika in a given situation. Rather, there is likely to be a set of principles which reinforce each other in pointing the way. As Ms Coates submits, for Te Ākitai Waiohua, "[t]ikanga is therefore a system comprised of interwoven principles that guides action and relationships".[431] As the Law Commission said in 2001, in a passage it quoted again in two of its 2021 reports:[432]

> As always in tikanga Māori, the values are closely interwoven. None stands alone. They do not represent a hierarchy of ethics but rather a koru, or a spiral, of ethics. They are all part of a continuum yet contain an identifiable core.

[307] Second, tikanga revolves around values and a value system. In 1996, Taihakurei Durie defined "Māori custom law" as "values, standards, principles or norms to which the Māori community generally subscribed for the determination of appropriate conduct".[433] In 2001, the Law Commission endorsed Joan Metge's view

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431 Te Ākitai Waiohua Closing at [154] citing NOE 704/17 (Williams).

432 Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) [Law Commission *Māori Custom and Values*] at [126], quoted in Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person's property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021) at [2.47] [Law Commission *Succession Issues Paper*]; and Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) [Law Commission *Succession Report*] at [2.15].

433 Meredith Brief at [29]; citing Edward Taihakurei Durie "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 Otago L R 449 at 452.

of tikanga as "way(s) of doing and thinking held by Māori to be just and correct, the right Māori ways".[434] The Commission said:[435]

> Tikanga Māori comprises a spectrum with values at one end and rules at the other, but with values informing the whole range. It includes the values themselves and does not differentiate between sanction-backed laws and advice concerning non-sanctioned customs.[436] In tikanga Māori, the real challenge is to understand the values because it is these values which provide the primary guide to behaviour.[437]

[308] Accordingly, "an analysis of any particular tikanga or kawa should reveal the continuously guiding presence of mana atua, mana tangata and mana whenua".[438] Similarly, Paul Meredith's evidence is:[439]

> … there is no way in tikanga Māori to divorce the rights and responsibilities with respect to land with those rights and responsibilities associated with people. In Te Ao Māori, the relationship between people and land is intimate and always informed by whakapapa (genealogy) links to tupuna (ancestors) and atua (spiritual deities).

[309] Third, the implications of this speak to the role of tikanga in constituting iwi and hapū. The Waitangi Tribunal has said:[440]

> Tikanga is both a consequence and a source of Māori identity. Unlike most Western law, tikanga is not a norm that is external to the person. Without [their] relationship through tikanga to land by whakapapa, in a fundamental sense, [they do] not exist. Tikanga defines [them]; protects [them]; shapes [their] idea of [themselves] and [their] place in the world.

[310] In a very real sense, then, tikanga is fundamental to "constituting" an iwi or hapū. It is essential to their identity along with, for example, their tribal histories, traditions and places. Without their tikanga, an iwi or hapū are not who they are. It follows that tikanga is quintessentially developed by each iwi or hapū, in the exercise

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434 Law Commission *Māori Custom and Values* at 16, citing Joan Metge *Comments provided to the Law Commission on a draft "Māori Custom and Values in New Zealand Law"* 16 February 2001 at 1. This Study Paper was developed while Denese Henare was a Commissioner and with the support and guidance of Manuhuia Bennett, Taihakurei Durie, Mick Brown, Mason Durie, Whetumarama Wereta and Te Atawhai Taiaroa.

435 At [75] (footnotes included).

436 Joseph Williams *He Aha Te Tikanga Māori* (Law Commission, 1998) [Williams *He Aha Te Tikanga Māori*] at 8.

437 At 8.

438 Kruger Brief at [59] (italics of Māori words omitted).

439 Meredith Brief at [53].

440 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 3.

of their rangatiratanga. As their custom, and as essential to their identity, principles of tikanga are norms of that iwi or hapū.

[311] Fourth, there are different versions of which principles would be regarded as "core" to tikanga. Ngāti Whātua Ōrākei identify seven: whanaungatanga, manaakitanga, kaitiakitanga, mana, tapu and noa, utu and ea.[441] Other iwi in this proceeding emphasise particular principles. The Crown identifies other lists.[442] As all parties here agree, tikanga is inherently contextual. The principles that are relevant will depend on the context of the particular issue that arises, holistically.

[312] Fifth, obviously but importantly, as circumstances change over time, norms evolve in response. Tikanga and its practice can change over time. None of the pūkenga disagreed with that.[443] It was accepted that "tikanga have continued to evolve and are not static".[444] As Mr Mahuika submits, there can be differences between experts as to what changes and what endures but there is a general view that general principles, and the way they manifest, change.[445] Tāmati Kruger describes tikanga as "ongoing and continuously updating".[446] Paul Meredith says:[447]

> [37] In addition to the performative and normative nature of tikanga, tikanga is characteristically dynamic and receptive to change. It is this ability of tikanga to change, and the fact that it is socially constructed as a matter of regional tribal practice rather than by a central governing body, that accounts for some variations among tribes. Nevertheless, Durie asserts that change was effected with:
>
> > … adherence to those fundamental principles and beliefs that Māori considered appropriate to govern the relationships between persons, peoples and the environment.

[313] Paul Meredith also agrees that tikanga can evolve, through the practices of the people of an iwi or hapū, guided by historical precedent and their rangatira.[448] He

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441 Ngāti Whātua Ōrākei Closing at [5.34].
442 Crown Closing at [302]. See also Law Commission *Māori Custom and Values* at n 165, citing Joan Metge *Commentary on Judge Durie's Custom Law* (unpublished paper for the Law Commission, 1996) at 3.
443 See Meredith Brief at [37] and Meredith Reply at [44]; Kruger Brief at [56]; NOE 715/13–20 (Williams), 264/21–29 (Kawharu), 2701/20–29 and 2702/1–26 (Maxwell).
444 Meredith Reply at [44]. See Kruger Brief at [56]; and NOE 301/24–29 (Kawharu), 723/10–24 (Williams), 2701/20–29 and 2702/1–26 (Maxwell).
445 Notes of Closings 272/30–273/19.
446 Kruger Brief at [56].
447 Meredith at [37] (footnote omitted).
448 NOE 1167/17 – 1168/20 (Meredith).

considers higher level principles of tikanga are less likely to change over time, compared with variations in how they are expressed.[449] All customs and law change. Otherwise they would not necessarily perform the function which they developed to perform. As the Law Commission said in 2001, "[t]ikanga Māori should not be seen as fixed from time immemorial, but as based on a continuing review of fundamental principles in a dialogue between the past and the present".[450]

[314] And sixth, Dr Te Kahautu Maxwell says "[t]ikanga is a way of life".[451] Wati Ngamane says, "[t]ikanga is not a formula found in books, it is lived and passed on through the generations in the traditional way."[452] Hirini Mead explains in his text that the ideas and beliefs about tikanga are carried in the minds of individuals, building up during their lifetimes "by seeing, being told, instructed and scolded, and by research and reading".[453] He also notes the importance of the operation or performance of the idea of tikanga, and the need for social validation by witnesses of the performance of tikanga.[454] He summarises:[455]

> By now it is clear that tikanga at one level is conceptual and represents a set of ideas, beliefs and practices. At another level it has to do with practice. Tikanga may be translated as custom (which applies especially to the practice of tikanga) or it might be referred to as a customary concept (which focuses on the set of ideas). There are also several aspects of tikanga which help us understand the nature and complexity of our customs. As well as the conceptual and performance aspects already mentioned, there is the ritual component, the witnessing of large-scale events, the value of manaakitanga, the knowledge and experience aspect of the group who are poised to carry out a tikanga, the assessment and judgment aspect, the obligations of participants, and the pragmatic knowledge that underpins some tikanga. In an analysis of tikanga all of these aspects need to be considered, and there are probably others.

[315] Paul Meredith reinforces this, saying: [456]

> [36] Tikanga norms and rules were not only practised day-to-day, they were passed on through generations predominantly via aural traditions such as

449 NOE 1168/18–20 (Meredith).
450 Law Commission *Māori Custom and Values* at [10], citing Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) at 51.
451 Maxwell Brief at [93].
452 W Ngamane Brief at [17].
453 Mead *Tikanga Māori* at 16–17.
454 At 17.
455 At 25.
456 Meredith Brief at [36] (italics of Māori words omitted).

> korero (oratory), waiata (songs), haka (performance) and karakia (prayer) among other performed actions. Unlike western normative concepts which are generally recorded and passed on in written instruments, these aspects of Te Ao Māori (the Māori world) all have their own charismatic force, which Māori refer to as te ihi me te wehi, which cannot be translated into writing.

[316] Tāmati Kruger says:[457]

> … my knowledge of tikanga Māori is gained, interpreted and passed on through lived experience and authentic cultural engagement with Te Ao Māori me Te Ao Tūhoe (the Māori world and the Tūhoe world), rather than through academic or written sources. After all, Te Ao Māori was, until fairly recently, an aural and practical tradition passed down through for example whaikōrero (oratory), karakia (prayer), waiata (song), haka (performance) and hui (meetings).
>
> …
>
> Practising tikanga and kawa is an inherently experiential and spiritual part of Te Ao Māori. It is difficult to commit an account of tikanga to writing because, as I've mentioned, Māori traditions are predominantly aural and practical.

[317] So, tikanga loses something when reduced to writing. It even loses something when explained orally, in the abstract. Tikanga is performed, more than stated. This is relevant to the giving of evidence of tikanga in court. The tikanga experts who gave evidence at trial were impressive in their command of nuance and subtlety in identifying and distinguishing how relevant principles of tikanga apply to different contexts. But their explanations and examples do not simply involve the dry stating of a principle and outcome. Sometimes, more meaning lies in what is not said. The pūkenga invoke unstated but salient human characteristics and virtues, such as honour, humility, and humour. Oral evidence of this is important. A written record is inferior. No doubt that poses particular challenges in appeals.

B Tikanga across iwi

[318] The parties disagree about the degree of difference between the tikanga of different iwi and about the extent to which tikanga Māori is common across all iwi and hapū in Tāmaki Makaurau and elsewhere:

[457] Kruger Brief at [20] and [40] (italics of Māori words omitted).

(a) Mr Hodder, for Ngāti Whātua Ōrākei, submits "[t]here is a body of custom within te ao Māori which is properly described as 'tikanga Māori'", which is "a set of binding principles, beliefs and traditions practised collectively by Māori as whānau, hapū and iwi since time immemorial".[458] He accepts tikanga can be flexible and localised but submits it is simply wrong to argue that tikanga in Tāmaki Makaurau is unique. He submits the non-expert witnesses of opposing iwi never truly explained the differences they saw between their and Ngāti Whātua Ōrākei tikanga, which were regularly revealed by cross-examination to be inconsequential.[459] Mr Hodder submits that, "[w]hile the expression of tikanga Māori may differ across regions and develop over time, the underlying values and principles that inform the broader system of tikanga Māori are universal and of general application".[460] Witnesses for Ngāti Whātua identified some "universally significant" principles of tikanga.[461] Mr Hodder submits Ngāti Whātua Ōrākei tikanga is entirely consistent with the relevant general principles of tikanga Māori and the burden of proof is on those who say their tikanga is different.[462]

(b) Mr Mahuika, for Ngāti Pāoa, submits that the suggestion that tikanga within Tāmaki is unique is not supported by the evidence.[463] He submits the different iwi traditions and history mean there is a difference in the application of tikanga but does not necessarily mean that different tikanga applies in Tāmaki from elsewhere.[464]

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458 Ngāti Whātua Ōrākei Closing at [5.25]–[5.26].
459 At [5.31].
460 At [5.28].
461 Kruger Brief at [54]–[58]; Kawharu Brief at [3]; Meredith Brief at [33]–[53]; NOE 703/12–15 (Williams).
462 Notes of Closings 379/21–32.
463 Ngāti Pāoa Closing at [7].
464 Notes of Closings 274/5–275/24.

(c) Mr Majurey, for Marutūāhu, put the most emphasis on differences between tikanga in Tāmaki Makaurau and elsewhere.[465] He submits there is no universally accepted tikanga in Tāmaki Makaurau.[466]

(d) Ms Coates, for Te Ākitai Waiohua, accepts there are some underlying values and principles that are universal and shared by Māori but submits that how they are expressed varies across regions and between groups.[467] She submits tikanga recognises regional as well as inter-iwi and inter-hapū variations.[468] She submits the nature of tikanga is such that specificity and context are vital.

(e) Mr Warren, for Ngāi Tai ki Tāmaki, submits they accept the principles and values underpinning tikanga are generally similar across Te Ao Māori.[469]

(f) Mr Ward, for the Crown, submits it is clear from the evidence that different perspectives on tikanga may be held between different iwi.[470] He submits the evidence is that tikanga is highly contextual and interconnected and relational, rarely supplying bright-line rules but instead providing broad social norms capable of qualification.[471]

[319] The evidence of the pūkenga and other witnesses is important and reasonably consistent with each other and with most of the parties' submissions in this regard. On the issue of whether principles of tikanga vary between iwi or are universal, all the pūkenga consider:[472]

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465 Marutūāhu Closing at [40]–[43] citing NOE 2564/5–20 (Taua), 1336/24–29 (Andrews and Tupuhi) and 1866/12–19 (Kruger).
466 Notes of Closings 162/13–16.
467 Te Ākitai Waiohua Closing at [151].
468 Te Ākitai Waiohua Closing at fn 282, citing Kruger Brief at [76]; Meredith Brief at [37]; and NOE 1151/5–19 and 1194/11–18 (Meredith), 1308/20–25 (Tawhiao), 1868/6–9 (Kruger) and 2550/12–16 (Taua).
469 Notes of Closings 247/2–5.
470 Crown Closing at [300]–[301], citing NOE 2296/1–4 (Ngāpō), 2320/17–18 and 2327/28–29 (Mikaere), 2941/2–4 (Wilson), 2346/25–30 and 2347/5–6 (W Ngamane).
471 Crown Closing at [303]–[304] citing NOE 705/16 – 28 (Williams), 2712/1–5 (Maxwell) and 302/5–27 (Kawharu).
472 Ngāti Whātua Ōrākei and Te Toru Pūkenga Summaries at point 2.

> It was agreed that there are fundamental philosophical underpinnings within Māoridom or what was described as the 'Tāhuhu he aratohu', that is that guide iwi approaches to tikanga and allow for some shared understandings and mutual interactions.
>
> However, tikanga are shaped by each iwi's own historical narratives and thus the application of tikanga cannot be examined and understood without that context.
>
> Agreed the historical context includes the disruption of colonisation and its impact on iwi and their ability to exercise their tikanga.
>
> There was some discussion around whether tikanga is temporary or constant. There was agreement as to the mutability of tikanga shaped by individual iwi's historical experiences but that the Tāhuhu element mentioned above ensured an element of commonality across iwi.

[320] Paul Meredith and Wati Ngamane explicitly endorse this aspect of the summary in their evidence.[473] Morehu Wilson notes that the summary should not be taken as a summary of tikanga as a whole, but a summary of that hui.[474] Otherwise, the evidence of individual witnesses on this point was:

(a) Te Kurataiaho Kapea considers there are general principles of tikanga including ahi kā and mana whenua, and that he would not expect other iwi to take substantially different approaches to those principles.[475]

(b) Margaret Kawharu considers that tikanga will be adapted when applied by rangatira in the best interests of the iwi or hapū in different sets of circumstances – and so may differ from other tikanga.[476] She says tikanga adapts to contemporary circumstances, but not at the expense of a community's identity.[477]

(c) Paul Meredith acknowledges each hapū and iwi will have their own tikanga. He considers, as discussed at the tikanga experts' hui, that there are "tāhuhu", or signposts, of "overarching" tikanga which "sort of provided guidance to those variations".[478] These commonalities

473 NOE 1151/5–19 (Meredith) and 2373/19–2374/2 (W Ngamane).
474 NOE 2951/1–13.
475 NOE 105/26–106/15.
476 NOE 264/21–29.
477 NOE 301/24–29.
478 NOE 1151/5–22.

allow Māori to "interact on a tikanga basis".[479] As discussed by Sir Hirini Mead, Sir Joe Williams and Sir Edward Taihakurei Durie, he sees tikanga Māori as an underpinning that informs more regional variations of tikanga.

(d) Charlie Tawhiao states:[480]

> I agree that tikanga is determined by those people who hold the authority and ability to define it. In that sense it is highly localised and is indeed an expression of mana motuhake, mana whenua, and rangatiratanga.
>
> But…Tikanga is not completely unique to each hapū or iwi. If there was no commonality among these ideas we could not have functioned as a Māori society. We have to have shared ideas of how the universe came to be and of what is right in order to interact with each other.

(e) Tāmati Kruger explains that there may be different kawa across different iwi but "the principles are generally the same".[481] Some different practices might occur but he agrees with Mr Mahuika's proposition in cross-examination that "the values that underpin land, connection, whakapapa, ahi kā roa are consistent across Māori society".[482]

(f) Dr Korohere Ngāpō considers that core values and principles exist across all or most Māori groups, and these may be described as tikanga Māori.[483] He says "tikanga is a structure giving effect to fundamental principles to achieve balance".[484]

(g) Harry Mikaere agrees that core principles of tikanga from his different iwi are not particularly controversial and he would not expect anyone to seriously disagree with him on that.[485]

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479 NOE 116/23–28.
480 Tawhiao Reply at [35]–[36].
481 NOE 1840/27.
482 NOE 1842/8–1.
483 NOE 2312/4–15.
484 Ngāpō Brief at [9].
485 NOE 2340/11–25.

(h) Dr Te Kahautu Maxwell acknowledges there are principles of tikanga and core values that underpin tikanga, though how they are applied or exhibited or practiced may vary across iwi and even within hapū.[486] He characterises the tāhuhu, or signpost or root, of tikanga as remaining the same. He explains that tikanga also adapts to differences in an iwi or hapū's place – for example climate or geothermal activity can influence the way people dress.[487]

(i) Te Warena Taua believes it is important to focus on the application of the principles of tikanga Māori in a specific regional area.[488] Although he uses the phrase tikanga Māori often, he also refers to tikanga as it applies to a particular area or marae.[489]

[321] Pūkenga who gave evidence were not prepared to make definitive statements about the tikanga of an iwi or hapū to which they did not whakapapa.[490] Most said that those who do not whakapapa to an iwi or hapū are unqualified to make any statements about the tikanga of that iwi or hapū, though others contested this.[491] For example, Tāmati Kruger was explicit in saying he did not claim to be an expert in the tikanga of other iwi or know how tikanga is practiced and applied in Tāmaki.[492] Some had different views. Paul Meredith expressed "trepidation" but did not rule out commenting on other's tikanga.[493] Charlie Tawhiao said he was comfortable making conclusions about the tikanga of another iwi; but he noted that his doing so would likely be offensive to those iwi in the same way he would be offended if others were to make conclusions about the tikanga of Ngāti Whātua Ōrākei.[494]

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486 Maxwell Brief at [96]–[97]; and NOE 2710/32–2711/18.
487 NOE 2704/3–28.
488 NOE 2550/13–14
489 NOE 2612/26–31.
490 Maxwell Brief at [153]; Taua Brief at [20]; NOE 96/3–4 (Kapea), 703/8–12 (Williams), 2714/28–34 and 2715/1–20 (Maxwell). Compare NOE 1309/7–18 (Tawhiao) and Meredith Reply at [5].
491 Maxwell Brief at [153]; Taua Brief at [20]; NOE 96/3–4 (Kapea), 703/8–12 (Williams), 2714/28–34 and 2715/1–20 (Maxwell).
492 NOE 1868/4–15 (Kruger). He did acknowledge that he made some conclusions about tikanga in Tāmaki in his evidence, NOE 1868/16–1869/8. He also stated he did not find external experts commenting on Tūhoe tikanga offensive; NOE 1890/15–18.
493 Meredith Reply at [5].
494 NOE 1309/7–18 (Tawhiao).

[322] The position agreed by the pūkenga set out above determines the point. There were and are fundamental philosophical underpinnings, tāhuhu he aratohu, that guide iwi approaches to tikanga and allow for some shared understandings and mutual interactions. However, the tikanga of an iwi or hapū is shaped by the historical narrative of that iwi or hapū, including the impact of colonisation and other events and circumstances over time. As such, the application of tikanga cannot be examined and understood without that context. At this conceptual level this position is consistent with most of the submissions outlined above.

[323] It is also reinforced by commentaries. The Law Commission recently observed that "Māori, both individually and collectively, interpret tikanga in their own ways and place varying degrees of importance on particular values".[495] Sir Hirini Mead stresses at the beginning of his book *Tikanga Māori* that:[496]

> … ideas and practices relating to tikanga Māori differ from one tribal region to another. While there are some constants throughout the land, the details of performance are different and the explanations provided may differ as well.

[324] The Law Commission said in 2001:[497]

> It is this ability of tikanga to change that accounts for its variations among tribes. While the practice of tikanga can differ depending on the circumstances of the particular iwi, hapū or whānau, those changes are always guided by the fundamental values that underpin tikanga.
>
> …
>
> This is not to say that Māori live in a society where anything goes. The point is that tikanga Māori has been receptive to change while maintaining conformity with its basic beliefs.

[325] Tikanga varies across iwi and hapū because they face different circumstances, which can lead to adjustments in what is required of custom. But, the evidence is that tikanga Māori rests on core principles that are common across most iwi and hapū. Such common understanding and sharing of tikanga can ease tensions, smooth relationships, and facilitate understandings between different iwi and hapū. As Dr Te

495 Law Commission *Succession Report* at [2.15].
496 Mead *Tikanga Māori* at 9.
497 Law Commission *Māori Custom and Values* at [12] and [16].

Kahautu Maxwell says, the core values are "like a whāriki; a woven mat, they must go together for tikanga to stand up".[498]

C The legal status of tikanga

[326] Tikanga was the first law of Aotearoa. It accompanied and governed Māori when they came here on successive voyages, before tauiwi did.[499] It arose "as a necessary and inevitable expression of self-determination" of Māori, as Sir Joe Williams has said.[500] Tikanga provided and provides rules, values, principles, and processes for identifying and developing customary practices, regulating behaviour and resolving disputes. Professor Joseph Raz has described law as "regulating human behaviour by prescribing conduct, and it expresses the decision to regard legal systems as independent normative systems".[501] As such, tikanga can be conceived of as a "sphere of law in its own right".[502] Sir Joe Williams also notes that:[503]

> Tikanga and law are not co-extensive ideas. Tikanga includes customs or behaviours that might not be called law but rather culturally sponsored habits.

[327] The Colonial Office initially recognised this to some extent. In 1839, the Marquis of Normanby instructed Captain Hobson on his departure from Britain that Māori "must be carefully defended in the observance of their own customs", at least until "brought within the pale of civilised life".[504] In obtaining signatures to the Treaty of Waitangi in 1840, Hobson and his emissaries provided repeated assurances to Māori to this effect. For example, in a letter of 27 April 1840 Hobson rejected, as false, statements that Māori customs would be trampled down and abolished. He reiterated assurances he said he had already made to rangatira at Waitangi and Hokianga,

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498 Maxwell Brief at [97].

499 Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 330 at 330; and Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 [Williams "Lex Aotearoa"] at 2.

500 Williams "Lex Aotearoa" at 9.

501 Joseph Raz *The Concept of a Legal System: An introduction to the Theory of Legal Systems* (2nd ed, Clarendon Press, Oxford, 2003) at 171.

502 Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2015) 1 NZLR 1 at 4; and Annette Sykes "The Myth of Tikanga in the Pākehā Law" (Nin Tomas Memorial Lecture, 5 December 2020).

503 Williams "Lex Aotearoa" at 2–3.

504 *Correspondence from the Marquis of Normanby to Captain Hobson, RN*, *14 August 1839* (1840) New Zealand Parliamentary Papers at 40.

promising that "the Governor will ever strive to assure unto you the customs … belonging to the Māori".[505] Mr Shortland made similar assurances at Kaitaia as did Major Bunbury at Tauranga in May 1840.[506]

[328] Hobson asserted the sovereignty of the United Kingdom in New Zealand in May 1840. The Crown, in New South Wales legislation that applied to New Zealand in 1840, in the Letters Patent of 1840 and in subsequent legislation, explicitly "recognised no title to land in New Zealand other than by that held by Māori according to their customs and usages and that established by the Crown's own grants (following extinguishment of native title)".[507] In December 1840, Lord John Russell recognised in his instructions to Governor Hobson that "[The Māori people] have established by their own customs a division and appropriation of the soil … with usages having the character and authority of law …".[508]

[329] So the assertion and enforcement of British law did not necessarily displace tikanga. And, in reality, the early colonial institutions of British government often did not reach far enough across New Zealand to conflict with the ongoing operation of tikanga. Most parts of New Zealand were beyond the enforcement of British law in the 1840s, except by voluntary agreement by the relevant iwi or hapū.[509] In those places, tikanga was the only effective law. As Governor Gore Brown told the Colonial Office in 1860 "English law has always prevailed in the English settlements, but remains a dead letter beyond them".[510] That changed over time, particularly after the

505 Ned Fletcher *The English Text of the Treaty of Waitangi* (2022 forthcoming, Bridget Williams Books, Wellington) at 334, citing circular letter of Hobson to the chiefs, 27 April 1840, as translated by T Lindsay Buick *The Treaty of Waitangi: How New Zealand Became a British Colony* (3rd ed, Thomas Avery & Sons, New Plymouth, 1936 at 191.

506 At 335.

507 *Proprietors of Wakatū* [2017] NZSC 17, [2017] 1 NZLR 423 at [96].

508 *Dispatch from Lord John Russell to Governor Hobson, 9 December 1840* (1841) 311 New Zealand Parliamentary Papers at 27, cited in A Frame "Colonising Attitudes Towards Māori Custom" [1981] NZLJ 105 at 106.

509 See, for example, *R v Maketu* SC Auckland, 1 March 1842 reported in *New Zealand Herald and Auckland Gazette* (Auckland, 19 January 1842) 2 at 2–3; and *R v Rangitapiripiri* SC Wellington, 1 December 1847 reported in *New Zealand Spectator and Cook's Strait Guardian* (4 December 1847) at 2–3.

510 Governor Gore Browne to the Duke of Newcastle (1 November 1860) (552) Vol XLVII *British Parliamentary Papers* 393 at 394, cited in Paul McHugh *Aboriginal Societies and the Common Law* (Oxford University Press, New York, 2004) [McHugh *Aboriginal Societies*] at 171.

wars of the 1860s. But it was still true of some areas of New Zealand until the early 20th century.[511]

[330] English common law eventually came to apply in New Zealand. This was confirmed by the New Zealand Parliament in 1858, retroactively, in the English Laws Act 1858.[512] The preamble to the Act noted that "the Laws of England as existing on the 14th day of January; 1840, have until recently been applied in the administration of Justice in the Colony of New Zealand, so far as such laws were applicable to the circumstances thereof".[513] But "doubts have now been raised as to what Acts of the Imperial Parliament passed … are in force in the said colony".[514] The preamble concluded that it is "expedient that all such doubts should be removed without delay". Accordingly, in s 1, the New Zealand Parliament "declared and enacted" that (emphasis added):

> The laws of England as existing on the 14th day of January 1840, shall, *so far as applicable to the circumstances of the said Colony of New Zealand*, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of Justice accordingly.

[331] The English Laws Act was consolidated and continued in 1908. Today, s 5 of the Imperial Laws Application Act 1988 preserves its continuing effect even more explicitly in relation to the common law:

> After the commencement of this Act, the common law of England (including the principles and rules of equity), so far as it was part of the laws of New Zealand immediately before the commencement of this Act, shall continue to be part of the laws of New Zealand.

[332] Importantly, there is a venerable line of English common law authority recognising local custom as law. Common law itself originated in local custom.[515]

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511 McHugh *Aboriginal Societies* at 172.

512 English Laws Act 1858 21 and 22 Vict No 2.

513 14 January 1840 was the date Governor Gipps swore in Captain Hobson as Lieutenant Governor of New Zealand in Sydney and also signed three anticipatory proclamations in respect of New Zealand. See David V Williams "The Pre-History of the English Laws Act 1858: *McLiver v Macky* (1856)" (2010) 41 VUWLR 361 [Williams "*McLiver v Macky*"] at 377.

514 The "doubts" had been expressed by Acting Chief Justice Sidney Stephen in *McLiver v Macky,* "Supreme Court" 13 (980) Daily Southern Cross (Auckland, 18 November 1856) at 3. Stephen ACJ held that the Wills Act 1837 did not apply in New Zealand but that "British subjects . . . carry with them the Common Law of England". The Attorney-General who introduced the Bill was the losing counsel in *McLiver.* See Williams "*McLiver v Macky*" at 376.

515 Shaunnagh Dorsett "'Since Time Immemorial': A Story of Common Law Jurisdiction, Native Title and the *Case of Tanistry*" (2002) 26 MULR 32 [Dorsett "Since Time Immemorial"] at 36.

Although English common law has sought to unify (or subordinate) other legal regimes, it has long had to uphold legal pluralism by recognising the validity of other sources of law in particular areas or spheres, such as Anglo-Saxon law after the Norman conquest, in the acquisition of the Channel Islands and Isle of Man, and in the recognition of ecclesiastical law and the law merchant.[516]

[333] In 1608, in the *Case of Tanistry* which was ultimately settled by agreement, both sides accepted that the common law recognised particular Irish custom as having survived British acquisition of sovereignty by conquest, subject to the custom being reasonable, certain, of immemorial usage, and compatible with the Crown's sovereignty.[517] In 1774, Lord Mansfield considered that finding in *Campbell v Hall* and held authoritatively that local laws of the conquered Grenada continued in force until altered.[518]

[334] This approach ebbed and flowed around the British Empire in the 19th century, with variations, including in New Zealand. The Crown and Te Ākitai Waiohua rely on Professor McHugh's 1991 text, *The Māori Magna Carta*, regarding the presumption of continuity in New Zealand.[519] His 2004 book, *Aboriginal Societies and the Common Law*, is both more comprehensive and nuanced.[520] In *Takamore v Clarke*, the Court of Appeal outlined various authorities regarding the reception of custom in English common law and in New Zealand common law.[521]

[335] I note in particular:

(a) In the well-known case of *R v Symonds* in 1847, Chapman J in the Supreme Court of New Zealand (effectively equivalent to the High

516 Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) [McHugh *The Māori Magna Carta*] at 84; and Shaunnagh Dorsett "Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of 'Barbarous' Customs in New Zealand in the 1840s" (2009) 30 J Legal Hist 175 at 193.

517 *The Case of Tanistry* (1608) Davis 28, 80 ER 516 (KB). See also *Calvin's Case* (1608) 7 Co Rep 1a at 17b; and Dorsett "Since Time Immemorial". The first three characteristics were repeated by the House of Lords in *Wolstanton Ltd v Newcastle-under-Lyme Corp* [1940] AC 860 (HL) at 876. The New Zealand Court of Appeal summarised these characteristics of English law in *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 [*Takamore* (CA)] at [109].

518 *Campbell v Hall* (1744) 1 Cowp 208 at 209, 98 ER 1045 at 1047.

519 McHugh *The Māori Magna Carta* at 83–85, 87–90 and 92–93.

520 McHugh *Aboriginal Societies.*

521 *Takamore* (CA) at [109]–[121].

Court now), declined to engage with submissions based on the Treaty of Waitangi.[522] He focussed more particularly on the law of aboriginal title, holding that New Zealand and other courts "as have adopted the common law of England, have invariably affirmed and supported [certain established principles of law applicable to relations with indigenous peoples]" and stated that these principles:[523]

> … are in fact to be found among the earliest settled principles of our law; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own colony; and from the letter of Treaties with native tribes, wherein those principles have been asserted and acted upon.

(b) In *R v Ratea* in 1849, in a criminal rather than an aboriginal title context, the Court recognised Māori customary law, holding that small matters of custom could be left to Māori law.[524]

(c) In 1901, in *Tāmaki v Baker,* the Privy Council dismissed arguments based on *Wi Parata*, holding that it was "rather late in the day" for an argument that "there is no customary law of the Maoris of which the Courts of law can take cognizance".[525] It noted that the relevant statute plainly assumed "the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence".[526]

(d) In 1908, in *Public Trustee v Loasby*, Cooper J held that the costs of provisions for a tangi were properly met out of the estate of a deceased rangatira in recognition of Māori tangihanga custom.[527]

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522 Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, New York, 2011) [Hickford *Lords of the Land*] at 207.

523 *R v Symonds* (1847) NZPCC 387 (SC) at 3.

524 *R v Ratea* SC Wellington, 1 September 1849 reported in *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 5 September 1849) 2 at 2

525 *Tāmaki v Baker* (1901) NZPCC 371 at 382–383.

526 At 382–383.

527 *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) [*Public Trustee v Loasby*].

(e) In 1910, in *Baldick v Jackson*, Stout CJ disapplied an English statute on the basis of Māori customary whaling practices.[528]

(f) In 1912, in *Tamihana Korokai v Solicitor-General*, the Court of Appeal acknowledged the enforceability of native title against the Crown in relation to the bed of Lake Rotorua.[529]

(g) In 1919, in *Arani v Public Trustee*, the Privy Council upheld Māori customary adoption as an alternative to the processes under the Adoption of Children Act 1895.[530]

[336] The nature of the common law is that a judge decides each case in its own context, drawing on relevant lines of authority. Some lines are cut, when they no longer suit the times. In 2001, the Law Commission considered that rules of discontinuity, contrary to the presumption of continuity, are now regarded as "a detour from proper common law principles".[531] Other lines of common law authority endure, if they suit contemporary needs, much like aspects of tikanga itself. As outlined below, modern case law indicates there is now no doubt that New Zealand common law recognises Māori customary law, or tikanga. But, in modern times, Parliament has taken the lead in that, by passing legislation.

[337] New Zealand statutes have consistently recognised and continue to recognise tikanga, though at times they have also legislated against and purported to extinguish it, as in the Tohunga Suppression Act 1907 and the Native Land Act 1909. As noted by the Law Commission, the Native Exemption Ordinance 1844, Resident Magistrates Courts Ordinance 1846, and Resident Magistrates Act 1867 all gave some legislative recognition to Māori custom law.[532] Indeed, though it was never implemented, s 71 of the New Zealand Constitution Act 1852 (UK) empowered districts to be identified where Māori "laws, customs, and usages" would govern all Māori relations with each

528 *Baldick v Jackson* (1910) 30 NZLR 343 (SC) [*Baldick v Jackson*] at 344–345.
529 *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA) at 345.
530 *Arani v Public Trustee* [1920] AC 198 (PC).
531 Law Commission *Māori Custom and Values* at [49].
532 At [84]–[90].

other. The Native Land Acts Amendment Act 1882 even made "native custom" paramount in relation to Māori succession to land.[533]

[338] Contemporary statutes invoke tikanga explicitly and not infrequently. For example, the preamble to the Marine and Coastal Area (Takutai Moana) Act 2011 states:

> (4) This Act takes account of the intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on their connection with the foreshore and seabed and on the principle of manaakitanga. It translates those inherited rights into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations:

[339] "Tikanga Māori" is defined to mean "Māori customary values and practices" by s 2 of the Resource Management Act 1991, s 4 of Te Ture Whenua Māori Act 1993 (from 2002), s 9 of the Marine and Coastal Area (Takutai Moana) Act 2011, and others.[534] Other statutes have slightly different formulations of the meaning of tikanga Māori, as: "Māori customary law and practices"; "Māori custom and practice"; "Māori custom and protocol"; and "Māori protocol and culture".[535] Many Acts that ratify Treaty settlements define tikanga or customary rights. Relevantly here:

(a) Sections 11 of the Ngāti Whātua Ōrākei Claims Settlement Act 2012 defines "customary rights":

> **customary rights** means rights according to tikanga Māori, including—
>
> (a) rights to occupy land; and
>
> (b) rights in relation to the use of land or other natural or physical resources.

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533 Native Land Acts Amendment Act 1882 46 Vict No 27, s 4; and *Pahoro v Cuff* (1890) 8 NZLR 751 (SC) at 756.

534 Te Ture Whenua Māori Act 1993, s 4; Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, s 6; Resource Management Act 1991, s 2; Public Records Act 2005, s 4; Fisheries Act 1996, s 2; Walking Access Act 2008, ss 8 and 13; Environmental Protection Authority Act 2011, s 9; Family Violence Act 2018, s 18; Housing Accords and Special Housing Areas Act 2013, s 89(2); and Marine and Coastal Area (Takutai Moana) Act 2011, s 9.

535 Oranga Tamariki Act 1989, s 2; Local Government Act 2002, s 33(5); Climate Change Response (Zero Carbon) Amendment Act 2019, s 5H(2); and Heritage New Zealand Pouhere Taonga Act 2014, s 10(3).

(b) Section 13 of the Ngāi Tai ki Tāmaki Claims Settlement Act 2018 contains the same definition of customary rights and s 2 also defines "tikanga" to mean "customary values and practices".

[340] In many ways, contemporary common law has been relatively muted and cautious, compared with Parliament's fuller-throated legal recognition of tikanga. Annette Sykes suggests that the incremental way tikanga has been incorporated into Pākehā law raises concerns of "window dressing by Pākehā lawmakers and those who administer justice".[536] Recognition has certainly proceeded in fits and starts, but it has become more gradually consistent in recent years, fanning out from consideration of the law of aboriginal title and customary rights.

[341] In 1986 in *Te Weehi v Regional Fisheries Officer*, Williamson J reviewed a number of the authorities mentioned above, as well as Canadian authorities, articles by Professor McHugh and Waitangi Tribunal reports, in upholding the continued legal existence of Māori customary fishing rights.[537]

[342] In 2003, in *Attorney-General v Ngāti Apa*, the Court of Appeal further confirmed the potential for legal recognition of Māori customary rights, in relation to the foreshore and seabed, that are found to exist as a matter of tikanga.[538] The judgments largely dealt with customary fishing rights in terms of customary property rights, preserved by common law and assumed and unextinguished by legislation.[539] The Court cited the Privy Council's judgment in *Amodu Tijani v Secretary, Southern Nigeria* and various New Zealand authorities in holding that "the common law recognised pre-existing property after a change of sovereignty".[540] However, the Court made further comments on the relationship between the common law and tikanga as to the preservation of proprietary rights:

536 Annette Sykes "The Myth of Tikanga in the Pākehā Law" (Nin Tomas Memorial Lecture, 5 December 2020).
537 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC) at 686–688.
538 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) [*Ngāti Apa*] at [10].
539 See [13] and [47] (Elias CJ).
540 At [15]–[48] (Elias CJ). citing *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 [*Amodu*] at 402–403.

(a) Elias CJ noted that "the existence and content of customary property is determined as a matter of the custom and usage of the particular community", in application of, and as a question of, tikanga.[541]

(b) Gault P considered "[i]nterests in land in the nature of usufructuary rights or reflecting mana", "may be capable of recognition both in tikanga Māori and in a developed common law informed by tikanga Māori" though he doubted they would satisfy relevant sections of Te Ture Whenua Māori Act.[542]

(c) Tipping J observed:

> [185] It follows that as Māori customary land is an ingredient of the common law of New Zealand, title to it must be lawfully extinguished before it can be regarded as ceasing to exist. In this respect Māori customary title is no different from any other common law interest which continues to exist unless and until it is lawfully abrogated. In the case of Māori customary land, the only two mechanisms available for such abrogation, short of disposition or lawful change of status, are an Act of Parliament or a decision of a competent court amending the common law. But in view of the nature of Māori customary title, underpinned as it is by the Treaty of Waitangi, and now by the Te Ture Whenua Māori Act 1993, no court having jurisdiction in New Zealand can properly extinguish Māori customary title. Undoubtedly Parliament is capable of effecting such extinguishment but, again in view of the importance of the subject matter, Parliament would need to make its intention crystal clear. In other words, Parliament's purpose would need to be demonstrated by express words or at least by necessary implication.

(d) Tipping J also observed that whether there is, and the extent of any, difference between land and sea in relation to customary rights to the foreshore "must be determined in accordance with tikanga Māori rather than the English common law. Tikanga Māori is to this extent part of the law of New Zealand".[543]

[343] *Takamore v Clarke* was the first contemporary case to grapple seriously and explicitly with the status and effect of tikanga in New Zealand law, outside a property

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541 At [32]–[33], citing *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 at 351 and Native Rights Act 1965, s 4; and at [49] and [88].

542 At [106].

543 At [205].

context.[544] Glazebrook and Wild JJ, in the Court of Appeal, traced the recognition of customary law by English common law and the presumption of continuity in English and New Zealand law.[545] They noted that "the continuation of customary law is inherent in the recognition of aboriginal property … because customary law defines the content of aboriginal proprietary rights".[546] They reviewed the requirements that custom be long-standing and continuous, reasonable, and certain,[547] but considered that "a more modern approach to customary law is to try to integrate it into the common law where possible rather than relying on the strict rules of colonial times".[548] The majority also considered that "[i]t requires no leap of faith therefore to suggest that in general the common law of New Zealand should as far as is reasonably possible be applied and developed consistently with the Treaty of Waitangi".[549]

[344] Without rejecting that, the Supreme Court took a different approach. A majority of the Supreme Court, Tipping, McGrath and Blanchard JJ, held that decisions on disposal of a body were up to the executors and potential administrators of an estate, taking account of the views of those close to the deceased.[550] They stated:[551]

> [150] The English common law has always applied in New Zealand only insofar as it is applicable to the circumstances of New Zealand.[552] Consequently the evolution of the common law in New Zealand reflects the special needs of this country and its society. The New Zealand common law can never be in conflict with its statute law, but with that qualification, our common law has always been seen as amenable to development to take account of custom.[553] Such development may occur in different ways.

[345] They said that "the common law of New Zealand requires reference to the tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation".[554]

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544 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 [*Takamore* (SC)].
545 *Takamore* (CA) at [109]–[121].
546 At [120].
547 At [121]–[132].
548 At [254].
549 At [249].
550 *Takamore* (SC) at [152]–[156].
551 At [150] (footnotes included).
552 *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18] per Elias CJ and [105] per McGrath J.
553 *Baldick v Jackson*; and *Public Trustee v Loasby*.
554 *Takamore* (SC) at [164].

Accordingly, executors and potential administrators are required to consider those values in some circumstances.

[346] Separately, Elias CJ observed that the case had to be resolved by the Court because neither family nor tikanga decision-making processes had resolved the dispute.[555] She said:

> [94] Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. That accords with the basis on which the common law was introduced into New Zealand only "so far as applicable to the circumstances of the … colony".[556] It is the approach adopted in *Public Trustee v Loasby*[557] and, in Australia, in *Manktelow v Public Trustee*.[558] Māori custom according to tikanga is therefore part of the values of the New Zealand common law.

[347] *Takamore* has been seen as an advance in the preparedness of New Zealand courts to recognise tikanga. In the last five years, New Zealand courts are increasingly considering, and recognising tikanga in law. For example:

(a) In 2017, in *Proprietors of Wakatū v Attorney-General* in the Supreme Court, Glazebrook J accepted that decisions on who is the appropriate plaintiff would normally be decided according to tikanga. She noted that tikanga "can vary between different iwi and hapū and it can evolve and develop over time".[559] And she said "[t]here may also be issues as to the rights of smaller collective groups (such as hapū) against a wider collective group (the iwi)".[560]

(b) In 2019, in *Ngāti Whātua Ōrakei Trust v Attorney-General* the Supreme Court remitted the present case to the High Court for hearing.[561] Elias CJ said: "[r]ights and interests according to tikanga may be legal rights

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555 At [92].

556 The footnote refers to an earlier footnote that says "The English Laws Act 1858, s 1; and English Laws Act 1908, s 2; the effect of these provisions is now preserved by s 5 of the Imperial Laws Application Act 1988".

557 *Public Trustee v Loasby* at 807.

558 *Manktelow v Public Trustee* [2001] WASC 290, (2001) 25 WLR 126 at [19].

559 *Wakatū* at [670], citing the Law Commission *Māori Custom and Values* at [10]; and Annis Somerville "Tikanga in the Family Court – the gorilla in the room" (2016) 9 NZFLJ 157 at 158

560 At [672].

561 *Ngāti Whātua Ōrakei* (SC).

recognised by the common law and, in addition, establish questions of status which have consequences under contemporary legislation”.[562]

(c) In 2020, in *Ngāti Maru Trust v Ngāti Whātua Ōrākei*, Whata J stated that “the jurisdiction to declare and affirm tikanga based rights in State law rests with the High Court and/or the Māori Land Court”, rather than under the Resource Management Act 1991.[563] But even there, he held that evidential findings may be made,[564] and “[t]o ignore or refuse to adjudicate on divergent iwi claims … is the antithesis of recognising and providing for them and an abdication of statutory duty”.[565]

(d) In 2020, in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, the Court of Appeal characterised tikanga as “an integral strand” of the common law of New Zealand and held it must treated as “applicable law” under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.[566]

(e) In 2021, in *Sweeney v The Prison Manager, Spring Hill Corrections Facility*, I said “[w]here material to a case, the Courts can, and may have an obligation to, recognise and uphold the values of tikanga Māori in applying the law of judicial review and granting remedies”.[567]

(f) Also in 2021, I stated in *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)*:[568]

> [43] Tikanga Māori was the first law in Aotearoa.[569] It arose “as a necessary and inevitable expression of self-determination” of

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562 At [77].
563 *Ngāti Maru Trust v Ngāti Whātua Ōrākei* [2020] NZHC 2768, [2021] NZRMA 179 at [67].
564 At [68].
565 At [73].
566 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [177]–[178].
567 *Sweeney v The Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181, [2021] 2 NZLR 27 at [75].
568 *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 [*Ngawaka*] (footnotes included). An application for leave to appeal this judgment was abandoned.
569 Williams “Lex Aotearoa” at 2–5.

Māori.[570] It is "an old system based around kinship…adapted to the new circumstances of this place".[571] Tikanga is still law for many iwi and hapū.

(g) Later in 2021, Cooke J held in *Mercury NZ Ltd v Waitangi Tribunal* that the Tribunal did not have a discretion under its statute to make decisions inconsistent with tikanga.[572] He said:

> [103] It is now well accepted that tikanga Māori is part of New Zealand's common law.[573] There is a degree of ambiguity, however, in describing it as "part of" the common law. It has previously been identified as a source for the development of the common law. This is uncontroversial as the courts frequently look to customs, practices, and contemporary societal attitudes when the common law is developed. But tikanga can be a little more than that. In some situations, tikanga will *be* the law, rather than merely being a source of it. There will be situations, perhaps particularly when the relevant Māori participants agree upon the tikanga to be applied where a court or tribunal will be applying that tikanga to resolve the matters within its jurisdiction.[574] To state the obvious the relevance and significance of tikanga will be highly contextual.
>
> [104] The present matter involves the exercise of statutory powers by the Tribunal under the TOW Act. The key question is how tikanga principles affect the exercise of those powers. The Tribunal has effectively treated them as an important relevant consideration, but it has decided that in the exercise of its statutory powers it has a discretion to depart from tikanga.[575] I disagree. In my view, this is one of the situations where as a matter of interpretation of the statute the Tribunal does not have a discretion to make decisions that are inconsistent with tikanga. Neither does it have a discretion to direct remedies that are inconsistent with the principles of the Treaty. This is one of the situations where both tikanga principles, and the principles of the Treaty are essentially binding. In this context, tikanga forms a key part of the law to be applied rather than merely being a relevant consideration.
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> …
>
> [111] It seems to me that tikanga Māori is an important aspect of the principles of the Treaty. The Māori text speaks of the Queen protecting "te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa". That is chiefly authority over lands and other taonga. That carries with it the relevant tikanga in relation to those

570 At 9.
571 At 5.
572 *Mercury* (HC) (footnotes included).
573 *Takamore* (SC) at [94] and [164]; and *Ngāti Apa*.
574 See *Ngawaka* at [58].
575 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal, *Determinations of the Tribunal Preliminary to Interim Recommendations Under Sections 8B and 8HC of the Treaty of Waitangi Act 1975* (Wai 863, 2020) at [259]–[261].

> lands. This is less clear in the English version, albeit that the guaranteed exclusive and undisturbed possession of lands would naturally include the customs that were associated with the lands.

(h) At the end of 2021, in *Te Pou Matakana Ltd v Attorney-General*, while acknowledging that "it is not for the Court to itself decide what tikanga applies", Gwyn J relied on Cooke J's statement that there will be situations where a court will be applying tikanga to resolve the matters within its jurisdiction.[576]

[348] The most authoritative and recent judicial statements about the place of tikanga in New Zealand law are by the Supreme Court in September 2021 in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.[577] They unanimously confirm that tikanga-based customary rights and interests are "existing interests" protected by the statutory requirement to recognise and respect the Crown's obligation to give to effect to the principles of the Treaty of Waitangi.[578] In addition they said:[579]

> Further, drawing on the approach to tikanga in earlier cases such as *Takamore v Clarke*, all members of the Court agreed that tikanga as law must be taken into account by the [decision-making committee] as "other applicable law" under s 59(2)(l) of the EEZ Act where its recognition and application is appropriate to the particular circumstances of the consent application at hand.

[349] William Young and Ellen France JJ held that "tikanga is a body of Māori customs and practices, part of which is properly described as custom law".[580] Winkelmann CJ and Glazebrook J agreed.[581] Williams J also broadly agreed and made explicit that the question of what is meant by "existing interests" and "other applicable law" "must not only be viewed through a Pākehā lens".[582] In a statement with which Glazebrook J agreed, he said:[583]

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576 *Te Pou Matakana Ltd v Attorney-General (No 2)* [2021] NZHC 3319 at [111]; citing *Mercury* (HC) at [103].

577 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [*Trans-Tasman* (SC)] [2021] NZSC 127, [2021] 1 NZLR 801.

578 At [8].

579 At [9] (footnotes omitted).

580 At [169]. At n 282, they explicitly left "open for determination the questions of whether or not tikanga is a separate or third source of law and whether or not there should be any change to the tests for the recognition of customary law as law set out in *Loasby*".

581 At [332] per Winkelmann CJ and [237] per Glazebrook J.

582 At [297].

583 At [297] (footnotes omitted) and see n 371 per Glazebrook J.

> As the Court of Appeal rightly pointed out, the interests of iwi with mana moana in the consent area are the longest-standing human-related interests in that place. As with all interests, they reflect the relevant values of the interest-holder. Those values–mana, whanaungatanga and kaitiakitanga–are relational. They are also principles of law that predate the arrival of the common law in 1840. And they manifest in practical ways as William Young and Ellen France JJ note.

[350] In this case, Mr Mahuika submits, for Ngāti Pāoa, that "[t]ikanga as the first law of Aotearoa, is and always has been part of local circumstances".[584] And "[t]ikanga will inform and form part of the development of the common law in Aotearoa".[585] He submits that the Treaty of Waitangi supports the recognition of tikanga as relevant to the development of the common law. This is on the basis of the Treaty's protection of "nga taonga katoa" and Waitangi Tribunal findings that article 2 of the Treaty protects Māori custom and cultural values.[586] Mr Mahuika also submits recognition of tikanga in the development of the common law is consistent with international instruments including the United Nations Declaration on the Rights of Indigenous Peoples.[587] Article 5 of the Declaration states that decisions for the resolution of conflicts and disputes of indigenous peoples with States "shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights".

[351] Mr Smith, for Ngāti Kuri and Ngāi Te Rangi, also submits tikanga is a taonga and itself defines what is guaranteed to Māori under the Treaty of Waitangi. He submits it is well-established that principles of tikanga inform the common law through its values and, in appropriate cases, as a direct ingredient that can be incorporated into the common law.

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584 Ngāti Pāoa Closing at [148], citing Ani Mikaere "The Treaty of Waitangi and recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 300; and Williams "Lex Aotearoa" at 2.

585 At [152].

586 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Motunui-Waitara Report* (Wai 6, 1983) at 51. See also Waitangi Tribunal *Ōrākei Report* at 190; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ngai Tahu Land Report* (Wai 27, 1991) at 824; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Mohaka River Report* (Wai 119, 1992) at 63–64.

587 Ngāti Pāoa Closing at [160], citing *Te Ara Rangatu O Te Iwi O Ngāti Te Ata Waiohua Inc v Attorney-General* [2018] NZHC 2886, [2019] NZAR 12.

[352] Dr Ward, in closing for the Crown, submits:[588]

> Tikanga Māori is given expression in New Zealand's law either through common law recognition (as an underlying value that informs the interpretation and development of law, or alternatively as a source of private rights and obligations) or through statute. In other words, tikanga does not operate as a free-standing source of law separate from the common law and statute with the effect of displacing or superseding the application of the common law and/or statute.

[353] Dr Ward submits tikanga Māori is recognised as part of the values of New Zealand common law as stated by Elias CJ in *Takamore*. He submits, when the British acquired sovereignty over a territory where there were indigenous laws, the common law presumed the customary laws generally continued until altered by legislation, relying on McHugh.[589] As he states in the Crown's closing submissions, "[t]he English common law has always recognised local custom as law for a borough or other local area (subject to certain qualifications)".[590] In particular, he submits any continuity of Māori customary law was limited personally to the Māori population, and did not apply to dealings between Pākehā and Māori.[591] He also submits, relying on the expert evidence of Paul Meredith, that legal provision for Māori custom was achieved by legislative reform not common law adjudication.[592] While Dr Ward acknowledges tikanga as part of the common law, he submits what that means in any particular case will differ depending on the tikanga invoked and the nature of the proceeding.

[354] Ms Coates submits, for Te Ākitai Waiohua, that "the importance and centrality of tikanga as part of the fabric of the common law and its operation and relevance as part of the state legal system is now undeniable".[593] She submits it is now well-accepted that tikanga forms "part of" the common law. But she submits the validity of tikanga is not sourced within the state legal system which recognises it, rather it is a separate legal framework. That should inform where the Courts should and should not stray in relation to their jurisdiction concerning tikanga.[594] Te Ākitai say that any

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588 Crown Closing at [171.1].
589 McHugh *The Māori Magna Carta* at 83. See also *Takamore* (CA) at [112] (per Glazebrook and Wild JJ); and *The Case of Tanistry* (1608) Davis 28, 80 ER 516 (KB).
590 Crown Closing at n 264.
591 McHugh *The Māori Magna Carta* at 85. See also *Takamore* (CA) at [177]–[183].
592 At [177], citing Meredith at [116]—[121].
593 Te Ākitai Waiohua Closing at [220].
594 Notes of Closings 209/3–9.

foray into contested tikanga disputes between iwi need to be done with reluctance and caution, ensuring preservation of the integrity of tikanga.[595]

[355] Based on my review of the legal authorities and submissions above, I consider it is clear that the law that accompanied Māori to Aotearoa was constituted by tikanga. Many aspects of it are law in New Zealand now: Māori customary law, made by iwi and hapū, governing behaviour of iwi and hapū and those who belong to them. As such, it is a "free-standing" legal framework recognised by New Zealand law. It does not cease governing an iwi or hapū just because the courts or Parliament or even other iwi suggest otherwise. In the context of succession law, the Law Commission recently noted:[596]

> While tikanga Māori has remained a constant as an independent source of rights and obligations in te ao Māori and the first law of Aotearoa, there is now broader acknowledgement of its significance for Aotearoa New Zealand, including under te Tiriti o Waitangi | Treaty of Waitangi (the Treaty).

[356] As the Chief Justice foreshadowed in *Takamore*, in the end the family there appears to have found reconciliation in that case in accordance with tikanga rather than in accordance with the default position determined by the Supreme Court.[597] Tāmati Kruger gave evidence in this case about that. He said "…in one day we resolved the issue, as is resolved today, the *Takamore* case. So what the judicial system failed to do, we did it with $200 worth of catering".[598]

[357] Tikanga is often assumed, recognised and referred to by New Zealand legislation. Like the common law made by courts, the legal effects of tikanga can be overridden by legislation. But even Parliament cannot change tikanga itself. Iwi do that, exercising their rangatiratanga. Similarly, one iwi cannot override another the tikanga of another iwi without impinging on their rangatiratanga.

[358] Tikanga was recognised by English common law that accompanied the Crown to New Zealand, as were other sources of law. It is recognised by New Zealand common law today. As governing values for iwi and hapū, tikanga informs the

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595 Notes of Closings 213/11–15.
596 Law Commission *Succession Report* at [2.2].
597 *Takamore* (SC) at [102].
598 NOE 1916/3–5.

common law. But it can be even stronger in legal effect than that. Tikanga can determine the outcome of a court's application of a statute or the common law, as it did in *Baldick v Jackson*, *Public Trustee v Loasby*, and *Mercury*.[599] It can be a direct source of legal rights enforced by the Courts, as recognised in *Ngāti Apa* and *Ngawaka*.[600] So, how the courts approach and treat tikanga deserves careful attention.

D The Court's role regarding tikanga

[359] I have received submissions from the parties and interested parties and evidence from the pūkenga and other Māori witnesses about the consistency with tikanga of a Court dealing with tikanga:

(a) Te Kura Kapea considers that the Court can appropriately have a role in resolving tikanga disputes when iwi and hapū are unable to agree through tikanga processes.[601]

(b) Margaret Kawharu states she is not comfortable with the Court determining tikanga.[602] Tikanga should be left to the rangatiratanga of rangatira.

(c) Paul Meredith considers that resolution of tikanga disputes by the Court is "not ideal" but may be necessary and appropriate provided the Court is assisted by tikanga experts.[603]

(d) David Williams's view is that tikanga processes are preferable, but resolution by the Court may be used as a last resort.[604] Charlie Tawhiao also states that bringing a court case is appropriate as a last resort to defend mana whenua.[605]

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599 *Baldick v Jackson*; *Public Trustee v Loasby*; and *Mercury* (HC).
600 *Ngāti Apa*; and *Ngawaka* at [57].
601 NOE 43/29–44/14.
602 NOE 264/7–10.
603 NOE 1191/8–25.
604 NOE 724/19–725/9.
605 Tawhiao Brief at [11].

(e) Tāmati Kruger considers that it is not consistent with tikanga for inter-iwi or inter-hapū disputes to be determined by the Court, and that tikanga processes "cannot be exhausted".[606] But he states that the Court is the right place for disputes about Crown conduct to be aired.[607]

(f) Dr Te Kahautu Maxwell states he is "somewhat disappointed" that the dispute is before the Court, and that determination of tikanga before courts "is not … a proper exercise of mana and is not tika".[608]

(g) Dr Korohere Ngāpō observes that resolution of tikanga disputes by the Court would be "difficult", because "they don't fully know or understand all the aspects relating to tikanga".[609]

(h) Harry Mikaere cautions the Court to "exercise the utmost care with any pronunciations on tikanga" due to the significance of any determination for iwi and hapū in Tāmaki Makaurau.[610] Wati Ngamane gives a similar warning, calling for the Court to be "very careful" when making determinations about tikanga.[611]

(i) Te Warena Taua considers that "matters of this nature do not sit well in a Pākehā institution" and resolution should be achieved through a tikanga Māori process.[612] He states that the adversarial nature of the Court is inappropriate, given that tikanga is about "connections and what binds us".[613]

(j) Ngarimu Blair's view is that the courtroom is a place for tikanga as a last resort. He states "[g]iven we've exhausted all other avenues to

606 NOE 1922/10–20.
607 NOE 1922/22–31.
608 Maxwell Brief at [164].
609 NOE 2308/1–9.
610 Mikaere Brief at [79].
611 W Ngamane Brief at [142].
612 Taua Brief at [15].
613 At [16].

resolve the claims of Marutūāhu that reach into our heartland, we've had to come here".[614]

(k) Karen Wilson did not consider it "appropriate for the Crown (or the Court for that matter) to make general determinations of concepts such as ahi kā and mana whenua".[615] However, she did state the Crown ought to have an understanding of the various rights and interests in an area as well as the relative strengths of those rights and interests.[616]

[360] Counsel have made submissions on how the courts should treat tikanga:

(a) Mr Hodder, for Ngāti Whātua Ōrākei, submits that the Supreme Court's judgment in *Takamore* indicates that the Court can recognise tikanga, consistent with Treaty of Waitangi principles.

(b) In his oral closing submissions Mr Mahuika, for Ngāti Pāoa, submits that in the traditional Māori world there were times when things reached a point where they were resolved not by intermarriage and peace agreements but by the patu.[617] While going to Court is similarly not the ideal way of resolving a dispute, sometimes, when the parties are unable to resolve a matter between themselves, there needs to be a method by which a resolution is able to be reached. Iwi are entitled to pursue court proceedings and it would be a dereliction of the Court's responsibility not to attempt to engage with issues that are properly before it.

(c) Dr Ward, for the Crown, submits that Māori custom may be local, flexible and evolving, with the consequence that certainty of general principles may be difficult to achieve. He notes the risk of judicial determination of custom freezing tikanga at one stage of its development. He advocates "a judicial approach that is mindful of the

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614 NOE 571/16-17.
615 K Wilson Brief at [105].
616 At [105].
617 Notes of Closings 260/15–261/5.

unique character of tribal tradition and practice that is engaged in any claim about tikanga".[618]

(d) Mr Majurey, for Marutūāhu, identifies the central question in this case to be "whether the mainstreaming of the first law in Aotearoa means tikanga must be decided by the Court".[619] He submits the Court must be very careful about "finding" tikanga as fact and effectively relies on my observations in *Ngawaka*. He submits it is not the role of a court, nor is it possible for a court, to make determinations that attempt to reconcile or prioritise different tribal tikanga.

(e) Ms Coates, for Te Ākitai Waiohua, submits the validity of tikanga is not sourced within the state legal system which recognises it. Rather it is a separate legal framework.[620] She identifies risks in the courts codifying tikanga, which would kill it, freezing a particular version of tikanga, or freezing it at a particular time.[621] She acknowledges that the role and function of the Court is to make declarations on the law, of which tikanga is a part. But she submits the Court should tread with caution when confronted with genuinely held, but differing, positions on tikanga and its application. She points to witnesses for Ngāti Whātua Ōrākei, the Crown, Marutūāhu, Ngāi Tai ki Tāmaki and Te Ākitai stating their objections to, or lack of comfort with, Pākehā institutions including the Court and Crown, determining, defining and deciding matters of tikanga.[622] She submits that tikanga disputes are most appropriately resolved in accordance with, and as a matter of, tikanga. She cites then Chief Judge Williams of the Māori Land Court saying "[t]ikanga divined by a judge who is not a member of the kin group and

618 Crown Closing Submissions at [200], citing *Ngawaka* at [58].
619 Marutūāhu Closing at [9]
620 Te Ākitai Waiohua Closing, 19 April 2021 at [221].
621 At [241](d), citing Williams *He Aha Te Tikanga Māori* at 8; and NOE 706/19–22 (Williams).
622 NOE 264/7–16 (Kawharu), 1191/8–25 (Meredith), 2308/1–9 (Ngāpō); Maxwell Brief at [164]; and K Wilson Brief at [105]. Compare NOE 42/5–10 and 43/29–44/14 (Kapea).

handed down from on high … would be the antithesis of tikanga”.[623] She submits the issues before the Court regarding tikanga:[624]

> … are effectively an internal tikanga based dispute between the iwi playing itself out in the Treaty settlement context. These disputes have existed for centuries and are simply re-playing themselves out in a different time and context.

Ms Coates submits the integrity of tikanga should be preserved. This may mean the Court should decline to make determinations and declarations when it is inconsistent or inappropriate as a matter of tikanga to do so.[625] Whether that is so is context-dependent.[626]

(f) Mr Warren, for Ngāi Tai ki Tāmaki, submits it is not the role of the Court to attempt to define tikanga concepts when there is a contest as to their meaning.[627] He submits the Court must be cautious not to determine, create, or change tikanga because the relevant hapū or iwi does that. He points out that tikanga is imbued with spirituality from ngā atua Māori, giving it validity and tapu sanctity.[628]

[361] With the benefit of the context of this case, authorities, and submissions, I maintain and expand on the views I expressed in *Ngawaka*.

[362] Tikanga governs matters of process as well as substance.[629] There are ways of resolving disputes about tikanga which are consistent with tikanga and ways which are not. Full discussion by kaumātua on a marae, abiding by the kawa of the marae, and resulting in consensus, can be consistent with tikanga. Recourse to courts without agreement between the parties is not obviously tikanga-consistent. Only one of the tikanga experts who gave evidence here says that it is.[630] Some say recourse to courts

623 Williams *He Aha Te Tikanga Māori* at 8.
624 Te Ākitai Waiohua Closing at [244].
625 At [246].
626 Notes of Closings 214/6.
627 Ngāi Tai ki Tamaki Closing at [3.6]; and see NOE 1915/8–24 and 1922/10–20 (Kruger). Compare NOE 42/5–10 and 43/29–44/14 (Kapea).
628 Ngāi Tai ki Tamaki Closing at [3.16].
629 See Law Commission *Succession Report* at [13.9].
630 NOE 42/5–10 and 43/29–44/14 (Kapea).

is inconsistent with their tikanga.[631] Others say that recourse to courts is far less appropriate or preferable than tikanga-consistent processes.[632]

[363] As a matter of tikanga, of course, tikanga-consistent dispute resolution process must be preferred to non-tikanga-consistent court resolution of disputes about tikanga. Indeed, resolution of a dispute about tikanga by tikanga-consistent processes may be more enduring than a ruling by a court, as Tāmati Kruger's evidence about resolution of the *Takamore* dispute illustrates.

[364] Tikanga-consistent dispute resolution may involve several or many discussions on marae over a long period. Tikanga may require a discussion of a dispute over a long period of time compared to Pākehā dispute resolution. Those involved will determine how long that is, depending on the circumstances. As Mr Mahuika submits, the time that it takes depends on the context. A court must be wary of claims by one group or another that resolution is not possible in the time taken so far. Tāmati Kruger, the eminent pūkenga from Tūhoe, says that a tikanga-consistent process "cannot be exhausted".[633] He said "we live in a different time zone to Pākehā culture … We think and operate in generations. That's how long these things take."[634] On the other hand, Ngarimu Blair's evidence is that the risk involved in a Court determining mana whenua is "a risk that we, as great as it is, have determined as an iwi to undertake".[635] Seeking a determination before the Court is a "last resort" in the absence of resolution of the dispute by a tikanga-consistent process.[636]

[365] I accept that it would be a brave court that attempts to reconcile or prioritise tikanga that truly differs between iwi or hapū, if that reconciliation is not tikanga-based. An attempt to do so may well not be accepted at tikanga. It may not be tika. But, as Mr Mahuika says, tikanga does not end when an issue is taken to court. A

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631 NOE 264/7–10 (Kawharu); NOE 1922/10–20 (Kruger); Maxwell Brief, 13 October 2020 at [164]; and Taua Brief at [15].

632 NOE 1191/8–25 (Meredith), 657/8–18 (Blair) and 724/19–725/9 (David Williams); and Tawhiao Brief at [11].

633 NOE 1922/15–20.

634 NOE 1842/16–19.

635 NOE 657/12–14.

636 NOE 657/8–11 (Blair).

court decision that pays due regard to tikanga could, perhaps, sometimes free a logjam in relationships and enable further iterations of tikanga-consistent discussions.

[366] Because tikanga is law, iwi and hapū may seek legal remedies relying on recognition of tikanga by the courts in particular cases. They may assert their customary rights and seek declarations accordingly. That is what Ngāti Whātua Ōrākei does here, as the Supreme Court ruled they could.[637] I accept Mr Hodder's submission for Ngāti Whātua Ōrākei that the Court's declaratory jurisdiction is able to include the making of formal declarations of legal status and rights, including customary rights, and of corresponding obligations.

[367] I deal further with the relevance of tikanga to relief in the parts of this judgment dealing with declarations. But I note, in general, that there may be a variety of different ways by which a court could seek to resolve a dispute over tikanga that may be consistent with tikanga. Paul Meredith gave evidence that there is historical precedent of third parties being requested to mediate or sometimes arbitrate on contested issues of tikanga.[638] A court could appoint one or more pūkenga, with a strong connection to the relevant iwi or hapū and/or a deep understanding of the relevant tikanga, to make a decision. It could refer the matter to the Māori Appellate Court under s 61 of Te Ture Whenua Maori Act 1993. Where all relevant parties agree through tikanga-based processes, the authority of the Court might be useful in granting remedies regarding an issue of tikanga. If they do not agree, it is more difficult.

[368] If tikanga-consistent resolution of a dispute about tikanga is not feasible, then recourse to a court may be appropriate as a matter of law. That necessarily follows from tikanga being part of New Zealand law. The quintessential function of courts is to determine disputes about law. That may include determining disputes about tikanga. As arose in discussion with Mr Warren and Mr Mahuika in closing submissions, in some ways litigation is now the modern alternative to resolution by battle which used to be, but is no longer, available to break a deadlock over tikanga.[639] I do not rule out a court doing so where a dispute genuinely requires resolution, as an

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637 *Ngāti Whātua Ōrākei* (SC) at [52]–[53].
638 NOE 1142/29–33.
639 Notes of Closings 253/23–254/16, 260/15–261/5.

ultimate alternative to battle. Whether such a decision is tika, and consistent with tikanga, is another matter.

E How should the Court approach tikanga?

[369] Just because a Court can do something does not mean it should. In 1894, the Court of Appeal considered that the (then) Supreme Court had no knowledge of "Native customs" which were "known and understood only by those who have made a special study of them".[640] Accordingly, the Court declared itself unqualified to interfere with the Native Land Court's decisions by way of judicial review.[641] This has changed. But the need for caution remains.

[370] One reason for judicial caution is that legal precedents in case law will not be authoritative as to the content of tikanga. This flows from the ongoing capacity for tikanga to change and for there to be differences in tikanga, and the application of tikanga, between iwi and hapū. In 2001, the Law Commission said:[642]

> [18] Flexibility cannot be so great as to allow a proposition to be advanced as Māori custom law where it is in conflict with basic principles handed down from the ancestors. Certainty cannot be so paramount that past understandings of tikanga Māori should be adopted, along the lines of common law precedents, without continually being tested by the practical jurisprudence of Māori communal decision-making. So judges and decision-makers invited to give recognition to tikanga Māori should bear in mind that the vitality of custom law is being continuously replenished within the fora of te ao Māori. There is a need to be cautious – kia tūpato.

[371] Iwi and hapū create, determine and change tikanga through their own deliberative aggregation of practices in exercising their rangatiratanga. Courts do not and cannot make, freeze or codify tikanga. Accordingly, a court must be cautious and careful when dealing with tikanga. As Churchman J said in *Re Edwards (No 2)*:[643]

> I reiterate here that it is not the role of the Court to define the tikanga of the applicants. As I discuss at [308] below, the proper authorities on tikanga are those who have been tasked or honoured with the mātauranga of their tīpuna – the knowledge and wisdom passed down to them by their ancestors.

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[640] *Te Wharo v Davy* (1894) 12 NZLR 502 (CA) at 514 (Williams J).
[641] At 514.
[642] Law Commission *Māori Custom and Values*.
[643] *Re Edwards (No 2)* [2021] NZHC 1025 [*Re Edwards*] at [272].

[372] If a court approaches tikanga in a particular case, it must recognise tikanga on the basis of the evidence before it. A Court may recognise tikanga made by iwi or hapū "for the particular purpose of the particular case before it at the time".[644] What is recognised by a court cannot change the underlying fact or validity of tikanga in its own terms. If tikanga changes, a future court will not be able to rely on a past court precedent. It must consider the evidence of tikanga at the time relevant to that case.

[373] A second reason for caution derives from the inherently difficult task of transcending culturally-specific mindsets. Most High Court Judges are currently Pākehā and most are trained more in the common law tradition than in tikanga. In 2003, in *Ngāti Apa*, Elias CJ and Keith J in the Court of Appeal cited the caution by Viscount Haldane in the Privy Council:[645]

> There is a tendency, operating at times unconsciously, to render [native title] conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence.

[374] Tipping J similarly observed explicitly:[646]

> [184] It is also important to recognise that the concept of title, as used in the expression "Māori customary title", should not necessarily be equated with the concepts and incidents of title as known to the common law of England. The incidents and concepts of Māori customary title depend on the customs and usages (tikanga Māori) which gave rise to it. What those customs and usages may be is essentially a question of fact for determination by the Māori Land Court.

[375] In *Takamore* in 2012, Elias CJ said:[647]

> [95] What constitutes Māori custom or tikanga in the particular case is a question of fact for expert evidence or for reference to the Māori Appellate

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644 *Ngawaka* at [58].
645 *Ngāti Apa* at [144], citing *Amodu* at 402–403.
646 *Ngāti Apa* at 683. And see *Re Edwards* at [121]–[130] and [144].
647 *Takamore* (SC) (footnotes included).

> Court in an appropriate case.[648] A court asked to identify the content of custom by evidence is not engaged in the same process of interpretation or law-creation, as is its responsibility in stating the common law. As in all cases where custom or values are invoked, the law cannot give effect to custom or values which are contrary to statute or to fundamental principles and policies of the law. But it is necessary for the Court to take care in identifying the custom or values truly relevant to its determination. In that connection, I consider that the majority in the Court of Appeal were wrong to see the customs or values here invoked as requiring the Court to accept determination according to tikanga, including by forcible removal of the body of the deceased.
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> …
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> [97] The role of the Court is not to judge the validity of traditions or values within their own terms. It is concerned with the application of established traditions and values in fulfilling the Court's own function of resolving disputes which need its intervention. The determination of the Court says nothing about what is right according to the value systems themselves. Indeed, the determination of the Court can only settle the immediate legal claim. The family and tikanga processes may well continue.

[376] In 2021, in *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)*, I stated:

> [57] Tikanga Ngāti Rehua-Ngātiwai ki Aotea lies at the heart of this dispute. That very description demonstrates that the relevant tikanga belongs to, and perhaps even constitutes, Ngāti Rehua-Ngātiwai ki Aotea. The common law recognises tikanga and its binding force on those subject to it. But a court does not determine, create or change tikanga. The relevant iwi or hapū does that, as Parliament recognises, for example in relation to whāngai in s 114A of Te Ture Whenua Māori Act 1993.
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> [58] As noted above, I have previously accepted that tikanga is law proved as fact.[649] Usually, a court "finds" facts for the purposes of a case. But a court must be very careful about "finding" tikanga as a fact, even where it is required by the relevant iwi or hapū to do so. Whereas most facts relevant to a case are created by circumstance, I understand tikanga to be created by the relevant hapū or iwi through a mixture of practice, tradition and deliberation. Tikanga can change over time. Any recognition by a court can only be a snapshot at a certain point. And a court recognises tikanga only for the particular purpose of the particular case before it at the time. What is recognised by a court cannot change the underlying fact of tikanga determined by the hapū or iwi, exercising their rangatiratanga.

[377] In recognising tikanga, common law courts must hold "in check closely" any unconscious tendency to see tikanga in terms of the English law heritage of New

648 Te Ture Whenua Maori Act 1993, s 61.
649 *Ngāti Whātua Ōrākei* (issues and pūkenga) at [36].

Zealand common law.[650] They must be open to seeing tikanga on its own terms, as a distinct framework. I accept Mr Ward's submission that the Court must be mindful of the unique character of tribal tradition and practice engaged in any claim about tikanga. A court's caution in approaching tikanga must be heightened when the content of tikanga is disputed within an iwi or hapū or between iwi or hapū.

[378] A court must identify the tikanga relevant to the issues it has to decide, recognising the holistic nature of tikanga referred to above.[651] A court must be careful and cautious in its findings, which must be based on expert evidence, whether of pūkenga called by litigants or appointed by the Court. That is particularly so where there is, or appears to be, a conflict of tikanga of different iwi or hapū.

[379] I also have heard evidence and submissions about whether it is consistent with tikanga for a Court to deal with tikanga and, on that basis, what it is appropriate for a Court to do in relation to tikanga. I deal with that below, in the context of the particular tikanga and issues that arise here. But before I turn to that context, I need to address the arguments I heard on the standard of proof of tikanga.

F The standard of proof of tikanga

[380] The validity of local custom in English common law derived from its practice, which was considered a matter of fact, often relying on the evidence of the oldest members of the local community.[652] In *Wolstanton Ltd v Newcastle-under-Lyme Corporation* in 1940, the House of Lords suggested the presumption that a custom was in immemorial existence "should in general be raised by evidence showing continuous user as of right going as far back as living testimony can go".[653] In *Public Trustee v Loasby,* a pre-requisite for Cooper J's tests for recognition of custom was that the custom be proved.[654] In *Takamore v Clarke,* two independent experts gave evidence of Tūhoe custom.[655] As noted in *Loasby,* the authorities explained above, and as agreed by all parties here, it seems clear that tikanga is proved as fact.

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650 *Amodu* at 403.
651 *Takamore* (SC) at [95].
652 Dorsett "Since Time Immemorial" at 43.
653 *Wolstanton Ltd v Newcastle-under-Lyme Corp* [1940] AC 860 (HL) at 876.
654 Richard Boast and others *Māori Land Law* (2nd ed, LexisNexis NZ, Wellington, 2004) [Boast *Māori Land Law*] at [2.2.5], citing *Public Trustee v Loasby*.
655 *Takamore* (CA) at [58].

[381] However, the parties differ here on whether tikanga must be proved to the usual standard for civil law cases, of the balance of probabilities, or to some other standard:

(a) Mr Hodder, for Ngāti Whātua, accepts the civil burden of proof lies on Ngāti Whātua Ōrākei, who must prove their case as more probable than not. He submits there is nothing to suggest that tikanga prescribes a different standard or burden of proof or that any of the exceptions to the usual standard apply.[656] He acknowledges that a court is unlikely to say it is 100 per cent sure about contested matters of history and tikanga but that Ngāti Whātua Ōrākei has probably proven its case beyond reasonable doubt.[657]

(b) The Crown's written closing submits that it is unclear whether the standard of proof is determined by the civil standard of the balance of probabilities or approached from a tikanga standard and, if the latter, what that is.[658] The written closing submits that care needs to be taken to avoid an assumption that a common law test would be applied, which may have some tension with the requirements at tikanga for determining the application of tikanga. In closing orally, Dr Ward submits it is unclear whether the standard of proof for ascertaining whether Ngāti Whātua Ōrākei has mana whenua or ahi kā is determined by the common law civil standard or should be approached from a tikanga standard, about which there is a lack of evidence.[659] He submits "there's a real issue for the Court about trying to determine what tikanga is by applying a standard of proof that is not a tikanga standard".[660]

(c) Mr Majurey, for Marutūāhu, submits the civil standard of proof is inapt where the Court is being asked to determine tribal identity in accordance with tikanga. Rather, he submits a claim in tikanga must be determined at tikanga, not a tauiwi construct of the balance of

656 Notes of Closings 429/5–8 and 430/2-24.
657 Notes of Closings 430/8–24.
658 Crown Closing at [362].
659 Notes of Closings 107/12–108/10 and 120/13–20.
660 Notes of Closings 107/21–23.

probabilities, though that is open to the Court.[661] He submits tribal disputes were resolved by consensus, by battle or by cementing peace, before first contact with Europeans. Accordingly, he submits the appropriate tikanga yardstick is consensus, absent which the Court must decline to make declarations, and tikanga determinations are not for this Court to make. Alternatively, the criminal standard is a potential third option.

(d) Mr Warren, for Ngāi Tai ki Tāmaki, submits there must be a very clear alignment of tikanga before the Court can make a finding of fact one way or the other. He submits that the standard of proof here, given that tribal identity is at stake, must be higher than the usual civil standard. He submits the standard of proof required should be more akin to beyond reasonable doubt and cites the "clear and convincing evidence" standard adopted by the United States Supreme Court in *Colorado v New Mexico*.[662]

[382] I do not consider Mr Warren's valiant efforts to introduce American standards of proof bear edible fruit in New Zealand. As Churchman J in *Re Edwards* stated in relation to customary rights cases under the provisions of the Marine and Coastal Area (Takutai Moana) Act, "the starting point is that the civil burden of proof, on the balance of probabilities, is applicable".[663] As he noted, the Māori Land Court adopted the position in *Tau v Ngā Whānau o Morven & Glenavy – Waihao 903 Section IX Block* that customary rights and interests must be established to that civil standard, "having regard to that standard's inherent flexibility that takes into account the nature and gravity of the matters at issue".[664] The position of the Māori Land Court is entitled to considerable respect in relation to such issues.

[383] But there may be a difference between the standard of proof faced by a party who is required to prove a fact in court and how a court recognises the existence of

661 Notes of Closings 149/13–24 and 153/27–31.
662 *Colorado v New Mexico* 467 US 310 (1984).
663 *Re Edwards* at [100].
664 *Tau v Ngā Whānau o Morven & Glenavy – Waihao 903 Section IX Block* [2010] Māori Appellate Court MB 167 (2010 APPEAL 167) at [61]; and *Bristol v Ngāti Rangi Trust* [2017] Chief Judge's MB 269 (2017 CJ 269) at [24].

particular tikanga. The prospect that a court might find the tikanga of an iwi or hapū has or has not been established "on the balance of probabilities" seems inapt. I accept that it is not consistent with tikanga itself. And I accept that tikanga is established by a dynamic consensus, evidenced by the ongoing practice of an iwi or hapū. Given that, it seems to me that a court simply has to be satisfied, on the evidence before it, that such a consensus amongst the relevant iwi or hapū prevails at any given time. That is consistent with how New Zealand courts approach the recognition of other forms of law, such as foreign law.

[384] Foreign law is proved as a matter of fact to the satisfaction of the Judge.[665] The Court of Appeal has stated foreign law must be pleaded and proved "as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means".[666] It cannot be decided based on precedent as it is a question of fact rather than law.[667] It is typically proved by expert evidence.[668] Evidence of foreign law in New Zealand courts is governed by s 144 of the Evidence Act 2006. Under that provision, foreign law may be proved by expert evidence, copies of laws, relevant government documents, law reports, and other "reliable source[s] of information" in the Judge's view. I consider the New Zealand courts can usefully take the same approach of being satisfied as to the content of tikanga, based primarily on the evidence or commentary of pūkenga.

[385] Professor Richard Boast in *Māori Land Law* notes that foreign law needs to be proved by qualified experts, and that "logically, the same should be true of indigenous customary law".[669] The Privy Council in *Angu v Attah* stated that:[670]

> As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular

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665 M Pawson *Laws of New Zealand* Proof of Foreign Law (online ed) at [272], citing *Bilgola Enterprises Ltd v Dymocks Franchise Systems (NSW) Pty Ltd* [2000] 3 NZLR 169 (CA), reversed by *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 NZLR 289 (PC); *Mount Cook (Northland) Ltd v Swedish Motors Ltd* [1986] 1 NZLR 720 (HC) at 726; and *Apple Computer Inc v Apple Corps SA* [1990] 2 NZLR 598 (HC) at 602.

666 *Schaeffer v Murren* [2020] NZCA 224 at [28], citing Lord Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at [9R-001]. See also *Skye Court Pty Ltd v Mason* CA6/03, 18 June 2003 at [10].

667 M Pawson *Laws of New Zealand* Proof of Foreign Law (online ed) at [272].

668 At [274].

669 Boast *Māori Land Law* at [2.2.5].

670 Unreported, see Boast *Māori Land Law* at [2.2.5].

> customs have, by frequent proof, become so notorious that the Courts will take judicial notice of them.

[386] Similarly, Moore J reinforced in *Ngāti Hurungaterangi v Ngāti Wahiao* that tikanga concepts are "evidence-based matters of fact", unless the specific custom "has become so 'notorious' as to no longer require proof".[671] This is analogous to foreign law which must be proved by "an appropriately qualified expert".[672] The Environment Court has stated that it is "well settled that Maori customary law is treated as analogous to foreign law and is a matter of fact to be proved by appropriately qualified experts".[673] "[F]ruitful source[s]" for proving and interpreting tikanga include expert evidence and the reports of the Waitangi Tribunal.[674]

[387] So, in *Te Weehi v Regional Fisheries Officer*, custom was proved by the evidence of University lecturers and kaumātua.[675] In *Arani v Public Trustee*, the Privy Council relied on decisions of the Māori Appellate Court and an affidavit from a rangatira.[676] In short, as Profesor Boast says, custom should be "rigorously proven" and New Zealand courts have "adhered closely to the 'foreign law' analogy" for reception and proof of tikanga.[677]

[388] That is consistent with tikanga being law, even if it is proved as fact. A balance of probabilities test can only apply to questions of fact.[678] And, as Elias CJ pointed out in *Z v Dental Complaints Assessment Committee,* "[t]he notion of flexibility in application of the civil standard is confusing and disputed even among judges of high standing".[679]

[389] As the Court of Appeal has said in a different context, "[t]he phrase 'is satisfied' means simply 'makes up its mind' and is indicative of a state where the Court

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671 *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486, [2016] 3 NZLR 378 at [176]; and Boast *Māori Land Law* at [2.2.5].
672 At [171]; and Boast *Māori Land Law* at [2.2.5].
673 *Land Air Water Association v Waikato Regional Council* [2001] 7 NZED 26 at [394].
674 At [395]–[397].
675 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).
676 *Arani v Public Trustee* [1920] AC 198 (PC).
677 Boast *Māori Land Law* at [2.2.5] and [2.25].
678 *Saifiti v Commissioner of Police* (1992) 7 CRNZ 695 (HC) at 697.
679 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [4].

on the evidence comes to a judicial decision."[680] The Court of Appeal has also said the need to be satisfied "calls for the exercise of judgment" by a court and "[i]t is inapt to import notions of the burden of proof and of setting a particular standard".[681]

[390] I doubt there is much practical difference between proving on the balance of probabilities that a consensus exists in an iwi or hapū about tikanga, and a court simply being satisfied of that. The crucial point is that the finding expressed by the Court is effectively about tikanga as determined by the iwi or hapū.

VI Mana whenua in Tāmaki Makaurau

[391] This Part of the judgment addresses whether Ngāti Whātua Ōrākei has mana whenua in Tāmaki Makaurau in terms of the historical basis for their claim, in terms of the tikanga of Ngāti Whātua Ōrākei and in terms of tikanga more generally.

A Historical evidence

[392] In these proceedings, several parties sought to impugn the evidence of various witnesses about the historical narrative which underlies the Ngāti Whātua Ōrākei claim to mana whenua. For example:

(a) Dr Vincent O'Malley was tasked under cross-examination by Ms Coates with explaining a difference in tone and emphasis of his brief of evidence formulated for Ngāti Whātua Ōrākei with his *Te Wherowhero* report, written to support Waikato-Tainui in their direct negotiations with the Crown in 2014.[682] She submits little weight should be given to his evidence which was Ngāti Whātua Ōrākei centric and under-emphasised the interests of Waikato-Tainui. Mr Warren also questions Dr Vincent O'Malley's credibility in these proceedings based on his lack of interaction with the *Te Wherowhero* report.[683] Mr Warren

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680 *R v White (David)* [1988] 1 NZLR 264 (CA) at 268. See also *Nogueira v New Zealand Police* [2018] NZHC 1435 at [8]–[15].

681 *R v Leitch* [1998] 1 NZLR 420 (CA) at 428 citing *R v White (David)* [1988] 1 NZLR 264 (CA) at 268. This was endorsed by the Supreme Court in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, the majority (at [96]) citing *R v Leitch,* and Elias CJ (at [26]) citing authorities relied upon in *R v White (David)*.

682 NOE 996/31–997/7 (O'Malley).

683 Ngāi Tai ki Tāmaki Closing Submissions, 19 April 2021 [Ngāi Tai ki Tāmaki Closing] [7.15].

submits the confidential nature of that report does not excuse Dr Vincent O'Malley from ensuring its findings were factored into his evidence for this case.

(b) Ms Coates submits that Professor David Williams' evidence relied heavily upon the work of Sir Hugh Kāwharu who he acknowledged could not be considered independent.[684]

(c) Ms Coates notes that Tāmati Kruger acknowledged he was not, and Charlie Tawhiao and Paul Meredith did not claim to be, experts in the tikanga and customary history of Tāmaki.[685]

(d) Peter McBurney faced explaining, under cross-examination by Mr Hodder, a marked evolution of his thinking about Tuperiri's raupatu between his Mahurangi Report, for the Mahurangi and Gulf Island District Collective completed by the end of 2009, and his report with Nat Green for Ngāi Tai ki Tāmaki completed in December 2011.[686]

(e) Mr Hodder submits that the Court was entitled to expect much better from Professor Michael Belgrave on the grounds that he was "prone to gratuitous slurs about other witnesses and would endorse or dismiss other historians according to whether their views supported his theories".[687]

(f) Ngāti Whātua Ōrākei applied to exclude Te Warena Taua's evidence altogether on the grounds it was based on privileged information he received from Ngāti Whātua Ōrākei before preparing his evidence for Ngāi Tai ki Tāmaki and on the basis it was not impartial. I declined the application, though I described the meeting and discussions by Te

684 NOE 701/6 (Williams).
685 NOE 1868/4– 5 and 13–15 (Kruger); NOE 1308/28–1309/29 (Tawhiao); Meredith Brief at [138]; NOE 1143/11–15 (Meredith).
686 NOE 2814/27-2815/20, and see: NOE 2799/25–32; McBurney *Mahurangi Report* at 148; and Peter McBurney and Nat Green *Ngāi Tai Ki Tāmaki Claims Overview Report* (December 2011) at [362].
687 Ngāti Whātua Ōrākei Closing at n 5, [2.12], and [6.169].

> Warena Taua with Ngarimu Blair, after being engaged by Ngāi Tai ki Tāmaki, as "troubling".[688] In closing, Ngāti Whātua Ōrākei accused Te Warena Taua's evidence of being plainly partial, speculative, lacking credibility and intended to denigrate the mana of Ngāti Whātua Ōrākei.[689] Ngāi Tai ki Tāmaki rejected the criticism.

[393] I take Dr Ward's point that making findings of fact about historical issues in the 1700s and 1800s at this distance is fraught. I also take his point that both tikanga and traditional tribal histories can differ from each other and competing views can validly be held.[690] They can also differ over time. As Tāmati Kruger says:[691]

> An one must appreciate how things have evolved, how things have changed, how relationships have now evolved from 1840 to now. And so when examining what was going on in 1840 and trying to find that semblance in 2021, and we can't, because its different, we must not make a judgement then that one of them is lying. Is 1840 lying or is 2021 lying? No, no what we're observing is humanity in progress, evolution …

[394] But any accounts of historical events may differ when recounted for different purposes, whether given orally on the basis of tribal narratives or written down by historians paid for their views. They can be slanted by particular interests at play at any given time as well as the limits of the understanding or experience of the witnesses. Such tendencies are evidence of human qualities of different people focussing on different things at different times for different purposes. The Courts are used to evaluating evidence by witnesses of fact and expert witnesses in all spheres. I have taken the above submissions into account in terms of the weight I accord to particular evidence. They have not caused me to put aside all the evidence of any witness. I have evaluated and critically analysed each piece of evidence presented by the expert and other witnesses in the context of its consistency or inconsistency with the other relevant evidence. I have attempted to make explicit my assessments in relation to each piece of evidence, where required.

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688 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2021] NZHC 88 at [34].
689 Ngāti Whātua Ōrākei Closing at n 5 and [6.132].
690 NOE 2077/8–14 (Wilson); NOE 2184/13–23 (Belgrave).
691 NOE 1860/6–12.

[395] It is fair to say that I have had more difficulty with Te Warena Taua's historical evidence than that of other witnesses. But I have also been struck by the approach to historical evidence by professional historians contracted to undertake research for clients for purposes of advocacy. On occasion, the presentation of their research can convey the impression that the evidence has been viewed in the light of a pre-existing hypothesis rather than the other way around. This is a general concern; I do not intend to target any particular witness. In any case, I do not regard the evidence of professional and tribal historians as necessarily any more or less credible or reliable than each other. As the historical experts agreed:[692]

> All historical sources have limitations and should be critically analysed and examined. Particular forms of evidence should not be privileged over others.

[396] As Professor Michael Belgrave says, "[t]here is no such thing as a definitive history".[693]

[397] Regarding the Native Land Court, I consider the accounts of the witnesses who gave evidence to be relevant evidence of what witnesses of fact were understood (including by translators) to have said at a time closer to the relevant events than we are now. The historical experts agreed on that. I consider appreciably less weight is due to the conclusions drawn by the judges in those hearings, who did not hear from all the relevant potential witnesses, or even iwi, in the context of he most intense conflict between the Crown and iwi, particularly with Waikato-Tainui and affiliated iwi in Tāmaki Makaurau. I do not discount the Court's conclusions entirely. They did, as Mr Hodder submits, constitute application of judicial method to the evidence of witnesses closer to the relevant events than we are today. But, as Dr O'Malley said in his *Te Wherowhero* report:[694]

> The Native Land Court has been the object of sustained criticism from the Waitangi Tribunal and many historians for its tendency to impose a simplified and simplistic set of rules around determining ownership to lands that ignored the reality of a much more complex and intricate customary reality. In many respects the Ōrākei judgment provided a template for this kind of approach. An intricate and evolving network of customary rights on the ground was swept aside in favour of a convenient 'one iwi' ruling.

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692 Ngāti Whātua Ōrākei Memorandum of Counsel, 17 February 2021; and Te Toru Joint Memorandum of Counsel, 22 February 2021.

693 NOE 2153/5.

694 O'Malley *Te Wherowhero* at 85.

B The historical basis of mana whenua at Ngāti Whātua Ōrākei tikanga

[398] I outlined the historical narrative and traditions of Ngāti Whātua Ōrākei and their submissions about tikanga in Part III. I outlined responses to that in Part IV. In the course of that I made observations about the historical evidence relied upon, where I was able to do so. Here I examine the objections in terms of a number issues regarding the competing historical narrative and traditions in light of the evidence about tikanga:

(a) the timing of the attacks by Tuperiri and Te Taoū on Waiohua in the 1700s;

(b) uncertainty as to whether Te Taoū was able to maintain undisputed control over the isthmus in the decades following Tuperiri's attacks;

(c) the implications of Ngāti Pāoa occupying any whenua over which Ngāti Whātua Ōrākei claim mana whenua;

(d) whether Marutūāhu iwi other than Ngāti Pāoa occupied sites on the isthmus after that;

(e) whether Tuperiri and Te Taoū conducted a raupatu of Waiohua;

(f) the effect of the strategic withdrawal by Ngāti Whātua Ōrākei from the isthmus in the 1820s and 1830s;

(g) the significance of the return of Ngāti Whātua Ōrākei under the mana of Te Wherowhero;

(h) whether tikanga concerning ahi kā has evolved; and

(i) the implications of historical associations with sites, including wāhi tapu, in the area over which Ngāti Whātua Ōrākei claim mana whenua.

1 The timing of Tuperiri's attacks

[399] Ngāti Whātua Ōrākei say Tuperiri and Te Taoū attacked and defeated Waiohua around 1740. Morehu Wilson, implicitly accepts the raupatu occurred in 1740 in discussing Marutūāhu traditions.[695] Te Ākitai Waiohua consider it more likely that the attacks occurred around 1780 to 1790.[696] The evidence before me is:

(a) In 1869, when Te Kawau died, his nephew Paora Tūhaere said he was "known to be 90; or more than 90", placing his birth in the 1770s.[697] He estimated the attacks occurred between 1750 and 1755.[698]

(b) Professor David Williams suggests 1760 as the date.[699] Mr Hodder cites estimates of the date of the raupatu, consistent with reports of the Waitangi Tribunal *Ōrākei Report,* Office of Treaty Settlements reports and other sources, as occurring in:

  (i) 1740–1750 by Professor Stone;[700]

  (ii) 1750 by Percy Smith who said "[f]rom personally knowing many of the grandsons of those who took part in the subsequent events, I am inclined to think that 1750 is nearer the date. It is impossible however to get it correctly";[701] and

  (iii) 1740 or 1760 by Sir George Graham.[702]

(c) In her text *Taua* in 2003, Dr Angela Ballara suggested the 1740 date derived from Chief Judge Fenton's Native Land Court judgment. Unlike Paora Tūhaere, she assumed Te Kawau was born in the 1790s. Based on that, assumptions about Tuperiri being a contemporary of Hongi Hika's father, and the age of Tuperiri's sons she estimates the

695 M Wilson Brief at [63]–[65].
696 Te Ākitai Waiohua Closing at [73], citing McBurney Brief at [35]-[36].
697 Mangai Uhu Uhu "Ke a te kai tuhi o te Waka Māori" *Te Waka Māori* (Napier, 16 December 1869) at 40.
698 Paul Tūhaere *A Paper Giving an Account of the Genealogy of the Ancestors of Ngāti Whātua,* handwritten version (undated) at 11.
699 NOE 768/18–20.
700 Stone *From Tāmaki-Makau-Rau* at 40.
701 Smith *The Peopling of the North* at 85.
702 George Graham *MS 120 George Graham papers* (1887).

raupatu may have been as late as 1780 or 1790.[703] Peter McBurney suggests the 1740 raupatu is more likely to have occurred around 1780 to 1790, based on Ballara's work.[704]

[400] Marutūāhu does not take a stance on this timing. Ngāi Tai ki Tāmaki does not explicitly take a position on the date of the raupatu either, though Mr Warren notes the date is contested and far from certain.[705] Professor Michael Belgrave, giving evidence for Marutūāhu Rōpū, considers there are major difficulties in connecting whakapapa to dates and, as a result, he does not take a definitive position on when the raupatu occurred.[706] I agree. This is a finely balanced question on which historical sources and expert historians do not agree and which a Court is poorly placed to "resolve". It has become a matter of tribal tradition. If I had to do so, I would be inclined to place greater weight on the estimates of those who lived closer to the time such as Paora Tūhaere but there are arguments against doing so. I do not consider I need to resolve the precise timing of Tuperiri's attacks in Tāmaki Makaurau. If they occurred significantly later, that could be relevant to how long Ngāti Whātua Ōrākei enjoyed ahi kā until the 1820s. But I do not understand from the tikanga evidence about raupatu here that the timing of these events would make a significant difference to the claim of Ngāti Whātua Ōrākei to mana whenua now in terms of their own tribal narrative and tikanga, or to those of the other iwi.

2 Whether Te Taoū maintained undisputed control after Tuperiri's attacks

[401] It difficult to determine as a matter of fact the claim by Ngāi Tai ki Tāmaki that there is uncertainty about whether Te Taoū and Ngāti Whātua Ōrākei were able to maintain undisputed control over the isthmus in the decades following Tuperiri's raupatu, and the tikanga implications of that. The historical tribal narrative of Ngāi Tai ki Tāmaki, including the oral history of which Dr Te Kahautu Maxwell gives evidence, suggests they did not. It is a matter of tribal tradition, better argued on a marae.

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703 Ballara, *Taua* at 493 n 1.
704 McBurney Brief at [36]
705 Ngāi Tai ki Tāmaki Closing at [3.37].
706 NOE 2176/31–2177/12; and see NOE 2200/7–15.

[402] Ngāi Tai ki Tāmaki also rely on Peter McBurney's evidence. But his views have changed over time. His reliance on the killing of Tuperiri's sons by Ngāti Pāoa and their victory at Orohe does not appear necessarily to demonstrate the point. And these incidents relate to conflict between Ngāti Whātua Ōrākei and Ngāti Pāoa, from whom Ngāti Whātua Ōrākei does not claim take raupatu and with whom Ngāti Whātua Ōrākei has now entered the Kawenata Tapu. Accordingly, it is not clear to me that they undermine the claim to mana whenua by Ngāti Whātua Ōrākei as a matter of tikanga, as I explain next.

3 The claims of Ngāti Pāoa and Marutūāhu Rōpū

[403] I do not consider I need to resolve disputes which concern occupation by Ngāti Pāoa of the area over which Ngāti Whātua Ōrākei claim mana whenua. Ngāti Pāoa and Ngāti Whātua Ōrākei have concluded their own tikanga-consistent resolution of their respective areas of "lead mana whenua". No Ngāti Whātua Ōrākei, Marutūāhu Rōpū and Ngāti Pāoa witness who addressed the implications of the Kawenata Tapu and Agreement disputed their validity in terms of their respective tikanga. Ngāti Pāoa does not now dispute Ngāti Whātua Ōrākei having "lead mana whenua" over the area in which they claim it in this proceeding. Indeed, Ngāti Pāoa recognises the claim. Ngāti Pāoa is also fierce in its assertion of independence from Marutūāhu Rōpū in this regard. There is no suggestion that is inconsistent with tikanga.

[404] So, to the extent that the objections by Marutūāhu Rōpū to Ngāti Whātua Ōrākei mana whenua rely on the occupation, actions and tikanga interests of Ngāti Pāoa, they appear currently to be settled by the Kawenata Tapu and Conciliation Agreement between Ngāti Pāoa and Ngāti Whātua Ōrākei in terms of the tikanga of both of those iwi. That appears to me to apply to the issues of:

(a) whether Waiohua or Te Taoū invited Ngāti Pāoa to live in the Waitematā at the time of the alleged tuku whenua or "wedding gift" in 1780 and whether Ngāti Pāoa needed any such tuku;

(b) whether, as Morehu Wilson says, Ngāti Pāoa lived in pā and kāinga, engaged in battles, and mutually recognised shared resource-gathering

areas with Ngāti Whātua Ōrākei in the 1700s and 1800s on the Tāmaki isthmus until the Ngāpuhi incursions in the 1820s;

(c) whether, as Hauāuru Rawiri and Morehu Wilson say, at peace gatherings around 1835, Kahukoti of Ngāti Pāoa effectively permitted Ngāti Whātua to stay at Ōrākei on their return to the isthmus; and

(d) whether, as Ted Andrews and Joe Tupuhi say, the ahi kā of Ngāti Pāoa has never gone out in Ōrākei, Kohimarama and Ōkahu.[707]

4 Other Marutūāhu iwi claims

[405] It is difficult to determine as a matter of fact, on the basis of the evidence before me, the implications of Morehu Wilson's evidence that other Marutūāhu iwi had cultivations and settlements at the pā and kāinga where he says Ngāti Pāoa lived through the 18th and 19th centuries until the early 1820s.[708] I have little context about these sites, including when they were occupied, by which iwi and whether they were occupied again after the 1830s return. The same applies to the tradition of Ngaati Whanaunga harvesting a beached whale at Tokaroa – Te Ara Pekapeka a Ruarangi.

[406] It is, accordingly, difficult for me to determine the historical basis of Marutūāhu iwi other than Ngāti Pāoa having interests over these sites at tikanga, and whether they approach ahi kā roa and mana whenua in the same sense in which Ngāti Whātua Ōrākei uses those concepts. And the historical experts have agreed that "[b]efore 1840, in general terms, tribal boundaries were often fluid or poorly defined and sometimes intersected or overlapped". More detailed evidence and inquiry would be required in relation to each site. Again, these are matters of conflicting tribal traditions better discussed on marae.

5 The continuation of Waiohua

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707 Andrews and Tupuhi Brief at [30]–[33]. See also M Wilson Brief at [112]; Maxwell Brief at [159].
708 M Wilson Brief at [58].

[407] I accept that Tuperiri's attacks did not result in the extinguishment or extinction of the Waiohua people. Clearly they did not, because everyone accepts Ngāti Whātua Ōrākei subsequently married Waiohua people. And Te Ākitai Waiohua exists today. But, as Mr Derby acknowledges, the dominant narrative is that there was a raupatu, or conquest of Waiohua by Tuperiri and Te Taoū. That is reflected in the evidence before me. Professor Stone's work, on which Te Ākitai Waiohua relies, suggests the hapū structures of Waiohua were "eliminated" by the raupatu. He suggests Te Ākitai Waiohua returned as a "remnant" in the later decades of the 18th century. Mr Derby relies on Lucy Macintosh's work for the Manukau City Council that "Te Ākitai Waiohua re-established itself in the 1820s and the Te Ākitai Waiohua territory included Pūkaki and extended north towards Onehunga".[709] The views of these Pākehā historians is that Waiohua did not survive the raupatu with its tribal structures substantially intact. But that does not appear consistent with their tribal tradition.

[408] David Wilson Takaanini's authoritative evidence for Te Ākitai Waiohua, as a direct descendant of Kiwi Tāmaki, is that their ancestors "re-established" themselves in the 19th century. He says that happened in and around Māngere, which is where Te Ākitai Waiohua is based today. His evidence is:

> [29] … Te Ākitai have an enduring connection with central Tāmaki, the area occupied by our tupuna. Our identity is tied to Kiwi Tāmaki and the whenua to which he and his ancestors belonged. This cannot be broken.
>
> [30] Te Ākitai Waiohua also maintained a whakapapa connection to the land through subsequent strategic marriage between Ngāti Whātua and the Waiohua people that occurred after the battle between Kiwi Tāmaki and Te Taou.

[409] Overall, the evidence before me does not suggest that the tikanga interests of Te Ākitai Waiohua constitute ahi kā and mana whenua in the way Ngāti Whātua Ōrākei conceive of it or impugn the ahi kā and mana whenua of Ngāti Whātua Ōrākei in the way Ngāti Whātua Ōrākei conceive of it. But neither does the evidence of the interests of Te Ākitai Waiohua in specific sites in this area at their tikanga and on the basis of their tribal traditions suggest they accept the tikanga conceptions of Ngāti Whātua

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709 Derby and Rother "Te Ākitai Waiohua Customary Interests" at 15, citing Lucy Mackintosh "Shifting Grounds: History, Memory and materiality in Auckland Landscapes c. 1350 – 2018" (Thesis submitted for Doctor of Philosophy in History, University of Auckland, 2019) at 44. See also Lucy Mackintosh *Shifting Grounds: Deep Histories of Tāmaki Makaurau Auckland* (Bridget Williams Books, Wellington, 2021) at 38.

Ōrākei. And Te Ākitai Waiohua does not seek declarations from the Court about their own tikanga and traditoins.

6 The implications of strategic withdrawal in the 1820s-1830s

[410] There is a question as to the effect of the departure by Ngāti Whātua Ōrākei from Tāmaki after or around 1826. It is not disputed that Ngāpuhi did not establish ahi kā in Tāmaki in that period. So I do not consider that, at tikanga as Ngāti Whātua Ōrākei conceive it, and in terms of Ngāti Whātua Ōrākei tribal narrative and traditions, the ahi kā roa and mana whenua of Ngāti Whātua Ōrākei was extinguished. But I have little contextual information or supporting evidence for Mr Brown's suggestion that Ngāti Rau, a Ngāi Tai ki Tāmaki hapū, maintained a presence on the isthmus during the Ngāpuhi incursions. That would require more examination to resolve satisfactorily, preferably on a marae. Ngāi Tai ki Tāmaki do not seek that examination by the Court.

[411] There is no suggestion that the temporary withdrawal by any of the iwi from Tāmaki Makaurau in the 1820s and 1830s affected their interests in the area at tikanga, as each of them conceive of it.

7 Return under Te Wherowhero's protection

[412] Mr Warren submits there is uncertainty about the significance of the return of Ngāti Whātua Ōrākei under the mana of Te Wherowhero. Te Warena Taua's evidence is that Ngāti Whātua Ōrākei was able to seek refuge in Waikato due to their Waiohua connections. And, as Ms Coates submits, it seems clear that Te Kawau's return would not have been possible, at least at that point, without the protection of Te Wherowhero. As Mr Hodder submits, the evidence to the Native Land Court of Matire Toha, a Ngāpuhi women married to Kati, supports the proposition that there was an alliance between Te Kawau and Te Wherowhero.[710]

[413] The personal mana of Te Wherowhero is unquestioned. And what Ngāti Whātua Ōrākei say was a gift by Te Kawau to Kati, of lands at Pukapuka, is another

[710] Native Land Court *Ōrākei* MB 2 at 36–55.

matter. But there is no evidence before me in these proceedings that, by protecting Ngāti Whātua Ōrākei and other iwi who returned to Tāmaki, Te Wherowhero and/or Waikato-Tainui acquired or asserted mana whenua over all the land that those iwi then re-occupied in Tāmaki, in the sense in which Ngāti Whātua Ōrākei conceive of mana whenua. Neither does the evidence suggest they asserted mana whenua on the basis of Te Wherowhero's protection of the new capital of Auckland in the 1840s.

[414] When Te Whakakitenga o Waikato Inc indicated their support of the position of Ngāti Whātua Ōrākei in this case in May 2018, Ngāti Whātua Ōrākei was seeking declarations of their ahi kā and mana whenua in the area at issue. But their challenge then focussed on the Crown's specific decisions to offer land in that area to Marutūāhu Rōpū and Ngāti Pāoa. The position of Waikato-Tainui regarding the declarations now sought by Ngāti Whātua Ōrākei has not been formally put before the Court. Waikato-Tainui are not a party in these proceedings. Kiingi Tuuheitia and Waikato-Tainui came to court in support of the opening of the case of Ngāi Tai ki Tāmaki. I do not make any findings about the mana whenua or other tikanga interests of Waikato-Tainui.

8 Has tikanga regarding ahi kā evolved?

[415] Mr Warren submits that, for Ngāi Tai ki Tāmaki today, ahi kā is better defined by a spiritual connection together with the fulfilment of cultural and legal responsibilities in a modern context. He relies on *Te Mātāpunenga*.[711] He points to the evidence of Te Warena Taua and Dr Te Kahautu Maxwell that the terms ahi mataotao and tahutahu are not used within the isthmus.[712]

[416] I do not understand the position of Ngāi Tai ki Tāmaki to affect the pre-colonisation requirements of tikanga. As the entry for ahi kā in *Te Mātāpunenga* says:[713]

> *Entry Guide.* 'Keeping fires alive', as a metaphor for the active exercise of rights of occupation, is seen by many commentators as a prerequisite for both a legitimate claim to a particular tract of land and to tāngata whenua status in a district. The metaphor itself appears to have reflected a concrete reality, although buildings, boundary posts, cultivations and burial grounds would

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711 *Te Mātāpunenga* at 33.
712 NOE 2567/3-15 and 2655/20-2656/10 (Taua) and 2743/22-31 (Maxwell).
713 *Te Mātāpunenga* at 33.

> also be evidence of sustained occupation. The concept of *ahi kā* was codified by the Native Land Court and other judicial bodies, but the Court's interpretation of the custom was regarded by some Māori authorities as having over-simplified a complex issue. Thus, while occupation was conceded to be important, arguments were advanced that ancestry had also to be taken into account. Nonetheless, continuous possession in itself appears to have been a key factor in the assertion of customary rights to land in both Aotearoa and other parts of Polynesia.

[417] Nor do I understand the position of Ngāi Tai ki Tāmaki to be inconsistent with the position of other iwi about the effect of colonisation on tikanga in contemporary times. As the pūkenga agree, "tikanga are shaped by each iwi's historical narratives and thus the application of tikanga cannot be examined and understood without that context", and "the historical context includes the disruption of colonisation and its impact on iwi and their ability to exercise their tikanga".[714]

[418] There is nothing to suggest the responsibilities of an iwi or hapū to whenua over which they have ahi kā, signifying their continued presence, cannot be fulfilled despite non-Māori ownership of that whenua. The key appears to be the notion of permanency of presence said by Ngāti Whātua Ōrākei, on the basis of the evidence of Tāmati Kruger and Te Kurataiaho Kapea, to be the fundamental underlying distinguishing feature – perhaps a tāhuhu of ahi kā compared with ahi tahutahu or ahi mātaotao.[715] The changing nature of ahi kā does not appear to undermine the claim of Ngāti Whātua Ōrākei in terms of the tikanga and tribal history and tradition of Ngāti Whātua Ōrākei.

9 Historical associations

[419] Finally, it is clear that Marutūāhu iwi, Ngāi Tai ki Tāmaki and Te Ākitai deeply value their various spiritual, ancestral and historical connections with sites, including wāhi tapu – their deep hononga – in the area over which Ngāti Whātua Ōrākei claim mana whenua. But Ngāti Whātua Ōrākei does not dispute that other iwi have connections and relationships with sites in central Auckland. They deny that other iwi have mana whenua at tikanga and they deny that what other iwi have is equivalent to or displaces the mana whenua of Ngāti Whātua Ōrākei in the area at issue. The

714 Ngāti Whātua Ōrākei Pūkenga Summary and Te Toru Pūkenga Summary, point 2.
715 Kruger Brief at [106]; NOE 111/29-30 (Kapea).

historical associations to the whenua by other iwi is not, itself, inconsistent with the claim of Ngāti Whātua Ōrākei to mana whenua as they conceive it.

10 Summary of historical tribal narratives and traditions

[420] The evidence and submissions suggest the Ngāti Whātua Ōrākei tribal historical narrative and tradition is clear, coherent, and consistent in terms of the tikanga of Ngāti Whātua Ōrākei.

[421] The objections of Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki and Te Ākitai Waiohua are in the nature of different tribal historical narratives and traditions. As indicated above, more information would be required to reconcile some aspects of their objections to the historical narrative and tikanga of Ngāti Whātua Ōrākei: the timing and nature of the raupatu in the mid-18th century; whether Te Taoū maintained undisputed control thereafter; whether Marutūāhu iwi other than Ngāti Pāoa had cultivations and settlements in the area at issue in the 18th and 19th centuries; whether Te Ākitai Waiohua survived the raupatu with their tribal structures substantially intact; whether Ngāti Rau maintained a presence in the area at issue during the 1820s and 1830s and the significance of that; the effect of iwi returning to the isthmus with the protection of Te Wherowhero.

[422] Whether Ngāti Whātua Ōrākei, Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki and Te Ākitai Waiohua wish to reconcile their tribal histories and traditions and whether it occurs in a tikanga consistent manner, is up to them. It seems to me to be better explored on a marae than by a Court. I do not attempt to reconcile the different historical narratives and traditions in the judgment.

C Mana whenua in Tāmaki Makaurau at tikanga Māori

[423] Marutūāhu Rōpū, Ngāi Tai ki Tāmaki and Te Ākitai Waiohua also object to the claim by Ngāti Whātua Ōrākei that their conception of ahi kā roa and mana whenua is valid in terms of the tikanga of other iwi and at tikanga Māori. At the heart of this issue is whether mana whenua is an exclusive or non-exclusive concept at tikanga. It is also directly related to the commonality of tikanga regarding mana whenua across iwi and hapū.

[424] The evidence of the pūkenga and other witnesses called by Ngāti Whātua Ōrākei is clear and consistent in their account of take raupatu, reinforced by take tupuna, followed by ahi kā roa in creating mana whenua. It is clear and consistent in saying that mana whenua is generally exclusive, except in fringe or contested areas or by agreement; it is not shared, particularly in a group's heartland or core rohe. Ngāti Whātua Ōrākei say their tikanga is entirely consistent with tikanga Māori more generally. Ngāti Pāoa supports that in the terms noted above. So do Ngāti Kurī and Ngāi Te Rangi.

[425] I have no doubt that mana whenua, as the strongest "interest" at tikanga in the "heartland" or ūkaipō of an iwi, and central to their identity, is currently a real and robust aspect of the tikanga of Ngāti Whātua Ōrākei and some, perhaps many, but not necessarily all, other iwi. This is consistent with the evidence of the independent pūkenga called by Ngāti Whātua Ōrākei from outside Tāmaki Makaurau: Tāmati Kruger, Paul Meredith and Charlie Tawhiao. For example, in more detail, Tāmati Kruger's evidence in chief is:[716]

> 107 It is possible for an iwi or hapū to have ahi kā roa within its rohe but also have areas of ahi mataotao. It is equally possible that an iwi or hapū with ahi kā roa can allow another group into its rohe, such that that group can establish an ahi mataotao connection.
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> 108 That is a natural consequence of the way in which Māori society was configured. As I've mentioned the centre of an iwi is its hapū or community and so it is there that the iwi's power is concentrated. Physical centres of the hapū then become sites of power, authority and influence within the iwi's rohe (heartland). These sites comprised of a marae ātea, which was reserved for political debate and decision-making, papakāinga, which contained the family homesteads and the village, pā being the wider neighbourhood and includes any gardens and areas of industry such as fishing and clothing production and urupā, the burial sites. Geographically then, most members of the iwi were concentrated in the centre of the rohe, as was the power and authority of that group. Towards the boundaries of the site of influence there would be a decentralising of power and so there any influence and power over whenua along the margins of the boundary would be shared with neighbouring iwi.
>
> 109 The ability of an iwi to protect or control its rohe is due to the strength of its ahi kā concentrated at the centre of its rohe. The limit of that exclusive authority is reflected in the land: an iwi would not likely contend that they held ahi kā roa in an area where they could not, for example, send troops to defend it or gift a portion of it to secure a

[716] Italics of Māori words omitted.

marriage or other alliance. Those limits should not be considered as boundaries in the Pākehā sense where they are fixed lines on maps. Iwi boundaries were often marked by natural features such as rivers, streams, plains and mountains, but these physical markers were just one consideration in defining the rohe of an iwi. The influence and authority of that iwi was equally significant.

110 An iwi can also maintain influence in land that is beyond its area of exclusive interests. That influence would usually be maintained by something other than tāngata whenua status, such as a marriage (in other words, a particular person is not 'of' that particular land, but may seek to influence what happens there by way of marital alliances).

111 Beyond the areas of exclusive interest, and the area of influence, iwi can claim shared interests with other iwi. Those interests would often be located at the true limits of the rohe of a particular iwi, where two or more iwi may reciprocally acknowledge each other's interests.

[426] In his evidence in reply, Tāmati Kruger says:

17 I agree with Dr Maxwell and Mr Mikaere (at paragraphs [148]-[156] and [41] respectively) that mana whenua can sometimes be shared. However to my mind there is no such thing as "shared mana whenua" over an iwi's heartland, or core rohe. Iwi are a territorial, cultural, political, economic nations, where iwi and hapū connect closely to land and other natural resources within a specified territory. A territory always has a heartland, and the heartland with landmarks is in turn a crucial aspect of the identity of an iwi. It is the place of origin, existence and future of the iwi and is filled with strong whanaungatanga connection traces between the iwi and the land. Simply put, if there was no heartland, there would be no iwi. The tribal structure is a kinship organisation layered by iwi, hapū, whānau inherent to their culture.

18 And iwi have strong connection to their heartland, which is where they will have undisputed mana whenua, mana tangata. "Shared mana whenua" cannot be accommodated within this paradigm, except towards the extremities of the territory of an iwi, where shared interests is most obvious within another iwi. These areas are roha rōhai, or shared interests as I referred to in my earlier statement and addressed the tikanga implications of such places being shaken by the ebb and flow of politics and the fortunes and misfortunes of life.

19 An iwi can still access the resources from the heartland of another iwi. But accessing resources on this land does not confer mana whenua, rather acknowledges whakapapa connections. They are still considered manuhiri / rāwaho (outsider or non-local), and the iwi with mana whenua are the tāngata whenua. The tāngata whenua exercise and express their mana whenua by controlling, operating and managing the terms of conditions of access to natural resources.

[427] Charlie Tawhiao says:

(a) mana whenua is central to iwi identity, which is intimately bound to place;[717]

(b) "[i]f all their mana whenua is shared, then they have no identity that is separate from those who they share it with";[718]

(c) there can be no "layering" of mana whenua although there can be layering of lesser interests alongside mana whenua, according to tikanga.[719]

[428] As Ngāti Whātua Ōrākei submits in closing:[720]

> Mana whenua is best expressed as the responsibility for exercising exclusive cultural authority in a specific rohe or location. It is both the exercise of power over the land, and a corresponding responsibility for the land. The use of the term mana also means that mana whenua is central to iwi identity. Iwi exist as unique entities not just because of their specific whakapapa but also because of their very specific relationship with a place or whenua. Iwi identity is intimately bound to place. It is that relationship with a place or whenua that defines mana whenua. And because mana whenua is central to iwi identity it is fiercely defended.[721]

[429] The evidence supporting this in terms of the tikanga and tribal narrative and traditions of Ngāti Whātua Ōrākei is given by their own witnesses, Te Kurataiaho Kapea, Taiaha Hawke, Margaret Kawharu and Ngarimu Blair. It is consistent with the published and unpublished writings of its distinguished kaumātua and leading scholar and anthropologist, the late Professor Sir Hugh Kāwharu. As Ngāti Whātua Ōrākei says, in their tikanga, the principle of mana whenua is:[722]

> Ngāti Whātua Ōrākei has mana whenua over its heartland, or ūkaipō. Mana whenua is the responsibility for exercising cultural authority, and includes the following (which is not intended to be an exhaustive list):
>
> (a) the authority to grant rights of use or access to its heartland and its resources;[723]

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717 Tawhiao Brief at [28].
718 NOE 1235/10-12 (Tawhiao).
719 Tawhiao Brief at [47].
720 Ngāti Whātua Ōrākei Closing at [5.57] (footnote included).
721 Tawhiao Brief at [27]–[28].
722 Ngāti Whātua Ōrākei Closing at [5.109] (citations included).
723 Kruger Brief at [119]; Kruger Reply at [19].

(b) the authority to withhold such access, including through imposition of rāhui;[724]

(c) the authority to recognise, and the responsibility to protect, the cultural connections of other iwi within the heartland;[725]

(d) the responsibility of welcoming manuhiri and caring for them;[726]

(e) the responsibility of kaitiakitanga towards the whenua.[727]

[430] Sir Hirini Mead's text *Tikanga Māori* suggests 11 requirements to establishing mana whenua today:[728]

> 1. Mana whenua is achieved by military action (take raupatu, take ringa kaha, take pakihiwi kaha) that displaces the people and their leaders who occupied that estate, extinguishes their rights of occupation and use of the land and establishes a new group of occupiers. …
>
> 2. Mana whenua is based on occupation by a group of people over an area of land they settle on for several generations (take ahikāroa). Ultimately this land becomes the rohe, or tribal estate, of the new group. Rapata Wahawaha is of the opinion that ahikāroa by itself is insufficient to clinch a claim; it needs to be supported by take tipuna (ancestral right).
>
> 3. Military action by itself is usually not sufficient to extinguish all rights to the land. Usually the new leaders marry women of the land to ritually secure the land and bring it under the control of new leadership. This tikanga might be called 'take moe whenua'. It is based on the notion that the hau (spiritual essence) of the land rests with the women of the land. They carry within them the essence and significance of what whenua is about. Whenua is to sustain the life of a growing infant in the womb. Out in the world of light the whenua sustains the people and provides for each individual a place for one's feet to stand upon, tūrangawaewae. This land is home. The claim to the land based on take tipuna (ancestral claim) is more highly valued than any other take and this is an important point. It is also fair to say that if the new leaders do not marry into the land, the conquering iwi goes to extraordinary lengths to try and extinguish tāngata whenua rights totally.
>
> 4. Acknowledgement by neighbouring iwi is required to validate the new political reality that now controls the estate. This is an important part of the validating process so that occupation is seen to be accomplished through complying with the tikanga relating to land acquisition.
>
> 5. The estate should be able to meet the basic needs of the new group of occupiers as well as those former citizens who were allowed to

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724 Tawhiao Reply at [15]; Meredith Reply at [8.3].
725 Tawhiao Reply at [25] and [28].
726 Kruger Brief at [119].
727 Meredith Brief at [87]; Tawhiao Brief at [30].
728 Mead *Tikanga Māori* at 306–308.

remain, usually because of the skills they possessed and sometimes through family connections – whanaungatanga.

6. The new iwi/hapū needs to establish alliances that will help validate its occupation, increase its military strength and at the same time set up trade relationships for resources and taonga that the local people need from others.

7. The new group sets in place systems such as a leadership structure, kāinga arrangements, organisations to carry out collective tasks, training schools and arrangements that allow each whānau to look after itself. It will require every hapū to have a group of able-bodied men and women ready to respond to military attacks and ready to join in iwi-wide enterprises such as large-scale fishing, building a meeting house, establishing village sites or in earlier times hurriedly building defensive fighting pā.

8. Once its systems are developed and are in place, the new group is able to defend its rohe against others and over several generations. …

9. With all of these in place mana whenua is secured, and the people are able to live in relative peace, tend to their gardens and food-gathering activities, practice their arts, establish well-organised kāinga, build houses and waka of various kinds, grow their population, look after the sick and wounded and ensure that the people are on side with the spiritual world.

10. Members of the next generation are able to claim the land on the basis of ancestral rights established through take moe whenua and now become take tipuna, as claims through take ringa kaha are valid but less so.

11. The people and their leaders are able to enjoy rangatiratanga; thus securing mana whenua is the first step towards being able to exercise rangatiratanga over the people of the land. Others may argue that the chief's writ kicks in from the moment of occupation, but I argue that this occurs over time when mana over the land has been validated and accepted by other iwi. There is a process to establish mana whenua and it takes time.

[431] As Mr Majurey emphasises, Sir Hirini's fourth requirement suggests acknowledgement of the mana whenua of an iwi is important to its validity at tikanga. With two exceptions, the evidence before me is that the neighbours of Ngāti Whātua Ōrākei participating in these proceedings do not recognise or acknowledge the mana whenua of Ngāti Whātua Ōrākei over the whole area over which they claim it. The exceptions are:

(a) Ngāti Pāoa recognises the mana whenua of Ngāti Whātua Ōrākei over the area at issue in the Kawenata Tapu and Conciliation Agreement.

That has weight due to the strength of the potential claims of Ngāti Pāoa in the area.

(b) My understanding is that Marutūāhu Rōpū, Ngāi Tai ki Tāmaki and Te Ākitai Waiohua agree that Ngāti Whātua Ōrākei has mana whenua in the terms Ngāti Whātua Ōrākei conceive of that, at their heartland of Ōrākei:

(i) Mr Majurey submits "[f]or Marutūāhu, there is no challenge to the identity of Ngāti Whātua Ōrākei being centred at Ōrākei".[729]

(ii) Ngāi Tai ki Tāmaki acknowledge Takaparawhau/Ōrākei, where the marae of Ngāti Whātua Ōrākei sits, consistent with its name, as the heartland of Ngāti Whātua Ōrākei.[730]

(iii) Te Ākitai Waiohua notes the evidence suggests the "heartland" of Ngāti Whātua Ōrākei is at Ōrākei, where they have their strongest association.[731]

[432] Otherwise, and elsewhere, the lack of recognition by other iwi that Ngāti Whātua Ōrākei holds mana whenua is a potential problem for Ngāti Whātua Ōrākei in terms of tikanga Māori. Mr Hodder submits there was no credible contest of recognition until the modern Treaty settlements, which affect the relevance of the need for recognition, and may explain why recognition may not be forthcoming. No dout the context of Treaty settlements exacerbates the tensions. However, the Native Land Court proceedings in the 1860s illustrate that such tensions have been present for some time. And Treaty settlements can hardly affect the need for recognition by others if that is required at tikanga. I take the evidence from Ngāti Whātua Ōrākei to be saying that recognition by other iwi is not a pre-requisite for Ngāti Whātua Ōrākei to have mana whenua in terms of their own tikanga. Implicit in the terms of the declaration they seek is that it is also true at tikanga Māori and at the tikanga of other iwi.

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729 Marutūāhu Closing at [55].
730 Ngāi Tai ki Tamaki Closing at [2.12]; citing NOE 1900/13–30.
731 NOE 62/18–28 (Kapea)

[433] Whatever effects a Court declaration might have, including regarding the legal incidents of mana whenua, it is difficult to see how it could purport to constitute or require recognition of mana whenua by another iwi if that would be inconsistent with their own tikanga and/or their own tribal traditions and history. That would be inconsistent with the nature of tikanga and its relationship to the law declared by courts examined in Part V. This is also directly related to the implications of the tikanga of different iwi being different in their conceptions of the exclusivity or non-exclusivity of mana whenua.

[434] Ngāti Whātua Ōrākei say that their tikanga is entirely consistent with the relevant general principles of tikanga Māori. Ngāti Pāoa support the conception of mana whenua put forward by Ngāti Whātua Ōrākei. But Marutūāhu Rōpū, Ngāi Tai ki Tāmaki and Te Ākitai Waiohua (Te Toru) object. They accept that Ngāti Whātua Ōrākei have tikanga interests in the area over which they claim mana whenua. But Te Toru do not accept that Ngāti Whātua Ōrākei has mana whenua that overrides or is superior to their own tikanga interests in that area. And Mr Warren, for Ngāi Tai ki Tāmaki, disagrees that ahi kā or mana whenua are underpinning principles of tikanga – rather, they are what manifests if a tribe adheres to the underlying principles.[732]

[435] Counsel for Te Toru point to the evidence of their pūkenga that, for them, mana whenua can often be shared and is not an exclusive concept.[733] There are also other authoritative statements that doubt the nature of mana whenua in general. In 1994, Sir Edward Taihakurei Durie observed:[734]

> Some Māori have adopted the opinions of the early European writers. This includes and may apply especially to Māori academics. This, and the voluminous, archival record expressing the Pākehā view, makes the truth yet harder to ascertain. The current constructs of hapū acting collectively as national states and exercising mana whenua or dominion over defined territories may owe more to European influence than we may care to admit. While significant rangatira had influence from time to time over widely dispersed hapū, it is arguable that their control depended upon their personal mana and not on political land boundaries. Their mana could come and go and arguably, their influence was over people rather than land. Again, I am not suggesting there was no sense of unity amongst the people of descent groups, but that the nature of the unity must be seen in Māori terms. It is one

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732 Notes of Closings 247/7/9.

733 Ngāi Tai ki Tamaki Closing at [3.61]–[3.64]; Te Ākitai Waiohua Closing at [14]; and Marutūāhu Closing at [53].

734 E T Durie "Ethics and Values in Māori Research" (1998) 4 He Pūkenga Kōrero 19 at 2223.

> thing to equate this unity with dominion at English law, but quite another to reconstruct Māori society to make it fit.

[436] The Waitangi Tribunal has made several observations about mana whenua that have evolved over time and between different Tribunal panels. In 2001, a Waitangi Tribunal comprising Chief Judge Durie, John Kneebone, Professor Gordon Orr and Makarini Temara, issued the *Rēkohu Report*. The report condemned the term "mana whenua" as doing "violence to traditional ethics".[735] It criticised the inclusion of the term in legislation, going as far as to state that statutory reference to mana whenua was contrary to the principles of the Treaty.[736] It stated:[737]

> The term "mana whenua" appears to have come from a nineteenth-century Māori endeavour to conceptualise Māori authority in terms of the English legal concepts of *imperium* and *dominium*. It links mana or authority with ownership of the whenua (soil). But the linking of mana with land does not fit comfortably with Māori concepts. Recent research tends to agree that the term "mana whenua" itself does not appear in the early records about customary rights to land. ... These opinions confirm that the term "mana" was personal and was used in regard to the influence or authority of chiefs. Other opinions compiled in the Appendix consider that mana whenua was a nineteenth-century invention. Crown counsel likewise challenged – we think correctly – its use to describe the general authority of a particular group over any area of land.
>
> We are inclined to think that the term "mana whenua" is an unhelpful nineteenth century innovation that does violence to cultural integrity. However, subject to such arrangements as may have been settled by the people themselves, our main concern is with the use of the words "mana whenua" to imply that only one group can speak for all in a given area when in fact there are several distinct communities of interest, or to assume that one group has a priority of interest in all topics for consideration. Some matters may rightly be within the purview of one group but not another. As far as Moriori are concerned it is clear that they retain a customary interest in their ancestral lands and cannot be denied the right to be heard thereon.

[437] In 2004, a Tribunal comprising Sir John Clarke, Dame Alamein Koopu, Judge Richard Kearney, Professor Sorrenson and the Hon Michael Bassett (dissenting), in the *Tauranga Moana Raupatu Report*, endorsed that view, stating:[738]

> We also endorse the Rēkohu Tribunal's concerns about the use of the term 'mana whenua', particularly when it is used to assert that one group has exclusive authority within a particular area. Māori custom was characterised

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[735] Waitangi Tribunal *Rēkohu Report* at 11.
[736] At 260.
[737] At 28 (footnotes omitted).
[738] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Raupatu o Tauranga Moana* (Wai 215, 2004) at 40 (footnotes omitted).

> by complex overlapping and intersecting interests, so that, in different circumstances, the interests of one group or another might be more significant. The concept of 'mana whenua' appears to be a nineteenth-century innovation, which confuses the personal or spiritual quality of mana with the distinct issue of rights to land.

[438] In the *Tāmaki Makaurau Report* in 2007, a Waitangi Tribunal comprising Judge Carrie Wainwright, Joanne Morris and Te Wharehuia Milroy carefully did not focus on mana whenua as a concept but was heavily critical of the notion of exclusivity, or "predominance of interests", as used in the proposed Treaty settlement with Ngāti Whātua Ōrākei:[739]

[439] By contrast, in the *Hauraki Settlement Overlapping Claims Inquiry Report*, the Tribunal, composed of Judge Miharo Armstrong, Professor David Cochrane, Professor Rawinia Higgins and Dr Ruakere Hond, engaged with the concept of mana whenua in a more positive way, which may have reflected position of the iwi claimants. It stated:[740]

> … that is often precisely how redress is perceived: as an expression of a group's mana whenua status within the rohe in which the redress lies. According to Mr Tawhiao, this is 'naturally … an affront to those iwi who already hold mana whenua in that area'. His views echoed those of another Ngāi Te Rangi claimant, Hauata Palmer, who stated before the Pare Hauraki Deed was signed that if it was 'finalised with redress that is in Tauranga Moana, the Crown is effectively saying that Hauraki have mana whenua, mana moana, and rangatiratanga in Tauranga Moana. That is just patently wrong, and it is simply not true.'

[440] Each of these reports no doubt reflect the claims before each Tribunal, and their differing contexts. They may also reflect differences in the tikanga of different claimant iwi and, perhaps, evolution of tikanga over time. My own perception is that the term "mana whenua" has become increasingly used in the last 20 years to refer not only to the tikanga concept but as a shorthand for those who hold mana whenua – who used to be referred to as the tāngata whenua.

[441] Te Toru do not deny the possibility of exclusive mana whenua or that Ngāti Whātua Ōrākei considers that to be part of tikanga Ngāti Whātua Ōrākei. Both

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739 Waitangi Tribunal *Tāmaki Makaurau Report* at 96–97.
740 At 84.

Mr Majurey and Ms Coates accept that.[741] Ngāi Tai ki Tāmaki asserted their mana whenua and rangatiratanga over Rangitoto (Peratu) and Motutapu and their counsel argued they had a pre-eminent interest in those motu in 2018.[742] Te Ākitai Waiohua claimed to have a heartland centred on their marae and its environs in its 2010 Mandate Strategy.[743] Ngaati Whanaunga claims on their website to have areas of shared and exclusive mana whenua.[744] Authoritatively, the pūkenga in these proceedings collectively agree that "the notion of exclusivity could be expressed in tikanga".[745] But they also state "it was maintained by the Tāmaki iwi present that no one iwi has exclusive mana in the Auckland CBD area, so such tikanga did not apply".[746]

[442] The evidence in these proceedings shows that mana whenua can be exclusively held by one iwi or hapū and that it can be shared. Importantly, the pūkenga collectively emphasise that tikanga is shaped by the historical experiences of an individual iwi. No doubt mana whenua is more easily shared for some iwi than others, in light of their experiences. Perhaps that can be seen in the differences between the iwi here. It would make sense for Ngāti Whātua Ōrākei, with its experience of loss of land, to be particularly focussed on authority over whenua. Perhaps the heritage of Marutūāhu iwi as a mobile, maritime people, is less rooted in territorial areas and exclusivity. Perhaps the ancient origins of Ngāi Tai ki Tāmaki and Te Ākitai Waiohua, seeing others come and go in wider Tāmaki Makaurau and elsewhere, naturally incline them to emphasise the nuance and complexity of their relationships in terms of whakapapa and whanaungatanga.

[443] No one in these proceedings disagrees with the Tribunal's *Rēkohu* or *Tauranga Moana r*eports that it is wrong at tikanga to assume that an exclusive version of mana whenua held by one iwi obviates the layers of interests of other iwi at tikanga. That would be inconsistent with the nature of mana whenua explored in the evidence in these proceedings. Indeed, as acknowledged by Ngāti Whātua Ōrākei, the obligations arising from having mana whenua include a tika consideration of, and looking after,

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741 Marutūāhu Closing at [52]; Notes of Closings 203/2–16.
742 NOE 2914/10–2916/24 (Brown); and *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2017] NZCA 613, [2018] 2 NZLR 453 at [79]–[80].
743 Te Ākitai o Waiohua Iwi Authority *Te Ākitai Mandate Strategy* (November 2010) at 3.
744 NOE 2058/18–28 (Compain).
745 Te Toru Pūkenga Summary at [5].
746 At [5].

others' customary connections. In their closing submissions, Ngāti Whātua Ōrākei refers to Charlie Tawhiao's explanation that iwi owe each other "tikanga obligations to be fair and reasonable where another group is claiming connections in their heartland".[747] That might involve discussions of how best to protect an urupā, acknowledgment that the history of another iwi in that area will not be forgotten, or even agreeing that land within their heartland could be provided to another iwi, akin to a tuku whenua.[748]

[444] But at the same time, the evidence is that it can be valid at their own tikanga for an iwi such as Ngāti Whātua Ōrākei to conceive of mana whenua as the strongest tikanga interest, held by one iwi, overriding aspects of the interests of other iwi while simultaneously owing responsibilities in respect of those interests. The evidence indicates this is valid at the tikanga of Ngāti Whātua Ōrākei, shaped by their historical experiences and tribal narratives and traditions, including the impact of colonisation.

[445] Any suggestion that such a conception of mana whenua is a 19th century innovations implies that tikanga may not evolve in certain directions. That does not seem to recognise that tikanga, and its application, continues to evolve over time and is shaped by the ongoing experience of iwi, including in the twentieth and twenty-first centuries. The evidence here does not suggest that a conception of mana whenua as the strongest tikanga interest held by one iwi necessarily transgresses the tāhuhu of tikanga Māori. Many iwi appear to have adopted exactly that conception. The iwi in these proceedings have demonstrated that different conceptions of mana whenua, whether in response to contemporary pressures or not, are currently legitimate concepts at their own tikanga.

[446] I do not accept Mr Hodder's submission that the pūkenga called by Te Toru are "simply wrong" about mana whenua in tikanga Māori or their own tikanga. And I do not consider that to be affected by whether or not they have agreed to abide by the Expert Witnesses Code of Conduct. The pūkenga called by Te Toru were clear and consistent about the underpinning principles of their tikanga and the implications for the claim by Ngāti Whātua Ōrākei:

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747 Ngāti Whātua Ōrākei Closing at [5.74].
748 At [5.75]–[5.76].

(a) Harry Mikaere's evidence is that the Ngāti Whātua Ōrākei claim to exclusive mana whenua does not reflect the tikanga of Ngāti Maru and Marutūāhu or Waitangi Tribunal findings on custom.[749] He says relationships with whenua do not depend on continual occupation but on maintaining or keeping warm the relationships with the whenua.[750] He says:

> While Tāmaki is not our "core territory" or "predominant area of interest" (to use the language of the Waitangi Tribunal), it is no less a part of us and our identity. Nor, is our relationship with the whenua consequently inferior. Notions of primary and non-primary (second class iwi) have no basis in our tikanga. Again, I am talking in the context of an exclusive mana whenua/ahi kā claim brought by one hapū against all other iwi over a huge area with a complex and contested history.

(b) Wati Ngamane's evidence emphasises whakapapa and whanaungatanga in the tikanga of Ngāti Maru and Marutūāhu.[751] He says shared whenua and resources is a common tradition among Marutūāhu iwi and that mana whenua and ahi kā, for them, "is all about whanaungatanga and whakapapa to the whenua".[752]

(c) James Brown's evidence is: [753]

> Mana whenua for Ngāi Tai starts and ends with whakapapa. And as explained by tohunga and by other experts, it's underpinned by many other sub features of our whakapapa: whaungatanga, aroha, tika, pono. … So our definition is Ngāi Tai ki Tāmaki have mana whenua through their whakapapa to Tāmaki Makaurau in this context.

(d) David Wilson Takaanini's evidence is that all tikanga principles are connected: whanaungatanga informs how Te Ākitai Waiohua interact with other groups; manaakitanga reflects their historical and ancestral connections; the deep hononga, ancestral connections, of Te Ākitai to

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749 Mikaere Brief at [35]–[37] and [40]–[41]. See also [46]–[56].
750 At [38].
751 W Ngamane Brief at [20]–[22].
752 At [32]–[34].
753 NOE 2896/3-1–9 (Brown).

areas in central Tāmaki gives them standing and mana there.[754] His evidence is that the term "mana whenua" according to the elders of Te Ākitai Waiohua is "arrogant" whereas "tāngata whenua" denotes the mana of all people in Tāmaki Makaurau.[755]

(e) Dr Korohere Ngāpō says that "[w]hanaungatanga and whakapapa are at the heart of tikanga" which is part of why tikanga Marutūāhu emphasises inclusiveness and allows for shared whenua within their "heartland" or "core areas".[756] His evidence is that Marutūāhu acknowledge all the other tribes in Tāmaki "because history, whakapapa and tikanga put us all there on the whenua".[757]

[447] It may be that there are subtle distinctions between tikanga and the application of tikanga through different iwi traditions and history, as Mr Mahuika submits. Or there may be a distinction between the underlying values and principles of tikanga and what manifests if a tribe adheres to them, applying those principles, as Mr Warren submits.[758] But either way, I accept the evidence of Harry Mikaere, James Brown, and David Wilson Takaanini and Dr Korohere Ngāpō that the tikanga and tribal histories and traditions of Ngāti Maru and Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki and Te Ākitai Waiohua do not accept that their interests in Tāmaki Makaurau are subject or inferior to the mana whenua of Ngāti Whātua Ōrākei.

[448] I see no reason why the tikanga or application of tikanga by Ngāti Whātua Ōrākei and these other iwi may not differ regarding mana whenua. The High Court and Court of Appeal have recognised that there can be variability in the nature of mana whenua:

(a) In *Port Nicholson Block Settlement Trust v Attorney-General,* in interpreting the absence of a proposed reference in a deed to exclusive mana whenua, Williams J said "[i]n a land tenure system driven by

754 D Wilson Brief at [51]–[55].
755 D Wilson Brief at [57].
756 Ngāpō Brief at [10].
757 At [41].
758 Notes of Closings 247/7–9.

kinship, the phrase mana whenua meant (and means) authority and priority, but not necessarily exclusivity".[759]

(b) Moore J in the High Court in *Ngāti Hurungaterangi v Ngāti Wahiao* said:[760]

> The variability of opinion on the topic [of mana whenua], the influences of context (particularly time and space) and the deeply divergent views of the contesting parties necessarily means the concepts of mana whenua have not assumed notorious status.

(c) Williams J, for the Court of Appeal in *Kamo v Minister of Conservation* emphasised the need for a proper determination of the factual background regarding contested mana whenua, saying, in addition:[761]

> There is a further complication in this case. Ngāti Mutunga and Moriori are now considerably intermingled, although they are not co-extensive communities. It is common, in tikanga Māori at least, for conqueror and conquered (assuming those terms to be apt in this case) to intermarry in this way. The victor obtains thereby the deeper ancestral right (or take tupuna) of the vanquished by recruiting their DNA. And the vanquished obtain the protection of a stronger ally at a time of vulnerability by agreeing to share whakapapa. But these things can change. Mana whenua is not frozen in time. It is a living principle of tikanga. Mana whenua might come to be shared, or it might merge in the name of a new shared ancestor. These are complex factual questions to be assessed on the evidence against the applicable principles of tikanga Māori, or tikane Moriori, or indeed both.

[449] On the basis of the extensive factual evidence in this context, between these iwi in Tāmaki Makaurau at this time, I conclude that who has mana whenua as a matter of tikanga and tribal history and tradition, and what that means, is contested. That is consistent with what the learned authors of *Te Mātāpunenga* said more generally in 2013:[762]

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759 *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181 at [72].
760 *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486, [2016] 3 NZLR 378 at [174].
761 *Kamo v Minister of Conservation* [2020] NZCA 1, [2020] 2 NZLR 746 [*Kamo*] at [27].
762 *Te Mātāpunenga* at 178 (references and italicisation of Māori words omitted). The quotation about mana whenua is one paragraph in a 27-page entry but gives the flavour of the contested nature of the concept.

> The phrase mana whenua has been held to link political responsibilities (the protection of people, particularly members of a tribal group under traditional leadership) and other land-related authority. However the inherent ambiguity of the expression mana whenua has made its use and that of the complementary expressions noted above a vexed issue, with the appropriateness of their use challenged by Māori and other commentators. Some commentators on the other hand have identified mana whenua as a key component of tribal identity, and, particularly in contemporary situations, its retention as a symbolic marker of status has been noted even when there is no longer any authority to be exercised, or physical presence of those said to possess it, on the land over which mana is claimed. Mana whenua has been construed in a broad sense as indicating a form of ownership and used that way in some government documents. Its possession has been officially deemed an attribute which must be recognised by government agencies; in official discourse its meanings have extended to include an environmental responsibility acquired by individuals in infancy, and synonymity with the terms tāngata whenua. Mana whenua has been identified as an attribute of chieftainship, either generally or specifically in relation to the Kīngitanga. It has also been given statutory recognition as a form of customary authority. Apart from official and Kīngitanga-related discourse, the term mana whenua has been used to encapsulate the collective right of a descent group to occupy and identify with their territory, and, in a broader sense, to signify the effective occupation and use of land as a base for collective enterprise. According to some accounts, this mana may be shared by a number of separate tribal entities, but others would deny that such divided sovereignty is permissible.

[450] So, the tikanga, tribal history and tradition of some iwi, including Ngāti Whātua Ōrākei, include mana whenua as the strongest form of tikanga interest held by one iwi. The tikanga and tribal histories and traditions of other iwi, such as Ngāti Maru and Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki, and Te Ākitai Waiohua, does not recognise that. What that means in terms of the declarations sought here depends largely on the Court's role in relation to tikanga more generally.

D Declarations about mana whenua

[451] The Woolfs' authoritative text on *The Declaratory Judgment* explains that "[a] declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs".[763] Declarations are a well-established form of relief in the common law and are now a routine remedy in judicial review. As Elias CJ said in the Supreme Court in these proceedings in 2018, "[w]here claims of right

[763] Lord Woolf and Jeremy Woolf *The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) [Woolf and Woolf *The Declaratory Judgment*] at [1–02].

or legal interest are made in our constitutional order, it is the function of the courts to determine them."[764] The majority stated that:[765]

> It is common ground that the function of the courts includes making declarations as to rights. Nor is there any dispute that it may be possible for Ngāti Whātua Ōrākei to advance a claim in relation to customary rights.

[452] The majority said "it must be open to Ngāti Whātua Ōrākei to seek to clarify its status in the area over which it claims rights short of a challenge to the particular decisions to transfer the specified properties".[766]

[453] Declarations of right became a more common remedy in English courts from the mid-19th century.[767] They were originally a private law remedy in the Court's inherent jurisdiction. In New Zealand, the High Court has general equitable jurisdiction to make declarations.[768] That may be an apposite source of authority for declarations of legal rights at tikanga, if a source needs to be identified. The Court also has supervisory jurisdiction under the common law, and under s 16(1)(b) of the Judicial Review Procedure Act 2016, to grant declaratory relief in judicial review proceedings. That is also relevant here; these are judicial review proceedings in form. And the Court has jurisdiction under the Declaratory Judgments Act 1908 in relation to the interpretation or validity of statutes or other instruments, though that may not be so relevant to matters of pure tikanga.

[454] The Court's power to grant a declaration as a remedy is discretionary. It is well-established in the law of judicial review that "courts today will generally consider it appropriate to grant some form of relief where they find reviewable error".[769] A declaration will not usually be made where it lacks utility. But declarations vindicate rights and bind the parties by preventing them from relitigating the same issues.

[455] Here, Ngāti Whātua Ōrākei seeks a declaration that:

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764 *Ngāti Whātua Ōrākei* (SC) at [78].
765 At [34].
766 At [53].
767 Woolf and Woolf *The Declaratory Judgment* at [2–01].
768 *Association of Dispensing Opticians of NZ Inc v Opticians Board* [2000] 1 NZLR 423 at [10]. See generally Rachael Schmidt-McLeave "Declaratory Relief" in Sir Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2012).
769 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 [*Ririnui*] at [112] per Elias CJ and Arnold J.

> Ngāti Whātua Ōrākei have ahi kā and mana whenua in relation to the 2006 RFR Land and the 1840 Transfer Land.

[456] Mr Hodder submits the ahi kā and mana whenua of Ngāti Whātua Ōrākei create a status which the Court can and should recognise by making the declaration. He submits the Court can and should determine issues of tikanga, the other parties overstate the fluidity of the factual matrix, a declaration would not pre-empt other determinations, and all relevant parties have been served. Mr Hodder submits Ngāti Whātua Ōrākei have proven, as a matter of fact and a matter of tikanga, that they have mana whenua and ahi kā in the area over which they claim it, and it has a sound basis in law for the Court to exercise its discretion to issue a declaration to that effect. He submits that if the Court comes to the view that the declarations should be modified, then it should provide an opportunity for the parties to make submissions on the terms of the declarations that would reflect the judgment.[770] Ngāti Pāoa, supports the declarations sought, as reflective of the Kawenata and Conciliation Agreement. Otherwise, they too would like the opportunity to make further submissions on alternative terms of declarations.[771]

[457] Counsel for the other parties oppose such a declaration:

(a) Mr Majurey, for Marutūāhu Rōpū, submits that it is open to the Court to decline the declaration if the Ngāti Whātua Ōrākei claim of exclusive ahi kā and mana whenua is not made out over every inch of the claim area. He submits the declaration has no limitation as to extent and claims exclusivity but is not clear on its wording. He submits it would tend to pre-empt pending litigation regarding the foreshore and seabed and it would encompass the Tūpuna Maunga shared by iwi, and properties they purchased under the right of first refusal, under the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2011. If the Court proposes to make an alternative declaration, Marutūāhu Rōpū would like the opportunity to make submissions on that.[772]

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770 Notes of Closings 582/14–26.
771 Notes of Closings 317/4–6.
772 Notes of Closings 156/20–157/3.

(b) Mr Warren, for Ngāi Tai ki Tāmaki, submits the declaration sought will divide people, create a legal class under the guise of tikanga and forever distort the history of Tāmaki Makaurau, contrary to tikanga. Tikanga is sourced in atua so this is not a conventional situation for the Court to apply law to facts. He submits it is clear that any declaration regarding sole ahi kā or exclusive mana whenua for Ngāti Whātua Ōrākei is wholly inappropriate.

(c) Ms Coates, for Te Ākitai, submits that the Court should decline to grant declarations when it is inconsistent or inappropriate with tikanga to do so.[773] She submits the declaration sought has no utility outside of the specific articulated effect of the other declarations sought, so if they fail, so should this one. She submits there is no reasonable basis for the Court to find as a matter of fact or tikanga that Ngāti Whātua Ōrākei has the only and exclusive mana whenua and ahi kā interests within the relevant area, or to make any of the declarations sought by Ngāti Whātua Ōrākei. Te Ākitai Waiohua would have to see any alternative declarations in order to comment on them.[774]

(d) Dr Ward, for the Crown, submits that the declaration sought is too broad and general and unclear for the Crown, local government and other iwi, and that the declarations lack utility. In particular, he submits the impact on a consent authority's assessment of matters under s 6(3) of the Resource Management Act 1991 is uncertain and it would cut across other proceedings. A declaration may freeze tikanga. He submits there is real doubt whether the declaration would serve a useful purpose as it would not alter other group's traditional histories and understandings. Because the application of tikanga Māori is highly contested here, he submits it may be appropriate to decline to make declarations, as in other cases where matters of tikanga could not be resolved on the facts.

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773 Notes of Closings 213/14–15.
774 Notes of Closings 184/29.

> [775] If an extensive reframing of the declarations sought is proposed, fairness would require an opportunity for further submissions.[776]

[458] In Part V of the judgment, I traversed the nature of tikanga as a free-standing legal framework recognised in New Zealand law. Tikanga is often assumed, recognised and referred to by New Zealand legislation. Tikanga was recognised by English common law that accompanied the Crown to New Zealand. It is recognised by New Zealand common law today. It can determine the outcome of a court's application of a statute or the common law. It can be a direct source of legal rights. The Court can make declarations about tikanga, where that is appropriate.

[459] In Part V, I also outlined my conclusions about the Court's role regarding tikanga. Tikanga-consistent dispute resolution process must be preferred to non-tikanga consistent court resolution of disputes about tikanga. But it follows from tikanga being part of New Zealand law that, if tikanga-consistent resolution of a dispute about tikanga is not feasible, then recourse to a court may be appropriate as a matter of law. It would be a brave court that attempts to reconcile or prioritise tikanga that truly differs between iwi or hapū, especially if that reconciliation is not tikanga-based. An attempt to do so may well not be accepted by those who follow tikanga. It may not be tika. There may be a variety of different ways by which a court could seek to resolve a dispute over tikanga that are more consistent with tikanga. I also accepted that the Court's declaratory jurisdiction is able to include the making of formal declarations of legal status and rights, including customary rights, and of corresponding obligations.

[460] From one perspective, the lack of external recognition of, and respect for, their mana whenua is one of the reasons why Ngāti Whātua Ōrākei sought a declaration from the Court. From another perspective, such a lack of recognition and respect means a declaration is not justified at tikanga. From yet another perspective, perhaps

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775 *Kamo*; *Pouwhare v Kruger* HC Wellington CIV-2009-485-976, 12 June 2009 at [28]–[29].
776 Notes of Closings 142/28–143/13.

closest to the conclusions I have come to, Ngāti Whātua Ōrākei simultaneously has mana whenua from some perspectives, and not from others.[777]

[461] It will be clear from my analysis above that I am satisfied the evidence demonstrates that Ngāti Whātua Ōrākei has mana whenua based on take raupatu and ahi kā over the area in which they claim it, according to their own tikanga and based on their tribal historical narrative and tradition. Ngāti Whātua Ōrākei seeks a declaration of its rights at tikanga and law. The issues have been sufficiently traversed to support that. I would be inclined to make such a declaration on the basis that it speaks only of the tikanga and historical tribal narrative and traditions of Ngāti Whātua Ōrākei. My preliminary view is that such a declaration would not unduly cut across other proceedings or legislation, which decide different issues. Such a declaration might be worded as follows:

> Ngāti Whātua Ōrākei currently have ahi kā and mana whenua in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau, with all the obligations at tikanga that go with that, according to the tikanga and historical tribal narrative and tradition of Ngāti Whātua Ōrākei.

[462] That is not what Ngāti Whātua Ōrākei sought, though Mr Hodder suggested that Ngāti Whātua Ōrākei might regard such a declaration founded on the tikanga of Ngāti Whātua Ōrākei as helpful. So I reserve leave for the parties, and particularly Ngāti Whātua Ōrākei, to make further submissions, if they wish, on whether the Court should exercise its discretion to make a declaration in those or similar terms.

[463] Marutūāhu Rōpū, Ngāi Tai ki Tāmaki, and Te Ākitai Waiohua do not seek declarations regarding their tikanga. They oppose the declaration sought by Ngāti Whātua Ōrākei that goes further than the tikanga of Ngāti Whātua Ōrākei. I am satisfied, on the basis of the evidence I have heard, that Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki and Te Ākitai Waiohua do not accept, based on their tikanga and tribal histories and traditions, that their interests in Tāmaki Makaurau are subject or inferior to the mana whenua of Ngāti Whātua Ōrākei. On that basis, I am not prepared to make a declaration that suggests their tikanga, tribal histories and

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777 It is tempting to draw an analogy with the measurement problem in quantum mechanics. This is exemplified by Schrödinger's cat, which simultaneously exists in two different states until observed. But that does not seem entirely apt.

traditions are consistent with those of Ngāti Whātua Ōrākei, which might be inferred from the declaration sought by Ngāti Whātua Ōrākei.

[464] I also do not consider that Ngāti Whātua Ōrākei and the opposing iwi have yet exhausted the possibility of tikanga-based resolution about the differences between them over mana whenua, if it can be exhausted. Trial by battle (of lawyers) is not necessary. The Court should not intervene by making declarations that go further than the tikanga of Ngāti Whātua Ōrākei for that reason as well. But the parties may consider that a single declaration about the tikanga of Ngāti Whātua Ōrākei leaves too much room open for inferences about their positions.

[465] Accordingly, I also reserve leave for the parties, and Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki and Te Ākitai Waiohua in particular, to make submissions on whether I should make a declaration along the following lines:

> The tikanga and historical tribal narratives and traditions of Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki, and Te Ākitai Waiohua do not currently recognise that Ngāti Whātua Ōrākei have ahi kā and mana whenua, as those concepts are conceived of by Ngāti Whātua Ōrākei, in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau.

[466] I observe that the conflicts between iwi in these proceedings over these issues are long-standing. I am sure the means of resolving them are available, at tikanga, to them. I note that counsel for every iwi participating in the hearing stated they would prefer a tikanga-based settlement. They may consider the Court can assist to facilitate a tikanga-based resolution process, given my observations in part V regarding such options as appointment of one or more pūkenga by consent. I reserve leave for any iwi participating in these proceedings as parties or interested parties to make a joint application for such assistance with any of the disputed issues of applying tikanga canvassed in this judgment. I also reserve leave for them to apply for a declaration by the Court to reflect a joint position about any of these disputed issues, reached by a tikanga-consistent process, to be recorded by the Court.

VII Treaty settlements and overlapping interests today

A Bastion Point and specific Treaty settlements of Ngāti Whātua Ōrākei

[467] The Ōrākei block includes 13 acres at Bastion Point. This land was acquired by the Crown for defence purposes in 1886. It was not returned. In 1976, the Crown announced it was planning to develop the remaining land at Bastion Point for high-income housing and parks. Taiaha Hawke gave compelling evidence about the Bastion Point protests. He is Senior Cultural Engagement specialist to the Ngāti Whātua Ōrākei Trust, a direct descendant of Tuperiri and the son of Joe Hawke. I acknowledge Joe Hawke's attendance at the hearing.

[468] In brief, on 5 January 1977, roughly 30 members of the Ōrākei Maori Action Committee occupied Bastion Point. The occupation and protests grew and continued in 1977 and 1978. The Government met with members of Ngāti Whātua Ōrākei. That resulted in transfer of ownership of 29 acres and 27 state houses and land, and a debt of $200,000, confirmed in the Ōrākei Block (Vesting and Use) Act 1978.

[469] In parallel, the Government pursued legal action to evict the protesters. On 25 May 1978, the Government sent in around 600 police, army personnel, army vehicles, buses, bulldozers and helicopters to forcibly remove the protestors. A navy frigate was stationed in the harbour in direct sight of the occupation. Taiaha Hawke's evidence is that the images and footage from this shameful act are now a well-documented event in the national psyche.[778] Two hundred and twenty-two protesters were arrested, and the meeting house, buildings, and gardens were demolished. This was the first of three mass arrests that took place at Bastion Point. Most of the prosecutions were eventually dropped.

[470] Taiaha Hawke says the Bastion Point occupation gave Ngāti Whātua Ōrākei time and space to think, act and feel Māori, and rekindle their connection with Ngāti Whātua Ōrākei land. They felt as though they had finally returned home.

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778 Margaret McClure "Auckland Places – Eastern suburbs: Ōrāker to the Tāmaki River" (5 August 2016) Te Ara — the Encyclopedia of New Zealand <www.teara.govt.nz>.

[471] In 1984, Joe Hawke and 12 others filed a claim with the Waitangi Tribunal that the 1978 settlement was unjust and contrary to the Treaty of Waitangi. The Tribunal heard the claim at Ōrākei in May 1985. In July 1985 a second hearing was held into issues concerning the control of the Ōrākei marae. The Tribunal issued its report in November 1987. The report contains a detailed history of the Ōrakei block. The Tribunal findings emphasised by Ngāti Whātua Ōrākei in this proceeding are that:

(a) Ngāti Whātua Ōrākei are tāngata whenua of what is now central Auckland;[779]

(b) the Crown alienated the Ōrākei block from collective ownership in breach of the Treaty of Waitangi;[780] and

(c) the Crown's actions to clear the papakāinga in the 20th century (including the discharge of raw sewerage near the papakāinga, deliberate flooding, and the "traumatic" evictions of 1952) were in breach of the Treaty.[781]

[472] The Tribunal recommendations included that the Crown vest land at Bastion Point and Ōkahu, and the Ōrākei marae and meeting house, in Ngāti Whātua Ōrākei. The recommendations were given effect through the Ōrākei Act 1991.

[473] Ngāti Whātua Ōrākei made other specific Treaty claims. One, in 1993, resulted in a settlement with the Crown in relation to surplus railway lands in Tāmaki Makaurau. Ngāti Whātua Ōrākei and the Crown signed a deed of settlement involving payment of $4 million to the Ngāti Whātua o Ōrākei Māori Trust Board and Te Rūnanga o Ngāti Whātua.[782] And in 1996, in compensation for the loss of preferential access to subsidised state housing at Ōrākei, the Crown paid $8 million to the Trust Board, "on account" of an eventual wider Treaty settlement.

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779 Waitangi Tribunal *Ōrākei Report* at 19.

780 At 255.

781 At 255.

782 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Reports on Lands at Waikanae, Wellington, Auckland and South Auckland* (Wai 264, 1992); and *Deed of Settlement of Surplus Auckland Railways Lands*, 6 July 1993.

B The 2006 Ngāti Whātua Ōrākei AIP and the Waitangi Tribunal

[474] In 1993, Ngāti Whātua Ōrākei lodged a broader claim with the Waitangi Tribunal alleging historical breaches of the Treaty by the Crown. This has not been the subject of a Tribunal hearing. In May 2003, Ngāti Whātua Ōrākei entered direct negotiations with the Crown. On 9 June 2006, the Ngāti Whātua o Ōrākei Trust Board and Hon Mark Burton as Minister in charge of Treaty Negotiations for the Crown, signed an Agreement in Principle (AIP) to settle Ngāti Whātua Ōrākei's historical Treaty of Waitangi claims.

[475] The AIP recorded that the parties were "willing in principle" to settle Ngāti Whātua Ōrākei's historical claims in a subsequent Deed of Settlement (subject to passage of settlement legislation) on the basis, relevantly, of:

(a) "the cornerstone of the Crown's settlement offer", described in cl 10 as:

(i) an agreed Historical Account, including the Treaty of Waitangi in Māori and English, a preamble about Ngāti Whātua before 1840 and its claims, and an account of the relationship between Ngāti Whātua and the Crown;

(ii) Crown acknowledgements that certain of its actions or omissions breached the Treaty of Waitangi; and

(iii) a Crown apology for those breaches;

(b) "cultural redress" through:

(i) vesting (and possible name changes to) Maungakiekie (One Tree Hill Domain), Maungawhau (Mt Eden Historic Reserve), Puketapapa (Mt Roskill, Winstone Park Domain) and Purewa Creek Stewardship Area, as reserves governed by a joint management body;

(ii) empowering the joint management body to advise on the management of Owairaka (Mt Albert Domain), Ohinerau (Mt Hobson Domain), Te Kopuke (Mt St John Domain), and Taurangi (Big King Recreation Reserve);

(iii) statutory acknowledgements of the cultural, spiritual, historical and traditional association of Ngāti Whātua Ōrākei with the latter four sites plus Otahuhu (Mt Richmond Domain), North Head Historic Reserve and defence land at Kauri Point;

(iv) enhanced relationships with government agencies and local authorities; and

(v) the possibility of non-exclusive redress recognising the historical and cultural relationship of Ngāti Whātua Ōrākei with Rangitoto and Motutapu;

(c) financial and commercial redress of:

(i) payment of $10 million, including earlier settlement redress;

(ii) a 100 year right of first refusal (RFR) for Ngāti Whātua Ōrākei over surplus lands of the Crown, Transit New Zealand, the Auckland District Health Board, naval housing, four police stations and some Housing New Zealand Corporation properties, in a defined area, as depicted in Map 1 in this judgment (the area over which Ngāti Whātua Ōrākei claims mana whenua in these proceedings); and

(iii) a Crown offer of sale and lease back of defence houses as commercial redress;

(d) the definition of Ngāti Whātua o Ōrākei which would be further developed and discussed and would include:[783]

> those that descend from Tuperiri and the Ngāti Whātua o Ōrakei hapū of Nga Oho, Te Uringutu and Te Taoū to the extent that customary interests from these hapū were exercised after 1840 predominantly in the areas of Central Auckland, West Auckland, North Shore and Tāmaki isthmus.

(e) the Deed would include acknowledgement by both parties that the settlement does not extinguish or acknowledge any customary rights of Ngāti Whātua Ōrākei and:[784]

> is intended to enhance the ongoing relationship between the Crown and Ngāti Whātua o Ōrākei (both in terms of Te Tiriti o Waitangi/the Treaty of Waitangi and otherwise)

[476] Clauses 6–8 of the AIP recorded that:

(a) the parties would work together to develop a Deed of Settlement;

(b) the parties reserved the right to withdraw from the AIP; and

(c) the AIP was entered into on a without prejudice basis, was non-binding and may not be used as evidence (though of course it has been, by both parties, here).

[477] There is evidence that the Crown understood Ngāti Whātua Ōrākei to have pressed for the RFR over a geographic area for commercial reasons.[785] The then solicitors for Ngāti Whātua Ōrākei argued a geographic area could be fixed, contrary to the Crown's usual practice at the time, because that would delineate only an area of commercial redress, to which mana whenua was not relevant.[786] There is also evidence OTS saw the RFR as an opportunity to "go some way to meeting Ngāti

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783 Ngāti Whātua o Ōrākei Māori Trust Board *Agreement in Principle for the Settlement of the Historical Claims of Ngāti Whātua o Ōrākei* (9 June 2006) [Ngāti Whātua Ōrākei *AIP*] at cl 53a.

784 At cl 61a.

785 Memorandum Manager, OTS to Minister, 4 March 2005 at [27]–[28].

786 Letter from Wackrow Williams and Davies to Ngāti Whātua, 19 April 2005.

Whātua o Ōrākei's strong desire for the Crown to recognise its mana through this settlement".[787]

[478] Other iwi in Tāmaki Makaurau had not reached Treaty settlements of their own allegations of Treaty breaches with the Crown at that point. Concerns about the implications of the AIP prompted a claim to the Waitangi Tribunal by Ngāti Te Ata, Ngāi Tai ki Tāmaki, Marutūāhu, Te Kawerau ā Maki and those Te Taoū not descending from Tuperiri.[788] The Tribunal conducted an urgent inquiry and issued its findings in June 2007. In summary:[789]

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

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787 Internal OTS Memorandum, 10 March 2005 at 4.
788 Waitangi Tribunal *Tāmaki Makaurau Report* at 113.
789 At 86.

- The offer to Ngāti Whātua o Ōrākei of exclusive redress in maunga was purportedly on the basis of a predominance of interests. This approach was not adequately prefigured and is anyway inapplicable to cultural redress.

- The expression of the commercial redress in the agreement in principle is neither complete nor, in some key areas, clear, so it's not possible to know from that document what is on offer, nor how much it is worth.

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

[479] The Tribunal strongly criticised the Crown's approach in taking an explicit view of the strength of the customary interests of Ngāti Whātua Ōrākei:[790]

> The use of 'predominance of interests' as a basis for giving exclusive rights in cultural sites to one group – even when other groups have demonstrable interests that have not been properly investigated – is a Pākehā notion that has no place in Treaty settlements. Where there are layers of interests in a site, all layers are valid. They derive from centuries of complex interaction with the whenua, and give all the groups with connections mana in the site. For an external agency like the Office of Treaty Settlements to determine that the interests of only one group should be recognised, and the others put to one side, runs counter to every aspect of tikanga we can think of.

[480] The Tribunal recommended the Crown "engage with and understand concepts of layers of interests, rather than 'predominance' and ranking".[791] Regarding the AIP, the Tribunal recommended:[792]

> The draft settlement with Ngāti Whātua o Ōrākei should now be put on hold, until such a time as the other tangata whenua groups in Tāmaki Makaurau have negotiated with the Crown an agreement in principle, …

C Collective and individual settlements in Tāmaki Makaurau

[481] The Crown treated the Tribunal's *Tāmaki Makaurau Report* as "extremely significant".[793] On becoming Minister for Treaty of Waitangi Negotiations at the end of 2008, the Hon Christopher Finlayson turned for advice, about settling claims in Tāmaki Makauru, to the first Minister to hold that portfolio, the Rt Hon Sir Douglas

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790 At 96–97.
791 At 109.
792 At 107.
793 Affidavit of Michael Dreaver, 14 October 2020 [Dreaver Affidavit], at [16].

Graham.[794] In May 2009, Cabinet agreed to Sir Douglas's proposed approach which the Minister acknowledged carried some risks, as it might be perceived as a "take it or leave it" offer.[795] Cabinet authorised Sir Douglas to put his proposal before iwi and hapū. Michael Dreaver was appointed as the Chief Crown Negotiator.

[482] In June 2009, Sir Douglas presented the broad architecture of his proposal to Tāmaki iwi at the Ellerslie Racecourse.[796] He concluded that the objections to the Ngāti Whātua Ōrākei AIP were never going to be withdrawn and it would not be possible to reach settlements with the other groups without resolving the issues with all groups. The first option he identified was that the Crown could never treat the overlapping interests as addressed to its satisfaction so would never be able to enter a Deed of Settlement with Ngāti Whātua Ōrākei. The second option was described in this way:[797]

> The second option would require considerable courage, a generosity of spirit and a desire to work together in the common interest. This option entailed grabbing the bull by the horns and striving to see if the Ngāti Whātua Ōrākei AIP could be renegotiated to take account of the 'layers of interest'. At the same time, the Crown would negotiate now with all tangata whenua groups in Tāmaki Makaurau and also in the Kaipara and the Coromandel because many groups have interests in one or more and sometimes all three regions.

[483] Sir Douglas' report said:[798]

> It follows that the Crown will have to put on the table for all to see just how it proposes to resolve issues around the sensitive cultural redress items such as the maunga, and the right of first refusal part of the commercial redress package. There will be many groups that will be affected. The only realistic way forward, if decades of negotiations are to be avoided, is to suggest that the issue of manawhenua is put to one side for the purposes of these negotiations, and instead regard is had to interests in the whole. After all the Crown is in a difficult position when two iwi contest who has manawhenua. It is not for the Crown to determine. Only Māori can give such recognition. If there is no such recognition it is pointless expecting the Crown to rule on the matter. The Crown has to act with integrity to all iwi/hapū at all times and

794 Affidavit of Christopher Finlayson, 8 October 2020 [Finlayson Affidavit 2020] at [10].
795 Dreaver Affidavit at [23]; Memorandum for Treaty of Waitangi Committee "Crown Offer for Settlement of Treaty Claims to Kaipara, Tāmaki Makaurau and Coromandel-Hauraki", 27 May 2009.
796 Douglas Graham "Report by the Facilitator to the Minister for Treaty of Waitangi Negotiations and to the iwi/hapū of the Kaipara, Tāmaki Makaurau and the Coromandel" (The Office for Māori Crown Relations, 24 June 2009) at 5. And see Dreaver Affidavit at [25].
797 At 5.
798 At 5.

must not prefer one over another. Any discretionary redress has to reflect any 'layers of interests'.

[484] In relation to the maunga he said:

> The objection here is that Ngāti Whātua Ōrākei is offered exclusive rights to some of the maunga. It cannot be disputed that over the centuries various groups exercised ahi kaa over many of the maunga. Kiwi Tāmaki of Te Ākitai and Waiohua for example, lived in a pa on Maungakiekie at the time of the Te Taoū/Ngāti Whātua invasion in the mid 1700s. Waiohua descendents today include Ngāti Te Ata, Ngāti Tamaoho, Ngāi Tai and Te Ākitai who, although staunch members of the Kingitanga, advise me that they regard the maunga on Tāmaki Makaurau as spiritually very important. So the deeply felt association of the other groups to the maunga is understandable and continues to this day. It is true of course that the antecedents of Ngāti Whātua o Ōrākei undoubtedly had a strong association with many of the maunga for most of the century prior to their sale in the early 1840s. Today all groups therefore claim past associations which to each are extremely important and can never be extinguished. The maunga remain visible to all groups and always will be. A structure which recognises shared interests is clearly desirable. One possible way this could be done is presented in this paper.

[485] In relation to the RFR, Sir Douglas said:[799]

> The objection here is that, despite Ngāti Whātua o Ōrākei properly acknowledging the interests of other tangata whenua groups in Tāmaki Makaurau and restricting their exclusive RFR area to the CBD, other groups maintain that they have interests in the CBD too and that, looking at the isthmus as a whole and the various iwi interests in it, it is still quite unfair that Ngāti Whātua o Ōrakei should be able to pick the plums of the CBD leaving less valuable areas to the others. It is highly likely the Right of First Refusal (RFR) area has better prospects for capital gains than properties further afield. This objection is unlikely to be satisfied unless the provision is varied and I suggest a shared RFR over the whole Tāmaki Makaurau RFR area as defined.

[486] Accordingly, and impressively in terms of the negotiations that must have been required, on 12 February 2010 the Crown and 13 iwi and hapū entered into the Ngā Mana Whenua o Tāmaki Makaurau and Crown Framework Agreement (the Collective Agreement). The iwi and hapū grouped into three rōpū:

(a) the Ngāti Whātua rōpū of hapū with interests in any of the maunga (including Ngā Oho, Te Uringutu and those Te Taoū who descend from Tuperiri as well as Ngāti Whātua o Kaipara and Te Rūnanga o Ngāti

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799 At 10.

Whātua which includes those Te Taoū who do not descend from Tuperiri);

(b) the Tāmaki rōpū (Te Kawerau ā Maki, Ngāti Te Ata, Ngāti Tamaoho, Te Ākitai Waiohua and Ngāi Tai ki Tāmaki); and

(c) the Marutūāhu rōpū (composed of four Marutūāhu iwi, Ngāti Maru, Ngaati Whanaunga, Ngāti Pāoa and Ngāti Tamaterā).

[487] Somewhat jarringly, given the contested nature of mana whenua in these proceedings, the iwi and hapū were collectively known in the Collective Agreement, and in the subsequent Deed and Act, as Ngā Mana Whenua o Tāmaki Makaurau (Ngā Mana Whenua). They are now known as the Tāmaki Collective. Clause 2 of the Collective Agreement stated:

> The iwi/hapū members of Ngā Mana Whenua o Tāmaki Makaurau (or other name chosen by the iwi/hapū) recognise that they each have legitimate spiritual, ancestral, cultural, customary and historical interests within Tāmaki Makaurau.

[488] The essence of the Collective Agreement was that the Crown-owned parts of specified maunga and motu of Tāmaki Makaurau would be vested in Ngā Mana Whenua. The maunga would be co-governed by an entity comprising equal membership from Ngā Mana Whenua and Auckland Council. The Crown would offer Ngā Mana Whenua a RFR for 170 years over all land held by core Crown agencies, and possibly others, in Tāmaki Makaurau.

[489] The mandated negotiators for each iwi prepared a ratification booklet which made clear that the collective RFR would not apply to any property required to be used for individual settlements.[800] In the advisory to Ngāti Whātua Ōrākei, Grant Hawke noted:[801]

> We have had to accept the compromise of dealing and sharing the platform of mana whenua status with our tribal colleagues to the west and east perimeters of our southern borders. This has presented many challenges to our way of

[800] Ngā Mana Whenua o Tāmaki Mkaurau *The Collective Deed of Settlement & PSGE Proposal 2012 Ratification* (2012) at 16.

[801] Ngāti Whātua o Ōrākei Māori Trust Board *Ngāti Whātua Ōrākei Supplement to the Ngā Mana Whenua o Tāmaki Makaurau Collective* (2 July 2012) at 1.

> thinking and to our spiritual well-being so we have resolved in ourselves that like WAI 388 this is the best we can get for a deal wrought with cultural sensitivities.

[490] In December 2012, the Crown and the Tāmaki Collective, with the addition of Te Patukirikiri in the Marutūāhu rōpū, entered into the Collective Deed. It provided that the individual claims of each iwi would be addressed through iwi-specific settlements (and a collective settlement for the Marutūāhu iwi). The shared redress would be provided through the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Collective Act), which provides for:

(a) The restoration of ownership and "mechanisms by which the iwi and hapū may exercise mana whenua and kaitiakitanga" over specified motu and 14 specified maunga in s 3(b) (including the maunga in the area over which Ngāti Whātua Ōrākei claims mana whenua). It does not identify any individual iwi as having mana whenua over particular areas. The motu and maunga are managed by the Tūpuna Maunga o Tāmaki Makaurau Authority (composed of two members appointed by each rōpū entity and six members appointed by the Auckland Council and one non-voting member appointed by the Minister for Arts, Culture and Heritage).

(b) A collective RFR for all iwi, through the Whenua Haumi Roroa o Tāmaki Makaurau Limited Partnership (the Partnership) covers land from Muriwai to the Waikato River, including the area over which Ngāti Whātua Ōrākei claim mana whenua. Section 3(c) expresses the purpose of the RFR to be "to enable those iwi and hapū to build an economic base for their members".

(c) A collective right to purchase any deferred selection properties, that are included in the individual iwi settlements of the members of the Ngā Mana Whenua, but not ultimately selected or acquired by the individual iwi or hapū concerned.

[491] The operation of the collective RFR is provided for in the Collective Act and in a separate agreement between the Tāmaki Collective iwi (and not the Crown) known as the "carousel", according to which:[802]

(a) section 118 defines certain land (generally land of the Crown and specified Crown bodies) to be RFR land;

(b) section 121 requires a RFR landowner to first offer land to the Partnership or to a rōpū entity before disposing of it;

(c) when a property worth over $5 million becomes available, the Partnership can exercise the RFR for itself or through a special purpose vehicle in which each rōpū can fund up to a third of the purchase cost;

(d) when a property is worth less than $5 million, the rōpū take it in turns to exercise the collective RFR if they wish (with the rōpū having first pick rotating in sequence);

(e) under s 120 "[t]he Minister for Treaty of Waitangi Negotiations must, for RFR land required for another [historical] Treaty settlement, give notice to both the RFR landowner and the Limited Partnership that the land ceases to be RFR land"; and

(f) in addition to the RFR, the Partnership has a second right to purchase any deferred selection properties offered to, but not selected by, any individual Tāmaki iwi or hapū.[803]

[492] Michael Dreaver's evidence, as Chief Crown Negotiator, is that each iwi member of the Tāmaki Collective "was clear that their willingness to enter into collective redress was contingent on their being able to secure acceptable individual redress".[804] He also gives evidence that "during Tāmaki Collective negotiations, all iwi, including Ngāti Whātua Ōrākei, agreed that properties required for use in another

802 Dreaver Affidavit at [45].
803 At [46].
804 At [47].

Treaty settlement would be able to be removed from the RFR".[805] He considers that "[w]ithout that assurance, it is my view that the Tāmaki Redress deed would not have been agreed by the iwi of the collective".[806] Sections 118 and 120 of the Act were foreshadowed in the Deed and in the draft Bill that was supplied to the parties by the time the Deed was signed.[807]

[493] On 12 February 2010, the date the Collective Agreement was signed, the Crown and Ngāti Whātua Ōrākei also entered into a supplementary agreement to their 2006 AIP. They agreed to amendments to the AIP:

(a) the preambular statement in the agreed Historical Account was turned into a statement of the situation of Ngāti Whātua Ōrākei before 1840;

(b) the cultural redress provisions, other than in relation to Pūrewa Creek, were deleted and references were made to redress relating to maunga and motu and harbours under the Collective Agreement;

(c) the financial redress was changed from $10 million to $18 million (plus interest). It included Ngāti Whātua Ōrākei receiving the right to buy Defence Force housing land blocks; and

(d) the Ngāti Whātua Ōrākei RFR was substituted by the collective RFR under the Collective Agreement.

[494] Michael Dreaver's evidence is that a significant issue arose during negotiations that impacted on the "fairness between groups of the iwi specific settlements".[808] In late September 2011, Marutūāhu raised concerns with Michael Dreaver about landbank allocations and wanted to ensure there would be a "parity of approach" between Marutūāhu and Ngāti Whātua Ōrākei with regard to certainty of property selection.[809] On 27 September 2011, two days before Ngāti Whātua Ōrākei initialled

805 At [48].
806 At [48].
807 At [50].
808 At [118].
809 Email from Counsel for Marutūāhu to Other Counsel and Chief Crown Negotiator, 26 September 2011.

its Deed of Settlement, Michael Dreaver sent a memorandum to Marutūāhu, Ngāti Whātua Ōrākei and Ngāi Tai ki Tāmaki that included this paragraph:[810]

> I have been asked whether the Crown would agree to a veto right for other groups over redress offered to Ngāti Whātua o Ōrākei; or to a veto right in favour of Ngāti Whātua o Ōrākei over redress to be offered to other groups. The Crown is not prepared to offer such a right to any iwi. Instead, the Crown will continue to make a careful assessment of appropriate iwi-specific settlement offers, and will consider the views of all other groups with an interest when developing those offers and reaching any settlement agreements.

[495] In a subsequent meeting with Marutūāhu, Michael Dreaver reiterated that no iwi would have a veto right. His evidence is that this was not the first time that such assurances had been sought and rejected.[811]

[496] On 5 November 2011, the Crown and Ngāti Whātua Ōrākei signed a Deed of Settlement which also included additional Defence properties, a property on the North Shore and a property on the slopes of Maungawhau (Mt Eden). An initialled version of the Deed was approved by a vote of 89 per cent of the voting members of Ngāti Whātua Ōrākei. The first of the Crown's acknowledgements were:

> 3.1 The Crown acknowledges that Ngāti Whātua Ōrākei endeavoured to establish a relationship with the Crown from 1840 and sought to strengthen this relationship, in part, by transferring lands for settlement purposes. These lands have contributed to the development of New Zealand and Auckland in particular. The Crown also acknowledges that Ngāti Whātua sought to strengthen the relationship by expressing loyalty to the Crown.
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> 3.2 The Crown acknowledges that the benefits and protection that Ngāti Whātua Ōrākei expected to flow from its relationship with the Crown were not always realised.
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> 3.3 The Crown acknowledges that a large amount of Ngāti Whātua Ōrākei land was alienated from 1840 by way of Crown purchase and pre-emption waiver transactions, including the acquisition of "surplus lands" by the Crown. The Crown's failure to protect lands and provide adequate endowments for the future use or benefit of Ngāti Whātua Ōrākei was a breach of the Treaty of Waitangi and its principles.
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> 3.4 The Crown acknowledges that land alienation has diminished the ability of Ngāti Whātua Ōrākei to exercise mana whenua.

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810 At [118] and Memorandum from Chief Crown Negotiator to Marutūāhu, Ngāi Tai ki Tāmaki and Ngāti Whātua o Ōrākei, 27 September 2011.

811 Dreaver Affidavit at [67].

[497] The Crown's apology at cl 3.10 was:

> The Crown recognises that from 1840, Ngāti Whātua Ōrākei sought a close and positive relationship with the Crown and, through land transactions and other means, provided lands for European settlement.
>
> The Crown profoundly regrets and is deeply sorry for its actions which left Ngāti Whātua Ōrākei virtually landless by 1855. This state of landlessness has had devastating consequences for the social, economic and spiritual well-being of Ngāti Whātua Ōrākei that continue to be felt today.
>
> The Crown unreservedly apologises for not having honoured its obligations to Ngāti Whātua Ōrākei under the Treaty of Waitangi. By this settlement the Crown seeks to atone for its wrongs, so far as that is now possible, and begin the process of healing. The Crown looks forward to repairing its relationship with Ngāti Whātua Ōrākei based on mutual trust, co-operation and respect for the Treaty of Waitangi and its principles.

[498] The Deed was given legislative effect by the Ngāti Whātua Ōrākei Claims Settlement Act 2012. That includes setting out, in te reo Māori and English, the text of the Crown's acknowledgements and apology in ss 6 and 7. Michael Dreaver's evidence is:[812]

> 38. The Ngā Mana Whenua o Tāmaki Makaurau deed and legislation gave each iwi/hapū the opportunity to record their name on the title to each of the maunga and motu. The iwi/hapū could also choose to have statements of association with the maunga and motu recorded in the collective deed or in the individual iwi deed of settlement.
>
> 39. No iwi or hapū, including Ngāti Whātua Ōrākei, objected to any of those iwi/hapū having their interests recorded in relation to the central maunga (including Maungakiekie, Maungawhau, Ōhinerau, Te Kopuke and Puketapapa).

[499] Meanwhile, negotiations progressed between the Crown and other iwi in Tāmaki Makaurau:

(a) Ngāti Whātua o Kaipara and the Crown signed an AIP in December 2009 and a deed of settlement in September 2011. Settlement legislation was enacted in June 2013. Te Rūnanga o Ngāti Whātua and the Crown signed an agreement in principle in August 2017.

[812] At [38]–[39] (footnotes omitted).

(b) Te Kawarau ā Maki and the Crown signed an AIP in February 2010 and a deed of settlement in February 2014. Settlement legislation was enacted in September 2015.

(c) Ngāi Tai ki Tāmaki and the Crown signed an AIP in November 2011 and a deed of settlement in November 2015. Settlement legislation was enacted in July 2018.

(d) The Crown and each of the iwi in the Marutūāhu Collective entered a Record of Agreement (equivalent to an AIP) in May 2013. The Marutūāhu Iwi Collective Redress Deed was initialled on 27 July 2018 by the Crown and by four of the Marutūāhu iwi (but not by Ngāti Pāoa, who had entered the Kawenata Tapu in January 2017). Four of the five Marutūāhu iwi initialled their individual deeds of settlement with the Crown in August or September 2017. The fifth, Te Patukirikiri, signed an AIP in July 2011 and a deed of settlement in October 2018. Within the area over which Ngāti Whātua Ōrākei claim mana whenua: the cultural redress to Marutūāhu includes an offer to vest land at Gladstone Park in the Marutūāhu Rōpū; and the commercial redress includes offers to Marutūāhu Rōpū to select various property in central Auckland.

(e) In late 2012, the Crown and Te Ākitai Waiohua entered negotiations for settlement of their Treaty claims. An agreement in principle was signed in December 2016. A deed of settlement was initialled in December 2020 and signed in November 2021. Within the area over which Ngāti Whātua Ōrākei claim mana whenua, two properties are to be transferred as commercial redress: a landbank property (no longer needed by a government agency); and Mt Eden Normal School.

[500] Other settlements are yet to be negotiated. For example, witnesses referred to Waikato-Tainui negotiating with the Crown regarding their remaining historical

claims, which include issues in Tāmaki Makaurau.[813] Terms of Negotiation were signed on 14 December 2020.

D The Crown's policy on overlapping interests

[501] At the heart of the issues that give rise to these proceedings is how, in negotiating the settlement of historical claims under the Treaty of Waitangi with one iwi, the Crown should approach the overlapping interests of other iwi. These issues have been apparent from the beginning of the contemporary Treaty settlements. They have been known by various labels such as cross-claims, overlapping claims or, now, overlapping interests. I use the last of these terms because, as evident here, the issues arise from interests, whether or not there are unresolved Treaty claims.

[502] The Crown's approach to overlapping interests needs to be seen in the context of its wider processes, policies and practices for negotiating the settlement of historical Treaty claims. Since the Treaty settlement negotiation process started, the Crown has developed policies and practices to guide its approach to negotiations. In October 1999 the Crown published a detailed guide about that, known as the Green Book.[814] In 2000, a new government reviewed the Treaty settlement processes and policies and published a further iteration of the guide, known since then as the *Red Book*.[815] The Crown emphasises in its closing submissions that the *Red Book* is a general guide only.

[503] Lil Anderson, the current Chief Executive of Te Arawhiti, the Office for Māori Crown Relations (and previously the Director of the Office of Treaty Settlements (OTS) from August 2016) was an impressive witness. She says:[816]

> [I]t is not just the Red Book, the Red Book is a summary of policy, practice and process, and a group in negotiations is well-informed about policies, processes and practices in more detail than we put in the Red Book. There are whole processes around the management of overlapping claims, including tools like overlapping claims registers, and so I think from that perspective the Crown cannot be measured against the Red Book, because it is not the sum total of the Crown's policy, process and practice.

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813 NOE 578/1–5 (Blair), 1484/30–32 (Macky), 1695/32–1696/2 (Campbell)

814 Affidavit of Lilian Anderson, 13 October 2020 [Anderson Affidavit] at [15]. Office of Treaty Settlements *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown Ka Tika ā Muri, Kā Tika ā Mua* (October 1999).

815 Office of Treaty Settlements *Ka Tika ā Muri, Kā Tika ā Mua: Healing the past, building a future* (June 2018) [*Red Book 2018*].

816 NOE 847/18–25.

[504] In terms of process, on the Crown side, settlement negotiations involve an intense series of interactions between the Minister in charge of Treaty of Waitangi Negotiations, a Chief Crown negotiator, and officials from OTS, known since 2018 as Te Arawhiti. They work with the claimant iwi as well as all other relevant departments and Crown entities, and with the Cabinet which approves the Crown's position. Lil Anderson notes that "[c]ertain milestones are common to all negotiation processes, namely achieving a deed of mandate, the ratification and signing of deeds of settlement and, then, enactment of legislation".[817] In 2000, the Crown adopted six negotiating principles, of: good faith; restoration of relationship; just redress; fairness between claims; transparency; and government-negotiated.[818]

[505] Lil Anderson says the Crown's objective is "to provide redress in acknowledgement of the Crown's past wrongs and, in the process, restore and enhance relationships as best it can".[819] The Crown guidelines for settlements are:[820]

- the Crown will explicitly acknowledge historical injustices – that is, grievances arising from Crown actions or omissions before 21 September 1992
- Treaty settlements should not create further injustices
- the Crown has a duty to act in the best interests of all New Zealanders
- as settlements are to be durable, they must be fair, achievable and remove the sense of grievance
- the Crown must deal fairly and equitably with all claimant groups
- settlements do not affect Māori entitlements as New Zealand citizens, nor do they affect their ongoing rights arising out of the Treaty or under the law, and
- settlements will take into account fiscal and economic constraints and the ability of the Crown to pay compensation.

[506] According to the Red Book, Lil Anderson's evidence, and the settlements outlined above, settlements usually involve three areas of redress:[821]

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817 Anderson Affidavit at [18].
818 *Red Book 2018* at 25–26.
819 Anderson Affidavit at [77].
820 *Red Book 2018* at 24–25.
821 *Red Book 2018* at 77; and Anderson Affidavit at [18].

- the Crown recognises the wrongs done – it does this through the historical account, Crown acknowledgements and apology
- the Crown provides financial and commercial redress, in recognition of breaches by the Crown of the Treaty of Waitangi and its principles, which can be used to build an economic base for the claimant group, and
- the Crown provides redress recognising the claimant group's spiritual, cultural, historical or traditional associations with the natural environment, sites and areas within their area of interest – often called cultural redress.

[507] Regarding cultural redress, Lil Anderson says:[822]

> 48. For cultural redress to be considered for a site, area or resource, the Crown requires there to be an association with that specific site, area or resource.
>
> 49. Such associations might be of various kinds. The Crown does not require these to be established as a matter of tikanga or even based in tikanga. An item of redress might carry importance by virtue of a cultural practice or because of a particular historical event that impacted the group or possibly due to a broken promise of the Crown. What matters to the Crown is establishing the importance of the association to the settling group.
>
> …
>
> 54. The Crown seeks to understand all associations of all groups. As I explain below, the Crown does not consider that it can or should adjudicate upon matters of tikanga or mana whenua. Rather, the Crown considers the nature of associations to be relevant to determining redress that is fair and appropriate. Fairness requires the Crown to consider consistency across settlements. This requires more than simply considering kinds of associations and related redress items across settlements. As I set out further below, a range of factors affect what is appropriate redress in any context.
>
> 55. The Crown does not accept mere assertions of associations. The Crown will consider evidence provided by the settling group of their asserted associations with particular sites or areas so as to understand the basis of those assertions and the importance of the associations to the group. As I explain below, the Crown will also seek information concerning associations of other groups with those sites or areas so as to understand, as far as possible, the full range of groups' associations with those places. I have read the affidavit that the Hon Christopher Finlayson has prepared for this hearing and agree with his explanation that the purpose of the Crown's historical inquiry is to ensure there is a "principled historical basis" for redress."
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> 56. As I have noted, the strengthening of relationships between the Crown and Maori is an important principle underlying all Treaty settlements.

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[822] Anderson Affidavit (footnotes omitted).

> It applies to all Maori, not just the group in negotiations, hence the settlement guideline that Treaty settlements should not create further injustices to the group seeking redress or others. In seeking to understand all the different associations with a site, the Crown considers its obligations to the settling group and other groups. A failure to consider all associations may cause harm to relationships with and between groups and thereby undermine the Crown's objective of securing durable settlements.

[508] Financial and commercial redress can include a cash payment and/or transfer of commercial properties, Crown forest licensed land and operational sites such as schools that are generally leased back to the Crown.[823] They can also include rights and opportunities to purchase properties for a specified time after settlement, such as deferred selection properties and rights of first refusal.[824] Together, financial and commercial redress is known as the redress quantum or amount.[825]

[509] Lil Anderson's evidence is that:[826]

> 69. There is a key difference between the Crown's approach to identifying potential commercial redress items and that taken with respect to cultural redress items. Commercial redress requires an association in the general area in which the redress item is located but does not require an association with the redress item itself. As with cultural redress, the Crown will inform itself as to the settling group's associations in the relevant area. The kinds of associations the Crown will consider for this purpose are the same as those considered in relation to cultural redress.
>
> 70. A negotiating group will be invited to select which (if any) commercial redress properties it would like to "purchase" from its financial and commercial redress amount and which it might like the opportunity to purchase after settlement. A group might make selections based on commercial considerations or because the land has customary or historical significance or a combination of these factors.
>
> 71. In a highly overlapped area, such as Tāmaki Makaurau, Crown decisions to offer commercial redress include consideration of distributing assets across overlapping groups in a way that both contributes to the economic and social development of each group and is fair to each group. Fairness requires consideration of matters such as the value of properties, their location, how many groups there are and how many properties are available.
>
> 72. The Crown generally considers commercial properties to be substitutable in that the negotiating group can take the financial and

823 Anderson Affidavit at [65].
824 At [66].
825 At [59].
826 (Footnotes omitted).

> commercial redress amount as cash, rather than as commercial property. If a commercial property is not available or considered inappropriate for some reason (including for example, in light of the concerns of overlapping groups), a property of a similar value and nature may be negotiated into the commercial redress package in substitution.

[510] Michael Dreaver's evidence is that there a cap on how much the Crown is prepared to gift as part of a settlement and that the Crown takes into account the effect of each settlement's financial redress on the relativity clauses in the Crown's settlements with Waikato-Tainui and Ngāi Tahu.[827] It seems clear that, for the Crown, cultural redress requires particular site significance to the claimant group but commercial redress does not.[828] But the Crown acknowledges that commercial redress may nevertheless be sought by a claimant group because of its cultural significance to the group, which may not be because they claim mana whenua there.[829]

[511] In summary, the *Red Book 2018* said:

(a) Only the claimant groups can decide their boundaries or resolve the question of who has the predominant interest in a general area. The Crown does not intend to determine either of those issues by engaging in the settlement process.[830]

(b) Where there are overlapping claims:[831]

> the Crown encourages claimant groups to discuss their interests with neighbouring groups at an early stage in the negotiation process and establish a process by which they can reach agreement on how such interests can be managed.

(c) Overlapping claims must be substantially resolved before an AIP is finalised and signed and "provision of settlement redress in the AIP will remain subject to the satisfactory resolution of overlapping claims prior to the Deed of Settlement being signed".[832]

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827 NOE 1545/12–14 and 1552/20–34.
828 NOE 1544/1–31 (Dreaver).
829 NOE 1545/4-27 (Dreaver); NOE 1551/13–19 (Dreaver); and Crown Closing at [102].
830 *Red Book 2018* at 53.
831 At 54.
832 At 59.

(d) If the claimant groups are unable to come to an agreement, the Crown may have to "make a decision", in which it will be guided by its wishes to:[833]

(i) "reach a fair and appropriate settlement with the claimant group in negotiations"; and

(ii) "maintain, as far as possible, its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims".

(e) Consistent with the Treaty of Waitangi, as determined by the Waitangi Tribunal in the *Ngāti Awa* report in relation to forest land, "[w]here there are valid overlapping claims to a site or area, the Crown will only offer exclusive redress in specific circumstances", such as after considering:[834]

(i) whether "a threshold level of customary interest been demonstrated by each claimant group";

(ii) if so, the potential availability of other land for each group, the relative size of likely redress and the "relative strength of the customary interests in the land" (which is "only likely to be the primary factor when there is limited forest land available"); and

(iii) "the range of uncertainties involved".

[512] The Hon Christopher Finlayson, Minister for Treaty of Waitangi Negotiations from 2008 to 2017, explained the Crown's approach in an affidavit for these proceedings in 2016, and adopts that explanation in his 2020 affidavit:[835]

833 At 54.
834 At 54; and Waitangi Tribunal *Ngāti Awa Cross-Claims.*
835 Affidavit of Christopher Finlayson, 8 July 2016 [Finlayson Affidavit 2016] and see Finlayson Affidavit 2020 at [4].

35. The Crown prefers that disagreements about redress between a claimant group and neighbouring groups are settled by mutual agreement between the groups. The Crown's practice is therefore to encourage the claimant group to discuss its interests with the neighbouring groups at an early stage in the negotiation process and to establish a process by which they can reach agreement on how such interests can be managed. However, if the groups are unable to agree, the Crown may have to decide whether it is satisfied that the overlapping claims have been addressed to the point that I am willing to include the redress in any settlement. In reaching such a decision on whether to offer a particular property as redress, the Crown is guided, among other things, by three general principles:

 35.1 its wish to reach a fair and appropriate settlement with the claimant group in negotiations;

 35.2 its wish to maintain, as far as possible, its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims; and

 35.3 the Crown's wish to ensure the redress offered to the claimant group in negotiations strikes a balance between the Crown's obligations to that group and its ongoing obligations and relationships with overlapping settled groups.

36. As noted above, when assessing whether to use particular property in a settlement, including assessing the impact of overlapping claims, I must also consider a range of fiscal matters, such as the financial cost of the settlement to the Crown, the management of the overall financial cost of Treaty settlements more broadly, and a number of (confidential) decisions by Cabinet setting policy and financial parameters for particular iwi negotiations or negotiations in particular areas.

37. The Treaty settlement process is not intended to, and does not, establish or definitively recognise claimant group boundaries according to tikanga. Settlements may recognise areas of interest, but iwi and/ or settling groups may have overlapping areas of interest. Most settlements are entered into with “large natural groups” that are not necessarily the same as, or are often a confederation of, traditional groupings. Redress is provided to the post-settlement entity selected by the large natural group. Further, the settlement process does not create or confirm any exclusive status, such as exclusive mana whenua or ahi kā. Such matters can only be decided between claimant groups themselves.

38. The vesting of a particular site as redress should not be seen as a signal that the Crown is making such a determination. Rather, it is simply a recognition that the Crown accepts that a claimant group has a level of interest that the Crown considers makes the particular grant of redress appropriate in light of all other circumstances.

39. Where a settlement involves the transfer of Crown-owned property to the claimant group, the Crown's practice generally is to transfer property that is in the claimant's area of interest and not property that

is outside that area of interest. The Crown has sometimes made exceptions to this approach.

[513] In his 2020 affidavit, Mr Finlayson expands on this in one respect:

> 9. … I said at [40] in that affidavit that assessing which redress to use in a settlement is often a "highly political and intensely negotiated aspect of the Treaty settlement process" and that Treaty negotiations are "difficult and quintessentially political processes requiring compromises on all sides". This remains my view. Treaty settlements engaged my political judgement constantly, but I always considered it was necessary to have a principled historical basis on which to provide redress to a group.

[514] The Hon Andrew Little, Minister for Treaty of Waitangi Negotiations since October 2017, reinforces that approach:[836]

> 5. The Treaty settlement process is intended to achieve a settlement of a settling groups' historical Treaty claims. The Crown provides redress for its previous breaches, including an apology. It is not the purpose of Treaty settlements to resolve disputes between groups over interests, nor is it the Crown's objective to bestow mana whenua or customary authority. The settlement process does require the Crown to consider groups' connections with particular areas and places, and the customary interests that they assert in relation to those places. The Crown must have regard to the relationships it wishes to repair and maintain with all settling groups - but ultimately it is for Ministers to determine what redress proposals they are prepared to support, particularly where that redress will only be put in place if and when Parliament passes legislation to do so.

[515] Lil Anderson's evidence also expands on the Crown's approach to overlapping interests:[837]

> 85. The Crown also encourages groups to discuss overlapping claims together at an early stage and to establish a process by which they might reach agreement. The Waitangi Tribunal's *Hauraki Settlements Overlapping Claims Inquiry Report* has recently re-emphasised the utility of tikanga processes in allowing affected groups to themselves resolve overlapping interests. As noted, the Crown prefers that any issues relating to overlapping interests are settled by mutual agreement between affected groups. Crown policy ensures that tikanga concepts and processes can be utilised by groups at any stage of negotiations. The Crown can likewise support engagement between groups at any stage of the process by providing information or funding research, mediation or facilitation.

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[836] Affidavit of Andrew Little, 7 October 2020 [Little Affidavit] at [5].

[837] Anderson Affidavit (footnotes and italics of Māori words omitted).

> 86. The Crown does not, however, require that tikanga processes be used, or purport to adjudicate on the appropriate tikanga by which overlapping interests are addressed. Groups do not always agree on the concepts and processes to be used. What is considered tika by one group may not be considered tika by another. The Crown seeks to be satisfied that there has been proper opportunity for engagement between groups. The Crown considers the nature of that engagement to be appropriately a matter for the affected groups.
>
> …
>
> 90. Of course, agreement is not always achieved and the Minister for Treaty of Waitangi Negotiations may need to make a decision as to what redress is appropriate in the context. This is really a last resort. Agreement between groups - as opposed to a potentially divisive decision by the Crown - is always to be preferred. However, where agreement is not possible, the Crown must take decisions. As the Red Book states, the Crown has "accepted a moral obligation to resolve historical grievances in accordance "with the principles of the Treaty of Waitangi".[838]

[516] In relation to the Waitangi Tribunal's 2007 *Tāmaki Makaurau Report*, Minister Finlayson says "when dealing with any Tāmaki issues in subsequent years I was mindful of the Tribunal's views on predominance of interests".[839] Lil Anderson explains the change in the Crown's approach to overlapping interests following the 2007 Report this way:

> 105. To avoid the consequences identified by the Tribunal of "picking winners" and to allow for a fuller understanding of inter-relationships between claimants, the Crown moved to a regional approach whereby the Crown seeks to engage simultaneously with multiple claimant groups in a common geographic area. By engaging in this way, the Crown seeks to consider overlapping interests earlier in negotiations. Pre-mandate claimant funding is available for groups to engage in overlapping interests discussions with neighbouring groups before their negotiations have commenced. The approach of simultaneous negotiations and co-ordinated redress offers also aims to support overlapping interests engagement by giving groups a sense of what they will receive in comparison to their neighbours. The Crown has also increased the use of facilitators to work with groups towards resolution.

[517] The Tribunal's criticism led to a significant revision of the approach of Crown historians to their advice regarding Treaty settlements. Michael Macky is Principal Historian at Te Arawhiti/OTS. Michael Macky provided two affidavits on which he

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838 *Red Book 2018* at 54.
839 Finlayson Affidavit 2020 at [15].

was cross-examined.[840] His evidence traces the evolution in thinking of the OTS historians, and the Crown's positions in relation to mana whenua, in relation to the tribal histories in Tāmaki Makaurau. He says, of the reaction to the 2007 Report:[841]

> Instead of drawing conclusions about predominant or customary interests, OTS historians have since focused on summarising the available evidence in relation to customary interests of different groups in sites being considered as redress. Historians generally seek to avoid weighing different groups' interests against each other. Rather the focus is on identifying and summarising information from primary or secondary sources about known iwi interests in an area. This includes, for example, interests or associations that a group might have asserted in Native Land Court hearings, or in dealing with government officials. Historians have developed an approach of summarising the evidence in relation to all groups and all associations with a site. This was informed by the Tribunal's approach, but, as noted, does not involve the historian reaching his or her own conclusions about the status of interests as a matter of tikanga.

[518] Under cross-examination by Mr Hodder, Michael Macky explains:[842]

> I don't think that we're in a position of rejecting particular versions of tikanga as being invalid. OTS' position as I understand it is that in Treaty settlements, it will not adjudicate or it will not be the video referee in cases where there is contested mana whenua and will be extremely cautious about the provision of or historians need to be very cautious about in drawing conclusions that groups have mana whenua or exclusive interests in overlap areas.

[519] In closing, Dr Ward summarised the Crown's evidence about the role of Crown historians since 2007 in this way, which I consider is fair:[843]

> 132.1 OTS/Te Arawhiti historians prepare memoranda on customary interests to assist negotiations teams in preparing redress packages, and to understand the interests of overlapping claimants in particular sites or areas where redress may be offered. They may be drawn on when officials are preparing briefings to the Minister that recommend preliminary and final decisions are taken in respect of overlapping claims and interests.
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> 132.2 OTS/Te Arawhiti historians are also almost always consulted by policy analysts if reports to the Minister with recommendations about redress items include historical analysis. The historians advise on whether the discussion of interests and associations in these reports reflects the historical evidence available to the Crown.

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840 Michael Macky, affidavits of 13 October 2020 [Macky Affidavit] and 15 January 2021 [Macky Reply].

841 Macky Affidavit at [21] (footnote omitted).

842 NOE 1447/18–24.

843 Crown's Closing at [132] (footnotes omitted).

132.3 In preparing customary interests memoranda, the kind of evidence that historians consider may relate to a range of types of evidence of occupation, use, control over, or access to an area, including wāhi tapu and rāhui. A range of sources is consulted by historians, including Waitangi Tribunal reports, research reports on Tribunal records of inquiry, and research reports commissioned by OTS/Te Arawhiti.

132.4 Particular guidelines for the preparation of customary interests memoranda are set out in an internal "historians' toolbox", and include the following:

> A customary interests memo should summarise the available evidence and note possible limitations or flaws of the source material. It should also note the inherent limitations of the documentary record.

[520] Lil Anderson's evidence is that "the Crown has been really clear that it does not wish to make decisions based on tikanga, because it doesn't have tikanga, if that's a way to put it, it has a clearly articulated policy framework that has been used in over 90 Treaty settlements".[844] She explains that:[845]

> When it comes to a, let's take a site of cultural redress instrument, a cultural redress site where a group is seeking to have that site vested in it, in advice to Ministers or in advice that we collect we would normally go through the process of identifying the groups interest and the history of the site as well as other iwi that may have interests. We will often note what that association or interest is for each of those groups and we will tell Ministers that based on a strength of interest that customary or that cultural redress site should be vested in the iwi that is settling. So in that way I think we are giving Ministers advice about the strength, that it is strong enough to vest in the iwi that we are vesting it in, but we are not weighing up other people's interests.

[521] She says the question of whether OTS stops short of assessing which customary interests hold predominance is more a matter for Michael Macky.[846] His evidence is that historians could not assess customary interests of ahi kā roa based on mana whenua and that where advice of that nature ought to come from is more a matter for Lil Anderson and other leaders.[847] Michael Macky explains that "[i]f the evidence in front of you was really clear [about the relative strength of competing interests] you might [consider it] but I think you'd approach it with considerable care".[848] He explains:[849]

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844 NOE 866/32–867/2.
845 NOE 890/17–27.
846 NOE 914/13–915/15.
847 NOE 1451/12–20.
848 NOE 1460/32–34.
849 NOE 1471/27–30.

> [I]t is standard in customary interest memos to have a disclaimer saying that you are not an expert in the tikanga of the local district and that a comprehensive understanding of customary interests in that district would require consultation with local experts.

[522] Michael Macky says a historian working in Treaty issues for any length of time would have to engage with ahi kā roa and the Crown has had to engage with concepts such as take raupatu and tuku whenua.[850] He says that Crown historians do not take a Pākehā or Māori view but rather a "negotiated view of history between the Crown and the settling groups that it's negotiating with".[851]

[523] Under cross-examination Michael Macky said that "OTS has accepted" the Waitangi Tribunal's view that, "if there are dense layers of interest, then that's an area where there can't be exclusivity".[852] Michael Macky said he sees the OTS historians as "trying to ensure that . . . there is a principled historical basis for redress to be considered" but is not aiming at the "highest possible bar" which would involve the Tribunal's warnings about exclusive redress in areas where there are layers of interest.[853]

[524] In February 2017, Te Arawhiti started reviewing the Crown's overlapping interest policy documentation, guidance and practices. This was informed by engagement with the Iwi Chairs Forum, which criticised the Crown's approach to overlapping claims and interests and called for a new approach. In May 2018, the Iwi Chairs Forum suggested to the Crown that:[854]

> - Rather than focusing on classes of redress, there needs to be focus on implications for iwi mana of any redress.
> - Whether it be commercial or cultural. Ownership of property implies mana whenua. This point seems to be lost on OTS and the Government.
> - A possible way to fix this, could be to ask the settled iwi (with stronger ties to whenua) to take part in gifting the land to the outside iwi. That

850 NOE 1419/9–34.
851 NOE 1489/8–9.
852 NOE 1456/8–14.
853 NOE 1455/25–1456/6.
854 Iwi Chairs Forum, Iwi Working Group (Treaty Cross Claims) *New approach to overlapping claims* (May 2018) at 45. (I note that Ngarimu Blair and Charlie Tawhiao have been involved with the Iwi Chairs Forum).

way they retain their mana and the relationship with the settling iwi is maintained.

- The tikanga-based agreements between Ngāti Whātua Ōrākei and Ngāti Pāoa is another proven way forward where iwi settle their differences, not the Crown.

- Ideally, the Crown would identify up front what redress it intends to make available to iwi and then invite affected iwi (neighbouring settled and unsettled) to identify mana impacts for them.

- The current process doesn't involve other iwi until the negotiations are progressed, and the redress is not made public until the settlement is initialled. This means affected iwi have little other option than litigation.

[525] The Forum also suggested change is needed from iwi:[855]

- Current approach encouraging some iwi to turn their back on relationships simply to get best deal.

- We need to start by showing confidence in our own tikanga based processes to resolve the real issue at the heart of overlapping interests, iwi mana.

- Showing confidence in our own processes means excluding Crown involvement altogether (unless the disputing parties agree otherwise).

- This means removing the Crown as the final arbiter in the event of an impasse (again, unless the parties agree to Crown making the decision for them).

- The Crown role in the process of determining iwi mana, should be the provider of resources only.

- We know where we can legitimately claim iwi mana. This should be debated on the marae or in our environment not the courts or Beehive.

[526] The Iwi Chairs Forum proposed an independently-facilitated tikanga-based dispute resolution process to the resolution of issues caused by overlapping interests in Treaty settlements. It noted that the process closest to the way their tipuna resolved these matters was for the groups to keep talking until they reached consensus. But they noted another example of a tikanga-based approach would be for an independent panel of tikanga experts helping to make a determination, similar to the statutory process used in the Central North Island. They also pointed to the process resulting in the Kawenata Tapu between Ngāti Whātua Ōrākei and Ngāti Pāoa, and a possible

[855] At 78.

"sphere of influence" model of ahi kā roa, an area of interest and an area of association). The Forum suggested the following principles:[856]

> - At the outset, settling group to identify their interests in an area.
> - Identify areas of overlapping or shared interests. Consultation then takes place with other iwi.
> - Tikanga-based engagement between iwi (both the settling iwi and those identified as having overlapping/shared interests).
> - If Iwi reach agreement it should become binding on the Crown to follow/implement in the settlement negotiations
> - Aim: To agree a process for engagement and dispute resolution (iwi to iwi).

[527] It recommended:[857]

> - Any redress ultimately provided by the Crown within an area of identified overlapping/shared interest:
>   - being commensurate with the relative customary interests of the iwi involved;
>   - being consistent with, and not prejudicial to, the rights and interests of the iwi; and
>   - not undermining the value and integrity of any existing settlements.

[528] In response, in March 2019, Minister Little said:[858]

(a) the current policy is for overlapping claims to be addressed as early as possible in the negotiation process;

(b) the Crown considers evidence of interests, including the rights and interests of settled groups, before making redress offers, though that was not properly reflected in the policy; and:

> While I cannot accept the proposal to remove the Crown as a final decision maker on the redress the Crown is prepared to offer to settle a group's historical Treaty claims, I can provide an assurance the

856 At 10.
857 At 23.
858 Letter from Minister Little to Iwi Chairs Forum (13 March 2019); and Anderson Affidavit at [108].

> Crown will seek to give effect to any agreement between iwi subject to consideration of Treaty settlement policy implications.
>
> *The Crown and settling iwi are putting redress ahead of relationships*
>
> Your paper states the Crown prioritises reaching settlement over relationships. I can assure it does not. This issue sits at the heart of the tension between the Crown's objective to settle with groups as efficiently as possible so as not to deprive them of the benefits of their settlement while not adversely affecting other iwi interests. Ultimately time does need to be built into negotiations from the start to allow for proper resolution of issues through iwi led engagement. This is, however, a fine balance as delays will prejudice unsettled groups by denying them the advantages settled groups already have.

[529] The Minister's evidence is that the Crown continued to engage with the Iwi Chairs Forum in 2019 and 2020.[859] In closing, Dr Ward said as a result of that engagement, and the Waitangi Tribunal's *Hauraki Report* (which is outlined below), Te Arawhiti was in the process of updating the sections of the Red Book relating to mandate, overlapping interests and cultural redress.[860]

[530] On 21 December 2021, after the hearing in these proceedings, the Crown advises that Te Arawhiti has now completed its review, the product of which is an updated edition of the *Red Book* replacing sections of the 2018 version relating to overlapping interests and exclusive and non-exclusive redress. The Crown characterises the new statement as providing "a fuller explanation" which is a "refinement of the 2018 policy – it does not represent new policy".[861] The other parties and interested parties, who have had the opportunity to make submissions on the 2021 policy, submit it makes little difference to their concerns. The 2021 statement states, most relevantly:[862]

> **The Crown's understanding of customary interests and associations**
>
> …
>
> 14. Where interests and associations are disputed by overlapping groups, the Crown does not consider that it can or should determine or adjudicate whether a group has a predominant interest or any exclusive status in an area. The Crown's role is to support groups to address these issues themselves. The Crown's approach to redress will be informed by the dialogue between groups

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859 Little Affidavit at [37].
860 Crown Closing Submissions at [144].
861 Memorandum of Counsel for the Attorney-General, 21 December 2021, at [3.2] and [3.3].
862 New Zealand Government "Overlapping interests" (21 December 2021) [*Red Book 2021*].

on these issues. Where groups are unable to reach agreement about how to address overlapping interests, the Crown may need to decide on the redress it is willing to offer the claimant group.

Customary interests or associations demonstrated by the claimant group is one factor informing the Crown's decision to offer redress (as identified in the sections 'How do overlapping interests influence the redress offered by the Crown?', 'Consideration of exclusive and non-exclusive cultural redress' and 'Consideration of exclusive commercial redress').

15. It is acknowledged however, that overlapping groups may see the Crown's offer of redress as a statement or recognition of mana whenua. This is not the purpose or the effect of Treaty settlements. Although the Crown will take into account groups' statements about their interests, the settlement process is not intended to establish or recognise boundaries between groups or make determinations of mana whenua.

…

How does the overlapping interests process work?

22. It is vital the Crown is properly informed of the interests of all groups in an area before making an offer to a claimant group. The Crown will not initial a deed of settlement until it is satisfied overlapping interests have been addressed. …

…

33. The Crown's preference is that the claimant group and overlapping groups agree solutions to address any issues relating to overlapping interests directly, in accordance with appropriate tikanga. If the groups seek it, the Crown can support engagement between groups at any stage of the overlapping interests process by funding research for groups, mediation or facilitation. Groups can contact Te Arawhiti directly for support.

…

How do overlapping interests influence the redress offered by the Crown?

…

53. Exclusive cultural redress is generally considered where a claimant group has expressed a strong customary interest or association (spiritual, cultural, historical and traditional association) or relationship to a site of special significance, that warrants exclusive cultural redress (taking into consideration any information about the customary interest or association of overlapping groups with that site). An example of exclusive cultural redress is the vesting of cultural redress properties in a single claimant group.

…

58. In developing the commercial redress package, consideration at a high level is given to whether there is a customary interest or association in the area that warrants the commercial redress. For example, if several groups seek redress for Crown Forest licensed land (CFL land) in the same area and claim

an interest in that land, the Crown will first consider whether each group has demonstrated a customary interest or association in that land. If a customary interest or association is demonstrated, the Crown then considers:

- the potential availability of other CFL land for each group;
- the relative size of likely redress for the Treaty claims, given the nature and extent of likely breaches;
- the nature of the customary interests or associations in the land; and
- what uncertainties are involved.

59. Where uncertainties exist, such as conflicting historical accounts of association with the land, the Crown is likely to take a cautious approach to offering CFL land redress.

60. The relative weightings given to each of these considerations will depend on the precise circumstances of each CFL land case. Broadly, a claimant group would only have to show an interest or association in the CFL land to be eligible to receive that land as redress. The nature of relative customary interests or association in the land is only likely to be the primary factor when there is limited CFL land available.

61. The Waitangi Tribunal has found that this approach to addressing overlapping interests in CFL land is consistent with the Treaty of Waitangi and its principles.

What happens if overlapping interests can't be resolved by agreement?

62. Sometimes it is not possible for groups to reach agreement about how to resolve their overlapping interests in redress offered by the Crown, despite the undertaking of processes by the claimant group and the Crown described in the section 'How does the overlapping interests process work?'

63. If there is no prospect of agreement within reasonable timeframes, the Crown may, as a last resort, have to make a decision about whether to maintain the offer of the redress. Any such decision is guided by the Crown settlement principles and guidelines (pages 24–26 of the 2018 Red Book), Treaty principles described in the section 'Treaty of Waitangi' and is also informed by consideration of the factors outlined in the section 'How do overlapping interests influence the redress offered by the Crown?', including the overlapping interests process undertaken to date and the views and information shared by groups with the Crown.

64. If such a decision is required, the Crown will invite the claimant group and overlapping groups to provide comment and information on the issue and the Crown's proposal for resolution. In general, the Crown will allow at least three weeks for formal responses to Crown requests for comment and information. However, timeframes will depend on the specific negotiations and agreed process. Meetings may be arranged between the Crown (the Minister for Treaty of Waitangi Negotiations and/or officials from Te Arawhiti) and affected groups to discuss the issue, interests and the Crown's proposal.

> 65. The comments and information provided by groups will inform Crown decision-making on whether to amend or confirm the redress for inclusion in the agreement in principle or the deed of settlement. Sometimes the Crown may seek independent advice from individuals or groups with expertise in the history and traditions of the relevant groups before making a decision.
>
> 66. The Crown's approach to addressing overlapping interests recognises that overlapping groups will not always be able to reach agreement and the settlement process cannot be held in hiatus indefinitely due to stalemate. This would not be fair to the claimant group, depriving them of the benefits of settlement. The Crown seeks to ensure a fair, robust and transparent overlapping interest process is undertaken that is consistent with Treaty principles and provides for the best opportunity for the resolution of issues raised by overlapping groups.
>
> **Questions and Answers**
>
> **Does the Crown require a tikanga-based process of engagement by the claimant group?**
>
> The Crown's preference is that the claimant group and overlapping groups agree solutions to address any issues relating to overlapping interests directly, in accordance with appropriate tikanga. However, it is the decision of iwi and hapū to choose to engage in a process based on their tikanga.
>
> **Does the Crown consider tikanga when making decisions about redress to offer to a claimant group?**
>
> Yes, the Crown will take into account groups' statements about their interests, including tikanga, when making decisions about redress to offer. This is in the context of a number of factors being considered (some factors are listed under the heading 'How do overlapping interests influence the redress offered by the Crown?' in the 2021 policy).
>
> Any decision is guided by the Crown settlement principles and guidelines, Treaty principles, the overlapping interests process undertaken to date, and the views and information shared by groups with the Crown. Sometimes the Crown may seek independent advice from individuals or groups with expertise in the history and traditions of the relevant groups before making a decision.

E Illustrative examples of the application of Crown policy

[531] These proceedings were sparked by the Crown's intention to transfer properties, in the area over which Ngāti Whātua Ōrākei claims mana whenua, to Ngāti Pāoa as part of their Treaty settlement in 2015. The proceedings were amended to encompass proposed transfer of other properties to Marutūāhu Rōpū in 2016 and Te Ākitai Waiohua in 2018. In 2018, the Supreme Court ruled that Ngāti Whātua Ōrākei could pursue its claim for declarations as to its rights, but it could not challenge the

proposed transfers of specific properties to other iwi, which would be implemented by legislation.

[532] Ngāti Whātua Ōrākei do not now seek to challenge the transfers. They plead that the Crown's offers of Treaty redress to the Marutūāhu Collective and to Te Ākitai Waiohua, in the area over which Ngāti Whātua Ōrākei claim mana whenua, are examples of the Crown's policy. Crown witnesses Lil Anderson, Michael Dreaver and Leah Campbell confirm that they consider they were following and applying the Crown's policy in their work on those offers.[863] They have been treated in these proceedings as illustrative examples of the application of the Crown's overlapping interests policy. I therefore outline here how the transfers to Ngāti Pāoa, Marutūāhu and to Te Akitai played out. Because they are only illustrative examples, I do not delve as far into the blow by blow details as the evidence makes possible. I then outline the Waitangi Tribunal's 2019 report regarding the application of the Crown's policy in Hauraki.

1 Ngāti Pāoa and Marutūāhu Rōpū

[533] Minister Finlayson's evidence is that, in November 2014, Ngāti Whātua Ōrākei approached him with concerns about the Crown's offer of redress to Marutūāhu.[864] He and OTS officials met with Ngāti Whātua Ōrākei. They offered to organise a discussion with an independent facilitator but Marutūāhu would not agree.[865] They suggested Marutūāhu meet directly with the Chief Crown Negotiator with Ngāti Whātua Ōrākei, but Ngāti Whātua Ōrākei did not agree. During a further series of discussions, Minister Finlayson understood Ngāti Whātua Ōrākei to have concerns "about any and all redress offered to Marutūāhu within the area that had been proposed in a 2006 Agreement in principle between the Crown and Ngāti Whātua Ōrākei".[866]

[534] Minister Finlayson met Ngāti Whātua Ōrākei again on 3 March 2015 and suggested the parties' historians meet to identify points of agreement and

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863 NOE 929/9–15 (Anderson); NOE 1562/20—1563/4 (Dreaver); NOE 1736/14–34 (Campbell).
864 Finlayson Affidavit 2020 at [20].
865 At [22].
866 At [23].

disagreement.[867] His evidence is that he was unable to arrange a meeting with Marutūāhu in 2015.[868] Ngāti Whātua Ōrākei applied for interim orders preventing transfers to Ngāti Pāoa and Marutūāhu but withdrew the application by consent. On 17 August 2015, the Minister notified Ngāti Whātua Ōrākei that:[869]

(a) the Minister wanted to discuss further with Ngāti Whātua Ōrākei their concerns about the Crown's application of the "layers of interest" concept referenced in the Waitangi Tribunal's 2007 *Tāmaki Makaurau Report*; but

(b) the Crown had determined that Ngāti Pāoa have interests in the central Tāmaki region; and

(c) the Minister had made a preliminary decision to confirm the redress offer of two properties, at 71 Grafton Road and 136 Dominion Road, to Ngāti Pāoa.

[535] The response of Ngāti Whātua Ōrākei was to issue these proceedings. On 25 September 2015, senior Crown Counsel relayed the instructions of the Attorney-General (also Minister Finlayson) that the Crown would not make a final decision on the relevant Ngāti Pāoa redress while the proceeding remained on foot.[870]

[536] On 4 March 2016, the Lead Negotiator for the Crown, the Hon Rick Barker, advised Ngāti Whātua Ōrākei that:[871]

(a) the Crown had recommenced settlement negotiations with the Marutūāhu Collective, and individual Marutūāhu iwi, subject to the resolution of overlapping claims to the Crown's satisfaction; but

(b) he had withdrawn the Crown's offer over Gladstone Park and said:

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867 At [24].
868 At [24].
869 Letter from Minister Finlayson to Ngāti Whātua Ōrākei Trust, 17 August 2015.
870 Email from Senior Crown Counsel to other counsel, 25 September 2015.
871 Letter from Lead Negotiator, Hauraki to Ngāti Whātua Ōrākei Trust, 4 March 2016.

> It is the Crown's preference for iwi to engage directly on proposed redress and resolve any issues themselves. If Ngāti Whātua Ōrākei and the Marutūāhu Collective cannot reach agreement the Minister for Treaty of Waitangi Negotiations will make a preliminary decision. The types of information that would assist in a preliminary decision are:
>
> a. information Ngāti Whātua Ōrākei has provided to date for the Crown to take into account;
>
> b. historical and cultural information as to your interests in the areas proposed as redress to the Marutūāhu Collective;
>
> c. whether and how you consider your interests (including cultural and commercial) might be affected by the proposals; and
>
> d. any other information you consider may assist the Crown in assessing the appropriateness, or otherwise, of the offer to the Marutūāhu Collective, when balanced with your interests.

[537] On 11 March 2016, Minister Finlayson met with Marutūāhu. In a letter dated 13 May 2016, he confirmed that the Marutūāhu Collective was to be offered 10 properties in its settlement in the area over which Ngāti Whātua Ōrākei claim mana whenua.[872] Nine would be commercial redress and one would be cultural redress. They included the iconic sites of Auckland Grammar School, Epsom Girls Grammar School, three other schools and the Fred Ambler Lookout at Gladstone Park.

[538] On 22 March 2016, Ngāti Whātua Ōrākei advised that negotiations with Marutūāhu should be treated the same as that for Ngāti Pāoa, since Marutūāhu Rōpū had now been joined to these proceedings. Accordingly, Ngāti Whātua Ōrākei advised it did not intend to further discuss overlapping concerns with the Marutūāhu Collective and/or Crown while the matter was before the Court, as its position in the proceedings may be compromised.[873] It considered it was premature and inappropriate for the negotiations to be progressed.

[539] On 24 March 2016, OTS advised the Minister to offer Marutūāhu and Ngāti Whātua Ōrākei a further opportunity to resolve overlapping claims before he made a preliminary decision.[874] The Minister disagreed with the recommendation.[875] He

872 Letter from Minister Finlayson to Chair of the Marutūāhu Collective (13 May 2016).
873 Letter from Ngāti Whātua Ōrākei Trust to Lead Crown Negotiator (22 March 2016).
874 Aide Memoire from Deputy Director OTS to Minister Finlayson (24 March 2016).
875 Finlayson Affidavit 2020 at [29].

"considered that sufficient opportunities to resolve overlapping claims had been provided and [he] was satisfied that reasonable steps had been taken".[876] Minister Finlayson continues to stand by that decision. On 31 March 2016, the Minister advised Ngāti Whātua Ōrākei that he had decided to make a preliminary decision.[877] On 22 April 2016, he made a preliminary decision on the basis of advice from OTS.[878] Minister Finlayson's evidence is:

> 33. In reaching that decision, I took into account that Ngāti Whātua Ōrākei had been consulted over the proposal, including in face-to-face discussions with me, and that historical research and negotiation discussions had been conducted over a number of years about the interests of various groups, including Ngāti Whātua Ōrākei. Further, I noted that Marutūāhu had sought, in March 2016, to meet directly with Ngāti Whātua Ōrākei, and Ngāti Whātua Ōrākei had declined to meet due to their commencement of the present High Court proceedings.
>
> 34. I considered the proposed redress was "commensurate" with Marutūāhu's interests in the central Tāmaki isthmus, based on the Crown's assessment of their associations with the area. This was raised with me by officials in briefings to me and through my discussions directly with Marutūāhu, including on 11 March 2016 (see [27] above). I turned my mind to that very carefully. The language of "commensurate" needs further comment. By "commensurate", I meant I was satisfied that there was a principled historical basis for the redress being proposed, and that the redress was reasonable and fair in all the circumstances, including the nature of the redress.
>
> 35. Ngāti Whātua Ōrākei's concerns were a very important consideration. I knew Ngāti Whātua Ōrākei considered they had ahi ka over the disputed redress items and saw the redress as quite inappropriate. Officials advised me that the Crown had not recognised an exclusive area of interest for Ngāti Whātua Ōrākei and had not given undertakings that redress would not be provided to other iwi in the area. I asked for (and received) a copy of the memorandum that the former Chief Crown Negotiator sent to Marutūāhu and Ngāti Whātua Ōrākei on 27 September 2011, which confirmed this. A copy of that memorandum is attached to this affidavit and marked "CFF-3".
>
> 36. I was concerned that Ngāti Whātua Ōrākei's position had the effect of restricting the ability of the Crown to provide redress to Marutūāhu (or other claimant groups) unless Ngāti Whātua Ōrākei gave their permission. This was not an approach I thought was appropriate in the Tāmaki context, especially in light of the Tribunal's comments on predominance.
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> 37. I also took into account that Ngāti Whātua Ōrākei had already received a settlement of their historical claims and had received a relatively

876 At [29].
877 Letter from Minister Finlayson to Ngāti Whātua Ōrākei Trust, 31 March 2016.
878 Finlayson Affidavit 2020 at [29]

substantial area of land in cultural redress. This was relevant because the Crown must be fair between groups. If the Crown was providing substantial property to a group where none had been provided to Ngāti Whātua Ōrākei, that would have required further consideration, because Ngāti Whātua Ōrākei's continuing interests were well known and significant. I considered all parties to the Tāmaki Collective understood that property subject to the RFR mechanism could be considered for iwi specific settlements. I did not consider this meant that "all interests were equal"; rather, I had to be satisfied that, in all the circumstances, I felt it was appropriate to offer the proposed redress. I did not consider Ngāti Whātua Ōrākei were entitled to prevent or veto redress for Marutūāhu or any other group (just as no group had been entitled to prevent or veto redress for Ngāti Whātua Ōrākei).

38. I therefore agreed to maintain the redress offer to Marutūāhu and to sign letters to Marutūāhu and Ngāti Whātua Ōrākei advising them of my preliminary decision.

[540] On 12 May 2016, the Minister made a final decision on overlapping claims between Marutūāhu and Ngāti Whātua Ōrākei, on the basis of a report from OTS.[879] In her report of four pages, the Deputy Director of OTS advised:[880]

8. Officials do not consider Ngāti Whātua Ōrākei's objections justified because the Crown considers other iwi have interests in central Tāmaki Makaurau, and do not recognise the "2006 proposed RFR area" as establishing an exclusive area of Ngāti Whātua Ōrākei interests or generating a substantive fetter on your decisions about redress to other groups. The Crown does not need to determine Ngāti Whātua Ōrākei mana whenua in order to maintain this position, nor does it make redress decisions based on mana whenua. The "2006 proposed RFR area" was never part of a final deed of settlement between Ngāti Whātua Ōrākei and the Crown. Further, as previously discussed, the "layers of interest" approach discussed in the Waitangi Tribunal's 2007 *Tāmaki Makaurau Settlement Process Report* was used in relation to maunga, but not in relation to the commercial redress discussed here.

9. In considering the provision of redress in Tāmaki Makaurau, the Crown is entitled to consider the interests of other relevant iwi who are yet to settle. If the Crown excluded all redress within the area Ngāti Whātua Ōrākei say is their exclusive area of interest it would prejudice other iwi in future settlements given the commercial value of land in this area: the Crown would adversely affect the cultural and economic opportunities it could offer to those iwi who have interests in central Tāmaki Makaurau in a way officials consider is inequitable.

…

13. The Crown considers the impact of the proposed redress on overlapping settled groups and this is often a wide-ranging consideration. The Crown does not assess or determine a group's mana whenua as part of that

879 Finlayson Affidavit 2020 at [39].
880 Briefing from Deputy Director OTS to Minister Finlayson, 12 May 2016.

process. In this case, officials have considered the impact of the redress on Ngāti Whātua Ōrākei, the interests of the Marutūāhu Collective, and the Crown's wish to achieve a fair and appropriate settlement, the ability to provide appropriate redress, and ensure the redress strikes a balance between these obligations.

14. The Crown accepts the Collective has interests within Tāmaki Makaurau. The redress offer provided to the Collective is commensurate with the Collective's interests. The redress is provided on the basis of assessments of interests, not on the basis of assessments of mana whenua. This approach was taken when developing Ngāti Whātua Ōrākei's Treaty settlement and Ngāti Whātua Ōrākei were aware of this approach.

15. Accepting Ngāti Whātua Ōrākei's position would prevent the Crown from providing a settlement that is fair and appropriate and restricts the ability of the Crown to provide redress to the Collective (or other claimant groups with interests) without the express permission of Ngāti Whātua Ōrākei.

[541] From the perspective of Ngāti Whātua Ōrākei, the Crown then altered its decision-making process. On 21 May 2016, the Minister revised his preliminary decision to propose Ngāti Pāoa would be given a right to purchase the properties at settlement date from private funds. That decision would be "implemented only by settlement legislation and any right for Ngāti Pāoa to purchase these properties will be constituted by Parliament".[881] Ngāti Whātua Ōrākei would be given four weeks' notice of any deed initially.

[542] Crown Counsel advised Ngāti Whātua Ōrākei that the previous assurance, that the Crown would not make final decisions on Ngāti Pāoa properties before the litigation was complete, had been superceded because "[n]o 'final decision' would be made in relation to that decision".[882] The Crown applied to strike out the proceedings as inconsistent with Parliamentary privilege. It succeeded in the High Court and Court of Appeal, but not the Supreme Court. Hence this judgment.

[543] Ngāti Pāoa and the Crown signed a deed of settlement on 18 August 2017. At this time, Ngāti Whātua Ōrākei and Ngāti Pāoa had entered into the Kawenata Tapu. Mr Hodder submits that Ngāti Whātua Ōrākei took a generous approach towards Ngāti Pāoa's settlement by allowing properties in their rohe to be given to Ngāti Pāoa, provided they were acknowledged in the process.

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[881] Letter from Deputy Director OTS Ngāti Whātua Ōrākei Trust, 2 June 2016.
[882] Letter from Senior Crown Counsel to Ngāti Whātua Ōrākei solicitor, 21 June 2016 at [5].

[544] The Hon Andrew Little became Minister in October 2017. His evidence is that "[i]n broad terms, the approach [Minister Finlayson] describes is also the approach I have taken to overlapping interests".[883] Minister Little's evidence is that Ngāti Whātua Ōrākei contacted him soon after he took office in October 2017, regarding their concerns about the Crown's approach to overlapping claims.[884] His preference was to await the then-pending decision of the Court of Appeal on the strike-out of these proceedings. He also considered the Iwi Chairs Forum to be an appropriate channel to discuss the concerns raised. Eventually, the Minister met Ngāti Whātua Ōrākei on 23 February 2018.

[545] In April and May 2018, Ngāti Whātua Ōrākei wrote to the Minister expressing concerns about the prospect of the Crown and Marutūāhu initialling the Marutūāhu Iwi Collective Redress Deed.[885] On 1 June 2018, the Minister wrote to Ngāti Whātua Ōrākei to say no date had been set and Ngāti Whātua Ōrākei would be notified should a date be set. He also said the Crown's assurance regarding Ngāti Pāoa did not apply to the Marutūāhu Collective settlement and that, as with the Ngāti Pāoa properties, none of the properties disputed by Ngāti Whātua Ōrākei would be transferred to Marutūāhu unless Parliament authorised it.[886]

[546] On 6 June 2018, Ngāti Whātua Ōrākei wrote to the Minister saying that the Crown was not giving a tikanga-based process an opportunity to work because the Crown was providing no incentive for the settling party to engage in it.[887] The letter complained about the Crown acting "aggressively and stubbornly" in relation to the litigation by creating the conditions to strike out the claim and never accommodating any alternative. The letter referred to Ngāti Whātua Ōrākei attempting to engage with Marutūāhu and Hauraki in a tikanga process hosted by Ngāti Pāoa, but noted that Hauraki and Marutūāhu did not attend. It also referred to the Iwi Chairs' proposal. It urged the Minister to stand by his commitment to seeing a tikanga-based process taking place.

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883 Little Affidavit at [4].
884 At [6].
885 At [9].
886 Letter from Minister Little to Ngāti Whātua Ōrākei Solicitor, 1 June 2018.
887 Letter from Chair of the Ngāti Whātua Ōrākei Trust to Minister Little, 6 June 2018.

[547] On 10 June 2018, the Minister agreed to initial the Marutūāhu Collective deed on a conditional basis (neither condition relating to the concerns of Ngāti Whātua Ōrākei).[888] He also agreed to re-instate redress of an expanded area of Gladstone Park.[889] He considered the concerns of Ngāti Whātua Ōrākei had been addressed by the process undertaken by Minister Finlayson and he was conscious that the redress would only be transferred if and when Parliament legislation to permit that.[890]

[548] On 11 June 2018, in a further letter to Ngāti Whātua Ōrākei, the Minister repeated the Crown's position that claimant groups should resolve who has predominant interests in any area. Otherwise, he said, the Crown may have to make a decision, guided by two principles it had previously identified. On 22 June 2018, Ngāti Whātua Ōrākei sought the Crown's response to their 6 June 2018 letter, noted the Minister's description on TV of the overlapping claims process, with which he continued to require compliance, as "clumsy and blunt" and expressing their grievance by the Crown's position.[891]

[549] On 24 July 2018, the Minister wrote to Ngāti Whātua Ōrākei to say that initialling the Marutūāhu deed did not remove the scope for making changes taking into account the outcome of any tikanga-based process, led by iwi not the Crown, to which he was open. The Marutūāhu deed was initialled on 26 July 2018.[892]

2 Te Ākitai Waiohua

[550] On 16 September 2016, the Chief Crown Negotiator made Te Ākitai Waiohua an offer including potential commercial redress of three properties, including Mt Eden School. There is dispute as to whether one of them (at 101A Hillsborough Rd) is within the area over which Ngāti Whātua Ōrākei claims mana whenua.[893] The offer was conditional on, among other things, "the resolution of overlapping claims to the Crown's satisfaction".[894]

888 Little Affidavit at [11]
889 At [13]–[15].
890 At [15]–[16].
891 Letter from Ngāti Whātua Ōrākei Trust to Minister Little, 22 June 2018.
892 Little Affidavit at [22].
893 Letter from Chief Crown Negotiator to Te Ākitai Waiohua Iwi Authority, 16 September 2016.
894 At 2.

[551] On 4 October 2016, the Deputy Director of OTS advised Ngāti Whātua Ōrākei that the Crown was working towards signing an agreement in principle with Te Ākitai Waiohua in the last quarter of 2016, subject to the resolution of overlapping claims.[895] She said:[896]

> The Crown's preference is for overlapping claims to be resolved by discussion between groups. The Crown acknowledges that such discussions can sometimes be difficult. Should the need arise the Crown is able to assist in such discussions if both parties agree. The Office of Treaty Settlements is also available at any time during this process to meet with you directly to discuss your interests and any issues.
>
> *Process and timeframes for engagement*
>
> Once we have your feedback, we will then assess this information alongside any additional information the Te Ākitai Waiohua lwi Authority provides us resulting from their engagement with you. Following this, we will report to the Minister for Treaty of Waitangi Negotiations on overlapping claims matters based on our assessment of information received from the Te Ākitai lwi Authority and neighbouring groups. The Minister will then advise claimant groups of his initial views on any unresolved overlapping claims and whether any of the redress proposals may need to be amended based on the information he has received to date.
>
> Should there remain outstanding matters between iwi, the Crown may have to make a decision. In reaching decisions on overlapping claims the Crown is guided by three principles:
>
> - reaching a fair and appropriate settlement with the claimant group in negotiations;
>
> - maintaining, as far as possible, its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims; and
>
> - the Crown's duty to ensure the redress offered to the claimant group in negotiations doesn't cause prejudice to a settled group and has no unintended inferences about the mana of other groups.
>
> You will have an opportunity, if need be, to respond to the Minister's preliminary decisions on unresolved overlapping claims. The Minister will then make final decisions on unresolved overlapping claims matters.

[552] On 7 October 2016, the solicitors for Ngāti Whātua Ōrākei responded, seeking urgent confirmation as to whether any redress was within the area over which they claim mana whenua, referring to these proceedings.[897] They concluded:

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[895] Letter from Deputy Director OTS to Ngāti Whātua o Ōrākei Trust Board, 4 October 2016.
[896] At 2.
[897] Letter from Ngāti Whātua Ōrākei solicitor to Deputy Director OTS, 7 October 2016.

Te Ākitai Waiohua

> 6 Ngāti Whātua Ōrākei intends to meet with Te Ākitai Waiohua to discuss, by way of kōrero pono, the Crown's redress proposal.
>
> 7 However, Ngāti Whātua Ōrākei considers that these discussions could be much more fruitful if the two groups were able to discuss the "full Te Ākitai Waiohua package as it relates to [Ngāti Whātua Ōrākei's] area of interest". It is not realistic for Ngāti Whātua Ōrākei to assess any overlapping claims it might have with Te Ākitai Waiohua discrete from the overall redress proposals.

[553] On 30 November 2016, the Deputy Director of OTS providing Ngāti Whātua Ōrākei with a summary of the full redress package in an AIP with Te Ākitai Waiohua which they were scheduled to sign in December 2016.[898] She advised none of the exclusive cultural redress were located within the Ngāti Whātua Ōrākei area of interest but the three commercial redress properties were. She requested comments no later than 13 December 2016 if Ngāti Whātua Ōrākei wished to provide comments on the redress prior to the signing. Following the signing, OTS would write to all overlapping groups again providing them with the AIP "and seeking formal views on the redress offered". The AIP was signed on 16 December 2016.

[554] In September 2018, Minister Little obtained Cabinet approval for a revised redress package for Te Ākitai Waiohua.[899] He says he was conscious that regardless of the changes to details, which is not unusual, he was aware the Crown needed to be satisfied that overlapping interests had been addressed.[900] On 25 February 2019, the Minister agreed to "close the overlapping claims process" with nine groups, other than Ngāti Whātua Ōrākei, who had raised concerns about the proposed redress to Te Ākitai Waiohua.[901] He encouraged Te Ākitai to meet with Ngāti Whātua Ōrākei to discuss overlapping interests. They met on 1 May 2019 but the objections of Ngāti Whātua Ōrākei were not resolved.

[555] On 18 November 2019, the Minister accepted Te Arawhiti's recommendation to make a preliminary decision to maintain the offer of the disputed properties to Te Ākitai Waiohua notwithstanding the objections of Ngāti Whātua Ōrākei.[902] Te

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898 Letter from Deputy Director OTS to Ngāti Whātua o Ōrākei Trust Board, 30 November 2016.
899 Little Affidavit at [23].
900 At [24].
901 At [25].
902 At [29];

Arawhiti's advice to the Minister noted that the courts had allowed Ngāti Whātua Ōrākei's proceeding about mana whenua to proceed, but not the challenge to specific properties that will be transferred by legislation.[903] It advised that "[w]e consider the better approach is to maintain consistency with our overall overlapping interests approach and continue to defend our position in the courts".[904] The Minister says he was familiar with Ngāti Whātua Ōrākei's objections to the overlapping interests policy, which appeared to him to be a general objection rather than relating to the particular properties.[905] The Minister's evidence is that he took into account officials' summaries of historical evidence and Waitangi Tribunal research regarding Te Ākitai's historical connections to the proposed commercial redress sites.[906] The Minister was concerned about the impact the decision would have for the Crown's relationships with Te Ākitai and Ngāti Whātua Ōrākei. He considered the objections had been addressed to his satisfaction and no further processes were required. But the decision was preliminary. Lil Anderson's evidence under cross-examination is:[907]

> A long drawn-out process between iwi along the lines of where that conversation was heading may not have been in the best interests of relationships between those two iwi. It could've caused more damage than this would've and you know, given I think the conversation they had, it was very likely to have not just affected their relationship but affected relationships across Tāmaki Makaurau.

[556] On 19 November 2019, the Minister wrote to Ngāti Whātua Ōrākei to say he had been advised Ngāti Whātua Ōrākei and Te Ākitai Waiohua had met but did not agree on how their overlapping interests can be addressed.[908] He said:

> This means I must make, on behalf of the Crown, a decision on the proposed redress.
>
> …
>
> *Factors taken into account by the Crown*
>
> The Crown is guided by two general principles when considering overlapping interests:

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903 Deputy Director Te Arawhiti to Minister Little, 7 November 2019 at [9].
904 At [12].
905 Little Affidavit at [30].
906 At [31].
907 NOE 879/32—880/3.
908 Letter from Minister Little to Ngāti Whātua Ōrākei Trust Board, 19 November 2019.

- the Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations; and

- the Crown's wish to maintain its capability to provide appropriate redress to other claimant groups who have yet to enter negotiations, and to achieve a fair settlement of their historical claims.

In making my preliminary decision I have also taken into account:

- relevant historical evidence on customary interests and Waitangi Tribunal research;

- the information Te Ākitai Waiohua have provided on their interests in the proposed redress;

- the information you have provided about the proposed redress and your interests;

- the commercial nature of the redress; and

- fairness between claims (including between settled groups and non-settled groups).

Preliminary decision

…

I am satisfied there is evidence that Te Ākitai Waiohua have historical connections to the areas in which the properties lie through their Te Waiohua ancestors. The properties are also within Te Ākitai Waiohua's area of interest.

…

I understand you may not agree with my preliminary decision. I have been reluctant to make a decision but in the absence of agreement between Te Ākitai Waiohua and Ngāti Whātua Ōrākei I am obliged to act in good faith toward Te Ākitai Waiohua so they may progress their Treaty settlement. I assure you I have considered your perspective, but in weighing the various considerations the Crown must take into account I am comfortable with my preliminary decision.

I also note the proposed redress will not be available to Te Ākitai Waiohua unless and until Parliament has enacted legislation that authorises it.

3 Waitangi Tribunal's *Hauraki Report*

[557] Another example of the application of the Crown's policy on overlapping interests, that was canvassed by the parties in evidence and submissions, is the Waitangi Tribunal's report on its urgent inquiry into the *Hauraki Settlement*

Overlapping Claims, issued on 13 December 2019.[909] The Tribunal was composed of Judge Miharo Armstrong, David Cochrane, Dr Rawinia Higgins, and Dr Ruakere Hond. It inquired into whether the application of the Crown's policies in the Treaty settlements with Ngāi Te Rangi, Ngāti Ranginui, Ngātiwai, and Ngāti Porou ki Hauraki, breached the principles of the Treaty of Waitangi. The Tribunal's summary in their letter of transmittal to the Minister is, relevantly:[910]

> Throughout this inquiry, the claimants gave powerful evidence of being excluded or sidelined from negotiations over redress proposed to Hauraki. They told us of 'consultation' between parties that was cursory or came far too late; of repeated and ultimately fruitless requests for information that the Crown should have provided without being asked; of the Crown's indifference to the use of tikanga-based processes; of their dismay at discovering deeds containing redress that had not been through a proper overlapping engagement process; and of relationships that have been left in tatters. The prejudice they have experienced, the claimants say, is neither short-lived nor abstract: it is significant, lasting, and its day-to-day effects are already apparent.
>
> For the most part, we agree. At a general level, we find the Crown's policies, processes, and practices for dealing with groups with overlapping interests during settlement negotiations are inadequate and inconsistent with its Treaty obligations, in many respects. The shortcomings of the *Red Book*, the only statement of Crown settlement policies and processes available to claimants, have been well-rehearsed in many Tribunal reports; we reiterate them here. Moreover, we find that the sometimes undocumented and often opaque practices the Crown adopts in circumstances that the *Red Book* does not address (and there are many) also breach Treaty principles and the Crown's duties and obligations.
>
> As for the way the Crown applied those policies, processes and practices when awarding redress in the Hauraki settlement negotiations, here too we identify deficiencies and Treaty breaches in respect of Tauranga Moana iwi and Ngātiwai. We consider their claims to be well-founded, and make several recommendations, which we urge the Crown to act on without delay to remove the prejudice to these groups. In particular, we call for the Crown to actively demonstrate its commitment to tikanga when dealing with overlapping interests, including by facilitating the use of tikanga-based processes. While it is not the Crown's role to devise such processes itself, it needs to do much more to provide space for them to operate as a means of testing overlapping interests, resolving conflict, and repairing relationships. Regrettably, in this settlement, the Crown prioritised speed over due process. The Crown's response to a failure of tikanga process should not be binary; making unilateral decisions by itself is not the only option. As the full title of the *Red Book* itself acknowledges, 'Ka tika a muri, ka tika a mua – Healing the past, building a future'; the Crown must now turn this admirable sentiment into practical action.

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909 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2020) [Waitangi Tribunal *Hauraki Overlapping Claims Report*].

910 At xvi.

[558] Particularly relevantly, the Tribunal said:[911]

> Ms Anderson told us that the *Red Book* did not reflect some significant changes in practice that had happened on the ground. But this is precisely what concerns us: the Crown does not necessarily apply the principles, policies, and processes set out in the *Red Book.* Thus, the *Red Book* is misleading, at least by omission. Unable to rely on the *Red Book,* the claimants in this inquiry - and, we suspect, all non-settling and already settled groups with overlapping interests - found themselves subject to a mysterious and ever-changing pool of Crown practices, decisions, and personnel. These were, variously, at odds with the Crown's own stated policies, and/ or inconsistent with Treaty principles and the Crown's corresponding duties.
>
> For example, we heard compelling evidence of the Crown failing to engage with or consult non-settling groups sufficiently early in negotiations (as the *Red Book* exhorts). We also heard that the Crown failed to share information with non-settling groups about other groups' interests and proposed redress items, and did not respond adequately when non-settling groups expressed concern over redress proposals. Claimants also told us of the Crown having offered redress items without properly determining the extent of customary interests or associations, and more. That evidence will be discussed more fully in chapter 5, and specific findings made.
>
> Of course, the Crown has multiple Treaty obligations it must take into account when undertaking settlement negotiations and, at times, these may come into conflict. For example, the Crown's duty to avoid unreasonably delaying settlement may clash with its obligation to avoid creating new grievances. Where such duties or obligations collide, we consider the Crown's over-arching duty must to be to avoid creating new grievances. This duty must be at the forefront of Crown policy, practice, acts, and omissions when the Crown finds itself in such circumstances. This did not happen here. An absence of robust, well-documented policies and processes meant non-settling groups in particular did not know what they could expect of the Crown. Instead, the Crown adopted an array of ad hoc practices that were neither consistent with its own policies and principles nor Treaty compliant - including at one point a proposition that deeds be signed, then amended later if necessary. In the next chapters, we examine these matters in more detail, along with the consequences for the claimants.

[559] The Tribunal’s summary of findings, and recommendations, include:[912]

> …
>
> **7.1.2 Consultation on redress proposals**
>
> In failing to carry out a proper consultation process, we find that the Crown breached its partnership obligation to Tauranga Moana iwi and Ngātiwai. It also breached its duty to consult by excluding Ngātiwai from discussions over Aotea until late in the negotiations, despite them having clearly expressed an interest very much earlier.

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911 At 32.
912 At 117–118.

7.1.3 Transparency: disclosing and sharing information

In failing to communicate openly with Ngāti Ranginui, Ngāi Te Rangi, and Ngātiwai, and in failing to share information with and between all groups, we find that the Crown has breached:

- the principles of partnership and active protection;
- its duty to act honourably and in good faith to all iwi and not just the settling group;
- its obligation to protect or preserve amicable tribal relationships.

The Crown's conduct has created fresh grievances, fractured relationships, and caused further delays to the settlement process.

7.1.4 The use of tikanga-based processes

We find that, by failing to properly promote, allow for, and facilitate tikanga-based processes, at the appropriate times and especially at the start of negotiations, the Crown has breached its duty to avoid creating fresh grievances. As a result, it has prejudicially affected iwi with overlapping interests and breached the principles of partnership, good faith, and active protection.

7.1.5 Protecting all parties and maintaining relationships

In respect of Ngāi Te Rangi, Ngāti Ranginui, and Ngātiwai, we find that the Crown acted in a way that damaged relationships between iwi and with the Crown. This breached the Treaty principles of partnership and active protection, and caused fresh grievances.

7.1.6 Providing additional redress after reaching initial agreements

We find that the Crown's actions in providing Hauraki iwi with additional redress, without undertaking a robust overlapping redress process, have created fresh grievances for the claimants. This is another breach of the principle of active protection, and the duty to avoid creating fresh grievances.

7.2 RECOMMENDATIONS

… we also address broader issues raised by what we have seen in this inquiry of the Crown's policies, processes, and practices when dealing with groups with overlapping interests. Accordingly, we further recommend:

- that the Crown, when undertaking overlapping engagement processes during settlement negotiations, fully commits to and facilitates consultation, information-sharing, and the use of tikanga-based resolution processes that reflect the principles we have identified in chapters 3 and 5 above; and
- that the Crown amends the *Red Book* to record its current policies, processes, and practices, and in particular to:

> explicitly acknowledge the Crown's commitment to consultation, information-sharing, and tikanga-based resolution processes at the appropriate times, and

> include the principles on which those processes should be based, taking into account the findings in this report, and other Waitangi Tribunal reports, concerning overlapping interest claims.

VIII Tikanga obligations in settling Treaty claims in Tāmaki Makaurau

A An overview of the submissions

[560] Ngāti Whātua Ōrākei claims that the evidence clearly establishes that in settling Treaty of Waitangi claims, the Crown has a policy not to resolve questions of contested group boundaries, nor which group has a predominant customary interest, unless the relevant groups agree. In the absence of such agreement, Ngāti Whātua Ōrākei submits the Crown uses non-tikanga criteria, including its assessment of "fair and appropriate settlement" in determining overlapping interests. The policy disregards the rights of a group with mana whenua over a core rohe or heartland. Ngāti Whātua Ōrākei submits it is unlawful for the Crown to refuse to engage in a meaningful assessment of competing customary interests and to refuse to engage with tikanga-based objections to proposed transfers. That is because:[913]

(a) There is a solemn compact in the settlement deed, about the observance of Treaty principles in the relationship between the Crown and Ngāti Whātua Ōrākei, that creates a direct obligation akin to contract. The terms of the settlement reinforce, clarify and restate the relationship. The Settlement Act adds a layer of statutory recognition to that relationship, akin to a statutory duty.

(b) In the Treaty settlement environment, Treaty principles and tikanga are incorporated into the relevant common law and public law, amounting to mandatory relevant considerations or matters the Court can consider in assessing a decision for unreasonableness.

913 Notes of Closings 541/27–542/24.

[561] Ngāti Pāoa, Ngāti Kuri and Ngāi Te Rangi generally support the submissions of Ngāti Whātua Ōrākei.

[562] Te Toru oppose the declarations sought by Ngāti Whātua Ōrākei, as premised on a conception of mana whenua with which they disagree:

(a) Marutūāhu Rōpū denies that the Crown determines mana or tikanga, including in Treaty settlements, denies that Ngāti Whātua Ōrākei has the legal rights they claim on the basis of their conception of mana whenua, and opposes the declarations sought.

(b) Ngāi Tai ki Tāmaki agrees that the Crown has obligations to tāngata whenua under the Treaty and at tikanga, whether before or after a settlement, but denies it can deal with just one tribe on overlapping claim issues or that one tribe can determine whether properties are transferred or not.

(c) Te Ākitai Waiohua submits that the Crown should not be the arbiter of mana whenua or tikanga in the Treaty settlement process. Te Ākitai supports judicial comment building on existing jurisprudence to strengthen the role and place of tikanga, the Treaty, Crown obligations to Māori, and international obligations such as the Declaration on the Rights of Indigenous Peoples. But none of these legal yardsticks justifies an approach which assesses rights and interests through the lens of one group where there are several groups with overlapping claims.

[563] The Crown's position is that this is not a general inquiry into the Overlapping Claims Policy, Treaty principles or the framework for Treaty settlements but into the specific legal rights about which Ngāti Whātua Ōrākei seeks declarations. The Crown accepts Treaty principles are relevant to interpretation of its Overlapping Interests Policy. But the particular rights claimed by Ngāti Whātua Ōrākei here are not consistent with the case law on Treaty principles, are not founded on the Treaty settlement with Ngāti Whātua Ōrākei and have no statutory hook. There is no clear

error or inherent flaw in the policy. The application for declarations should be declined.

B Jurisdictional parameters

[564] The parties made submissions about three parameters of the Court's jurisdiction in relation to the declarations sought concerning the Crown. First, Dr Ward submits Treaty settlements involve difficult and quintessentially political processes requiring compromise on all sides. It is true courts have treated some decisions about Treaty settlements as inappropriate for judicial review, as the Supreme Court stated in *Ririnui v Landcorp Farming Ltd*.[914] But the Court went on to say that does not mean any decision having some Treaty context is inappropriate for judicial review, as the Crown acknowledges.[915] The complex multi-faceted nature of Treaty settlements does not necessarily cloak government decisions from the constitutional process of judicial review for unlawfulness or from declarations of legal right.

[565] While the form of these proceedings began as a judicial review, it has become a consideration of the legal status and rights of Ngāti Whātua Ōrākei in relation to tikanga and the application of the Crown's overlapping interests policy. Accordingly, no specific decision of the Crown in relation to a particular Treaty settlement is susceptible to judicial interference here. The desirability of judges making declaratory orders about complex multi-factored decision-making bears on the exercise of discretion as to whether relief should be granted, rather than whether the Court is able to consider the issues.

[566] Second, I accept Dr Ward's submission that the Supreme Court's finding, that Ngāti Whātua Ōrākei cannot challenge the decisions to legislate to transfer particular properties, is important in these proceedings.[916] Ngāti Whātua Ōrākei amended their statement of claim accordingly. This judgment does not transgress that finding, or the underlying constitutional principle of non-interference in parliamentary proceedings, clarified by the Supreme Court consistently with constitutional principle. Rather, this judgment discharges "the function of the courts to make declarations as to rights"

914 *Ririnui* at [89].
915 At [90].
916 *Ngāti Whātua Ōrākei* (SC) at [66].

concerning the "live issues as to the nature and scope of the rights claimed by Ngāti Whātua Ōrākei".[917] I detect little difference between the parties regarding this.

[567] Third, Dr Ward submits the Supreme Court also made clear that Ngāti Whātua Ōrākei would have to establish that the Crown's overlapping interests policy provides a basis for a reviewable decision.[918] He submits that is only available in a narrow range of circumstances, on the basis of cases identified by the Supreme Court. But the primary authority he identifies, Lord Bridge's speech in 1985 in *Gillick v West Norfolk and Wisbech Area Health Authority*, is more in the nature of an understandable caution to courts to use their jurisdiction with restraint.[919] As the Woolfs say in their text, *The Declaratory Judgment*, Lord Bridge and Lord Templeman in *Gillick* "considered that the court had jurisdiction to correct errors of law in memoranda issued by public bodies even though the bodies were not acting pursuant to a statutory power in issuing the guidance and even though it had no legal force".[920]

[568] The jurisdiction to correct errors of law in guidance, and to correct manifestly unreasonable decisions to issue guidance, has also been accepted in other cases in England, though the Woolfs consider the jurisdiction is "probably confined to determining issues of law".[921] Indeed, as Professors Elliot and Varuhas point out, it may be more important for a court to exercise the jurisdiction to review a policy, if many people are likely to rely on a policy containing a legal error.[922] In the Treaty context in *Ririnui*, the New Zealand Supreme Court noted that declaratory relief has been granted even though there is no "decision" directly impacting rights.[923]

[569] Of more weight is the point made by Elliot and Varuhas that "courts are reluctant to assess the legality of guidance in contexts where determinations as to legality are heavily fact dependent".[924] The related point, made by the majority of a full Court of Appeal in *Attorney-General v Refugee Council of New Zealand*, is that

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917 At [46] and [48].
918 At [59].
919 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL) at 193–194.
920 Woolf and Woolf *The Declaratory Judgment* at 123.
921 At 123.
922 Mark Elliot and Jason Varuhas *Administrative Law: Text and Materials* (5th ed, Oxford University Press, Oxford, 2017) at 526.
923 *Ririnui* at [91](a).
924 At 527.

individual examples of the application of a policy are not the policy itself.[925] Here, examination of the illustrative examples adds richer factual context to understanding the Crown's policy, and how the Crown has understood and applied it in some circumstances; but these points remains valid. They bear particularly on the exercise of the Court's discretion to grant the relief sought.

C Tikanga and the Crown's prerogative or residual powers

[570] Part V.C explains that tikanga is a pre-existing free-standing legal framework recognised by New Zealand statutes and common law. Tikanga governs and binds iwi and hapū and is developed over time by iwi and hapū. The Crown is not an iwi or hapū. The Crown does not have tikanga, as Lil Anderson stresses in her evidence.[926] The Crown is not bound to follow tikanga in and of itself and does not develop tikanga. Neither does tikanga directly modify the common law or statutes which bind the Crown. In turn, common law and statutes do not directly modify tikanga, though they can provide for its effects and incidents in New Zealand's legal system.

[571] While the Crown does not share tikanga Māori, the Crown is subject to unwritten constitutional conventions which bind the exercise of many of its powers. And it has its own traditions and practices, some of which are recognised by the common law as the law of the royal prerogative. The Crown's power to enter settlements with iwi and hapū of its breaches of the Treaty of Waitangi does not rest on statute. Dr Ward submits it is primarily a prerogative power.[927] This is a respectable argument. The Crown's settlement of its breaches of the Treaty is linked to the Crown's exercise of its prereogative power to enter the Treaty of Waitangi in 1840. Similarly, the usual process of implementing a Treaty settlement by legislation has similarities with the incorporation of international treaties and their amendments into New Zealand law by legislation. I note that the fact a decision is made under the prerogative does not exempt it from judicial review.[928]

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925 *Attorney-General v Refugee Council of New Zealand* [2003] 2 NZLR 577 (CA) at [30]–[32].
926 NOE 866/32–867/2.
927 Notes of Closings 39/26–30 and 64/2–17.
928 *Burt v Governor-General* [1992] 3 NZLR 672 (CA) at 678.

[572] There is also academic debate about whether the Crown's prerogative is the sole source of its legal power or whether there is a further residual source. There is a robust line of United Kingdom and New Zealand authority, particularly in the judgments of McGrath J in New Zealand, that conceptualises the Crown as having the rights and powers of a natural person.[929] Professor Bruce Harris has also conceptualised a similar "third source" of power of government, after statute and the prerogative, to do anything that is not prohibited by law.[930]

[573] If the natural person and third source theories are alternatives to each other, I prefer the conception of the Crown having the rights and powers of a natural person. It is better established in New Zealand law. The extent of the legal powers of the Crown is a more natural corollary of its status as a legal entity than a reflection of a newly discovered source of power. But I agree with Dr Ward that there is a point at which such arguments about categorisation lose their utility. The distinction between the prerogative, natural person and third source of power does not matter for the purposes of this judgment. No party submits that it does; most submit it does not.

[574] Mr Hodder submits that the Crown's power to settle, whether a prerogative or residual power, is subject to and informed by the common law which includes tikanga Māori. He submits that exercises of the prerogative are subject to tikanga. The tikanga of mana whenua constitutes a set of rights and rules that are recognised at common law and enforceable against the Crown in the exercise of its prerogative powers. Mr Mahuika submits the third source of power must give way to statutory or common law and would not discount that tikanga is also law for that purpose. Mr Smith submits that any third source or residual common law freedom is informed by tikanga as a value of the common law which may not be encroached upon. He submits tikanga constrains the prerogative, as it did in *Baldick v Jackson*, and that entry into a contract that is offensive to, or inconsistent with, tikanga is outside the scope of the Crown's

929 *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 at [93]–[99].
930 See for example: B V Harris "The 'third source' of authority for government action" (1992) 108 LQR 626; B V Harris "The "third source" of authority for Government action revisited" (2007) 123 LQR 225; and B V Harris "Recent Judicial Recognition of the Third Source of Authority for Government Action" (2014) 26 NZULR 60.

power.[931] Dr Ward submits the Crown's prerogative or residual powers are not subject to tikanga.

[575] Whether the Crown enters Treaty settlements by way of the prerogative, as a natural person or by the third source, it exercises a power that cannot override rights and liberties prescribed by law, whether they be conferred by statute, common law or tikanga. That was made clear in principle as far back as the *Case of Proclamations* in 1610, where Coke CJ held that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm".[932] As McGrath J said in *R v Ngan* in New Zealand in 2007:[933]

> It is, however, a residual form of authority which is subject to statutory and common law constraints. It does not permit government officials to act in conflict with the rights and liberties of citizens. In particular the residual freedom of officials is constrained by the Bill of Rights Act. Residual freedom to act can never justify a breach of protected rights. Wherever residual freedom conflicts with a statutory or common law rule it must give way to that rule. No balancing of the relevant interests is permitted because the residual freedom only exists to the extent that there is no other positive law that deals with the circumstances in question.

[576] Tikanga and the Crown's residual or prerogative power are mutually exclusive. Neither interferes with the legal effect of the other. Both are systems of internal self-regulation. The Crown's power to act does not override or change tikanga without a further statutory or common law basis. Neither does tikanga govern or bind the Crown without a statutory or common law basis. But tikanga can be the source of legally binding obligations on the Crown, where the Treaty of Waitangi is relevant to Crown decisions.

D Tikanga and the Treaty of Waitangi

[577] The overwhelming majority of rangatira who signed te Tiriti o Waitangi signed the te reo Māori version. The certified te reo Māori version was published in 1841 by

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931 *Baldick v Jackson.*

932 *Case of Proclamations* [1610] EWHC KB J22, (1611) 12 Co Rep 74 at 76. See Paul Craig "Prerogative, Precedent and Power" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford University Press, Oxford, 1998) 65 at 68.

933 *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 at [97]; and see *Television New Zealand Ltd v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277 at [110].

the House of Commons in London labelled "Treaty.", followed by the English version under the heading "(Translation.)".[934] The texts of article two, as incorporated into New Zealand law by the Treaty of Waitangi Act 1975 are, relevantly:

> Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapū-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kāinga me o ratou taonga katoa …
>
> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession …

[578] Sir Hugh Kawharu's authoritative re-translation of this text from te reo Māori into English, recorded in the Deed of Settlement between the Crown and Ngāti Whātua Ōrākei in 2011, is:[935]

> The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over theirs lands, villages and all their treasures.

[579] The Waitangi Tribunal has consistently found that article two of the Treaty includes the protection of Māori custom and cultural values.[936] In its *Ōrākei Report* in 1987 the Tribunal said:[937]

> (c) In Māori thinking "rangatiratanga" and "mana" are inseparable. One cannot have one without the other. The Māori text of the Treaty conveyed to the Māori people that, amongst other things, they were to be protected not only in the possession of their lands but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences.

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934 Matthew S R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 56–57.

935 Ngāti Whātua Ōrākei Deed; and Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Melbourne, Oxford University Press, 2005) at 390. This retranslation was set out and referred to approvingly by the Court of Appeal in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*] at 662–663 and 713.

936 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Motunui-Waitara Report* (Wai 6, 1983) at 51. See also Waitangi Tribunal *Ōrākei Report* at 134–135; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ngai Tahu Land Report* (Wai 27, 1991) at 824; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Mohaka River Report* (Wai 119, 1992) at 63.

937 Waitangi Tribunal *Ōrākei Report* at 209.

(d) The lands owned by the Māori were held by them tribally and communally. The communal right so existing was recognised by the Crown in the Treaty. The conferral in the Māori text of "te tino rangatiratanga" of their lands on the Māori people carries with it, given the nature of their ownership and possession of their land, all the incidents of tribal communalism and paramountcy. These include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion.

(e) In recognising the "tino rangatiratanga" of their lands the Crown acknowledged the right of the Māori people for as long as they wished, to hold their land in accordance with long standing custom on a tribal and communal basis.

[580] In its *Hauraki Overlapping Claims Report* in 2020, the Tribunal said:[938]

> The Tribunal has noted that it is mana or authority that enables the exercise of tino rangatiratanga: "Rangatiratanga signifies the mana of Māori not only to possess what they own but to manage and control it in accordance with their preferences. That is, in accordance with Māori customs and cultural preferences".
>
> If the Crown is to work with Māori communities in a way that allows them to exercise tino rangatiratanga, it must therefore "be able to identify and understand the customs and cultural preferences of those communities". This requires the Crown to understand, respect. and engage with the tikanga of the various iwi and hapū it works with.

[581] In 2021, Cooke J held in *Mercury NZ Ltd v The Waitangi Tribunal* that "tikanga Māori is an important aspect of the principles of the Treaty of Waitangi".[939] In *Trans-Tasman* the Supreme Court unanimously held that it followed from a statutory Treaty of Waitangi clause that tikanga-based customary rights and interests were encompassed within the relevant statutory protection.[940] William Young and Ellen France JJ held that followed from the guarantee in article two of the Treaty of tino rangatirantanga over taonga katoa, in the context of the marine environment.[941] Williams J agreed, adding that the question must not only be viewed through a Pākehā lens.[942]

[582] There can be little doubt that article two of the Treaty encompasses the Crown's protection of tikanga. Tikanga could be seen as a taonga, analogously to te reo Māori,

938 Waitangi Tribunal *Hauraki Overlapping Claims Report* at 11 (citations omitted).
939 *Mercury* (HC) at [111].
940 *Trans-Tasman* (SC) at [8].
941 At [154] and n 287.
942 At [297].

which the Privy Council has agreed is a taonga.[943] But I prefer Sir Joe Williams' extra-judicial observation that "it is better to think of customary law as a necessary and inevitable expression of self-detetermination".[944] As I canvassed in part V, tikanga constitutes an iwi or hapū and is essential to their identity. Tikanga is integrally woven with rangatiratanga; the two dimensions give life to each other. The Crown's undertaking to protect rangatira, hapū and tāngata katoa in the exercise of tino rangatiratanga in article two inherently extends to their operation of tikanga.

[583] The nature of the Crown's obligations in relation to tikanga, when they arise under the Treaty, are the orthodox obligations as held by the Courts since the *Lands* case in 1987 and accepted and endorsed by successive executive administrations and Parliaments.[945] As the Privy Council confirmed in the *Broadcasting Assets* case:[946]

> [T]he "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty.

[584] I identify three orthodox principles of the Treaty as particularly relevant to the Treaty settlements context here. First, the Court of Appeal in *Lands* held that "acting reasonably and in good faith" was an essential aspect of the Treaty relationship.[947] Justice Richardson described it as the "paramount principle", saying:[948]

> I think the better view is that the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.

943 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets*] at 514.

944 Williams "Lex Aotearoa" at 9.

945 *Lands*; *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA) [*Forests*]; *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA), *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA) [*Radio Frequencies*]; *Broadcasting Assets*; and *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31.

946 At 513.

947 At 664.

948 At 680 and 683.

[585] In the *Forests* case, the Court of Appeal said it was "clear beyond argument" that "the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues".[949] A fait accompli would "[a]ssuredly … not represent the spirit of the partnership which is at the heart of the principles of the Treaty of Waitangi".[950] As the Privy Council said in *Broadcasting Assets*, "[t]his relationship the Treaty envisages is founded on reasonableness, mutual cooperation and trust".[951]

[586] Second, the Court of Appeal held in the *Lands* case that the duty of the Crown "is not merely passive but extends to active protection … to the fullest extent practicable".[952] The duty of active protection of what is guaranteed under article two extends to the exercise of tikanga, just as it extends to the exercise of rangatiratanga.

[587] It therefore follows from both the terms and the principles of the Treaty that, where Treaty obligations legally bind the Crown, the Crown will have legal obligations in relation to tikanga, to act reasonably and in good faith, with mutual cooperation and trust, and to actively protect tikanga. Whether there are such legal obligations, and what exactly they require, depends on the statutory and factual context in which the issue arises. As the Privy Council said in *Broadcasting Assets*:[953]

> It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.

[588] The context of Treaty settlements also directly invokes the third relevant principle of the Treaty, the duty to provide redress, and right to receive redress, for breaches of the Treaty — which Somers J described in *Lands* as "fair and reasonable recognition of, an recompense for, the wrong that has occurred".[954] Contrary to Mr Hodder's submission that it has no place, the duty to provide redress for breaches of

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949 *Forests* at 152.
950 At 152–153.
951 *Broadcasting Assets* at 517.
952 *Lands* at 664 per Cooke P, 673 per Richardson J, and 703 per Casey J. See also Waitangi Tribunal *Ōrākei Report* at 190–191.
953 *Broadcasting Assets* at 517 per Lord Woolf.
954 *Lands* at 693.

the Treaty is directly relevant to the Crown in a Treaty settlement context. It is the primary reason for the Crown's Treaty settlement endeavours. And it may cut against aspects of the other duties, as explored below.

E The Treaty and the law

[589] The Treaty of Waitangi is still currently thought not to give rise to free-standing obligations in and of itself in New Zealand law. This reflects the orthodox legal treatment of an international treaty by the Privy Council in 1941 in *Te Heuheu Tūkino v Aotea District Māori Land Board*.[955] That decision appears to have been based on an inaccurate understanding of the terms of the Treaty of Waitangi, referring to the English version alone. In *Lands* in 1987, Cooke P characterised *Te Heuheu Tūkino* as "[b]y past standards … the leading case on the Treaty of Waitangi", representing "wholly orthodox legal thinking, at any rate from a 1941 standpoint".[956] Similar characterisations have been repeated since, but no New Zealand court has had to directly consider the issue.[957] I am not called on, and do not, do so here. In the context of this case, whether the Treaty is incorporated into law by legislation makes little difference, due to the principles of statutory interpretation and administrative law.

[590] As Ms Coates submits, the Courts have moved on from the position that the Treaty is only relevant when legislation incorporates it.[958] In 1987, in a resource management context in *Huakina Development Trust v Waikato Valley Authority*, Chilwell J noted that the Treaty was part of the "fabric of New Zealand society" and should form part of the context for interpreting relevant legislation "when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material".[959] In 1997, in *Barton-Prescott v Director General of Social Welfare,* in a child custody appeal context, Gallen and Goddard JJ held that the general application of the Treaty "must colour all matters to which it has relevance, whether public or

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[955] *Te Heuheu Tūkino v Aotea District Māori Land Board* [1939] NZLR 107 (SC and CA). See also Alex Frame "Hoani Te Heuheu's Case in London 1940-1941: An Explosive Story" (2006) 22 NZULR 148 at 168.

[956] At 667.

[957] For example, the Court of Appeal in *Takamore* (CA) described it at [240] as the "traditional position" but referred to the courts' willingness to have regard to international instruments in developing the common law.

[958] Notes of Closings 220/2–18.

[959] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) [*Huakina Development Trust*] at 210.

private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the [T]reaty in the statute".[960] The Court held that familial organisation must be seen as a taonga and all Acts dealing with the status, future and control of children are to be interpreted as coloured by the principles of the Treaty.[961] This approach to statutory interpretation was endorsed by the Court of Appeal in 2017 in *Ngaronoa v Attorney-General* which said:[962]

> [46] Today it can be stated with confidence that, even where the Treaty is not specifically mentioned in the text of particular legislation, it may, subject to the terms of the legislation, be a permissible extrinsic aid to statutory interpretation.

[591] In addition, in *Lands*, Cooke P adopted the submission, now known as the principle of legality, that "the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty."[963] In *Trans-Tasman* in 2021, the Supreme Court elaborated. William Young and Ellen France JJ, with the general agreement of Winkelmann CJ and Glazebrook J, said:[964]

> The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question. It ought to follow therefore that Treaty clauses should not be narrowly construed. Rather, they must be given a broad and generous construction. An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.

[592] Williams J was in broad agreement with their reasoning and conclusions regarding the Treaty and added:[965]

> … the constitutional significance of the Treaty means that Treaty clauses will be generously construed. If Parliament intends to limit or remove the Treaty's effect in or on an Act, this will need to be made quite clear.

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960 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) [*Barton-Prescott*] at 184.

961 At 184.

962 *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 [*Ngaronoa*], citing *Takamore* (CA) at [248] as citing *Huakina Development Trust* and *Barton-Prescott*.

963 At 656.

964 *Trans-Tasman* (SC) at [151] (citations omitted). The first sentence quoted cited: *Huakina Development Trust* at 210 and 233; *Barton-Prescott* at 184; *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [36]–[37]; and *Ngaronoa* at [46]. The last sentence cited *Lands* at 655–656 per Cooke P. The whole Court endorsed the last sentence at [8]; and see at [332] per Winkelmann CJ and [237] per Glazebrook J.

965 At [296] (citation omitted).

[593] Similarly to the effect of those principles of statutory interpretation, the Treaty may be able to sustain judicial review of public law decisions, depending on the context. Again, this can be true whether or not there is governing legislation that mentions the Treaty, such as where the Crown is exercising a prerogative or residual power. As Professor Joseph's text states, "mandatory considerations might also arise simply from the context of the decision-making", giving as an example that "[t]he principles of the Treaty of Waitangi … might materially impinge on decision-making, requiring decision-makers to weigh the principles in the exercise of discretion".[966] That makes sense given the status of the Treaty of Waitangi as a constitutional foundation in New Zealand and as an international treaty.

[594] For example, the *Radio Frequencies* case was decided on administrative law grounds. Heron J held in the High Court that the Crown has embarked on the allocation of radio frequencies as a Treaty partner and the course of negotiations had been conducted against the background that Treaty considerations would apply.[967] A majority of the full Court of the Court of Appeal upheld his decision to grant an interim declaration for failing to await a report by the Waitangi Tribunal.[968] Cooke P, in the majority, held that:[969]

> To the extent that any prerogative powers are involved, Treaty of Waitangi obligations would be at least as relevant to them as to statutory powers, for the Treaty was entered into by the Crown under prerogative powers.

[595] Against the background of government policy about te reo Māori, the Crown accepted the Waitangi Tribunal's findings and recommendations were mandatory relevant considerations at administrative law. The New Zealand Māori Council submitted the principles of the Treaty apply if not excluded. Cooke P considered there was little or no practical difference between the two approaches, noting that "[i]f the Government, giving due weight to the Treaty principles, elects between the available options reasonably and in good faith, it seems to me that the Treaty is complied with".[970] Casey and Bisson JJ considered the Minister had failed to take into account

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966 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [23.2.3(4)].

967 *New Zealand Maori Council v Attorney-General* HC Wellington, CP 785/90, 21 September 1990.

968 *Radio Frequencies*.

969 At 133.

970 At 135.

relevant considerations. Richardson J, dissenting on the result on the facts, noted the Crown's acceptance that the promotion of Māori language and culture reflected the legislative recognition of its important role in New Zealand society.[971] Cooke P also held that no reasonable Minister could do other than allow the Tribunal a reasonable time for carrying out their inquiry.[972]

[596] So, depending on the context, the Treaty of Waitangi can potentially bear directly on the interpretation of a statute and can sustain judicial review of the treatment of tikanga on the grounds, for example, of illegality, failure to consider a relevant consideration, or unreasonableness.[973] Whether those grounds would be available in any particular case depends crucially on the context. The parties here disagree about what obligations are imposed by the Treaty regarding tikanga in the context of Treaty settlements in Tāmaki Makaurau.

F Tikanga obligations in Treaty settlements

[597] If there is any bare context in which it is apt for the Treaty of Waitangi to be a mandatory relevant consideration for the Crown, it is where the Crown seeks to fulfil its duty under the Treaty of Waitangi to provide redress for its own past breaches of the Treaty of Waitangi. Mr Hodder, Mr Mahuika, Mr Smith, Ms Coates and Mr Warren all make submissions to that effect. Treaty obligations in relation to rangatiratanga under article two of the Treaty are intimately bound up with tikanga. Tikanga is at the heart of overlapping customary interests between iwi. So, when the Crown makes decisions in redressing its own wrongs in relation to the Treaty that impact on the tikanga or interests at tikanga of an iwi, the Crown will have a duty to take tikanga into account. As Mr Hodder submits, the decision-maker in *Takamore*, in a private law context, was effectively required by the Supreme Court to take tikanga into account as a mandatory relevant consideration.[974] Dr Ward submits, responsibly, that the Crown does not disagree with the general proposition that Treaty principles may

[971] At 140.
[972] At 139.
[973] See Matthew S R Palmer "Indigenous Rights, Judges and Judicial Review in New Zealand" in Jason N E Varuhas and Shona Wilson Stark (eds) *The Frontiers of Public Law* (Hart, Oxford, 2020) 123.
[974] *Takamore* (SC) at [156], 164] and [168].

give rise to an obligation on the Crown to take reasonable steps to actively protect tikanga Māori.[975]

[598] Similarly, as Mr Mahuika and Ms Coates also submit, it is likely that the Crown will not be able to make a reasonable decision to engage with interests derived from tikanga Māori without understanding and engaging with tikanga.[976] A reasonable decision-maker making decisions on rights and interests derived from tikanga must have regard to tikanga, whether the legal tests in *Wednesbury*, *Wolf v Minister of Immigration*, or *Hu v Immigration and Protection Tribunal* are applied.[977] As Dr Ward acknowledges, an irrationality standard could apply if a Minister, having issued the overlapping interests policy, then completely disregards Treaty principles.[978]

[599] I do not accept Dr Ward's submissions that the policy, political and financial considerations of Treaty settlement decisions mean the language of mandatory relevant considerations are inapt. A statutory hook is not a prerequisite for mandatory considerations and unreasonableness to apply. The Crown often inherently deals with tikanga interests when it settles Treaty claims. That infuses what the Crown must have regard to, and what is unreasonable in that general context. More precise details of context, of course, can make a difference as to what exactly is required of the Crown.

[600] As the Waitangi Tribunal rightly reiterated in the *Hauraki Overlapping Claims Report*, the duty to act honourably and in good faith requires the Crown to be fully informed, which requires it to "have a sound understanding of 'the historical, political, and tikanga dimensions of mandate and overlapping [groups] and their interests'".[979] That reflects the Crown's responsibility to make a decision that is "sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty", as discussed by Richardson J in *Lands.*[980]

975 Notes of Closings 85/18–22.
976 Notes of Closings 308/12–17.
977 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA); *Wolf v Minister of Immigration* [2004] NZAR 414 (HC); and *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508.
978 Notes of Closings 65/10–13.
979 Waitangi Tribunal *Hauraki Overlapping Claims Report* at 12, citing Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Te Arawa Settlement Process Reports* (Wai 1353, 2007) at 26–27.
980 *Lands* at 683.

Depending on the situation, that will require consultation with other iwi whose tikanga interests are affected by a contemplated decision of the Crown. As Mr Smith submits, engaging with an iwi or hapū about their tikanga interests requires the Crown to ascertain and recognise tikanga. And, as Mr Warren puts it, the Crown will need to engage in good faith with iwi and hapū where its decisions may impact on customary or tikanga interests. The Waitangi Tribunal put it well in characterising the Crown as acting as an "honest broker" to effect reconciliation and build bridges whereever and whenever the opportunity arises.[981] As Sir Douglas Graham said in proposing the Collective Agreement in Tāmaki, "[t]he Crown has to act with integrity to all iwi/hapū at all times and must not prefer one over another".[982]

[601] As Ms Coates submits, these duties do not mean that tikanga determines decisions about whether to transfer a property as Treaty redress, but simply require that tikanga must be considered.[983] The Crown ultimately makes its own decision about whether to transfer redress. There may be circumstances in which the balance of Treaty considerations means the Crown has to make a decision in relation to Treaty settlements that is inconsistent with the tikanga of one iwi or another. As Ms Coates submits, it would likely be impracticable or unworkable for the Crown to have to give effect to tikanga in absolute terms, in a context of contested overlapping interests. That is particularly so where there are deeply disputed views as to the appropriate tikanga, or the manner in which interests should be recognised at tikanga.

[602] However, at administrative law, it must not be unreasonable for the Crown to transfer, or for an iwi to receive, properties as settlement redress, having regard to tikanga interests and any other relevant circumstances of context. Because of the potential impact of particular contexts, I do not accept Ms Coates' further, more detailed submissions that would necessarily require the recipient group to have a tikanga-based relationship to the land or that the redress must not be expressed to

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981 Waitangi Tribunal *Hauraki Overlapping Claims Report* at 13, citing Waitangi Tribunal *Ngāti Awa Cross-Claims* at 88.

982 Douglas Graham "Report by the Facilitator to the Minister for Treaty of Waitangi Negotiations and to the iwi/hapū of the Kaipara, Tāmaki Makaurau and the Coromandel" (The Office for Māori Crown Relations, 24 June 2009 at 5.

983 Notes of Closings 222/23–223/6.

represent exclusive tikanga interests. The context of any given fact situation may otherwise require.

[603] In summary, the duties of active protection of tikanga and of acting reasonably and in good faith, with mutual cooperation and trust in relation to tikanga, will likely bear on Crown decisions affecting tikanga interests in a Treaty settlement context. Accordingly, depending on the context, the Crown will need to take reasonable steps to understand, recognise and respect the tikanga of iwi or hapū, and the Crown will need to actively protect the ability of iwi and hapū to exercise their tikanga.

[604] But the way this principle manifests in practice derives from the context of the particular decision at issue, as all administrative law obligations do and as the Privy Council emphasised in a Treaty context in *Broadcasting Assets*.[984] The general context of Treaty settlement negotiations is ripe for tikanga to have legal effect on Treaty obligations. But what that means must be explored in the context of each particular decision at issue.

[605] There is nothing in the analysis above that suggests that Treaty obligations relating to tikanga in a Treaty settlement context apply only to the Crown. This is a point that is sometimes lost from sight. It is the Crown which has the obligation to actively protect the exercise of rangatiratanga, and therefore tikanga. However, iwi and hapū can also owe obligations under the Treaty of Waitangi, as the language quoted above in the *Lands* and other judgments makes clear. The Court of Appeal stated in *Lands*, the duty of acting reasonably and in good faith applies to all parties to the Treaty.[985] Cooke P said in that case that "[t]he duty to act reasonably and in the utmost good faith is not one-sided" and "[t]he parties owe each other cooperation".[986]

[606] The corollary of good faith that the Court found in *Forests*, requiring consultation on truly major issues rather than a fait accompli, also applies to all parties.[987] Dr Ward's submits, admittedly in response to my questions, that the Crown, iwi and hapū all owe each other duties of good faith, reasonableness and reasonable

[984] At 517.
[985] *Lands* at 680–681.
[986] *Lands* at 664 and 666.
[987] *Forests* at 152.

compromise and cooperation as discussed in *Lands*.[988] It is but a small step from *Lands* and *Forests* to acknowledge that, depending on the context, the Treaty of Waitangi may require iwi and hapū to assist the Crown to discharge its Treaty duty to other iwi and hapū to provide redress for Treaty breaches, by engaging in tikanga-consistent processes with those iwi and hapū about the status of relevant properties at tikanga.

[607] I did not hear argument about the legal basis of such duties of iwi and hapū. But if my analysis that the Crown's obligations arising from the context of Treaty settlements is correct, a similar analysis may apply to iwi and hapū. After all, the Treaty and Treaty settlements are quintessentially matters of public law. Those participating in them, or refusing to participate, could be held to be exercising public law powers. That may be enough to sustain declarations by a Court about the responsibilities of iwi and hapū under the Treaty. Or it may be that particular iwi and hapū would simply accept that they have such responsibilities. But these issues were not fully argued before me by all parties, and no declarations have been sought in relation to the obligations of iwi and hapū. I do not make direct findings about them.

G Other sources of legal duties

[608] I agree with the submissions of virtually all counsel that the notion of the honour of the Crown and the United Nations Declaration on the Rights of Indigenous Peoples do not add materially to the Crown's duties under the Treaty of Waitangi in relation to tikanga as outlined above.

[609] Mr Hodder must be right that the Court is entitled to, and should, assume the Crown's honour should be upheld in its dealings with its Treaty partners. The same is presumably true of the mana of iwi and hapū. But, as Mr Hodder, Ms Coates and Dr Ward submit, its effect is already incorporated into the principles of the Treaty. As Casey J said in *Lands,* the Treaty principles are no more than the maintenance of the honour of the Crown underlying all its Treaty relationships.[989] It is not a separate source of legal obligation in New Zealand. The effect of the notion of the honour of

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988 Notes of Closings 21/23–22/20 and 54/8–25.
989 *Lands* at 703 per Casey J; and see at 682 per Richardson J.

the Crown is likely to be primarily political. Only in extreme circumstances, where other constitutional principles are at play, might the honour of the Crown assist a Court. For example, I would not rule out the hypothetical possibility of a Court invoking the honour of the Crown if the Crown were to attempt to cloak its actions in Parliamentary proceedings for the deliberate purpose of avoiding judicial review of actions it knew were inconsistent with the Treaty of Waitangi.

[610] Similarly, as an expression of soft international law, the Declaration informs and reinforces the rights and responsibilities of the parties to the Treaty.[990] As Dr Ward submits, the Declaration may be relevant to interpretation of the Treaty of Waitangi but it seems unlikely to add significantly to the developed jurisprudence of Treaty principles.[991] As he also submits, the Crown endorsed the Declaration on the basis it does not intend to supplant Treaty principles as the way in which New Zealand attempts to settle grievances. That adds further weight to the above interpretation of the context of Treaty settlements as requiring consistency with Treaty principles. But it does not add substantively to the content of those principles in relation to the issues considered in these proceedings.

H Tikanga and the Crown's Overlapping Interests Policy

[611] Mr Hodder acknowledges that in reaching a Treaty settlement, it makes sense to look at the position of all groups to make sure the Crown is not disrespecting the customary interests and rights of other groups.[992] He accepts that was not done when the 2006 AIP was reached between the Crown and Ngāti Whātua Ōrākei so the Tribunal was right that the process was flawed. I agree. And I agree with Mr Hodder that the Tribunal's identification that there are historical layers of customary interests is unexceptional.[993]

[612] I am not persuaded by Mr Hodder's submission that the Tribunal went further than it needed to by not acknowledging that Ngāti Whātua Ōrākei had the predominant cultural and customary authority of mana whenua across Tāmaki Makaurau.[994] Such

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990 Notes of Closings 565/18–31.
991 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] NZLR 31 at [92].
992 Notes of Closings 485/32–486/5.
993 Notes of Closings 487/27–30.
994 Notes of Closings 487/27–488/22.

a substantive finding, which was the subject of so much argument and evidence over 11 weeks in these proceedings, was not the point of the Tribunal's urgent process inquiry. Rather, as Ms Hauraki submits for Ngāti Pāoa, the Tribunal said:[995]

> The need for officials in the Office of Treaty Settlements to be aware of, and comply with, tikanga Māori in their dealings with Māori is another aspect of partnership under the Treaty.
>
> It is vitally important that cultural redress not be deployed in a manner contrary to tikanga Māori.

[613] The Tribunal considered the Crown had not taken adequate account of tikanga in offering exclusive redress to Ngāti Whātua Ōrākei on the basis of a predominance of interests when other iwi had demonstrable tikanga interests that not had not been properly investigated. I cannot fault the Tribunal's assessment that OTS determining that the tikanga interests of only one group should be recognised, and the others put to one side, was contrary to tikanga. Rather than ignoring them, the Tribunal recommended that the Crown engage with concepts of layers of interest.[996]

[614] The Crown took the Tribunal's report seriously. But, as Ms Hauraki submits, it appears to have responded primarily to what it saw as the Tribunal's rejection of assessing relative weighting of tikanga interests, rather than the more general message of the importance of it understanding tikanga. The evidence is clear that what the Crown took from the *Tāmaki Makaurau Report* had a significant effect on the way Crown historians approached their role. As Michael Macky said, rather than drawing conclusions about customary interests, they focussed on summarising the available evidence in relation to customary interests in sites being considered as redress, and they avoided weighing different groups' interests against each other.[997]

[615] That was an understandable reaction by the Crown historians, who are not expert in tikanga, as their standard disclaimer states.[998] It also states that "a comprehensive understanding of customary interests in that district would require consultation with local experts". But assessing historical customary associations of iwi and hapū with land inherently requires considering tikanga. As Mr Hodder

995 Waitangi Tribunal *Tāmaki Makaurau Report* at 19 and 105. See Notes of Closings 296/27–297/32.
996 At 109.
997 Macky Affidavit at [21].
998 NOE 1471/27–30.

submits, you cannot extricate custom from history in relation to an iwi. The problem with the overall Crown reaction to the Tribunal's 2007 Report was that it did not adopt a practice or policy of assigning anyone with expertise to understand and advise it on the tikanga implications of its decisions.

[616] The Crown properly took the position that it was not for it to adjudicate or act as video referee in contests of mana whenua. It is not. And, as Dr Ward submits, the Crown is entitled to consider a range of financial, economic, social and cultural matters in deciding on its position in negotiating Treaty settlements. It requires flexibility to engage with the particular issues and concerns of each iwi and hapū to whom it has obligations.

[617] But that does not prevent the Crown from taking reasonable steps to understand, recognise and respect the tikanga interests of iwi and hapū that are implicated by its proposed Treaty settlements, and to actively protect their ability to exercise their tikanga. In the *Red Book*, three of the six negotiating principles the Crown adopted in 2000 and still holds to are good faith, restoration of relationship and fairness between claims.[999] Three of the Crown's adopted guidelines are that "Treaty settlements should not create further injustices", that "the Crown must deal fairly and equitably with all claimant groups", and that "settlements do not affect … ongoing rights arising out of the Treaty or under the law".[1000] Lil Anderson's evidence is that these guidelines are "especially relevant in the context of overlapping interests".[1001] This context cements the Crown's general legal Treaty obligations in relation to tikanga in dealing with overlapping interests in Treaty settlements.

[618] The *Red Book*, in both its 2018 and latest versions, contains much useful guidance for the Crown. It recognises the importance of addressing overlapping interests. It effectively recognises that it is iwi and hapū, and not the Crown, who can resolve the question of who has mana whenua as Ngāti Whātua Ōrākei conceive of it. It states that the Crown encourages claimant groups to discuss overlapping interests at an early stage and that the Crown will assist that process by providing information. It

[999] *Red Book 2018* at 25–26.
[1000] *Red Book 2018* at 24–25.
[1001] Anderson Affidavit at [24].

recognises that exclusive redress may not be appropriate where there are overlapping interests and that non-exclusive redress allows the interests of different groups to be recognised and accommodated. As Minister Little assured the Iwi Chairs Forum in 2019, the Crown "will seek to give effect to any agreement between iwi" albeit "subject to consideration of Treaty settlement policy implications".[1002] It would be difficult to imagine a context where it would be consistent with the Treaty for the Crown not to give effect to a genuine agreement between iwi and hapū about who has a greater association at tikanga with a property which the Crown proposes to use in settlement.

[619] It is also clear that the *Red Book*, and the Crown's practice, envisages the Crown making assessments of the implications of tikanga interests. The *Red Book* and Crown witnesses state that, "as a last resort", in the absence of agreement about overlapping interests, "the Crown may have to make a decision".[1003] This is supposed to be guided by the Crown settlements principles and guidelines, and Treaty principles.[1004] The *Red Book 2018* envisages that, if a claimant group identifies a "threshold level of customary interest", the Crown will consider "what is the relative strength of the customary interests in the land" and that:[1005]

> Exclusive redress may also be considered where a claimant group has a strong enough association with a site to justify this approach (taking into account any information or submissions about the association of overlapping claimants with that site). This exception would apply to sites, such as wāhi tapu, where no other site could be used as alternative redress.

[620] Under cross-examination, Lil Anderson acknowledges that, in applying its policies, the Crown makes a decision about whether a threshold level of customary interests is met by a claimant group and about the relative strength of customary interests.[1006] She agrees that the Crown makes a judgment on the nature of the associations that have been asserted, having considered all the evidence before it.[1007] As she says, "[a] failure to consider all associations may cause harm to relationships

[1002] Letter from Minister Little to Iwi Chairs Forum, 13 March 2019.
[1003] *Red Book 2018* at 54; and *Red Book 2021* at 63. And see Finlayson Affidavit 2016 at [35], affirmed in Finlayson Affidavit 2020 at [4]; and Anderson Affidavit at [90].
[1004] *Red Book 2021* at [63].
[1005] *Red Book 2018* at 55; and Finlayson Affidavit 2016 at [35], affirmed in Finlayson Affidavit 2020 at [4].
[1006] NOE 832/19–833/19.
[1007] NOE 890/17–27 and NOE 934/21–935/9.

with and between groups and thereby undermine the Crown's objective of securing durable settlements".[1008] Her account of the Crown's approach to cultural redress also makes clear that the Crown considers the nature of interests in particular sites.[1009] These are likely to be grounded in tikanga.

[621] These assessments and judgements inherently require understanding of tikanga. They are tikanga interests. As Minister Little says, "[t]he settlement process does require the Crown to consider groups' connections with particular areas and places, and the customary interests that they assert in relation to those places".[1010] As Mr Mahuika submits, even though the Crown does not confer mana whenua, transfers of properties matter because they are seen as putting the footprint of an iwi in that place as part of righting the wrongs of the past under the Treaty of Waitangi.[1011] Yet the language of the *Red Book 2018* is striking in its determined avoidance of references to tikanga or tikanga interests. It did not mention the word tikanga or tikanga concepts such mana whenua. No doubt that is because the Crown has been determined not to get involved in arguments about tikanga, in which it is inexpert and to which it can contribute little.

[622] The 2021 version of the *Red Book*, approved after argument in these proceedings concluded, is more explicit. It acknowledges it is vital for the Crown to be "properly informed of the interests of all groups in an area before making an offer" and that overlapping groups may see the offer as a recognition of mana whenua.[1012] It states that customary interests or associations are "one factor informing the Crown's decision to offer redress".[1013] An answer to a question at the end of the document makes explicit that "interests" include tikanga. The *Red Book 2021* identifies the Crown's preference that claimant and overlapping groups agree on solutions "in accordance with appropriate tikanga" and that the Crown may fund research,

1008 Anderson affidavit at [56].
1009 Anderson Affidavit at [54]–[56].
1010 Little Affidavit at [5].
1011 Notes of Closings 263/15–34.
1012 *Red Book 2021* at [15] and [22].
1013 At [14].

mediation or facilitation.[1014] It identifies that the Crown may seek independent advice from those with expertise "in the history and traditions of the relevant groups".[1015]

[623] The *Red Book 2021* pays greater attention to tikanga than did its predecessor. That would not be difficult. But it does not explicitly acknowledge the legal requirement on the Crown to consider tikanga, including the implications of mana whenua or other tikanga-based interests, and that it may not act unreasonably having regard to tikanga, in order to act consistently with the Treaty of Waitangi. As Mr Mahuika submits, the Crown must deliberately turn its mind to tikanga. Ignoring tikanga when it is relevant in a Treaty settlement context would be unlawful. And given the necessary intense focus by officials and Ministers on the settlements at hand at any given time, not spelling out that requirement in the Crown's policy runs the risk of prejudicing overlapping tikanga interests of iwi and hapū.

[624] The implications of time are difficult for everyone in this process. If the Crown has breached the Treaty, its obligation is to provide redress. The sooner that is provided, the sooner the relationship between the Crown and the wronged iwi or hapū can be restored. That is a key point of settling breaches of the Treaty. It is a duty of the Crown. It is certainly a relevant consideration for the Crown. And negotiations acquire their own dynamics, often with deadlines for reasons internal to the Crown or the claimant iwi or hapū. It would be easy for the tikanga interests of other iwi or hapū to be regarded by the negotiators on both sides as annoying obstacles or as bids for leverage.

[625] But, as the evidence in this case demonstrates, time has a different significance in tikanga. It is clearly important for the future of relationships between iwi and hapū, as well as between them and the Crown. to have a tika outcome. As Charlie Tawhiao says, "I don't accept unfairness is fixed by allowing more unfairness".[1016] One of the Crown's guidelines is that Treaty settlements should not create further injustices. Time needs to be taken for that.[1017]

1014 At [33].
1015 At [66].
1016 NOE 1306/7.
1017 NOE 1315/13–34.

[626] The Crown is obliged by the Treaty to allow reasonable time for disputes regarding overlapping tikanga interests in Treaty settlement negotiations to be resolved. That does not appear to me likely to be reckoned in generations, as Dr Ward submits. But what is reasonable will be informed by tikanga. It may be longer than Pākehā would usually accept and may be longer than the claimant iwi or hapū would like. As Tāmati Kruger says, "we live in a different time zone to Pākehā culture … We think and operate in generations. That's how long these things take."[1018] And a tikanga-consistent process "cannot be exhausted".[1019]

[627] The *Red Book 2021* suggests that in general "the Crown will allow at least three weeks for formal responses to Crown requests for comment and information".[1020] Three weeks may or may not be reasonable, having regard to the significance of the issue. The Kawenata Tapu was agreed between Ngāti Whātua Ōrākei and Ngāti Pāoa in January 2017, one year and four months after Ngāti Whātua Ōrākei joined Ngāti Pāoa to these proceedings. There are examples in the evidence of the Crown pausing for, and providing opportunities for, tikanga-based resolution of overlapping interests under the current policy.

[628] But in the end, the extent of time and effort that is reasonable to allow for tikanga-based resolution of overlapping interests depend on the particular circumstances of a particular settlement, having regard to tikanga. What is reasonable is inherently difficult to provide for in a policy. Engaging as early as practicable with the overlapping iwi or hapū would help, as the Crown's policy says. So would engaging before a commitment has been made to a particular property by the negotiating parties. Inventive negotiators may be able to devise ways of parking particular disputed properties pending future tikanga-consistent resolution, while allowing the wider settlement to proceed. Dr Ward's closing includes the responsible submission that the Crown is willing to facilitate discussions, act as observers, and provide logistical support to iwi negotiations if that is what iwi want.[1021] A process, such as that proposed by the Iwi Chairs Forum, that involves independent facilitation by pūkenga, might be promising. The Waitangi Tribunal's recommendations in the

[1018] NOE 1842/16–19.
[1019] NOE 1922/15–20.
[1020] *Red Book 2021* at [64].
[1021] Notes of Closings 53/9–18.

Hauraki Report should be taken seriously. And, no doubt, the Court would be available to assist with such processes, if the parties so wish.

[629] I also return to the notion that iwi and hapū have responsibilities under the Treaty to assist the Crown to discharge its Treaty duty to other iwi and hapū to provide redress for Treaty breaches, by engaging in tikanga-consistent processes with those iwi about the status of relevant properties at tikanga. Depending on the context, refusing to do so may breach the Treaty of Waitangi.

I Tikanga and Treaty settlements in Tāmaki Makaurau

[630] At last I reach tikanga and Treaty settlements in Tāmaki Makaurau. The relevant legal principles are largely spelled out above. Little more is needed to deal with the declarations sought by Ngāti Whātua Ōrākei. No particular Crown (or iwi) decisions are formally challenged in these proceedings. I do not wish to stray too close to the constitutional line of interfering in Parliamentary proceedings. But much evidence of illustrative examples of context was put before me and I have consistently emphasised the importance of context. Accordingly, I briefly outline my key observations about what difference the legal and factual context of Treaty settlements in Tāmaki Makaurau makes to the application of the principles identified above, if any.

[631] First, I accept that the context of the 2011 Treaty settlement between the Crown and Ngāti Whātua Ōrākei, and the 2012 Act, affirm and reinforce their obligations to act consistently with the Treaty of Waitangi. There are technically no legal operative clauses in the Deed or Act to that effect. But the Crown and Ngāti Whātua Ōrākei expressly state in the Deed their intention to enhance their ongoing relationship in terms of the Treaty and its principles. That includes acting reasonably and in good faith, with mutual cooperation and trust. Ngāti Whātua Ōrākei relies on that. The Crown accepts it.[1022] Parliament has effectively confirmed it in the Settlement Act. As explained above, that duty extends to the Crown taking reasonable steps to understand, recognise and respect the tikanga of iwi or hapū, and the Crown actively protecting the ability of iwi and hapū to exercise their tikanga. Ngāti Whātua Ōrākei

[1022] Notes of Closings 19/11–20/28.

and other iwi may have a duty under the Treaty to engage in tikanga-consistent processes with each other about the status of relevant properties at tikanga.

[632] The Court will not attribute to the Crown, to Ngāti Whātua Ōrākei or other iwi and hapū, or to Parliament, in this context, an intention to permit further breaches of the Treaty of Waitangi or to act inconsistently with its principles. As outlined above, the general context of the Treaty relationships and settlement negotiations is sufficient to establish those obligations. Absent context to the contrary, that is the same for iwi and hapū who have settled and who have not yet settled with the Crown. The context of the settlements in Tāmaki Makaurau affirms and reinforces that. That makes it even more difficult to argue that administrative law obligations do not bring the Treaty to bear on public law decisions in this context.

[633] Second, I do not consider the context of the 1840s gifting of land by Ngāti Whātua Ōrākei to the Crown adds materially to the legal duties of the Crown. The Crown submits: [1023]

> The Crown accepts that Ngāti Whātua Ōrākei intended the 1840 transfer to create a relationship with the Crown. That relationship was intended to provide a platform for the development of Auckland and New Zealand, and engage Ngāti Whātua Ōrākei in a relationship with the Crown, one which (today) the Crown says is encompassed in the Treaty and its principles.

[634] There may be circumstances in which that history is a relevant consideration for future Crown decisions involving that land (unless it constitutes a claim settled by the 2011 Deed and 2012 Act). The gifts may also reinforce the claim of Ngāti Whātua Ōrākei to mana whenua in terms of their own tikanga though, of course, other iwi dispute that. But the only matter on which the pūkenga recorded disagreement was as to whether the nature of the 1840 Transfer was a tuku or hoko or what it entailed.[1024] And I have held above that the Crown is not bound by tikanga. That extends to an arguable obligation of tuku whenua at tikanga. The Crown's duty to understand and respect the tikanga of Ngāti Whātua Ōrākei (rather than its history) is not materially enhanced by the 1840s gifting of land by Ngāti Whātua Ōrākei to the Crown.

[1023] Crown's Closing at [402]–[403].
[1024] Ngāti Whātua Ōrākei Pūkenga Summary and Te Toru Pūkenga Summary, point 8.

[635] Third, the Collective Agreement, Collective Deed and Collective Act do not affect who has mana whenua, or what that means, at tikanga in Tāmaki Makaurau. Neither the Crown nor Parliament determines mana, mana whenua or ahi kā roa. Mana whenua is a matter of tikanga which was explicitly put to one side for the purposes of the Collective settlement by the parties, with considerable courage, generosity of spirit, and a desire to work together in the common interest, on the recommendation of Sir Douglas Graham. It did not resolve or waive or override the tikanga of the iwi and hapū in Tāmaki Makaurau. Ngāti Whātua Ōrākei are not prevented by the Collective settlement from arguing it has mana whenua in Tāmaki Makaurau. Other iwi are not prevented from arguing it does not. As they have. I note Mr Hodder's submission in closing that, where ownership of maunga and motu was transferred under the collective settlement or where land is dealt through the collective RFR carousel regime, Ngāti Whātua Ōrākei do not claim mana whenua.[1025]

[636] Fourth, given my findings about the contest between iwi over the nature and extent of mana whenua in Tāmaki Makaurau, I do not need to comment on the Crown's "no veto" position communicated to iwi before the Collective settlement was agreed. The Collective settlement itself does not confer a veto. The way the individual settlement processes work may mean one iwi disagrees with redress proposed to be provided to another. Iwi can exercise their rangatiratanga by participating in tikanga-consistent processes to agree amongst themselves about such things. Perhaps they have a duty under the Treaty to do so. The Crown is required by the Treaty to have regard to the tikanga of all affected iwi and hapū.

[637] Fifth, the illustrative examples of the process of settling Treaty claims in Tāmaki Makaurau suggest that the Crown has made efforts to understand the position of iwi and hapū regarding the history, but not the tikanga, of their overlapping interests. Overlapping interests could have been addressed earlier in some of the processes. At times the Crown appears to have been rather quick to require responses from overlapping iwi before reaching for its own unilateral decisions of last resort. The Crown has not sought expert advice from pūkenga to enable it to fully understand and consider the tikanga dimensions of those interests. Accordingly, the Crown has not

[1025] Notes of Closings 546/30–547/16.

taken into account a fully informed understanding of the implications of its decisions for the tikanga interests of all iwi and hapū. The Waitangi Tribunal's *Hauraki Report* suggests these are not isolated features of Crown Treaty settlement negotiations.

[638] Sixth, the Crown would be well advised to seriously consider the constructive recommendations of the Waitangi Tribunal in the *Hauraki Report* and the Iwi Chairs Forum about how to improve its approach to overlapping interests in Treaty settlements, if it has not already done so.

[639] Finally, the illustrative examples suggest to me that the Crown as well as iwi and hapū, would also be well-advised to establish mutual relationship management processes and structures to enhance the health of their ongoing relationships, to the extent their resources permit. Te Arawhiti has a mandate to do so for the Crown. I cannot tell from the evidence whether its origins of Te Arawhiti in OTS yet enable it to focus on that. Neither do I have information about the relationship management processes that iwi and hapū have adopted with the Crown.

[640] It is clear that the relationships between Ngāti Whātua Ōrākei and the Crown, Ngāti Whātua Ōrākei and several other iwi, and other iwi and the Crown have suffered from tensions throughout the Treaty settlement process in Tāmaki Makaurau. This has not been uncommon. Perhaps those tensions, played out in these proceedings from 2015, have been brought to a head. My hope is that this will now enable all parties to pursue healthier ongoing relationships with each other, which are at the heart of what was and continues to be envisaged by the Treaty of Waitangi, paying due regard to tikanga.

J Declarations about Crown obligations regarding tikanga

[641] I summarised the Court's jurisdiction to grant declarations in Part VI.D. The declarations sought by Ngāti Whātua Ōrākei that relate to the Crown, as set out long ago at the beginning of this judgment, are:

> (b) When applying the Overlapping Claims Policy in a way which relates to and/or may affect any land within the area of the 2006 RFR Land and the 1840 Transfer Land, the Crown must act in accordance with tikanga, and in particular Ngāti Whātua Ōrākei tikanga.

(c) Crown development of Proposals to include the land in the 2006 RFR Land and the 1840 Transfer Land in a proposed settlement with iwi who do not have ahi kā in respect of that land, must be made in accordance with tikanga, and in particular Ngāti Whātua Ōrākei tikanga.

(d) In order to comply with tikanga in that situation when contemplating or developing Proposals, or making decisions under its Overlapping Claims Policy to offer any interest in land within the 2006 RFR Land or the 1840 Transfer Land as part of a proposed Treaty settlement with an iwi other than Ngāti Whātua Ōrākei, and whether involving s 120 of the Collective Act or not, the Crown must:

    (i) appropriately consult with Ngāti Whātua Ōrākei as the iwi having ahi kā;

    (ii) acknowledge the ahi kā of Ngāti Whātua Ōrākei as the iwi having ahi kā;

    (iii) decline to include the land in the proposed settlement if there is evidence that the transfer of the land would unjustifiably erode the mana whenua of Ngāti Whātua Ōrākei as the iwi having aki kā; and

    (iv) decline to include the land or recognise an interest in land in the proposed settlement where the land has previously been the subject of a gift to the Crown, unless Ngāti Whātua Ōrākei, the gifting iwi, have provided its consent to the transfer.

[642] Mr Majurey, Mr Warren and Ms Coates submit that these declarations are premised on mana whenua and ahi kā as Ngāti Whātua Ōrākei conceive of it. They submit these declarations fall, as a suite, with that premise. These submissions have force.

[643] I concluded in Part VI that the application of tikanga including the nature and extent of mana whenua in Tāmaki Makaurau, is contested between different iwi. The mana whenua of Ngāti Whātua Ōrākei, as they conceive it, is not accepted by Marutūāhu (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki or Te Ākitai Waiohua. Given that, making the declarations sought by Ngāti Whātua Ōrākei would provide a misleading impression of what the Court considers is a proper understanding of tikanga in Tāmaki Makaurau or with the implications of tikanga for Treaty settlements in Tāmaki Makaurau.

[644] In Part VIII I find that tikanga interests do bear on the Crown's legal obligations in dealing with overlapping interests in Treaty settlements. But I find that tikanga does not legally bind the Crown in itself. And I find the Crown is not necessarily required to "act in accordance with", or "comply with", the tikanga of one iwi when the tikanga of other iwi and hapū may also bear, and bear differently, on the Crown's decisions.

[645] It follows that I do not consider declarations (b), (c) or (d) would be accurate statements of the law. Accordingly, I decline to make those declarations as sought.

[646] In Part VIII, I have stated a number of aspects of the legal obligations in relation to tikanga in the context of Treaty settlements. I am inclined to consider that it speaks for itself and that there would be little utility in making declarations based on it. However, I have reserved leave for the parties and interested parties to make further submissions on whether the Court should issue alternative declarations in relation to tikanga. It may be that the alternative declarations I have identified have natural corollaries in terms of Treaty settlements that would be suitable alternatives to the declarations sought. Such a declaration might be phrased along the following lines:

> The duties of active protection of tikanga and of acting reasonably and in good faith, with mutual cooperation and trust in relation to tikanga, will bear on Crown decisions affecting tikanga interests in a Treaty settlement context.
>
> Accordingly, depending on the context, the Crown will need to take reasonable steps to understand, recognise and respect the tikanga of iwi or hapū, and the Crown will need to actively protect the ability of iwi and hapu to exercise their tikanga.
>
> Depending on the context, the Treaty of Waitangi may also require iwi and hapū to engage in tikanga-consistent processes with other iwi and hapū about the status of relevant properties at tikanga.

[647] The parties and interested parties seek the opportunity to make submissions on alternative declarations. Perhaps everyone will agree with these(!) Accordingly, I reserve leave for the parties and interested parties to make submissions on whether the Court should make such alternative declarations about legal obligations in relation to tikanga in the context of Treaty settlements, if they wish to do so.

IX Result

[648] I decline to make the declarations as sought by Ngāti Whātua Ōrākei.

[649] I reserve leave for any of the parties or interested parties, if they wish:

(a) to make submissions on whether the Court should make a declaration along the lines that:

> Ngāti Whātua Ōrākei currently have ahi kā and mana whenua in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau, with all the obligations at tikanga that go with that, according to the tikanga and historical tribal narrative and tradition of Ngāti Whātua Ōrākei.

(b) to make submissions on whether the Court should make a declaration along the lines that:

> The tikanga and historical tribal narratives and traditions of Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki, and Te Ākitai Waiohua do not currently recognise that Ngāti Whātua Ōrākei have ahi kā and mana whenua, as those concepts are conceived of by Ngāti Whātua Ōrākei, in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau.

(c) to make submissions on whether the Court should make any alternative declarations about legal obligations in relation to tikanga in the context of Treaty settlements, along the lines that:

> The duties of active protection of tikanga and of acting reasonably and in good faith, with mutual cooperation and trust in relation to tikanga, will bear on Crown decisions affecting tikanga interests in a Treaty settlement context.
>
> Accordingly, depending on the context, the Crown will need to take reasonable steps to understand, recognise and respect the tikanga of iwi or hapū, and the Crown will need to actively protect the ability of iwi and hapu to exercise their tikanga.
>
> Depending on the context, the Treaty of Waitangi may also require iwi and hapū to engage in tikanga-consistent processes with other iwi and hapū about the status of relevant properties at tikanga.

(d) to apply jointly for the Court's assistance to facilitate a tikanga-based resolution process to address any of the disputed issues of applying tikanga canvassed in this judgments or to apply jointly for a declaration by the Court to reflect a joint position about any of these disputed issues, reached by a tikanga-consistent process.

[650] Any further submissions under subparagraphs (a), (b) or (c) of the above paragraph should be filed and served within three months of the date of this judgment. I reserve leave for any of the parties or interested parties to request a teleconference to discuss any issues arising before that. There is no time limit on the leave reserved in subparagraph (d).

[651] Costs are reserved until after the Court has dealt with any such further submissions or the deadline for filing those submissions has expired.

[652] I close this judgment by quoting the Waitangi Tribunal in the *Ngāti Awa Raupatu Report*:[1026]

> In seeking solutions, it is important to bear in mind that Māori society is fundamentally about relationships. It is not enough to resolve the immediate problem. The people must continue to live together, and the more important task is to rebuild the relationships based upon whakapapa and respect for the mana of each group.

Palmer J

Counsel/Solicitors:
J E Hodder QC, Wellington
G H Allan, Barrister, Wellington
Chapman Tripp, Auckland
Crown Law, Wellington
Atkins Holm Majurey, Auckland
McCaw Lewis, Hamilton
Kahui Legal, Wellington
Chapman Tripp, Wellington
Walters Law, Auckland

[1026] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Ngāti Awa Raupatu Report* (Wai 46, 1999) at 136.

ANNEX OF SHORT FORM REFERENCE TAGS

I Judgments and Minutes

A Aotearoa New Zealand

[*Baldick v Jackson*] *Baldick v Jackson* (1910) 30 NZLR 343 (SC).
[*Barton-Prescott*] *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC).
[*Broadcasting Assets*] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).
[*Forests*] *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA)
[*Huakina Development Trust*] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).
[*Kamo*] *Kamo v Minister of Conservation* [2020] NZCA 1, [2020] 2 NZLR 746.
[*Lands*] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).
[*Mercury* (HC)] *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142.
[*Ngaronoa*] *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643.
[*Ngāti Apa*] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).
[*Ngāti Whātua Ōrākei* (HC strike out)] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516.
[*Ngāti Whātua Ōrākei* (issues and pūkenga)] *Ngāti Whātua Ōrākei Trust v Attorney-General (No 1)* [2020] NZHC 3120
[*Ngāti Whātua Ōrākei* (SC)] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.
[*Ngawaka*] *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1.
[*Public Trustee v Loasby*] *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).
[*Radio Frequencies*] *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA).
[*Re Edwards*] *Re Edwards (No 2)* [2021] NZHC 1025.
[*Ririnui*] *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.
[*Takamore* (CA)] *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573.
[*Takamore* (SC)] *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 (SC).
[*Trans-Tasman* (SC)] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127.

B Nigeria

[*Amodu*] *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC).

II Land Court Judgments and Minute Books

[*Native Land Court Ōrākei Decision 1866*] *Ōrākei Block* (1866) Native Land Court as reported in *The Daily Southern Cross* (New Zealand, 10 December 1866).
[*Native Land Court Ōrākei Decision 1869*] *Ōrākei Block* (1869) as reported in *Important Judgments Delivered in the Compensation Court and the Native Land Court 1866-1879* (Southern Reprints, 1994).
[Native Land Court *Ōrākei* MB 1] Native Land Court *Ōrākei Block* (1869) 1 Ōrākei MB, Transcribed Version.
[Native Land Court *Ōrākei* MB 2] Native Land Court *Ōrākei Block* (1869) 2 Ōrākei MB, Transcribed Version.
[Ōrākei Claim Notes 1866] *Notes taken in hearing the First Ōrākei Claim* (1866) Native Land Court.

III Waitangi Tribunal Reports

[Waitangi Tribunal *Hauraki Overlapping Claims Report*] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2020).
[Waitangi Tribunal *Hauraki Report 2006*] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Hauraki Report* (Wai 686, 2006).

[Waitangi Tribunal *Ngāti Awa Cross-Claims*] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ngāti Awa Settlement Cross-Claims Report* (Wai 958, 2002).
[Waitangi Tribunal *Ōrākei Report*] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report of the Waitangi Tribunal on the Ōrākei Claim* (Wai 9, 1987).
[Waitangi Tribunal *Rēkohu*] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Rēkohu – A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands* (Wai 64, 2001).
[Waitangi Tribunal *Tāmaki Makaurau Report*] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007).

IV Books and Chapters in Edited Books

[Ballara *Taua*] Angela Ballara *Taua: 'Musket Wars', 'Land Wars' or Tikanga? Warfare in Māori Society in the Early Nineteenth Century* (Penguin Books, Auckland, 2003).
[Boast *Māori Land Law*] Richard Boast and others *Māori Land Law* (2nd ed, LexisNexis NZ, Wellington, 2004).
[Elder *Marsden*] JR Elder (ed) *The Letters and Journals of Samuel Marsden, 1765-1838* (Coulls, Somerville, Wilkie and AH Reed for Otago University Council Dunedin, 1932).
[Hickford *Lords of the Land*] Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, New York, 2011).
[McHugh *Aboriginal Societies*] Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determination* (Oxford University Press, New York, 2004).
[McHugh *The Māori Magna Carta*] Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991).
[Mead *Tikanga Māori*] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016).
[Smith *The Peopling of the North*] S Percy Smith *The peopling of the North: notes on the ancient Māori history of the Northern Peninsula and sketches of the History of Ngāti-Whātua tribe of Kaipara, New Zealand* (Kiwi Publishers, Christchurch, 1998).
[Stone *From Tamaki-Makau-Rau*] RCJ Stone *From Tamaki-Makau-Rau to Auckland* (Auckland University Press, Auckland, 2001).
[*Te Mātāpunenga*] Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013).
[Woolf and Woolf *The Declaratory Judgment*] Lord Woolf and Jeremy Woolf *The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011).

V Journal Articles

[Dorsett "Since Time Immemorial"] Shaunnagh Dorsett "'Since Time Immemorial': A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry" (2002) 26 MULR 32.
[Tūhaere "The Conquest"] Paul Tūhaere "An Historical Narrative Concerning the Conquest of Kaipara and Tāmaki by Ngāti Whātua" (1923) 32 JPS 229.
[Williams "Lex Aotearoa"] Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1.
[Williams "*McLiver v Macky*"] David V Williams "The Pre-History of the English Laws Act 1858: *McLiver v Macky* (1856)" (2010) 41 VUWLR 361 at 377.

VI Documents Created for Hearings

[Anderson Affidavit] Affidavit of Lilian Anderson, 13 October 2020.
[Andrews and Tupuhi Brief] Brief of Evidence of Ted Andrews and Glen (Joe) Tupuhi, 13 October 2020.
[Belgrave Brief] Brief of Evidence of Michael Belgrave, 13 October 2020.
[Blair Brief] Brief of Evidence of Ngarimu Alan Huiroa Blair, 2 June 2020.
[Blair Reply] Brief of Evidence of Ngarimu Blair in Reply, 4 December 2020.
[Brown Brief] Brief of Evidence of James Brown, 13 October 2020.
[Compain Brief] Brief of Evidence of Tipa Compain, 13 October 2020.
[Crown Closing] Attorney-General Closing Submissions, 19 April 2021.

[D Wilson Brief] Brief of Evidence of David Wilson, 13 October 2020.
[Denny Brief] Brief of Evidence of Nigel Denny, 13 October 2020.
[Dreaver Affidavit] Affidavit of Michael Dreaver, 14 October 2020.
[Finlayson Affidavit 2016] Affidavit of Christopher Finlayson, 8 July 2016.
[Finlayson Affidavit 2020] Affidavit of Christopher Finlayson, 8 October 2020.
[Hawke Brief] Brief of Evidence of Taiaha (Lance) Joseph Hawke, 2 June 2020.
[K Wilson Brief] Brief of evidence of Karen Wilson, 13 October 2020.
[Kapea Brief] Brief of Evidence of Te Kurataiaho Lonoholoihaiki Kapea (English translation), 2 June 2020.
[Kawharu Affidavit *Ngā Uri o Te Taoū*] Affidavit of Ian Kawharu, 9 December 2002, in *Ngā Uri o Te Taoū Tribe Inc v Attorney-General* HC Auckland M.1079-00 and the Wai 388 claim at the Waitangi Tribunal.
[Kawharu Brief] Brief of Evidence of Margaret Kawharu, 2 June 2020.
[Kruger Brief] Brief of Evidence of Vivian Tāmati Kruger, 2 June 2020.
[Kruger Reply] Brief of Evidence of Tāmati Kruger in Reply, 4 December 2020.
[Little Affidavit] Affidavit of Andrew Little, 7 October 2020.
[M Wilson Brief] Brief of Evidence of Morehu Wilson, 13 October 2020.
[Macky Affidavit] Affidavit of Michael Macky, 13 October 2020.
[Macky Reply] Affidavit of Michael Macky in Reply, 15 January 2021.
[Marutūāhu Closing] Marutūāhu Rōpū Closing Submissions, 19 April 2021.
[Maxwell Brief] Brief of Evidence of Dr Te Kahautu Maxwell, 13 October 2020.
[McBurney Brief] Brief of Evidence of Peter McBurney, 13 October 2020.
[Meredith Brief] Brief of Evidence of Paul Meredith, 2 June 2020.
[Meredith Reply] Brief of Evidence of Paul Meredith in Reply, 4 December 2020.
[Mikaere Brief] Brief of Evidence of Harry Mikaere, 13 October 2020.
[Ngāi Tai ki Tāmaki Closing] Ngāi Tai ki Tāmaki Closing Submissions, 19 April 2021.
[Ngāpō Brief] Brief of Evidence of Korohere Ngāpō, 13 October 2020.
[Ngāti Kuri and Ngāi Te Rangi Closing] Ngāti Kuri and Ngāi Te Rangi Closing, 19 April 2021.
[Ngāti Pāoa Closing] Ngāti Pāoa Closing Submissions, 19 April 2021.
[Ngāti Whātua Ōrākei Closing] Ngāti Whātua Ōrākei Closing Submissions, 19 April 2021.
[Ngāti Whātua Ōrākei Pūkenga Summary] Tikanga summary attached to Ngāti Whātua Ōrākei Memorandum of Counsel, 17 February 2021.
[O'Malley Brief] Brief of Evidence of Dr Vincent O'Malley, 2 June 2020.
[Rawiri Brief] Brief of Evidence of Hauāuru Rawiri, 13 October 2020 (English).
[Solomon Brief] Brief of Evidence of Hayden Solomon, 13 October 2020.
[Taipari Brief] Brief of Evidence of David Taipari, 13 October 2020.
[Taua Brief] Brief of Evidence of Te Warena Taua, 14 October 2020.
[Tawhiao Brief] Brief of Evidence of Charles Tawhiao, 2 June 2020.
[Tawhiao Reply] Brief of Evidence of Charles Tawhiao in Reply, 4 December 2020.
[Te Ākitai Waiohua Closing] Te Ākitai Waiohua Closing Submissions, 19 April 2021.
[Te Toru Pūkenga Summary] Tikanga summary attached to Te Toru Memorandum of Counsel, 22 February 2021.
[W Ngamane Brief] Brief of Evidence of Walter Ngamane, 13 October 2020.
[Williams Brief] Brief of Evidence of David Williams, 2 June 2020.
[Williams Reply] Brief of Evidence of David Williams in Reply, 4 December 2020.

VII Iwi-Crown Agreements

[Ngāti Whātua Ōrākei *AIP*] Ngāti Whātua o Ōrākei Māori Trust Board *Agreement in Principle for the Settlement of the Historical Claims of Ngāti Whātua o Ōrākei* (9 June 2006).
[Ngāti Whātua Ōrākei Deed] Ngāti Whātua Ōrākei Deed of Settlement of Historical Claims, 5 November 2011.

VIII Reports and Other Materials

[Alemann "Early Land Transactions"] Maurice Alemann "Early Land Transactions in the Ngatiwhatua Tribal Area" (MA Dissertation, University of Auckland, 1992).
[Derby and Rother "Te Ākitai Waiohua Customary Interests"] Mark Derby and Tanja Rother "Te Ākitai Waiohua Customary Interests in three Auckland sites" (August 2020).

[Kawharu *Dimensions*] I H Kawharu *Dimensions of Rangatiratanga* (Hodge Fellowship, 1995–1996).
[Kawharu *Ko te Mana Whenua*] I H Kawharu *Ko te Mana Whenua o Ngāti Whātua o Ōrākei* (Wai 388 Draft, paper presented to the Crown, May 2003).
[Land Deed, 20 October 1840] Land Deed signed by George Clarke (Chief Protector of the Aborigines) and Kawau, Tinana, Reweti Tamaki and others (Chiefs of Ngāti Whātua) in respect of 3,000 acres between Mataharehare, Opou and Maungawhau (20 October 1840).
[Law Commission *Māori Custom and Values*] Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).
[Law Commission *Succession Issues Paper*] Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person's property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021).
[Law Commission *Succession Report*] Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of Succession Law: Rights to a person's property on death* (NZLC R145, 2021).
[McBurney *Mahurangi Report*] Peter McBurney *Traditional History Overview of the Mahurangi and Gulf Islands Districts* (Commissioned by the Mahurangi and Gulf Islands District Collective Committee, March 2010).
[O'Malley *Te Wherowhero*] Vincent O'Malley *Pōtatau Te Wherowhero and Tāmaki Makaurau* (Waikato-Tainui College for Research and Development, October 2014).
[*Red Book 2018*] Office of Treaty Settlements *Ka Tika ā Muri, Kā Tika ā Mua: Healing the past, building a future* (June 2018)
[*Red Book 2021*] New Zealand Government "Overlapping interests" (21 December 2021).
[Tūhaere *Ancestors*] Paul Tūhaere *A Paper Giving an Account of the Genealogy of the Ancestors of Ngāti Whātua* (undated) handwritten version.
[Walzl *Te Ākitai Waiohua*] Tony Walzl *Te Ākitai Waiohua Customary Interests Report* (presented and abridged by Te Ākitai Waiohua Iwi Authority).
[Williams *He Aha Te Tikanga Māori*] Joseph Williams *He Aha Te Tikanga Māori* (Law Commission, 1998).