IN THE HIGH COURT OF NEW ZEALAND CIV-2014-
GISBORNE REGISTRY

UNDER	the Judicature Amendment Act 1972 and/or Part 30 of the High Court Rules
IN THE MATTER OF	an application for judicial review of the Waitangi Tribunal's report, *The Mangatū Remedies Report* (2013)
BETWEEN	**ALAN PAREKURA TOROHINA HARONGA**, of Wellington, Chairman of The Proprietors of the Mangatū Blocks Incorporated, a Māori incorporation under Te Ture Whenua Māori Act 1993
	First applicant
A N D	**TE AITANGA A MĀHAKI TRUST,** a charitable trust having its registered office at Gisborne
	Second applicant
A N D	**WAITANGI TRIBUNAL (TE RŌPU WHAKAMANA I TE TIRITI O WAITANGI)**, a commission of inquiry established pursuant to s 4 of the Treaty of Waitangi Act 1975
	First respondent
A N D	**ATTORNEY-GENERAL**, sued in right of the Crown and as the respondent in the Tribunal
	Second respondent

STATEMENT OF CLAIM
(APPLICATION FOR JUDICIAL REVIEW)
Dated: 17 June 2014

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STATEMENT OF CLAIM
(APPLICATION FOR JUDICIAL REVIEW)

A. THE MANGATŪ CROWN FOREST LAND

1. This application seeks judicial review of the Waitangi Tribunal's report, ***The Mangatū Remedies Report*** (2013). That report considered applications for resumption of parts of the Mangatū State forest land, pursuant to s8HB of the Treaty of Waitangi Act 1975 ("**the 1975 Act**"), to remedy the Treaty of Waitangi claims of inter alia the first and second applicants.

2. Mangatū State Forest land is Crown forest "licensed land" ("**Mangatū CFL**") within the definition of that term in s 2(1) of the Crown Forest Assets Act 1989 ("**the CFAA**"). (Refer to the map **attached** as schedule 1).

B. THE PARTIES

(B1) Mangatū Incorporation

3. The first applicant ("**Mr Haronga**") sues in his capacity as Chairman of the Committee of Management of the Proprietors of Mangatū Blocks Incorporated, a Māori incorporation under Part 13 of Te Ture Whenua Māori Act 1993 ("**Mangatū Incorporation**"), acting on behalf of the descendants of the original owners of the "1961 land" (as that term is defined in paragraph [40]).

4. On or about 11 April 1881, the Native Land Court awarded ownership of the 100,000 acre Mangatū No 1 block ("**the Mangatū No 1 block**") to the hapū Ngāti Wahia and Ngāriki. Te Whānau a Taupara were later included as owners. All three hapū are affiliated to the iwi Te Aitanga a Māhaki.

5. The chief Wi Pere desired to establish a legal entity to represent the 179 owners, to protect the Mangatū No 1 block from alienation, and to enable the effective management and development of the block.

6. The Mangatū No 1 Empowering Act 1893 established the body corporate now known as Mangatū Incorporation and vested in it ownership of the Mangatū No 1 block.

7. Mangatū Incorporation has retained ownership of the Mangatū No 1 block since 1893, apart from the loss of the 1961 land.

(B2) Te Aitanga a Māhaki Trust

8. The second applicant is a charitable trust constituted under the Charitable Trusts Act 1957 on 15 January 1996, and having its registered office at Ngā Wai E Rua Building, 1st Floor, corner Bright St and Reads Quay, Gisborne.

9. The iwi Te Aitanga a Māhaki ("**Māhaki**") descends from the eponymous ancestor Māhaki.

10. Māhaki are tangata whenua of Tūranganui a Kiwa ("Tūranga"), the Gisborne district. Māhaki hapū traditionally exercised mana whenua (customary title) over an area that includes the Mangatū CFL which is the subject of this application for judicial review.

11. Te Aitanga a Māhaki Trust represents the iwi, and is the body currently mandated by the Māhaki people to settle all historical Treaty of Waitangi claims for Māhaki.

(B3) The Waitangi Tribunal

12. The first respondent ("**the Tribunal**") is a commission of inquiry established pursuant to s 4 of the 1975 Act.

(B4) The Attorney-General

13. The second respondent ("**the Attorney-General**") is joined as a respondent pursuant to s 14(2)(c) Crown Proceedings Act 1950, in right of the Crown and as the respondent party to the applicants' claims in the Tribunal.

C. THE 1989 CROWN FORESTS AGREEMENT

(C1) Background to the 1989 agreement

14. On or about 28 July 1988, the Minister of Finance announced in Parliament the Government's intention to sell State-owned commercial forests.

15. On or about 3 February 1989 the New Zealand Māori Council ("**the NZMC**") applied to the Court of Appeal, under leave reserved by that Court in its *Lands* decision,[1] for a declaration that the Government's

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[1] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) (*Lands / SOE*).

forestry sale proposal was inconsistent with the Court of Appeal's *Lands* judgment of 29 June 1987.[2]

16. That application led to further negotiations between the Crown, the NZMC and the Federation of Māori Authorities Incorporated ("**FOMA**").

17. Those negotiations took place in the knowledge that forest was part of the land as of right at common law, and that the resumption mechanism for protecting Māori Treaty claims in s 8A of the 1975 Act did not provide for a separation of forestry rights from land ownership.

18. Accordingly, applying the resumption provisions in s 8A of the 1975 Act to Crown forest land would incur a potentially significant discount in revenue for the Crown in selling its forestry assets.

(C2) Terms of the 1989 agreement

19. The negotiations resulted in an agreement being entered into on 20 July 1989 between the Crown, the NZMC and FOMA ("**the 1989 agreement**").

20. The 1989 agreement provided for the Crown to be able to sell the existing forest crop and other forest assets, providing purchasers with a licence to use the forest land over the term of the licence (clauses 1, 3, 13).[3] The purchaser was to pay an initial capital sum and a market rental for land use (clause 2).

21. The 1989 agreement also set out an agreed process for return to Māori ownership of forestry land and compensation associated with the land ("**resumption**").

22. The resumption process agreed to in the 1989 agreement was (inter alia):

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

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

3 *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), [70].

b) further compensate the successful claimant by paying the balance of the total sum calculated in paragraph 8(a) above or such lesser proportion as the Tribunal may recommend.

In none of the above will the purchaser be involved in compensation or payment to the successful claimant (i.e. the purchasers rights and obligations would be those specified in the original contract).

All payments made to successful claimants under paragraph 8 (other than stumpage) will be tax free in the hands of the recipients.

9. The methods of calculating the total sum on which compensation payable under paragraph 8 is based, are:

EITHER

a) (i) the market value of the tree crop and associated assets assessed at the time resumption is recommended. The value is to be determined on the basis of a willing buyer/willing seller based on the projected harvesting pattern that a prudent forest owner would be willing or expected to follow or;

(ii) the market stumpage of wood harvested each year over the termination period. Market stumpage to be determined in accordance with normal forestry business practice;

OR

b) the sales proceeds received by the Crown, plus a return on those proceeds for the period between sale and resumption. The return shall be limited to maintain the real value of sale proceeds during a period of grace of four years from the time of sale where a claim has been filed prior to the sale occurring, or from the time a claim is filed if after the sale. The period of grace may be extended beyond four years where the Tribunal is satisfied that an adequately resourced claimant is wilfully delaying proceedings or that for reasons beyond its control, the Crown is prevented from carrying out a relevant obligation under this agreement. Where the period of grace has expired then the subsequent return shall be based on one year government stock rate measured on a rolling annual basis plus an additional margin of 4% to reflect a commercial return.

The payment per hectare of land resumed shall not be less than an amount equal to the average price per hectare of the exotic forest lot as specified in the selling process as one forest lot for bidding purposes. However,

(i) where a bid is accepted for a number of lots as one parcel the average price reflects the total parcel; and

(ii) where the lot concerned has an average age distribution of less than five years, the average price applied is that of the same NZ Forestry Corporation Administrative District existing at the time of sale. ...

11. ...

iv) When any land covered by this agreement is recommended for resumption by the Waitangi tribunal, the accumulated capital

> in the [Crown Forestry] Rental Trust relevant to that piece of land will be paid to the successful claimant. Whenever the Tribunal recommends that land is no longer subject to resumption, the accumulated capital in the [Crown Forestry] Rental Trust relevant to that piece of land will be paid to the Crown.
>
> 15. The attached annex lists the main principles of the two parties within which this Agreement has been negotiated.
>
> 16. The provisions of this agreement are to be reflected and embodied where appropriate in draft legislation and in any event in a trust deed and consent order, the terms of each of which are to be agreed by the parties, in accordance with this agreement.

23. The "Annex" referred to in clause 15 of the 1989 agreement provides:

> Māori Principles
>
> (i) uphold the articles of the Treaty of Waitangi and the protections in current legislation;
>
> (ii) minimise the alienation of properly which rightly belongs to Māori;
>
> (iii) optimise the economic position of Māori.
>
> Crown Principles
>
> (i) to safeguard the integrity of the sale by guaranteeing security of tenure to purchasers to avoid discounting and to encourage investment in the forestry industry
>
> - security of tenure must involve purchasers having guaranteed access to wood and sufficient control over forest management to assure that wood supply;
>
> (ii) honour the principles of the Treaty of Waitangi by adequately securing the position of claimants relying on the Treaty
>
> - adequately securing the claimant's position must involve the ability to compensate for loss once the claim is successful.

24. The 1989 agreement nowhere states within it that the resumption process being agreed to is subject to the terms of any Treaty settlement policies that were later developed and applied by the Crown to settle Treaty claims.

(C3) Benefits to Crown of the 1989 agreement

25. The 1989 agreement settled the proceedings before the Court of Appeal and allowed the Crown to fully implement its corporatisation policy of

selling State-owned commercial forests on the open market at market value.[4]

26. The Crown through such sales received payments of a capital nature for the forest crop, free from any trust for Māori benefit.

27. The Crown has received over $3 billion in forestry capital from its sale of the cutting rights associated with the forest crop on licensed Crown forest land.[5]

28. Pursuant to s34 of the CFAA, the rental fees for Crown forestry licences are received and held on trust by the Crown Forestry Rental Trust for the benefit of the Māori owners of the licensed land ("**the accumulated rentals**").

D. THE CROWN FORESTS ASSETS ACT 1989

29. On 25 October 1989, the CFAA was enacted to give effect to the 1989 agreement.[6]

30. Its long title relevantly provides that the CFAA is:

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

31. Part 3 of the CFAA is headed "Return of Crown forest land to Māori ownership and compensation".

32. Within Part 3 is s 35, which places restrictions on the sale of Crown forest land and any rights or interests in any Crown forestry licence.

33. Section 36 is also within Part 3. It is headed "Return of Crown forest land to Māori ownership and payment of compensation", and provides:

> (1) Where any interim recommendation of the Waitangi Tribunal under the Treaty of Waitangi Act 1975 becomes a final recommendation under that Act and is a recommendation for the

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4 *Haronga* (SC), [76].
5 http://www.treasury.govt.nz/government/assets/saleshistory/index.htm#ref10
6 *Haronga* (SC), [70].

> return to Māori ownership of any licensed land, the Crown shall —
>
> (a) return the land to Māori ownership in accordance with the recommendation subject to the relevant Crown forestry licence; and
>
> (b) pay compensation in accordance with Schedule 1.
>
> (2) Except as otherwise provided in this Act or any relevant Crown forestry licence, the return of any land to Māori ownership shall not affect any Crown forestry licence or the rights of the licensee or any other person under the licence.
>
> (3) Any money required to be paid as compensation pursuant to this section may be paid without further appropriation than this section.

34. Part 4 of the CFAA is headed "Amendments to Treaty of Waitangi Act 1975". Within Part 4 is s 40. It inserted s 8HB into the 1975 Act, which provides the mechanism necessary to give effect to s 36 of the CFAA.

35. Section 8HB of the 1975 Act is headed "Recommendations of Tribunal in respect of Crown forest land", and it provides (as amended):

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

> (c) if it finds that the claim is not well-founded, recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land not be liable to return to Māori ownership.
>
> (2) In deciding whether to recommend the return to Māori ownership of any licensed land, the Tribunal shall not have regard to any changes that have taken place in —
>
> (a) the condition of the land and any improvements to it; or
>
> (b) its ownership or possession or any other interests in it—
>
> that have occurred after or by virtue of the granting of any Crown forestry licence in respect of that land.
>
> (3) Nothing in subsection (1) prevents the Tribunal making in respect of any claim that relates in whole or in part to licensed land any other recommendation under subsection (3) or subsection (4) of section 6; except that in making any other recommendation the Tribunal may take into account payments made, or to be made, by the Crown by way of compensation in relation to the land pursuant to section 36 and Schedule 1 of the Crown Forest Assets Act 1989.
>
> (4) On the making of a recommendation for the return of any land to Māori ownership under subsection (1), sections 40 to 42 of the Public Works Act 1981 shall cease to apply in relation to that land.

36. Schedule 1 of the CFAA is headed "Compensation payable to Māori". It provides for redress that shall be payable to the Māori to whom licensed land is to be returned on the recommendation of the Tribunal ("**Schedule 1 compensation**"). The Schedule 1 compensation was agreed to in lieu of the forest returning to Māori with the licensed land.

37. To determine the Schedule 1 compensation, the successful claimant nominates one of three options in clause 3 for calculating the "**specified amount**". The three options are different methods for assessing the value of the forest. The Tribunal must then recommend payment of:

    37.1 5% of the specified amount as compensation for the fact that the land is being returned subject to encumbrances; and

    37.2 As further compensation, the remaining portion of the specified amount, or such lesser amount as the Tribunal may recommend.

38. The CFAA nowhere states within it that the resumption process set out in it is subject to the terms of any Treaty settlement policies that were later developed and applied by the Crown to settle Treaty claims.

E. THE WAITANGI TRIBUNAL'S TŪRANGA INQUIRY

(E1) Treaty of Waitangi claims

Wai 274

39. In February 1992, a Treaty of Waitangi claim was filed in the Tribunal by Eric John Tupai Ruru, who at that time was a member of the Committee of Management for Mangatū Incorporation ("**Wai 274**", referred to as the "**Mangatū afforestation claim**").

40. Wai 274 concerned the Crown's 1961 acquisition of approximately 8,626 acres of the Mangatū No 1 block for an afforestation scheme to prevent erosion ("**the 1961 land**") and sought the return of the 1961 land to Mangatū Incorporation. The 1961 land is now part of the Mangatū CFL (refer to the map in Schedule 1).

Wai 283

41. In March 1992, Mr Ruru filed a wider claim on behalf of Māhaki ("**Wai 283**") concerning a range of Crown actions in Tūranga alleged to be in breach of the Treaty of Waitangi. The Wai 283 grievances are serious and broad ranging, and in summary included claims concerning the Crown waging war in Tūranga, confiscation of land by the Crown, the application of native lands and public works legislation, and the Crown's failure to protect the retention and development of traditional ancestral land.

42. Wai 283 sought inter alia the return of the Mangatū CFL.

43. In 2001, Wai 274 and Wai 283 were consolidated into a single amended statement of claim filed by Mr Ruru under both Wai numbers.

(E2) The 2004 Report

44. In 2003-2004, the Waitangi Tribunal held an inquiry into all Treaty of Waitangi claims in the Tūranga district, including Wai 274 and Wai 283.

45. In October 2004 the Tribunal issued its district inquiry report *Tūranga Tangata, Tūranga Whenua* ("**the 2004 Report**").

46. In summary, the Tribunal found that the following historical Treaty claims of Māhaki were well-founded:[7]

    46.1 The Crown's initiation of hostilities in 1865, and the conduct and outcomes of those hostilities, including:

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[7] *The Mangatū Remedies Report*, at p64.

(a) The "unlawful attack" by Crown forces on the defensive pā at Te Waerenga a Hika, "resulting in high casualties";

(b) The "subsequent arrest, detention, and deportation of 84 Māhaki men captured at Te Waerenga a Hika to Wharekauri" (the Chatham Islands), who became known as the Whakarau;

(c) The Crown's "unlawful pursuit" of the Whakarau after their return to the mainland;

(d) The Crown's "failure to discriminate between the Whakarau and their innocent prisoners at Ngātapa", and the "execution of many unarmed prisoners at the end of the siege";

(e) "the punitive 1868 deed of cession, signed under duress, which was ineffective in extinguishing the rights of the majority of Tūranga Māori who had not signed it, and the Crown's subsequent failure to properly obtain agreement on the lands it would retain";

(f) The "operation of the Poverty Bay commission, which confiscated the lands of those deemed 'rebels' without due process or appropriate safeguards, failed to ensure 'loyal' Māori were compensated for the lands retained by the Crown, and transformed Māori tenure into Crown-derived titles without their consent";

46.2 The "operation of the Native Land Court, which expropriated from Māori the right to make their own title decisions, removed community land management rights, and resulted in massive land alienation in Tūranga";

46.3 The "failure of the Tūranga trusts and consequent land alienation, which resulted from the Crown's failure to provide adequate systems for community title and management, and to prevent piecemeal erosion of community land interests";

46.4 The Crown's acquisition of Mangatū lands for erosion protection (ie the Mangatū afforestation claim).

47. The Tribunal made specific findings in relation to the Mangatū afforestation claim. It found that the Crown had breached the principles of the Treaty

by failing to act reasonably and with the utmost good faith when it acquired the 1961 land from the Māori owners.[8] In particular the Tribunal:

47.1 Found that the Crown had failed to act in a scrupulously fair, even-handed and honest way, and gave no serious consideration to the alternatives to sale – particularly the possibility of a lease arrangement or a form of partnership;[9]

47.2 Found that the Crown's misrepresentations to Mangatū Incorporation "led directly to the owners' decision to reverse their stance from one of implacable opposition to sale" of their ancestral land.[10]

48. In accordance with the usual practice of the Tribunal, the 2004 Report made no recommendations for redress. However the Tribunal did suggest that the Crown and the iwi of Tūranga enter into negotiations to settle the historical Treaty claims, and reserved leave to all parties to apply for further direction if necessary.[11]

(E3) Resulting settlement negotiations

49. After the release of the 2004 report, the iwi of Tūranga commenced the Treaty settlement negotiation process by mandating their claimant groups.

50. The Crown's current Treaty of Waitangi settlement policies require:

50.1 Negotiation by "large, natural groups" of tribal interests at an iwi level, rather than with hapū or individual claimants;

50.2 Comprehensive settlement of all claims represented by the large, natural group.

51. In August 2005, the Crown recognised the mandate of Te Pou a Haokai to negotiate settlement of a claimant group comprising Māhaki, Ngāriki Kaiputahi, Te Whānau a Kai, Te Whānau a Wi Pere, and Te Whānau a Rangiwhakataetaea ("**Te Pou a Haokai**"). Te Pou a Haokai subsequently changed its name to Te Whakarau, and then to "Te Aitanga a Māhaki and Affiliates" ("**TAMA**").

52. On or about 29 August 2008, the Crown entered into an agreement in principle for the settlement of the historical Treaty claims of Tūranga Māori ("**the agreement in principle**"). The agreement in principle inter alia

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8 *The 2004 Report*, pp733, 748.
9 *The 2004 Report*, p733.
10 *The 2004 Report*, p748.
11 *The 2004Report*, p751.

offered Te Pou a Haokai the right to purchase the Mangatū CFL (including the 1961 land).

53. The inclusion of the 1961 land in the agreement in principle prompted Mr Haronga to file the resumption application referred to in paragraph [55] below.

54. The TAMA settlement negotiations have not progressed any further towards a deed of settlement, as the Crown "paused" negotiations after the *Haronga* Supreme Court decision was released in May 2011.

F. THE APPLICATION FOR RESUMPTION

55. On 31 July 2008, Mr Haronga, acting with Mangatū Incorporation's authority, filed Treaty claim Wai 1489 in the Tribunal accompanied by an application for resumption pursuant to s 8HB(1)(a) of the 1975 Act.

56. Wai 1489 concerned the Mangatū afforestation claim and relied upon the existing findings of Treaty breach in relation to the Mangatū afforestation claim in the 2004 report.

57. The Wai 1489 resumption application sought:

    57.1 The return of the 1961 land to the 1961 owners of the Mangatū Incorporation (namely, those who owned the 1961 land at the date that it was acquired by the Crown);

    57.2 Schedule 1 compensation;

    57.3 Accumulated rentals held in relation to the 1961 land;

    57.4 Concurrent recommendations that the Crown should preserve the value of the offer made to TAMA in the agreement in principle to settle their historical Treaty claims, and that the parties should enter into negotiations during the 90-day interim period pursuant to s8HC of the 1975 Act to agree on the preservation of the value of the settlement for TAMA.

58. Mr Haronga sought an urgent hearing of the Wai 1489 resumption application on the basis that the 1961 land had been included in the 2008 agreement in principle. The Tribunal twice declined to grant an urgent hearing, by directions dated 28 August 2008 and 21 October 2009.

59. Mr Haronga subsequently filed a judicial review application in the High Court seeking an order requiring the Tribunal to hear and determine the Wai 1489 resumption application on an urgent basis.

60. The judicial review application was dismissed by the High Court in a judgment issued by that Court on 23 December 2009, and by the Court of Appeal in a judgment issued by that Court on 19 May 2010.

61. On 19 May 2011, the Supreme Court issued its judgment in *Haronga v Waitangi Tribunal*, upholding the application for judicial review and directing the Tribunal to hear the resumption application with urgency.

G. TRIBUNAL REMEDIES INQUIRY

62. Following the direction of the Supreme Court, the Tūranga panel of the Tribunal was reconvened to hear the Wai 1489 resumption application.

63. On 26 August 2011, the Tribunal directed that the remedies inquiry would encompass all applications for resumption of the Mangatū CFL made by Tūranga claimants with well-founded claims.

64. On 12 April 2012, the Tribunal directed that the remedies inquiry would be limited to determining applications for that part of the Mangatū CFL within the Tūranga district inquiry boundary - that is, former Mangatū block No 1 (the 1961 land) and former Mangatū block No 2, but excluding the Waipaoa blocks in the East Coast inquiry district (refer to the map in schedule 1).

65. In the ensuing remedies inquiry, the Tribunal heard resumption applications for the Mangatū CFL within the Tūranga inquiry district made by four groups:[12]

    65.1 Mr Haronga, on behalf of the 1961 owners of Mangatū Incorporation (Wai 1489);

    65.2 TAMA on behalf of Māhaki (Wai 274, 283);

    65.3 Ngāriki Kaiputahi claimants (in two separately represented claims, being Wai 499 and 507, and Wai 874);

    65.4 Te Whānau a Kai claimants (Wai 892).

66. In its amended statement of claim (amended on 9 November 2011, 31 January 2012, and 2 August 2012), TAMA sought an inquiry into remedies, including inter alia a recommendation for resumption of the entire Mangatū CFL within the inquiry district pursuant to s8HB of the 1975 Act, Schedule 1 compensation and accumulated rentals.

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[12] *The Mangatū Remedies Report*, p12 and Appendix 1, p193.

67. In the resulting inquiry TAMA adopted the position (described by the Tribunal in its resulting Decision as a "compromise position") that:[13]

    67.1 If Mangatū Incorporation's resumption application for the 1961 land was successful, then Māhaki sought from the Tribunal binding recommendations for return of the balance of the Mangatū CFL within the Tūranga inquiry district (ie former Mangatū block no 2), and the associated accumulated rentals and Schedule 1 compensation; and

    67.2 If Mangatū Incorporation's resumption application was not successful, then Māhaki sought binding recommendations for the return of the entire Mangatū CFL within the Tūranga inquiry district (ie former Mangatū blocks No 1 (1961 land) and No 2), and the associated accumulated rentals and Schedule 1 compensation.

68. Mr Haronga took a complementary position by seeking the concurrent recommendations referred to in paragraph [57.4] that the Crown should preserve the value of the offer made to TAMA in the agreement in principle.

69. The Crown took the position that resumption should not be ordered (inter alia) because binding recommendations for the return of the 1961 land would involve "excessive" relief when benchmarked against Crown Treaty settlement policies and the quantum of previous claims settled by the Crown without reference to the 1989 agreement or the CFAA.[14]

H. TRIBUNAL DECLINES RESUMPTION

70. On or about 18 December 2013 the Waitangi Tribunal issued its decision on the resumption applications for the Mangatū CFL ("**the Decision**").

71. The Decision was the exercise of a statutory power or statutory power of decision in terms of the Judicature Amendment Act 1972 or (further or in the alternative) the exercise or purported exercise of public authority amenable to judicial review under Part 30 of the High Court Rules.

72. In the Decision the Tribunal:

    72.1 Declined the resumption applications of Mangatū Incorporation, Ngāriki Kaiputahi and Te Whānau a Kai; and

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13 *The Mangatū Remedies Report*, p15 and p179.
14 *The Mangatū Remedies Report*, pp17-18.

72.2 Adjourned TAMA's application for resumption, but reserved leave for TAMA to subsequently apply to the Tribunal for a comprehensive remedies process.

(H1) Decision on 1961 land

73. The Tribunal accepted in the Decision that in terms of the statutory test for resumption under s 8HB(1) of the 1975 Act:

73.1 Mangatū Incorporation's application related to "licensed land"[15] – meaning that the resumption application satisfied the preambular requirement in s 8HB(1);

73.2 Mangatū Incorporation's claim in respect of the 1961 land was a well-founded claim[16] – meaning that the resumption application satisfied s 8HB(1)(a)(i);

73.3 The Crown's acquisition of the 1961 land in breach of the principles of the Treaty resulted in cultural and spiritual prejudice that was "grave" and "of a serious kind",[17] and that "to remove the prejudice suffered" the "1961 land, or at least a part of it, should be returned" to Mangatū Incorporation[18] – meaning that the resumption application satisfied s 8HB(1)(a)(ii); and

73.4 Mangatū Incorporation was of a size and organisational capability to receive redress which involves the ownership and management of a forest of variable quality sited on difficult erosion-prone country.[19]

74. Notwithstanding these findings, the Tribunal declined to make binding recommendations under s 8HB in respect of the 1961 land in favour of the 1961 owners of Mangatū Incorporation.

75. The Tribunal's reasons for declining to order resumption included:

75.1 The return of the land together with the accompanying accumulated rentals and Schedule 1 compensation, even at the 5% level, was "generous compensation" that was "more than what is necessary to compensate for or remove the prejudice suffered" by Mangatū Incorporation;[20]

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15 *The Mangatū Remedies Report*, pp21, 146.
16 *The Mangatū Remedies Report*, pp102, 162.
17 *The Mangatū Remedies Report*, pp 80, 93.
18 *The Mangatū Remedies Report*, p147; and see also p186 (return of at least some of the 1961 land was "the most appropriate form of redress").
19 *The Mangatū Remedies Report*, p162.
20 *The Mangatū Remedies Report*, pp151, 162.

75.2 The package of the 1961 land and monetary compensation that the Mangatū Incorporation would receive on resumption was "disproportionate" compared to the total settlement package that was offered by the Crown to Māhaki[21] and "other Māori groups [who] have settled on the basis of the Crown's current settlement policy".[22] Unduly favouring the Mangatū Incorporation in this way had the potential to "seriously disrupt the relativities between the other iwi groups in the district";[23]

75.3 Resuming the whole of the 1961 land would provide acre for acre redress. If acre for acre redress was applied to the other Māhaki applicants, "the increase in the settlement package would be very large", and "such an increase would not be sustainable either economically, practically, or politically";[24]

75.4 The restorative approach seeks to "restore the economic, social, and cultural well-being of the claimant",[25] but due to its strong financial position today, the "incorporation does not require economic or financial restoration";[26]

75.5 Payment of Schedule 1 compensation to Mangatū Incorporation would amount to unfairly awarding "punitive damages" against the Crown. The restorative approach to remedies does not seek to "punish" the Crown ;[27]

75.6 The statutory scheme did not allow the Tribunal to adjust the monetary compensation that would pass with the land to Mangatū Incorporation, so that the Tribunal could not deduct the monetary compensation that would provide redress that was proportionate to that which other claimants would receive;[28]

75.7 Mangatū Incorporation should not be awarded part of the 1961 land, because the Tribunal could "not determine with certainty" what would provide a "fair and equitable portion" for Mangatu

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21 *The Mangatū Remedies Report*, pp 147-148, 162.
22 *The Mangatū Remedies Report*, p152; also pp162-163.
23 *The Mangatū Remedies Report*, p182; also p163.
24 *The Mangatū Remedies Report*, p 163.
25 *The Mangatū Remedies Report*, p 163.
26 *The Mangatū Remedies Report*, pp147, 150, 163.
27 *The Mangatū Remedies Report*, pp82-83.
28 *The Mangatū Remedies Report*, p 163.

Incorporation that would leave sufficient CFL land for other applicants.[29]

(H2) Decision on TAMA's application

76. The Tribunal accepted in the Decision that in terms of the statutory test for resumption under s 8HB(1) of the 1975 Act:

76.1 TAMA's application related to "licensed land" in respect of the Māhaki claims referred to in paragraph [46][30] – meaning that the resumption application satisfied the preambular requirement in s 8HB(1);

76.2 All the Māhaki claims referred to in paragraph [46] were well-founded[31] – meaning that the resumption application satisfied s 8HB(1)(a)(i);

76.3 TAMA had suffered "serious prejudice from grave misconduct on the part of the Crown".[32] The Tribunal found that the prejudice from the economic deprivation caused by the widespread loss of land, and grievous injuries to the mana, rangatiratanga and loss of political autonomy was "incalculable", but nonetheless "substantial redress" was required,[33] and that redress "should include all of the CFL land or, if Te Whānau a Kai or others choose to revoke its mandate, a significant part of it"[34] – meaning that the resumption application satisfied s 8HB(1)(a)(ii); and

76.4 TAMA was generally representative of Māhaki, and of a size and organisational capability to receive redress, but had not yet completed the process of establishing a suitable settlement entity.[35] However, the Tribunal stated that this was not a determinative factor.

77. Notwithstanding these findings, and the fact that TAMA sought binding recommendations pursuant to s8HB, the Tribunal decided to adjourn TAMA's application in order to provide the parties with an opportunity to discuss a way forward in negotiations with the Crown.[36] The Tribunal

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29 *The Mangatū Remedies Report*, pp158, 159, 185; and see also pp163-164.
30 *The Mangatū Remedies Report*, pp21, 146.
31 *The Mangatū Remedies Report*, p183.
32 *The Mangatū Remedies Report*, p183.
33 *The Mangatū Remedies Report*, p183.
34 *The Mangatū Remedies Report*, p180.
35 *The Mangatū Remedies Report*, pp182-183.
36 *The Mangatū Remedies Report*, p184.

reserved leave to TAMA to apply to the Tribunal for a comprehensive remedies process.[37]

78. The Tribunal's reasons for that approach included:

78.1 It did not agree that negotiations between the Crown and TAMA had "broken down to such an extent that Tribunal intervention is necessary at this stage to resolve the impasse";[38]

78.2 In the agreement in principle, TAMA had been offered redress in the form of an option to purchase the whole of the Mangatū CFL including the Mangatū CFL land in the Waipaoa block (to be funded either from accumulated rentals or from the proceeds of the settlement);[39]

78.3 The Tribunal "would have to take a very cautious approach to making a binding recommendation which might seriously disrupt the relativities between the other iwi groups in the district".[40] As the redress that TAMA might receive could "far outstrip" the Crown's settlement offer, the Tribunal would have to be sure that it "did not leave the Crown in the position of being unable to offer fair and equitable redress to unsuccessful applicants";[41]

78.4 Notwithstanding that the remedies hearing was limited to the question of whether to make binding recommendations in relation to the Mangatū CFL land, TAMA could only achieve "comprehensive redress" through comprehensive negotiations with the Crown. Only the Crown could provide the other forms of redress, such as an apology and cultural redress, "which are as necessary to the restoration of the claimants' well-being and the Treaty relationship as is economic redress";[42]

78.5 In order to determine TAMA's resumption application to the Mangatū CFL land, the Tribunal would need to conduct a comprehensive remedies process to ensure that it had all the necessary evidence to make decisions as to the level of redress it would need to deliver through binding recommendations, and to be

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37 *The Mangatū Remedies Report*, p189.
38 *The Mangatū Remedies Report*, p184.
39 *The Mangatū Remedies Report*, p184.
40 *The Mangatū Remedies Report*, p182.
41 *The Mangatū Remedies Report*, pp180-181.
42 *The Mangatū Remedies Report*, p179, 180, 184

able to make the other non-binding recommendations needed for a comprehensive settlement;[43]

78.6 A pro-rata division of the Mangatū CFL was not tenable because of the uncertainties in deciding upon a "fair and equitable division" of the land between the competing claimants (given the problems in establishing the exact losses of the applicants, and the difficulty in assigning a value to the general district-wide historical claims).[44] Any such decisions "would be better decided by agreement amongst the claimants, rather than being imposed by the Tribunal upon everybody";[45]

78.7 "TAMA's mandate to represent claimant groups such as Te Whānau a Kai and Ngāriki Kaiputahi would need to be reconfirmed, otherwise the Tribunal could not be sure as to the identity of the Māori group to receive redress". There was a "reasonable chance" that TAMA could "stabilise and renew their mandate and re-enter negotiations with the Crown";[46]

78.8 The Tribunal could not guarantee that any smaller groups who chose not to go with TAMA would receive a settlement due to the Crown's large natural groupings policy;[47]

78.9 TAMA had not yet completed the setting up of a settlement entity to receive redress (although this factor was not determinative);[48] and

78.10 "The Crown is willing to re-enter negotiations so that another avenue is available to TAMA to obtain redress".[49]

I. DEVELOPMENTS SINCE TRIBUNAL DECISION

79. In March and April 2014, Māhaki followed a fresh mandating process.

80. At a Māhaki hui a iwi held on 27 April 2014, it was resolved to approve the "separate recognition" and "possible mandate" of the Te Whānau a Kai and Ngāriki claimant groups for the purposes of direct Treaty settlement negotiations with the Crown.

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43 *The Mangatū Remedies Report*, pp182, 185.
44 *The Mangatū Remedies Report*, p181.
45 *The Mangatū Remedies Report*, p185.
46 *The Mangatū Remedies Report*, pp185-186.
47 *The Mangatū Remedies Report*, p181.
48 *The Mangatū Remedies Report*, p185.
49 *The Mangatū Remedies Report*, p185.

81. In the March-April 2014 mandating process, the Māhaki people passed the following resolutions by poll (with over 1100 votes in favour, a majority of over 95%):

    81.1 Te Aitanga a Māhaki Trust would become the mandated entity to settle the historical Treaty claims of Māhaki; and

    81.2 If the Crown fails to engage to the satisfaction of Te Aitanga a Māhaki Trust, then John Ruru (Wai 274 and Wai 283) and Te Aitanga a Māhaki Trust have the mandate to represent Māhaki in seeking binding recommendations and other remedies through the Tribunal.

82. Treaty settlement negotiations between Māhaki and the Crown have not formally resumed.

83. Te Aitanga a Māhaki Trust has resolved to file these proceedings on behalf of Māhaki.

J. GROUNDS FOR JUDICIAL REVIEW

84. The Decision of the Tribunal, declining to order the resumption of the 1961 land and adjourning without deciding TAMA's application, involves misconstruction/misapplication of s 8HB of the 1975 Act and breaches of the 1989 agreement. In particular:

(J1) Error of law by statutory misconstruction / misapplication

84.1 The Tribunal failed to apprehend its statutory function with its conclusion that Tribunal "intervention" was unnecessary to "resolve the impasse" because another avenue for securing the redress in the form of Treaty settlement negotiations was available. In the case of Crown forest land the 'recommendatory' discretion in s 8HB is an adjudicatory obligation, even if the relief available is a matter for the judgment of the Tribunal;[50]

84.2 The Tribunal erred in law by concluding that the Tribunal has available to it under s 8HB(1) the option of recommending that land should be returned to Māori through a negotiated route with the Crown based on Crown Treaty settlement policies which are inconsistent with the CFAA /1989 agreement. That option is not contemplated by the statutory regime, which gives two options only to the Tribunal where (as here) it determines that a claim is well-

[50] *Haronga* (SC), [78], [89].

founded (the two options being to return the land to Māori or to the Crown).[51] Having decided that the Mangatū CFL should be returned to Māori, the Tribunal was obliged to order resumption;[52]

84.3 The Tribunal erred in law in its approach to s 8HB that to make a recommendation for the return of land with accompanying Schedule 1 compensation, the Tribunal needed to be satisfied that the value of the resumption orders would constitute fair and proportionate redress when compared to the Crown's prior settlement offer to Māhaki and the relative level of iwi Treaty settlements in the Tūranga district;

84.4 The Tribunal erred in law in its approach to s 8HB of treating an assessment of the quantum of Schedule 1 compensation which will follow the Crown forest land to be returned to Māori, as determining whether it should be returned to Māori ownership;

84.5 The Tribunal erred in law in its approach to s8HB(1) by deciding that a "restorative" approach was required, rather than an adjudicatory assessment of what was required in order "to compensate for or remove the prejudice";

84.6 The Tribunal erred in law in its characterisation of Schedule 1 compensation as "punitive damages" which would unfairly "punish" the Crown. Compensation in terms and at a level contemplated in the CFAA/1989 agreement, which the Crown was a party to, logically cannot be punitive or unfairly punish the Crown;

84.7 The Tribunal erred in law in its approach to s 8HB that it would be wrong to make a binding recommendation without making an assessment of the comprehensive remedies required to remedy all Māhaki Treaty claims in the district, including cultural redress and Crown apologies, notwithstanding that the resumption application related only to the Mangatū CFL (and under s 8HB could relate only to Crown forest land);

(J2) Error of law by failure to perform a statutory duty

84.8 The Tribunal erred in law in failing to decide between competing claimants once it had accepted that the Mangatū CFL should be returned to Māori;

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51 *Haronga* (SC), [91].
52 *Haronga* (SC), [92].

(J3) Error of law by consideration of irrelevancies

84.9 The Tribunal erred in law in treating Crown Treaty settlement policies developed after the execution of the 1989 agreement and after the enactment of the CFAA, and settlements reached and proposed under those Crown policies without reference to the CFAA /1989 agreement regime, as considerations relevant to (and telling against) an order under s 8HB. The CFAA provided Māori claimants with the opportunity of seeking from the Tribunal remedial relief which would be binding on the Crown;[53]

84.10 The Tribunal erred in law in treating the fact that only the Crown could provide the other forms of redress (such as cultural redress) which the Tribunal considered were necessary to the restoration of the claimants' well-being and the Treaty relationship as a consideration relevant to (and telling against) an order under s 8HB;

84.11 The Tribunal erred in law in considering that TAMA's mandate to represent claimant groups such as Te Whānau a Kai and Ngāriki Kaiputahi would need to be reconfirmed before the Tribunal could decide the identity of the Māori groups to receive redress, given that Te Whānau a Kai and Ngāriki Kaiputahi were pursuing separate resumption applications;

84.12 The Tribunal erred in law in treating the strong financial position of Mangatū Incorporation today, as a consideration relevant to (and telling against) an order in its favour under s 8HB;

(J4) Error of law by failure to consider relevancies

84.13 The Tribunal erred in law in failing to have regard to the fact that the 'inflated' level of Schedule 1 compensation was contemplated by the 1989 Act/1989 agreement, and that the level of such compensation was a function of the Crown's delay in settling Crown forest claims contrary to the "best endeavours" provision in clause 6 of the 1989 agreement;

84.14 The Tribunal erred in law in failing to have regard to the good faith compromises of Mangatū Incorporation, Māhaki and other claimants groups in proposing apportionment of the Mangatū CFL and the adjustment of interests by terms and conditions and Schedule 1

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53 *Haronga (SC),* [76], [87], [89], [98].

compensation (resulting in an equitable outcome for all claimant groups);

(J5) Error of law by breach of legitimate expectation

84.15 The Decision by the Tribunal breached the legitimate expectations of Mangatū Incorporation and Māhaki, based on the 1989 agreement, that they would receive redress on an (objectively) commercial basis through the resumption process (to compensate for Crown forest land being returned without the forest and encumbered by licences), not redress on the basis of less favourable Treaty settlement policies developed by the Crown after the execution of the 1989 agreement and after the enactment of the 1989 Act (and without reference to the 1989 agreement/1989 Act regime).

K. RELIEF SOUGHT

85. The applicants seek:

85.1 A declaration that the Decision of the Tribunal is unlawful;

85.2 An order quashing or setting aside the Decision;

85.3 An order requiring the Tribunal:

(a) To rehear the resumption applications on a correct legal basis; and

(b) Taking as the starting point the Tribunal's existing findings on the resumption applications (see paragraphs 73 and 76 above), to make binding recommendations under s 8HB in favour of Mangatū Incorporation in respect of the 1961 land, and in favour of Māhaki in relation to the remainder of the Mangatū CFL, subject to such terms and conditions and adjustments of interests as are seen necessary;

85.4 Such further or other relief as the Court considers just; and

85.5 The costs of and incidental to this proceeding.

This statement of claim is filed by Roger Bruce Douglas Drummond, solicitor for the applicant. The address for service of the applicant is the offices of Gibson Sheat, Solicitors, Wellington.

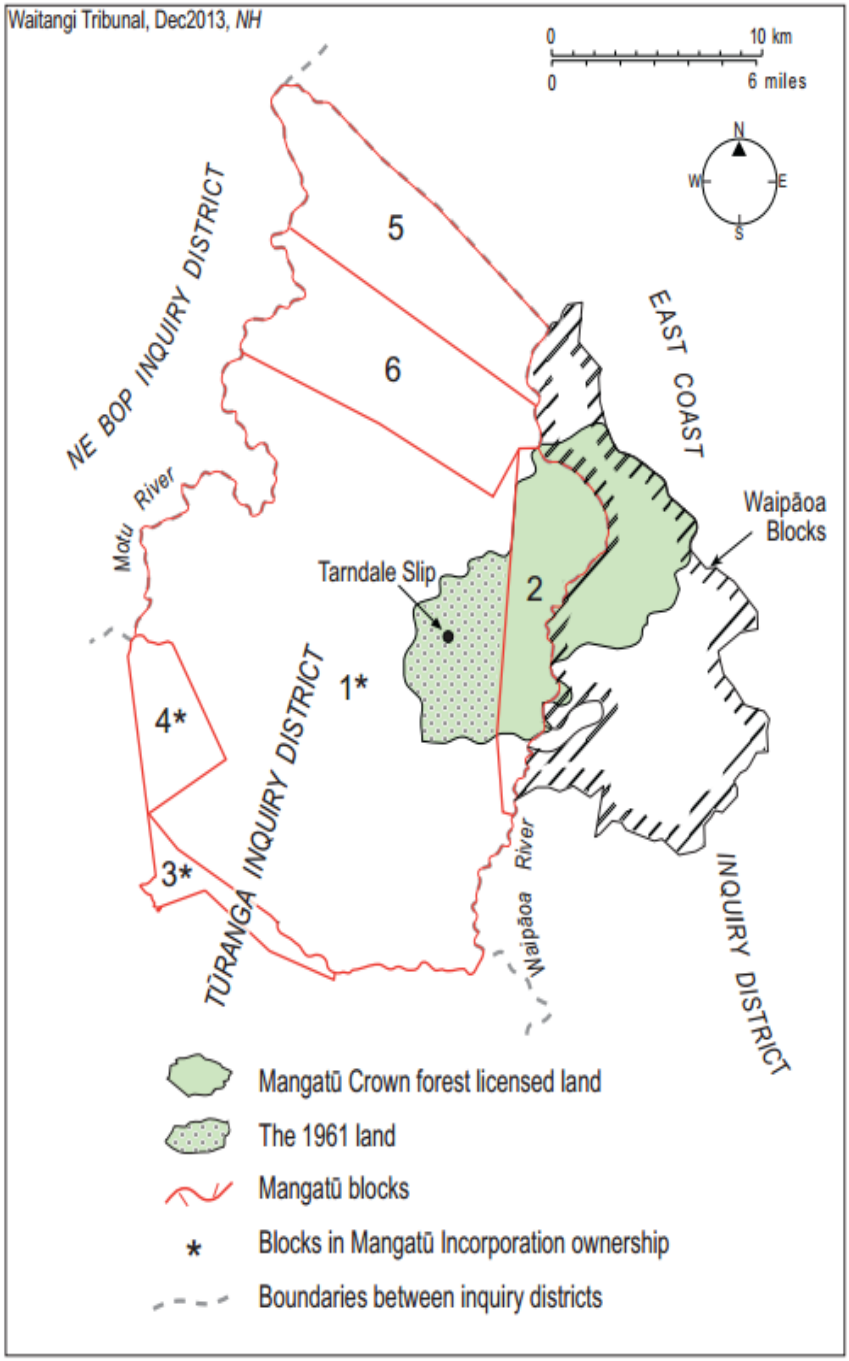
Documents for service on the applicant may be:

(a) posted to the solicitor at PO Box 2966, Wellington; or

(b) transmitted to the solicitor by facsimile at (04) 496-9991; or

(c) transmitted to the solicitor by email at roger.drummond@gibsonsheat.com (copied in all cases to counsel at karen.feint@chambers.co.nz and matthew.smith@chambers.co.nz).

Schedule 1



Map 4: The Mangatū blocks and the Mangatū Crown forest licensed land