In the High Court of New Zealand
Auckland Registry
I Te Kōti Matua O Aotearoa
Tāmaki Makaurau Rohe

CIV-2015-404-2033

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

and: **Marutūāhu Rōpū Limited Partnership**
Second Defendant

and: **Te Ara Rangatū O Te Iwi O Ngāti Te Ata Waiōhua Incorporated**
Third Defendant

Statement of evidence of Ngarimu Alan Huiroa Blair on behalf of the plaintiff

Dated: 2 June 2021

Next Event Date: For trial, 9 February 2021

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STATEMENT OF EVIDENCE OF NGARIMU ALAN HUIROA BLAIR ON BEHALF OF THE PLAINTIFF

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INTRODUCTION

1 My full name is Ngarimu Alan Huiroa Blair. I was raised at Te Mākiri Pā on the Kaipara river near Te Awaroa, Helensville before moving to the Ōkahu papakainga for my University tuteledge. I now live between Paruroa and Karangahape on the northern shores of the Manukau in Auckland. I am a trustee and Deputy Chairperson of the Ngāti Whātua Ōrākei Trust.

2 Ko Maungakiekie te Maunga, Ko Waitematā te Moana, Ko Tumutumu Whenua te Whare, Ko Tuperiri te Tupuna, Ko Ngarimu Blair ahau. Maungakiekie is my mountain, the Waitematā is my waterway, Tumutumuwhenua is my ancestral house, Tuperiri is my tupuna, my name is Ngarimu Blair.

3 It is through my whakapapa and lineages that I stand here today on behalf of Ngāti Whātua Ōrākei. I claim descent from Haumoewhaarangi and Waihekeao, who are often attributed as the progenitors of the 'Ngāti Whātua' iwi.

4 Through Nganaia I descend from Ngā Rīriki, down to his great grandchild Tarapakihi who wed Pāwhero, who had links to both Kaipara and Waikato. Their son was the renowned Te Taoū commander and chief Hukatere. Hukatere betrothed Toukararae of the Ngā Iwi & Ngā Oho people in Kaipara and begat Tuperiri from whom all uri of 'Ngāti Whātua Ōrākei' descend today.

5 Tuperiri's son Tarahawaiki married the Waiohua-Ngāti Te Ata ancestress Mokorua. I am a direct descendant of this union. I pay homage to my tupuna Hua Kaiwaka and the mana he possessed in Tāmaki in his time that continued down to his grand-daughter Te Ata i Rehia, the ancestress and progenitor of our Ngāti Te Ata bloodlines.

6 I also pay homage to my tūpuna Te Reweti, grand-son of Tarahawaiiki and Mokorua and the origin of my family name. His great grandson Piriniha Reweti, my Great Grandfather, was one of the principal Ngāti Whātua Ōrākei elders during the 1960s-80s, which was a period of much turmoil and pain for my iwi. Tuperiri also begat Paewhenua whose principal partner was Paretaua and

their offspring and great grandchild was the noted Ngāti Whātua tohunga and leader Pāora Kāwharu. I share this tupuna with my relation Margaret Kāwharu who is also giving evidence in this case. His Ōtene Pāora, my great great grandfather, was prominent in objecting to the Crown's destruction of communal title in the infamous Ōrākei Block in the early part of the 20th century.

7 A mihi (traditional acknowledgment) to our tūpuna is as follows:

> *Rātou ki a rātou, tatou ngā waihōtanga ki a tatou… Tīhei Whātua e!*
>
> To them who have passed, to us the living – long live Whātua!

8 I have worked for Ngāti Whātua Ōrākei for over 22 years as, among other roles, its Heritage and Resources Manager from 1998. I have extensive experience and knowledge of, Auckland's heritage issues, particularly as where it concerns Ngāti Whātua Ōrākei, our hapū and our wider iwi's rich relationship to the Tāmaki isthmus and the wider Auckland region. In that role I was a conduit between Ngāti Whātua Ōrākei and Auckland City Council (as it then was) on matters requiring Māori engagement such as resource consents.

9 I have also acted on behalf of Ngāti Whātua Ōrākei as a spokesman for Treaty claims, a researcher for the cultural redress matters and as a Treaty negotiator. I have done this work in various capacities: as an employee of the Ngāti Whātua Ōrākei Trust and its pre-settlement entities; on my own personal time; and more recently as an elected representative of the Trust.

10 I hold a Bachelor of Arts from the University of Auckland, majoring in Geography and Māori Studies. I guest lecture across a number of faculties from Māori Studies, Geography, Planning, the Business School and Elam. I **append** a full copy of my CV to this statement.

11 Most importantly I have visited most of the sites I talk about in this evidence, and continue to visit them on a regular basis. I frequently wānanga (meet and discuss) at these sites with whānau, iwi members, students as part of a walking lecture and for anyone who is interested in learning more about the history of these sites. I

consider this as an active expression of my obligations as a kaitiaki for these kōrero and these sites our tūpuna lived and loved.

12 My evidence in this proceeding will cover a number of areas, including our history, area of predominant interest (rohe), our Treaty settlement, our tikanga, and the journey that has brought us here today. Where my evidence covers matters of history and tikanga, I confirm that my evidence is drawn from my own research, knowledge and understanding which I have tested with kaumatua and Te Reuroa, our cultural committee, and that it is true and correct to the best of my knowledge and belief.

I. A BRIEF HISTORY OF NGĀTI WHĀTUA ŌRĀKEI AND ITS ROHE

Background

13 The Ngāti Whātua Ōrākei 'heartland' or the area we exercise ahi kā over encompasses the majority of the Tāmaki isthmus. The isthmus or Tāmaki as we know it, is the area of land between the two rivers and waka portages, with Te Whau in the west and Te Wai o Taiki in the east.

14 Our rohe extends from Kohimaramara (Mission Bay) north west up the inner Waitematā as far as Tauhinu Pā near Riverhead where we meet with our Te Taoū o Kaipara relations. We acknowledge shared interests with our close relations Te Kawerau a Maki around One Kiritea (Hobsonville), Mānu Te Whau (Massey) and Ōrangihina (Te Atatū Peninsula).

15 On the east of our border we recognise the primary mana whenua interests of Ngati Paoa in an approximate line from Kohimaramara (Mission Bay) to the Māngere inlet and back along the coastline of Te Wai O Taiki back to Kohimaramara.

16 Our western border with Te Kawerau a Maki runs from Te Kōtuituitanga in New Lynn to Te Whau (Blockhouse Bay).

17 Our southern borders run from Te Whau Pā on the northern shores of the Manukau back to Onehunga, then from the Māngere Inlet to the Waitematā and to Kohimaramara.

18 In the south west, although we had customary fishing rights there, we recognise our very close relatives of the former Te Waiohua confederation as holding the primary mana whenua rights, particularly at Āwhitu, Māngere and beyond. Our rights in those areas were through our Waiohua-Ngāti Te Ata whakapapa. **[307.04304]**

19 Ngāti Whātua Ōrākei has engaged historical experts to provide evidence in this litigation about the tribal, tikanga and colonial history of Ngāti Whātua Ōrākei. Their evidence explains the origins of Ngāti Whātua Ōrākei as the three hapū of Te Taoū, Ngā Oho and Te Uringutu, and how they came to be known as Ngāti Whātua Ōrākei by reference to:

19.1 Ngāti Whātua Ōrākei's whakapapa and prominent rangatira;

19.2 Ngāti Whātua Ōrākei's whakapapa as it relates to the Ngā Iwi, Ngā Oho, Waiohua and Ngāti Te Ata and the first peoples of the South Kaipara and Tāmaki;

19.3 the battles and alliances that defined Ngāti Whātua Ōrākei and our rohe, and our relationships with neighbouring iwi and hapū (and their rohe);

19.4 the customary use of the resources of Tāmaki that generally can be described as the 'ahi kā';

19.5 the signing of the Treaty of Waitangi in 1840;

19.6 interactions with Pākeha, in particular the group of settlers associated with Governor Hobson who established a capital city in Tāmaki Makaurau on land given to them by Ngāti Whātua rangatira Apihai Te Kawau;

19.7 the practices and policies of the Crown that rendered Ngāti Whātua Ōrākei virtually landless by 1855; and

19.8 Ngāti Whātua Ōrākei's continuous presence within its rohe (despite the landlessness) to the present day, and so

maintaining our status as the mana whenua of our rohe Tāmaki Makaurau.

20 I do not intend to repeat the evidence of other witnesses except where necessary and I am also aware that my Whāea, Margaret Kāwharu is giving detailed evidence of the history of our iwi from Ngāti Whātua Ōrākei's records and viewpoints. I am also aware that Te Kurataiahao Kapea will share a perspective on our history to this Court in te reo Māori.

21 Instead I will describe the raupatu or the process of the military takeover of Tāmaki, describe the rohe of Ngāti Whātua Ōrākei by reference to geographical sites of significance that define our rohe, as well as the customary practices such as food cultivating, fishing and seasonal migration.

22 In addition to the mere presence of people within an area, these activities are an important part of establishing and maintaining mana whenua through ahi kā roa (permanent occupation through, among other things, the ability to feed, shelter and protect the hapū).

23 Ngāti Whātua Ōrākei holds mana whenua within its rohe on account of three main pillars:

23.1 first, take raupatu or the taking land through military conquest;

23.2 second, take tūpuna or whakapapa; and

23.3 third, ahi kā.

Take raupatu

24 Ngāti Whātua Ōrākei took control over the Tāmaki isthmus by military conquest.

25 The first relevant military conquest was that of the South Kaipara by Te Taoū over Ngā Iwi and Ngā Oho in the late 17th century. These involved the Rangatira Hakariri, Poutapuaka, Te Atiakura, Tumupākihi and Tarapākihi.

26 The second and main military conquest was that of Tāmaki proper after Te Taoū rangatira, Te Wahaakiaki comprehensively defeated the Rangatira and paramount Chief of Te Waiohua, Kiwi Tāmaki in about 1740. This penultimate battle was fought at Paruroa (Big Muddy Creek) on the northern shores of the Manukau. Te Taoū had enticed the all-powerful Kiwi into a battlefield of their choosing by first attacking Pā at Āwhitu, Tara-taua and Puke Horo-Katoa across the harbour from Karangahape (Cornwallis) having crossed using mōkihi or rafts made of rushes.

27 A Waiohua account by Rongonui Kahupākē of Pūkaki of one of these 'pre-battles' also describes Wahaakiaki camping at Matenga-Rahi (Hillsborough) in full view of those at Puketūtū Pa which had been strengthened to prevent the enemy crossing Te Ara Tahuna (Path of Sand-banks) and attacking Māngere Pa. The first attack by Te Taoū was repulsed. They then returned to Mātenga-Rahi in wait. Water and food were running low so a decision was made by those at Puketūtū to retreat at night to Mt Māngere. Te Taoū spies heard of the plan and made a mock retreat of Hillsborough to embolden those at Puketūtū to leave their stronghold. At night an ambuscade of Te Taoū was made on the fleeing group with many perishing on both sides. This battle is known as Te One Rangā of 'The Stirred Up Sands'.[1]

28 These attacks angered and roused Kiwi who responded by calling his allies from all parts of Tāmaki including Maungakiekie, Māngere, Ihumatāo, and Moerangi. The Ngāti Huarere section were led by Rauiti and his tuakana Tai-Horo living at Te Tātua a Riukiuta (3 Kings) joining the battle as Kiwi was their elder cousin and 'his troubles involved them also'.[2]

29 An old proverb for Te Waiohua is that they are as 'numerous as ants' and with waka launching from Onehunga and Te Whau it was said, 'Ka kapi te moana' - the sea is covered over with waka

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[1] Geoff Fairfield (1938 pp.119-129) in his paper entitled 'Puketutu Pa on Weekes' Island, Manukau Harbour', that was published in the Journal of The Polynesian Society.

[2] 'A legend of Te Tatua pa' by Graham & Ngahuripoko, Journal of the Polynesian Society, Vol 30, 1921, pp.164-171.

heading for battle. Wahaakiaki had 60 men and Waitaheke 235 men.[3] All of them highly trained warriors. The battle ensued at Paruroa near the Nihotupu Kāinga of Te Kawerau a Maki who watched from the side-lines in neutrality given they were too closely related to both sides. Wahaakiaki's battle plan was to flee in mock-retreat up from the coast to the ridge ordering his troops to only turn and fight the pursuing Waiohua when they saw the Waitematā. This is approximately the Scenic Drive ridgeline today. With gravity and momentum on their side the highly trained Te Taoū forces turned upon seeing the Waitematā and 'they fell fiercely upon the Waiohua'.

30 Wahaakiaki and Kiwi met early in the battle with the Waiohua Rangatira falling to the second blow. Waiohua were now in a state of panic and so they fled to their waka at Paruroa. Waitāheke caught one waka hauling it in with his patu-paraoa (Whale-bone longstaff). It is recorded that 3,000 Waiohua fell that day. The battle is still remembered as Te Rangi Hingahinga Tahi – the Day many chiefs fell together.

31 The raupatu process continued with other formidable Pā falling easily. Rauiti and his older brother Tai-Horo died at Paruroa so Te Tatua a Riukiuta succumbed quickly to Te Taoū. Te Horo Pounamu their sister was spared as she was married to a Kawerau a Maki man. The citadel of Maungakiekie the largest man-made earth fortress in the southern hemisphere and a wonder of Māori city planning and engineering was also taken.

32 Te Taoū, joined by all Ngāti Whātua, then took further advantage of the weakened Waiohua and sacked a number of headland Pā on the Waitematā. These were Kohimaramara followed by all the Pā around Ōrākei. The following day Taurarua (Judges Bay) and Mangahekea (Albert Park) also fell.

33 The name Taurarua or 'annoying chant' refers to the battle where Ngāti Whātua warriors were goaded into action by the occupying

[3] From 'An Historical Narrative Concerning the Conquest of Kaipara & Tamaki by Ngati-Whatua', by P. Tuhaere, JPS Vol 32, 1923, pp232-236.

Waiohua forces inside the pallisades of the Pā. The insulting chant mocked fallen comrades of the invading Ngāti Whātua being eaten by the Araara or Trevally fish in the waters of the Waitematā. Ngāti Whātua to this day are forbidden to eat this fish given Rongomai, the captain of their founding waka, Mahuhu-Ki-Te Rangi, was eaten in the Kaipara by the Araara following his drowning there.

34 I understand that Te Ākitai Waiohua had significant coastal pa sites. For example, Taurarua Pā (Judges Bay) was held by Waiohua until the 18th century when its chiefs, twin brothers Humataitai and Hupipi, were defeated in battle. Te Ākitai Waiohua also occupied until these battles certain places at Horotiu on Queen Street, Te Hororoa on Anzac Avenue and Whakatakataka (Ōrākei).

35 I distinctly recall hearing Te Ākitai leaders acknowledging the fall of these pā and the defeat of their eponymous ancestor Kiwi Tāmaki at the hands of Te Taoū in a number of local government and resource consent fora that I have attended and gave evidence in. I consider that is an important statement of Ngāti Whātua Ōrākei's take raupatu in Tāmaki.

36 Te Taoū returned to Kaipara and considered their next moves. Tuperiri now took the lead assembling the tribes of Kaipara as he was driven to extract utu for the murders of his sisters Tangihua and Tahatahi by Kiwi Tāmaki at Mimihānui. It is about this time they made further plans for completing the raupatu with plans for the occupation of Tāmaki.

37 Waiohua under their chiefs Mahitokotoko and Mahikourona and others had regrouped at Mt Māngere to make what would be their final stand spreading shells around the Pā that they might hear the invading forces. Tuperiri ordered his troops to lay their dog skin cloaks to make a path muffling the sounds of the scrunching shells beneath thus taking the Pā by surprise. All were killed except a few including Te Moumou who went to live with Ngāi Tai at Hunua. Eruera Paerimu's grandfather Tiaki was spared. Eruera Paerimu was an original trustee of the 'Ōrākei Block'.

38 "This was the last pā, and the termination of the warfare. Te Tao-u and Tuperiri then settled down upon his land at Tamaki."[4] The Waitangi Tribunal noted in the Ōrākei Report that:[5]

> …there can be no doubt that from the killing of Kiwi Tāmaki of Waiohua, Te Taou of Ngati Whatua held the mana of Tāmaki isthmus.
>
> **[311.07123]**

Whakapapa

39 Ngāti Whātua Ōrākei holds the mana whenua within its rohe due to the second pillar being Take Tūpuna or whakapapa. Te Taoū Rangatira whilst still in the north Kaipara at Pouto in the mid-17th Century married with Nga Iwi women. These unions included Tarakete (son of Ihenga) marries Rangiteipu eldest daughter of Haumoewhaarangi. Their son is Tumupakihi. Father of Wahaakiaki.

40 After Te Taoū conquered the South Kaipara area in the late 17th century, they decided to settle there. A key union following this invasion and occupation was Hukatere the son of Tarapakihi, to Toukararae of Ngā Oho. Their son was Tuperiri.

41 Tuperiri's sons from his marriage to Kuraroa his first wife of Te Taoū of Kaipara were then wed to Waiohua-Ngati Te Ata women. Their son Tarahawaiiki betrothed Mokorua, who was the daughter of Te Hōreta and Maringi. Te Hōreta was a grand-son of Te Ata I Rehia, who descended from Hua Kaiwaka and Rau Whakiwhaki. Kiwi Tāmaki also descended from Hua Kaiwaka however from another wife, Rangihauāmoa. Another of Tuperiri and Kuraroa's sons, Tomoaure, married Te Hōreta's other daughter Te Tahuri from another wife Huia Wairua.

42 These marriages combined the whakapapa of the Te Taoū who also brought with them to Tāmaki their Ngā Iwi and Ngā Oho whakapapa attained in the Kaipara generations earlier, with that of the Waiohua of the Tāmaki isthmus. The converging of whakapapa in these two

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4 Paora Tuhaere "An Historical Narrative Concerning the Conquest of Kaipara and Tamaki by Ngati Whatua" (1923) 32 JPS at 223.

5 Waitangi Tribunal *Report of the Waitangi Tribunal on the Ōrākei Claim* (Wai 9, 1987) (the **Ōrākei Report**) at 18. **[311.07123]**

marriages in particular, of the invading and occupying Te Taoū with that of the ancient Tāmaki lines through Te Horeta's daughters established their descendants – the 'Ngāti Whātua Ōrākei' as the "masters of the isthmus".[6]

43 From these marriages emerged the generation that lead Ngāti Whātua Ōrākei through the turbulent musket wars, the negotiations with Ngāti Paoa and Ngāti Mahuta that allowed for the peaceful re-settlement of Tāmaki following the end of those wars, and the 'fetching' of Governor Hobson to establish his Government on the Waitematā as an ally of Ngāti Whātua Ōrākei. Apihai Te Kawau the son of Tarahawaiiki and Mokorua would take the place of Tuperiri before him and became known far and wide, given his whakapapa described above, as the 'Man of Many Cousins'.

Ahi kā

44 Ngāti Whātua Ōrākei holds mana whenua within its rohe as they have maintained ahi kā over the rohe since Tuperiri's conquest in 1740.

45 Tuperiri built his main pā at Hikurangi just below the summit of Maungakiekie on the cusp of the three volcanic craters. Tarahawaiiki, Tomoaure and their brothers Te Whakaariki and Paewhenua then established kāinga and a defensive network of pā across the isthmus. Tomoaure with Te Tahuri was based mainly with his wife's iwi at Āwhitu and Māngere. In time they became known as Te Uringutu. Paewhenua and his wife Paretaua were based at Okahu, Waipapa (Mechanics Bay) and Te Tō (Freemans Bay). Te Whakaariki lived at Waipapa, Ōkahu and Te Tō on the Waitematā. Tarahawaiki moved across both harbours with Pā at Maunganui (Birkenhead), Te Onewa (Northcote), Māngere and Puketāpapa.

46 From 1740 to 1840 therefore Ngāti Whātua Ōrākei had their food production in the central isthmus organised into gardening and

[6] I H Kāwharu, *Ōrākei: A Ngāti Whātua Community* (New Zealand Council for Educational Research, Wellington, 1975) at 5.

fishing circuits themselves dictated by soils, fish stocks and the native calendar (maramataka).

47 There were numerous fishing circuits around both the Waitematā and Manukau Harbours, generally commencing in early spring and using fishing stations when distant from main settlements. For instance, shark and snapper in the Waitematā were obtained off Kohimaramara, Ōkahu, Okā (Herne Bay), west around the Harbour off Te Whau, north to Pitoitoi and Tauhinu, south and east to Ouruamo and Ōnewa. In the Manukau there were abundant pipi, kina, pāua, kūtai and tio all along the northern shore especially from Te Whau to Karangahape. Off Māngere/Ihumātao and Puketūtū Island, there were pātiki and kahawai as well as shark.

Working the land and sea – ahi kā[7]

48 The next three generations of Ngāti Whātua Ōrakei following the brothers Tarahawaiki, Tomoaure, Te Whakaariki and Paewhenua consolidated their holdings on the Tāmaki isthmus concentrated at large kāinga at Onehunga/Māngere and Ōrakei. Onehunga and Māngere though separated by the portage was easily crossed by foot at low tide and operated as a single large kāinga complex. This area was attractive because of its concentration of good garden soils, sea resources and route junctions across the isthmus.

49 The Onehunga-Māngere complex was separately backed by hundreds of acres of light, productive soils which enabled depleted garden plots to be continuously relocated adjacent to the main settlement. Both sectors were adjacent to marine resources, the southern part of Māngere being inside one of the seasonal centres of marine resource exploitation, while the site complex was focally situated on movement routes which covered the whole expanse of the isthmus between the Upper Waitematā and Manukau Heads and linked it with neighbours in all directions.

50 Once established, Ngāti Whātua Ōrākei exercised its influence across the isthmus through agriculture and fishing. This can be

[7] For this section generally, see Agnes Sullivan "Māori Gardening in Tamaki Before 1840" (PhD Thesis draft, 1994), at 3, 23, 10 Table 6 (A1, B1, C1, E1). **[303.01638]**

demonstrated from how the iwi interacted with the land across the four seasons in peaceful times. The start of the Māori year is in winter and at this time Ngāti Whātua Ōrākei would collect together in the centralised residential zone at Onehunga/Māngere. During winter, garden work would start around this area, with potato and kūmara being grown in Onehunga and kūmara at Māngere. There would also be some fishing of snapper at Ōrākei as well.

51 Moving into spring, Ngāti Whātua Ōrākei moved out from Māngere and Onehunga to subsidiary sites and harbour shores for planting. In particular, late spring was generally the busiest time of year as one-third of the year's planting was being done and fishing begun. Gardening areas on the isthmus would cycle depending on soil exhaustion. One later cycle was at Horotiu (modern day Queen Street), then moving to Rangitoto-Iti (Remuera) and then to Ōkahu. Ōrākei was also used. Different locations around the isthmus were better for growing, with Remuera being the most productive ground for kūmara. Fishing gardens were also planted along the harbour shores of Manukau and the Waitematā to prepare for the upcoming summer season of fishing.

52 In summer, fishing was the iwi's full time focus, with most of the population dispersing across the isthmus in a methodical manner. First they'd move west from the residential zone with the first stop at Waitakere shore of Manukau harbour to Te Whau (Blockhouse Bay). This continued further along to Karangahape (Cornwallis) and to Huia, which was in Te Kawerau's rohe. These areas were rich with pipi and cockle but also pāua, mussels, crayfish and other sharks were fished there. The next fishing area was interior Manukau with fishing grounds between Ihumātao, Pūkaki, Puketūtū Island and lower Māngere which provided many seafood such as flat fish, mullet and scallops. After this, fishing canoes were dragged across to the Waitematā to begin fishing for shark and snapper. Ngāti Whātua Ōrākei started at Te Whanganui o Toi (or modern day St Heliers) and moving down to Okahu, then to Okā (or modern day Herne Bay) up to the exit of the Whau river by Avondale known as Rangi Matariki. From there they'd move north to Onewa

(Birkenhead), then Mangonui (Birkdale) and across to One Kiritea (Greenhithe), Pahiki (Herald Island) and Pītoitoi (Riverhead).

53 As autumn set in, most Ngāti Whātua Ōrākei returned to Onehunga-Māngere. Some would stay at the second base camp of Ōrākei to do part time fishing and to finish drying the fish catches. They also would engage in minor food-gathering activities in this area including gathering karaka berries for winter use and taking of curlew to be preserved in fat. Others would also go to the other end of the Waitematā at Te Whau for eeling.

54 Ngāti Whātua Ōrākei would also build pā at garden and fishing areas. These offered shelter and protection, particularly at fishing stations where people would work in exposed grounds. These fishing pā were at Karangahape first then Onewa and Ōrākei, with further pā built at Te Whau-Blockhouse Bay in 1836 and Ōkahu at 1839.

55 As I mentioned, this was Ngāti Whātua Ōrākei's practice during peaceful times. This routine was not followed when Ngāti Whātua Ōrākei strategically withdrew from the isthmus in around 1825 to avoid the incoming threat of Ngapuhi. Despite periodically returning to test the safety of Tāmaki it would not be until 1835 that Ngāti Whātua Ōrākei retuned permanently to the Tāmaki isthmus.

Other iwi within the Ngāti Whātua Ōrākei rohe

56 There are notable areas within greater Auckland that are within the rohe of other iwi. For example, the Hauraki Gulf Coastline was shared with Hauraki based iwi Ngāti Paoa. As mentioned Ngāti Paoa was also located to the east of our heartland, living on the Tāmaki river after Ngāti Whātua Ōrākei together with Ngāti Te Ata provided the land as a wedding gift in 1780. Ngāti Whātua Ōrakei were instrumental in this tuku through its own Ngā Iwi and Ngā Oho whakapapa acquired during the invasion of the South Kaipara and also the raupatu and occupation of the central isthmus. Tomoaure's marriage to Ngāti Te Ata's Mokorua was also crucial given her ancestry from Hua Kaiwaka. For this tuku to have authority and substance it required the mana of both Te Taoū through Tomoaure and Waiohua-Ngāti Te Ata through Te Tahuri.

57 Moving south-east, Ōtāhuhu and Pakuranga was under the control of Waikato/Tainui hapū including Ngāti Te Ata and Ngāi Tai ki Tāmaki. To the south-west on the southern Manukau and Āwhitu Peninsula as mentioned earlier lived the remnant hapū of the former Te Waiohua confederation along with the Te Uringutu hapū from Tomoaure and Te Tahuri. Out west, there is Te Kawerau a Maki. We have always recognised the rohe of Te Kawerau a Maki running along the West Coast on the Tasman Sea from Bethells Beach down to Whatipu and up from those beaches into the Waitakere Ranges.

58 As further illustration of our closeness to them, Mana of Te Kawerau a Maki was left secure at his village at Mangonui (Kauri Point). This is also known as Te Mātārae a Mana or Mana's Headland. Mana was married to Kiwi Tāmaki's sister Waikahina. Despite this, due to his close whakapapa to Tuperiri, Mana's safety was assured. A story about Mana given to George Graham by Hapi te Pataka and Iriti Karena notes that:[8]

> From this time onwards for some 50 years peace prevailed and Mana, now grown old among his people sent for his relative Tuperiri and commended to his care his Kawerau tribe. Tuperiri accepted the trust and Mana died in peace about 1790'.

59 Ngāti Paoa also fished at Waitematā with Ngāti Whātua Ōrākei and the two iwi often shared fishing stations.[9] **[302.00704]** However Ngāti Paoa was able to fish there because Ngāti Whātua Ōrākei gave them permission to do so. It was considered theft if an iwi fished around the isthmus without Ngāti Whātua Ōrākei's permission.[10] **[303.01638]**

60 Ngāti Whātua Ōrākei also gave land within its rohe to Waikato iwi such as Ngāti Mahuta and Ngāti Tamaoho in 1837. Blocks of land at Three Kings, Mount Hobson and Pukapuka were given to repay them for their services during the time Ngāti Whātua Ōrākei had withdrawn from the isthmus and received shelter on their lands.

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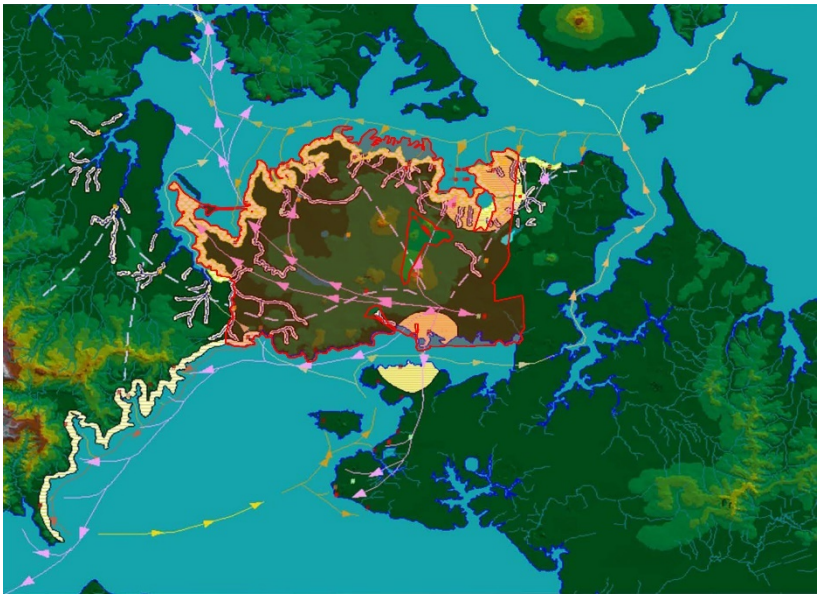
8 Graham MS 120 M15:15.

9 Ōrākei Minute Book No 1 (1868) at 48 (***OMB 1***). [**302.00704**]

10 Agnes Sullivan "Māori Gardening in Tamaki Before 1840" (PhD Thesis draft, 1994), at 3. **[303.01638]**

These lands were 'tuku rangatira' (an offering of land between high-ranking iwi leaders) and while that kind of tuku gave them rights of use and occupation, it was still subject to Ngāti Whātua Ōrākei's mana whenua and rangatiratanga. **[307.04304]**

61 All of these interactions with the natural resources and features within the Tāmaki Isthmus and with neighbouring iwi and hapū establish the area over which Ngāti Whātua Ōrākei exercised its ahi kā and shared with its allies as at 1840 is illustrated in the following map, which is an amalgamation of a map showing the seasonal migration and land use of our tūpuna **[331.20846]** and the area over which we were offered an exclusive right of first refusal over in our Agreement in Principal ("the 2006 RFR Land"). **[307.04693]**



Ngāti Whātua Ōrākei at 1840

62 On 20 March 1840, Apihai Te Kawau Te Tawa, the chief of Ngāti Whātua Ōrākei at the time, signed the Treaty of Waitangi at Mangere. My tupuna, Apihai's nephew, Te Reweti, signed also with his uncle Te Tinana.

63 Shortly after signing the Treaty, Te Kawau sent Te Reweti to the Bay of Islands with an offer of land for Hobson along the Waitematā if they moved their colonial capital to Tāmaki Makaurau. The block of land gifted was 3,500 acres large and started from the river Mataharehare near Newmarket and continued along the Waitematā

to the river Opoutūkeha (or modern day Coxs Bay) and then from both points to the summit of Maungawhau (Mt Eden). This transfer was executed under a Deed of Purchase No 206 on 20 October 1840 with Te Kawau, Te Tinana, Te Reweti and Te Horo representing Ngāti Whātua Ōrākei. This was the first transfer of land in Auckland by the Crown.[11] **[303.01766]; [301.00269]**

64 The second Crown transfer was from Ngāti Paoa of the Kohimarama block on 28 May 1841. This starts at Kohimaramara (Mission Bay) to Waiparera, then goes inland to Whakamuhu, then along the coast to Omaru, to Te Whanake, Te Puakawau, to Mokoia (Panmure), to Kororipo, to Tauoma and to Pakaukino, from there to the side of Maungarei (Mt Wellington) and reaches Waiatarua and from there to Kohimaramara.[12] **[303.01766].**

65 Ngāti Whātua Ōrākei was then involved in the third transfer. After the first transfer, Te Kawau promised that he would give more land once the Governor would reside amongst them in Auckland. This promise was honoured on 29 June 1841 when approximately 13,000 acres was given to the Crown. The eastern boundary of this land commenced at Ōrākei and ran down the road to Manukau (now Manukau Road) until it reached Maungakiekie. The Southern boundary ran from Maungakiekie to Puketāpapa (Mt Roskill) by Wairaka to the portage of Te Whau. The western boundary runs from the portage Te Whau to the boundary of the land in the first Crown purchase and from there along the sea coast to the bay of Ōrākei. This Deed was signed by Te Reweti, Te Kawau, Te Hira, Pāora Tūhaere and Taumata.[13] **[303.01766].**

66 There was also a smaller fourth transfer to the Crown for 200 acres on 14 September 1842. The names on the Deed of this block was that of Te Kawau, Reweti Tāmaki and Te Keene Tangaroa. This land is a triangle between Royal Oak, Three Kings and the line towards

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11 Maurice Alemann "Early Land Transactions in the Ngatiwhatua Tribal Area" (Master of Arts, University of Auckland, 1992) at 108. [**303.01766**]

12 Maurice Alemann "Early Land Transactions in the Ngatiwhatua Tribal Area" (Master of Arts, University of Auckland, 1992) at 110. [**303.01766**]

13 Maurice Alemann "Early Land Transactions in the Ngatiwhatua Tribal Area" (Master of Arts, University of Auckland, 1992) at 111. [**303.01766**]

One Tree Hill. This was the last piece of land given to the Crown before pre-emption was lifted.[14] **[303.01766].**

67 When pre-emption was lifted in March 1844, Ngāti Whātua Ōrākei entered into private transfers with Pākehā. Most of these transfers were in Mt Roskill, Onehunga and Maungakiekie. After this, Ngāti Whātua Ōrākei's only land left was the Ōrākei block and Remuera.[15] **[303.01766].**

68 However, these last landholdings grew smaller with blocks being sold at Te Tiki in Remuera, Ōhinerau (Mt Hobson), Pukapuka (Meadowbank) and Rarotonga (Mt Smart) to the Crown. These blocks were smaller than previously and occurred in the late 1840s and early 1850s. Ngāti Whātua Ōrakei also received significantly higher 'payments' for these reflecting by now they understood the reality of the Crown's true intent of extinguishing their rights completely and forever under Pākeha culture and law.[16] **[303.01766].**

69 As I will explain later in my statement, mana whenua means to receive mana from the land as a result of discharging obligations to it. As such, mana whenua is necessarily exercised only by the hapū or iwi that has been living on and with the land for an extended period of time, and so maintaining an ahi kā connection. This was the area over which the Crown, in the 2006 Agreement in Principle with Ngāti Whātua Ōrākei, offered a Right of First Refusal in respect of Crown properties within the area. This area was settled with the Crown after much negotiation, but reflects the extent of Ngāti Whātua Ōrākei's mana whenua interests in Tāmaki Makaurau as at 1840. This area corresponds directly with the customary use of resources as described above and is included below. **[307.04693]**

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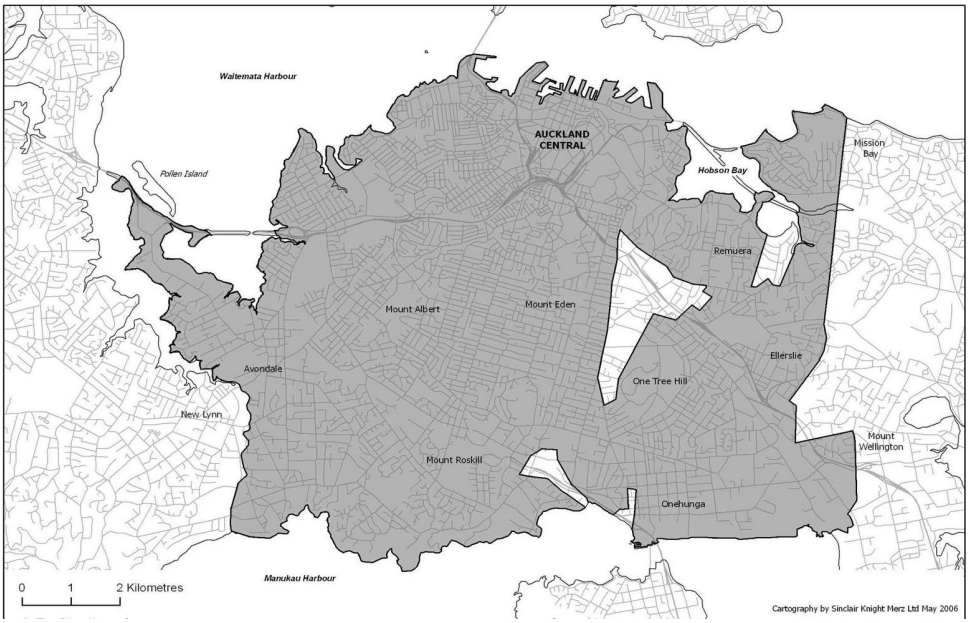
14 Maurice Alemann "Early Land Transactions in the Ngatiwhatua Tribal Area" (Master of Arts, University of Auckland, 1992) at 112. [**303.01766**]

15 Maurice Alemann "Early Land Transactions in the Ngatiwhatua Tribal Area" (Master of Arts, University of Auckland, 1992) at 112. [**303.01766**]

16 Maurice Alemann "Early Land Transactions in the Ngatiwhatua Tribal Area" (Master of Arts, University of Auckland, 1992) at 3. [**303.01766**]



The 1840 Transfer Land tuku

70 I want to emphasise the importance of the tuku Apihai Te Kawau made to the Crown and Governor Hobson in 1840. The tuku of this land (referred to in the statement of claim in this case as the "1840 Transfer Land") was an exercise of rangatiratanga (tribal leadership and authority) by Apihai on behalf of Ngāti Whātua Ōrākei.

71 The transfer was in the nature of a tuku. Tuku is a tikanga Māori concept whereby an area of land is donated or gifted by the chief/rangatira of the iwi holding mana whenua to another party. The purpose of a tuku was usually to establish a new relationship, maintain a previous relationship,[17] **[324.15728]; [332.21492]** secure an alliance or, less often, to repay a debt. Distinct from the Pākeha concept of a gift, the party making the tuku retains interests in and responsibilities to the land. According to tikanga Māori, there is no such thing as permanent alienation of land unless of course it taken by Take Raupatu military conquest (and even then, continuous occupation must follow a raupatu in order to establish a connection with the land and of any meaningful value). I understand that other witnesses are explaining this point in detail.

[17] Bruce Stirling "Ngāti Whātua o Ōrākei and The Crown: 1840-1865" at 7. **[304.02164]**

72 The purpose of the tuku of the 1840 Transfer Land was to attract Governor Hobson's people to Tāmaki Makaurau and establish a mutually beneficial relationship with the new settlers to Aotearoa. It was entirely within Apihai's discretion and power to make such a tuku, as the paramount chief of Ngāti Whātua Ōrākei at the time.

73 As explained in the Agreed Historical Account in the Ngāti Whātua Ōrākei Deed of Settlement, some insignificant compensation to Ngāti Whātua Ōrākei was provided. **[324.15728]** The money and goods that were exchanged would have been understood by Apihai and others as a koha, or tokens to mark the occasion itself. This is a common occurrence in tikanga Māori. Despite that, there was no expectation that Ngāti Whātua Ōrākei's ties to the land would be permanently severed, despite the Deed of Transfer indicating a 'sale' was made. That simply would not have been contemplated in this context. Whilst Ngāti Whātua Ōrākei did not have any role in drawing up the Deed of Transfer, nor its translation into te reo Māori, it does also use the words 'kia tukua' and 'kia hokona'.

74 I attended many hui with kaumatua and kuia from 2000 to 2007 where these concepts were discussed and the Crown's ongoing insistence that we 'sold' the land to them. We are adamant that the transfers in the period up the 'Fitzroy Waivers' were given purely under our tikanga as practised for generations as we knew nothing else having had very limited contact with Pākeha. By the mid-1840s the Fitzroy Waiver period was in full swing. In that time period, we are less certain about whether our people understood how a 'sale' worked in the Pākeha sense. With respect to the Remuera lands, sold in the 1850s, we understand those to be sales in the Pākeha sense. By that time, we understood well that the Crown had absolutely no regard for our tikanga and views about of any of the transactions. This is evident in the higher prices paid for the Remuera lands. Until the Remuera purchase, we had until then resisted all rapacious attempts for purchase by the Crown and Pākeha.

75 Subsequent interactions between Apihai and settlers like John Logan Campbell emphasise Apihai's firm intention that land over which Ngāti Whātua Ōrākei exercised mana whenua would not be 'sold'.

For example, in response to an enquiry from Campbell about acquiring land at Remuera and Ōrākei, Apihai's emphatic response was '*kahore, kahore!'* (no, no!). Te Kawau was also at that moment only interested in establishing relationships with powerful allies like the Governor as Campbell presented as a mere opportunistic settler.

76 It is difficult to overstate the significance of this land to Ōrākei. In preparing my evidence I reviewed an affidavit provided by my colleague and another iwi member, Rangimarie Hunia, who explained the significance of this land, and the damage to our mana which would result from it being given away. I completely agree with her view and so I have adopted some of her language in explaining it.

77 The land in the 2006 RFR Land, and the land gifted to the Crown by Ngāti Whātua Ōrākei in 1840, is land integral to our mana and identity as tangata whenua. We whakapapa to the tūpuna who established Ngāti Whātua Ōrākei's mana over this land, which has remained undisturbed to the present day save for the historic and recent actions of the Crown.

78 The 1840 Transfer Land is also a potent and profoundly significant symbol of our relationship with the Crown, and the people, of New Zealand. We see our gift as integral to our ongoing relationship with the Crown. We do not see the gift as an historical event, but rather a symbol of our ongoing connection to and mutual respect for our Treaty partner and, of course, of our Treaty partner's obligations to, and respect for, Ngāti Whātua Ōrākei, our mana, and our tikanga.

79 We are absolutely certain and each generation of Ngāti Whātua Ōrākei leaders have been groomed in this kōrero that we gave the land for mutual benefit. That despite the actions of the Crown we are continually reminded by our stories and our elders to remain firm in our partnership with the Crown. Bastion Point which is presented in evidence by my relation Taiaha Hawke is another case in point where our faith in the hoped-for alliance was sorely tested with history judging Ngāti Whātua Ōrākei actions fairly in time. Despite this court case we remain firmly committed to the potential

of a positive partnership with the Crown which Te Kawau always sought.

80 I understand that the Crown's actions which led to our iwi becoming virtually landless and making our Treaty claim, and the efforts of our iwi since 1840 to the present day to maintain our ahi kā and exercise our mana whenua in Tāmaki Makaurau are dealt with by other witnesses for the plaintiff. I will therefore continue from the point where Ngāti Whātua Ōrākei tried to settle its grievances with the Crown.

II. THE TREATY SETTLEMENT PROCESS

The Ōrākei Block (Vesting and Use) Act 1978

81 Ngāti Whātua Ōrākei began its journey towards settling its historical Treaty grievances in 1978, when the Crown offered back title to 29 acres of the land in the 700 acre Ōrākei Block that was acquired under historical public works legislation. This initial step also provided for a loan of $200,000 from the Māori Trustee.

The 1987 Ōrākei Report (WAI 9) and the Ōrākei Act 1991

82 Ngāti Whātua Ōrākei followed this event by filing one of the very first claims in the Waitangi Tribunal – WAI 9.

83 The WAI 9 claim covered was specific to the Ōrākei Block – the 700 acres investigated by Judge Fenton's Native Land Court between 1866 and 1868. The Waitangi Tribunal explored the circumstances in which title to the Ōrākei Block was allocated to 13 owners and how it was subsequently, over the course of a century, alienated from the hands of the hapū the last 13 acres of which were compulsorily acquired with the forceful eviction of remaining whanau.

84 The report was issued in November 1987.[18] The Tribunal found that the Crown's actions in respect of land at Ōrākei were contrary to the Treaty of Waitangi. It noted the Crown's persistent categorisation of the Ōrākei owners as willing sellers, when in fact the hapu had

[18] Waitangi Tribunal *Report of the Waitangi Tribunal on the Ōrākei Claim* (Wai 9, 1987) (the **Ōrākei Report**). **[311.07123]**

protested the destruction of communal title and the alienation of their lands in ways that could not be ignored. Ngāti Whātua Ōrākei were left virtually landless as a result of the Crown's land and purchasing policies.[19] **[311.07123]**

85 The Tribunal found that the whole of the Ōrākei Block should have been returned to Ngāti Whātua Ōrākei, and that the return of land at Bastion Point in the late 1970s went some way towards reparation for historical Treaty breaches. That alone was insufficient, however, and the Tribunal recommended an urgent economic contribution to Ngāti Whātua Ōrākei in order to establish an economic base to support the restoration of Ngāti Whātua Ōrākei's mana. The Tribunal noted that while the 1978 settlement was in accordance with the Treaty of Waitangi Act 1975, the Crown had failed to explore, acknowledge and provide for the full range of Ngāti Whātua Ōrākei's grievances.[20] **[311.07123]**

86 The Tribunal also recommended that the land at Bastion Point/Takaparawha be vested in partnership between Ngāti Whātua Ōrākei and the then-Auckland City Council for the benefit of the hapū and all the people of Auckland and that Ōrākei marae should return to Ōrākei ownership and custodianship.[21] **[311.07123]**

87 The Crown ultimately did not dispute the Tribunal's findings and recommendations, and a period of negotiations followed between the Ngāti Whātua Ōrākei Trust Board (the 1978 Trust Board was the precursor to the 1991 Trust Board, which eventually became the post-settlement governance entity which is the Ngāti Whātua Ōrākei Trust of today) and the Crown in order to settle the mechanisms for administering the redress.

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19 Ōrākei Report at 253. **[311.07123]**

20 Ōrākei Report at 271. **[311.07123]**

21 Ōrākei Report at 277. **[311.07123]**

88 The Ōrākei Act 1991 was passed as a result of those negotiations. The Act provided that:

88.1 the Ngāti Whātua Ōrākei Trust Board was the tribal authority mandated to represent all members of Ngāti Whātua Ōrākei;

88.2 an area of hapū land should be returned to Ngāti Whātua Ōrākei as its tūrangawaewae. That cannot be sold or leased, and must be used for a marae, Papakāinga, church and an urupā for the benefit of the hapū;

88.3 an area now known as the Takaparawha Reserve (Bastion Point) would be held as a Māori reserve known as "whenua rangatira" and jointly governed by the Trust Board and Auckland City Council. This co-governance model was the first of its kind and involved equal representation on the reserve board, with Ngāti Whātua Ōrākei holding the Chair and casting vote. Ngāti Whātua Ōrākei consider this aspect of our redress as just one of many examples throughout our history with the Crown where we have made a significant contribution towards the relationship between us as Treaty partners, for the benefit of all New Zealanders;

88.4 the Crown paid $3 million to the Ngāti Whātua Ōrākei Trust Board for the purposes of establishing an economic development base for housing and development; and

88.5 further land was returned to Ngāti Whātua Ōrākei to establish roads.

The Surplus Railway Land

89 Another chapter in our settlement story involves the multi-iwi claim to the Waitangi Tribunal in respect of surplus Crown railway lands across the country.

90 After the Waitangi Tribunal hearing on this matter in 1993, the Crown entered into a settlement with multiple iwi for these lands. From this package, Ngāti Whātua Ōrākei received a $2 million "on account", which essentially means that the sum is paid immediately

to the iwi group but is taken into account when settling the group's remaining Treaty claims. **[322.14303]; [306.03726]**

Towards a comprehensive Ngāti Whātua Ōrākei settlement

91 Following the several partial settlements in Auckland, it appears the Crown began developing its strategy for settling the wider Auckland area. By at least 1998, the Crown's research demonstrated its view of the tribal landscape in the Auckland area:

91.1 Ngāti Whātua Ōrākei is described as "the hapu who held mana whenua over the greater part of Central Auckland at 1840";

91.2 Ngāti Paoa is described as a "core Hauraki iwi, but with some Waikato connections. It had some 1840 interests in central Auckland, mostly on the coast e.g. Panmure on the north bank of the Tāmaki river, Takapuna, and Waiheke Island";

91.3 Ngāti Te Ata's claims at the time were centred on Waiuku Forest and the Āwhitu peninsula;

91.4 Waiohua was centred in South Auckland, and a prominent Waiohua researcher maintained that, for claims made in South Auckland, Ngāti Whātua and Ngāti Paoa should be considered in the context of their Waiohua whakapapa;

91.5 Ngāi Tai was considered to have fragmented interests across Howick, Torere (Bay of Plenty) and Umupuia;

91.6 There is no mention of "Marutuahu". However, the Hauraki Māori Trust Board at the time claimed coastal parts of Auckland, possibly through Ngāti Paoa.

[306.03790]

92 As stated previously where I outline our rohe and where our neighbours are situated, I therefore generally concur with the Crown's view of the tribal landscape as at 1998.

93 For Ngāti Whātua Ōrākei's part, negotiations towards our comprehensive Treaty settlement began in earnest in 2003.

94 Many aspects of the period between 2003 and 2006 have been considered by the Waitangi Tribunal in the WAI 1362 claim against the Crown's settlement processes with Ngāti Whātua Ōrākei. I will return to the report issued by the Waitangi Tribunal later in this statement to discuss its effect on how Ngāti Whātua Ōrākei and other Auckland Treaty settlements were negotiated and completed.

95 In the sections that follow I refer only to the aspects of the negotiations between Ngāti Whātua Ōrākei and the Crown that are relevant to this litigation.

Negotiations begin in 2003

96 The Ngāti Whātua o Ōrākei Trust Board entered into negotiations with the Crown in 2003.

97 The negotiations with the Crown were to settle all matters outside of the previous piecemeal settlement I have already described. As an on-account settlement, the $2m received as a result of the surplus railway land settlement would be taken into account when assessing the ultimate quantum in the comprehensive settlement. I note that Ngāti Whātua Ōrākei gave $1m to all 32 Ngāti Whātua marae as an expression of our whanaungatanga.

98 The remaining matters were essentially captured by the WAI 388 claim to the Waitangi Tribunal. In a newsletter to the hapū in 2003 summarising the historical events that would inform the negotiations, Sir Hugh Kāwharu described the rohe of Ngāti Whātua Ōrākei (our area of dominant influence) in the following way:

> Our rohe runs from West of the Tamaki River and Estuary across to the Inner Waitematā Harbour side of North Head, the whole of the Inner Waitematā Harbour and all points from there to the Tasman Sea, the North side of the Manukau Harbour from Cornwallis running from there to Onehunga/Mangere
>
> **[307.04304]**

99 Sir Hugh acknowledged the presence of other iwi towards the outer limits of Ngāti Whātua Ōrākei's rohe. These were:

99.1 Te Kawerau A Maki between Bethells Beach and Karekare and up into the Waitakere Ranges;

99.2 Te Ākitai and Ngāti Te Ata around Mangere and the southern side of the Manukau Harbour and up the Āwhitu Peninsula, with who Ngāti Whātua Ōrākei shared resources at the Manukau Heads;

99.3 Ngāti Paoa west of the Tāmaki River at Panmure (Mokoia), in the area gifted to them by Ngāti Whātua in the 1780s, and on the North Shore where the Hauraki Gulf coastline provided passage to Rangitoto;

99.4 Te Waiohua in Ōtāhuhu and Pakuranga, south-east of the Tāmaki River;

99.5 other Ngāti Whātua hapū north of the Tāmaki isthmus, including west of Dargaville and Maunganui Bluff, and east of Whangarei;

99.6 Te Waiohua hapū and Ngāti Tamaoho in the Three Kings, Mt Hobson and Pukapuka areas which Ngāti Whātua gifted to those hapu.

100 The negotiations also would not touch on any foreshore and seabed matters, or redress specific to water bodies such as the Waitematā and Manukau Harbours.

101 With those exceptions, the Crown and Ngāti Whātua Ōrākei would negotiate a settlement of historical grievances relating to our rohe, arising from Crown Treaty breaches since 1840, including:[22] **[304.02475]; [332.21492]; [307.04304]**

101.1 the 1840 and 1841 Crown land acquisitions under Hobson;

[22] **[307.04304]** See also two historical reports of Bruce Stirling commissioned by Ngāti Whātua Ōrākei for settlement purposes **[304.02164], [304.02475]**.

101.2 Ngāti Whātua Ōrākei's understanding of British land tenure;

101.3 Fitzroy Waivers of 1844 and 1845;

101.4 various decisions of Governor Grey relating to pre-emption and waiver purchases;

101.5 failure to set aside 'tenths' reserves for Ngāti Whātua;

101.6 failure to follow the Normanby instructions to set aside 15 per cent of the proceeds of land proceeds for the benefit of Māori;

101.7 the Hikurangi purchase in Waitakere; and

101.8 various North Shore purchases.

102 The Terms of Negotiation entered into defined the objectives of the negotiation as follows:[23]

102.1 negotiate in good faith a comprehensive, final and durable settlement of all the Ngāti Whātua o Ōrākei Historical Claims, which is fair in the circumstances;

102.2 achieve a settlement that will not diminish or in any way affect any ongoing rights that Ngāti Whātua o Ōrākei have arising from Te Tiriti o Waitangi/the Treaty of Waitangi and its principles, or extinguish any ongoing aboriginal or customary rights that Ngāti Whātua o Ōrākei may have;

102.3 achieve a settlement that recognises and acknowledges the nature and extent of the breaches of the Crown's obligations to Ngāti Whātua o Ōrākei under Te Tiriti o Waitangi/the Treaty of Waitangi and its principles, and as part of that the nature and extent of the losses suffered by Ngāti Whātua o Ōrākei;

102.4 provide a platform, which will assist Ngāti Whātua o Ōrākei to develop their economic base;

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[23] At [3].

102.5 achieve a settlement that provides the basis for developing an ongoing relationship between the parties (both in terms of Te Tiriti o Waitangi/the Treaty of Waitangi and otherwise);

102.6 achieve a settlement that will help restore the honour of the Crown; and

102.7 achieve a settlement that will recognise the mana of Ngāti Whātua o Ōrākei within its claim area.

[322.14312]

103 The Terms of Negotiation described the cross-claims policy (which became known as the overlapping claims policy) in this way:[24] **[322.14312]**

> The Trust Board and the Crown agree that cross-claim issues over redress assets will need to be addressed to the satisfaction of the Crown and Ngāti Whatua o Orakei before a Deed of Settlement can be concluded. The parties also agree that certain items of redress provided to Ngati Whatua o Orakei as part of the Deed of Settlement may need to reflect the importance of an area or feature to other claimant groups.
>
> The Trust Board and the Crown note that in areas where there are cross-claims 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.
>
> The Trust Board and the Crown will at an early stage in the negotiation process discuss the nature and extent of the interests of cross-claimant groups in the Ngati Whatua o Orakei area of interest. The Trust Board and the Crown will then consider what further action on the part of Ngati Whatua o Orakei is necessary to address cross-claim issues. The Trust Board will make reasonable endeavours at an early stage to assist in resolving cross-claims issues. The Crown will assist Ngati Whatua o Orakei as it considers appropriate. The Crown will carry out its own consultation with cross-claimant groups.

104 At this stage, the Crown described its approach to cross-claims as "a set of best practice principles that have developed over the course of a number of Treaty settlements". **[307.04353]** The Crown took on a largely facilitatory role, which wasn't without its limitations.

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[24] At [17]-[19].

For example, in an internal memorandum dated August 2003, the Office of Treaty Settlements (**OTS**)[25] acknowledged that the policy was "problematic" because:

104.1 settling groups may not accord a high priority to cross-claims, because their focus is on negotiating with the Crown;

104.2 any agreements between iwi may not be durable, particularly if the agreements are with cross-claimants who lack a Crown-recognised mandate;

104.3 where there are multiple cross-claimants, the settling group may not be able to resolve matters with all cross-claimants; and

104.4 cross-claimants are likely to view proceedings as a "zero-sum game", and have few incentives to engage in dialogue, let alone agree.

[307.04353]

105 Should cross-claimants and the settling group fail to reach agreement, OTS describes that the Crown "will make a decision as to whether or not to continue with the offer", as guided by "two general principles":

105.1 the Crown wants to reach a fair and appropriate settlement with the settling group; and

105.2 the Crown wants 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.

[307.04353]

[25] I understand that OTS have since been renamed to Te Arawhiti, however for the remainder of my statement I will refer to that entity as OTS.

106 Notwithstanding, the cross-claims policy required the Crown to make its decision "based on information provided by the settling group and cross-claimants, and in-house research".

107 OTS also described its use of exclusive and non-exclusive redress in light of cross-claims. Where several groups claim an area of land, the Crown considers the following points:

107.1 Has a threshold level of customary interest been demonstrated by each claimant group?

107.2 If a threshold has been demonstrated:

(a) What is the potential availability of other land for each group?

(b) What is the relative size of likely redress for the Treaty claims, given the nature and extent of likely Treaty breaches?

(c) What is the relative strength of the customary interests in land?

[307.04353]

108 The internal OTS memorandum appropriately provides no guidance as to how the cross-claims resolution between iwi and hapu should occur. That is obviously a matter best left to the iwi to carry out in accordance with tikanga Māori in the context of the particular issue being debated.

109 But the cross-claims policy gives decision-makers no guidance about how the Crown might understand and respect any tikanga Māori resolution between iwi, or how the Crown should exercise its decision-making powers in the event there is no resolution between iwi. Instead, there is only one reference to a "threshold level of customary interest", with no framework to assist the Crown in how it might affect the mana of either the settling group or the cross-claimant.

110 A further, and in my view fatal, flaw in the cross-claims policy is that it appears cross-claims negotiations between iwi are to take place only after an offer of redress is made to the settling iwi. I will return to this aspect of the policy in more detail later in my statement, but for now it is enough to note that that sequence of events almost neutralises any incentive from either the settling iwi or cross-claimant to engage in meaningful negotiations to resolve issues where the settling iwi has the prize of Treaty settlement redress almost secured. **[307.04492]**.

111 Ngāti Whātua Ōrākei's Treaty negotiations with the Crown occurred against this background.

Ngāti Whātua Ōrākei and cross-claimants

112 OTS identified a number of overlapping claimants relevant to its negotiations with Ngāti Whātua Ōrākei, including all of those Sir Hugh identified in his earlier Trust Board communications to the wider iwi. **[332.21094]**

113 At the early stages of negotiations, I understand that cross-claimants were identified on the basis of claimed iwi interests in Ngāti Whātua Ōrākei's area of interest.

114 From some of the documents that were filed in the Waitangi Tribunal and discovered in this proceeding, I can see that both Ngāti Te Ata and Paul Majurey on behalf of the Marutuahu Collective made objections to the redress offered to Ngāti Whātua Ōrākei.

115 In briefest summary:

115.1 Ngāti Te Ata's position was that the Ngāti Te Ata branch of Waiohua was not conquered by Ngāti Whātua Ōrākei in its 1740 raupatu over Kiwi Tāmaki's people, and that Ngāti Whātua Ōrākei was not dominant in the Tāmaki Isthmus at 1840 having recently returned from "refuge" from Tainui lands; and

[307.04366]; [307.04501]; [307.04665]; [308.05428]; [309.05538]

115.2 Marutuahu's position was that Ngāti Whātua Ōrākei had "not one piece" of land in Tāmaki Makaurau, and that it was Marutuahu rangatira Rautao that had defeated Kiwi Tāmaki's people. Marutuahu pointed to a number of Ngāti Paoa pa sites in the area, including North Head (Maungauika) and Mount Victoria (Takarunga). Marutuahu claimed that it had "mana whenua mana moana in Tāmaki Makaurau, including in the area claimed by Ngāti Whātua".

[309.05536]; [308.05331]; [308.05322]; [307.04457]; [307.04332]

116 I also understand that Marutuahu placed (and still place) significant emphasis on land in modern day Parnell and St George's Bay, which they say was reserved to them by George Clarke, who was the Crown's "Chief Protector of Aborigines". They say they have mana whenua there, and that events in the early 1840s are a key plank in their claims to central Tāmaki Makaurau. **[308.05290]**

117 In my view that is a drastically oversimplified version of events. Apihai had previously escorted Ngāti Paoa and Ngāti Whanaunga rangatira to a piece of land at Judges' Bay as a tuku as part of a series of peace-making hui to settle earlier disputes between the hapū. That tuku was again an exercise of the rangatiratanga of Apihai, as mana whenua of that land. The tuku did not extinguish any of Ngāti Whātua Ōrākei's connections to that land. Rather, they were strengthened as a result of the tuku.

118 At some point after that tuku, George Clarke purported to 'reserve' some land at Mechanic's Bay (St George's Bay) to Māori to stay on while visiting Auckland for trade. Ngāti Whātua Ōrākei would, of course, deny that George Clarke had the right to do that on land within Ngāti Whātua Ōrākei's rohe, because that occurred without our involvement as mana whenua. However, despite George Clarke's intention to provide only for Thames Tribes, the hostel that was eventually opened at Waipapa, in Mechanic's Bay was accessible to all Māori as well as some needy Pakeha. I do not see these events as a justification for a claim to land within the core

rohe of Ngāti Whātua Ōrākei, on a tikanga basis or based on objective historical facts.

119 I can see that as recently as 2016, Marutuahu were claiming that redress at Blackett's Point was justified for them, on the basis they would have had a presence on that land when trading as part of the "maritime system" in Auckland. **[334.22521]** However, Blackett's Point is some way away from St George's Bay. It is difficult to imagine Marutuahu people dragging produce-laden waka from the shores of the Waitematā up a near-vertical cliff to Taurarua Pā (now Blackett's Point).

Negotiating history

120 Separately but occurring simultaneously to the cross-claims process, the Crown was undertaking an appraisal of Ngāti Whātua Ōrākei's presentation of historical research. It noted "there is potential for serious exception to be taken" **[307.04347]**, with the Crown's historian initially noting:

120.1 that the state of Ngāti Whātua Ōrākei's historical research was "fundamentally flawed";

120.2 "Ngāti Whātua in 1840 were a very small tribe which claimed a very large area of land in a strategic location as theirs by customary right";

120.3 "they sought to escape both the threat of further Ngāpuhi attacks and the domination of the Waikato tribes";

120.4 "there is no reason to think that, in the situation which prevailed in March of 1840, Ngāti Whātua would have expected or required any 'undertakings' from the Crown beyond those explicitly made in the Treaty";

120.5 "the Crown's decision to move the capital of the Colony from the Bay of Islands to the shores of the Waitematā was a huge bonus for the tribe, but the crown did not expect to be given the land for free and Ngāti Whātua did not offer it on those terms";

120.6 "the so-called 'gift' of Auckland is a classic example of a myth fostered in equal measure by wishful thinking and incomplete research"; and

120.7 "in 1840 Ngāti Whātua placed themselves under the protection of the Crown, willingly accepted the creation of a European town on their doorstep, and set out to make the most of their opportunities".

[304.02648]; [307.04459]

121 The historian's conclusions operated so as to justify, from a historical perspective in relation to aspects of the events Ngāti Whātua claimed gave rise to Treaty breaches, that:

> It would not be advisable to concede Treaty breaches in the Auckland area relating to these sales without a better foundation than is at present available.

[304.02648]

Concluding an Agreement in Principle

122 The arguments against the strength of Ngāti Whātua Ōrākei's mana whenua in Tāmaki Makaurau by the Crown and other iwi were of course not new to Ngāti Whātua Ōrākei. Those same korero had been repeated to us throughout our history and passed down through generations of ancestors, and indeed formed the basis of many of our historical grievances. At that point in time, OTS required overlapping claimants to meet and discuss their differences. Some of these hui occurred before the AIP was concluded, and some after.

123 I can see from evidence provided by the former Chief Executive of the Ngāti Whātua Ōrākei Trust Board, Tiwana Tibble, in the Tribunal hearing, that Ngāti Whātua Ōrākei began approaching and circulating information to overlapping claimants in 2004, not long after Ngāti Whātua Ōrākei confirmed its Terms of Negotiation with the Crown.[26] **[309.05685]**

[26] At [12].

124 Mr Tibble described to the Tribunal:

> 22 I see the process of meeting as being important. First of all it reduces misinformation and any additional potential for conflict that would result. Secondly it has the capacity to improve the information held by all sides which must improve decision-making. Thirdly it provides continuing relationship and contact with the neighbours of Ngāti Whatua o Orakei which should enhance the future of such relationships. There are of course continuing relationships, both formal and informal, with the neighbours of Ngati Whatua o Ōrākei and this is another element to maintaining and improving whanaungatanga.
>
> 23 Having said that, there are certain matters where Ngati Whatua o Orakei and its neighbours put their various viewpoints and the reasons for them to each other, but they do not agree. That is an inevitable part of life and its reality has to be recognized.
>
> 24 The final question is what does Ngati Whatua think of its role in the process. Of course its first role is to obtain a settlement for Ngāti Whatua on satisfactory terms. The process that Ngati Whatua have undergone to date is slow, painstaking and detailed. If the question is whether what has occurred from the commencement of active direct negotiations in 2003 is an appropriate process, I say that it is hard to imagine a system that will work any better. One has to have a practical process that works. I cannot envisage a better and more practical process.
>
> **[309.05825]**

125 Ngāti Whātua Ōrākei held a number of meetings, which the following cross-claimants relevant to this litigation attended and were invited to present on the topic of "Unfulfilled promises from the Crown to Ngāti Whātua o Ōrākei":

125.1 10 December 2004: with Ngāti Te Ata at their Tahuna Marae at Waiuku;

125.2 11 December 2004:

(a) John McEnteer for the Marutuahu group as well as the Hauraki Māori Trust Board;

(b) Warena Taua for Te Kawerau A Maki;

(c) Emily Karaka for Ngāi Tai;

125.3 12 December 2006: with the Marutuahu Confederation;

125.4 23 January 2007: with the Hauraki Māori Trust Board;

125.5 9 February 2007: with Te Kawerau A Maki and Ngāi Tai (although these meetings did not go ahead); and

125.6 13 February 2007: again with Ngāti Te Ata.

[309.05685]; [309.05825]; [305.03413]

126 I can see from a record of the 11 December 2004 meeting in particular that John McEnteer on behalf of the Hauraki/Marutuahu that he expressed the following view:

> Hauraki have maintained that "we are here" and Ngāti Whātua cannot claim an exclusive title to this land.
>
> …
>
> When it comes to Ngāti Whātua negotiating remedies by property, monetary or any other means, Hauraki will be concerned if the crown hands over any properties that are rightfully theirs and they will fight to obtain them.

[307.04661]

127 Although this certainly isn't a comprehensive record of the hui, I cannot see a reference to any specific grounds of objection or material to substantiate the claim that "we are here". I note, however, that Sir Hugh Kawharu attended the meeting and expressed his view that Ngāti Whātua Ōrākei do not have "any grievances with other iwi". He is reported as saying:

> It is with the Crown where everyone's grievances are. Today's proceedings have been very helpful inn strengthening our resolve to fight our common enemy – The Crown".

[309.05685]

128 I recall this hui. John McEnteer arrived at Ōrākei marae on a bus from Thames with his people. He stood at the doorway of our whare, and waved his arms around pointing at various remarkable landscapes throughout the upper Waitematā and the Auckland CBD including Takaparawha and Rangitoto and claimed that they were "ours". That proclamation was made as a visitor, in English and was not informed by references to whakapapa or other cognisable tikanga. I would have expected a claim like this to be accompanied by a recital of whakapapa or by reference to other tikanga connections with the land he claimed was theirs. He certainly could not.

129 Following much negotiation on both fronts – being historical negotiations with the Crown and meetings held in accordance with tikanga with other iwi like Marutuahu and Ngāti Te Ata – Ngāti Whātua Ōrākei entered into an Agreement in Principle (**AIP**) for the Settlement of the Historical Claims with the Crown in 2006. **[322.14413]**

130 According to the OTS' *Guide to Treaty of Waitangi Claims and Negotiations with the Crown* sometimes referred to as the "Red Book", an Agreement in Principle:[27]

> … outlines the nature and scope of all settlement redress agreed as the basis for the final Deed of Settlement. An Agreement in Principle is non-binding on the Crown and the claimant group.
>
> **[334.22866]**

131 The work left to be done between signing the AIP and ultimate Deed of Settlement are "usually matters of detail and implementation".[28] **[334.22866]** That is consistent with the level of governmental approval required to reach the AIP point – including from the Minister for Treaty of Waitangi Negotiations and other relevant Ministers if redress affects their portfolios, and Cabinet. **[334.22866]** In my experience, there is very rarely a significant

[27] This is a 2015 version of the Red Book. There are others, for example the 2018 version at **[334.22866]**, which have been updated incrementally over the years.

[28] At 30.

alteration of course to the detriment of the negotiating iwi between AIP and Deed of Settlement stages.

132 The AIP included the following categories of redress for Ngāti Whātua Ōrākei:

132.1 Cultural redress at Maungakiekie (One Tree Hill), Maungawhau (Mount Eden), Puketāpapa (Mount Roskill) and Pourewa;

132.2 Statutory acknowledgements over several other maunga within the Tāmaki Isthmus;

132.3 $10 million in financial and commercial redress (including the $2 million of the railway settlement);

132.4 a Right of First Refusal (**RFR**) for 100 years over Crown land within the area referred to as the "2006 RFR Land" in the Statement of Claim in this litigation (reproduced earlier in my statement); and

132.5 the opportunity for sale and leaseback arrangements regarding NZ Defence Force housing land on the North Shore (Devonport in particular).

[322.14413]

133 Reaching the AIP stage of negotiations was momentous for Ngāti Whātua Ōrākei. For us it represented an appreciation on the Crown's behalf of the crucial role Ngāti Whātua Ōrākei had played in facilitating British settlement in Auckland, and the Crown's subsequent actions that breached the Treaty and left Ngāti Whātua Ōrākei in a state of near landlessness.

134 It is also important to acknowledge that by this stage in the process, the Agreed Historical Account (**AHA**) was finalised. I recall Sir Hugh's opinion that the AHA was the most difficult aspect of the settlement to negotiate. To Sir Hugh, it was very important that the Crown knew "exactly what it was apologising for". He used to say that it involved complete good faith by both sides in order to define

the events that would restore the mana of the Crown in the eyes of Ngāti Whātua Ōrākei following its many years of Treaty breaches and broken promises. **[308.05316]** The significant aspects of the AHA were:

134.1 the Crown's acknowledgment that Ngāti Whātua Ōrākei's occupation and resource use was widespread across the Tāmaki Isthmus, North Shore, upper Waitematā and Waitakere areas;

134.2 following Ngāti Whātua Ōrākei's temporary relocation to the Waikato, Ngāti Whātua Ōrākei "re-established" its settlements at Ōrākei, Karangahape (Cornwallis), Horotiu (Queen Street), Onehunga and other places in the Tāmaki Isthmus from about 1835;

134.3 Some inconsistencies between the English and Māori versions of the Treaty of Waitangi;

134.4 Te Kawau's offer of land in central Tāmaki Makaurau to Hobson (via Te Reweti), as an example of seeking mutual benefit from European settlement and a "desire for peace across the isthmus";

134.5 the Normanby instruction to the British Government to enter into land dealings with Māori in accordance with the principles of "sincerity, justice and good faith", adding that Māori "must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves";

134.6 the 20 October 1840 transfer of 3,500 acres of what is now the Auckland CBD following negotiations with Ngāti Whātua Ōrākei chiefs. The deed recording the transfer noted "te utu mo taua wahi wenua koia tenei". The English understood these words as "payment", but utu is a tikanga Māori principle that "represented a broader concept of reciprocity, ongoing mutual obligation and the maintenance of balance between groups";

134.7 the acknowledgment that the 1840 transfer was made "with a view to a mutually beneficial and enduring relationship";

134.8 Te Kawau's personal welcome to Hobson at Okahu Bay in March 1841, encouraging Hobson to "pick the best part" of "my land" and "place your people, at least our people upon it!", and the acknowledgement that the welcome "signalled the reciprocal relationships that Ngāti Whātua Ōrākei anticipated with the Crown and European settlers.

135 The AHA went on to detail the further land transactions entered into between the Crown and Ngāti Whātua, and the Crown's actions in alienating virtually all of the land that had once been subject to the mana of Ngāti Whātua Ōrākei.

136 Even though the AHA represents a significant departure from the Crown's earlier position that it should not concede any Treaty breaches in Auckland, there were, however, aspects of history that the Crown would not sign up to, and were included as background only to the AHA. These were included, essentially, as Ngāti Whātua Ōrākei's description of itself, and included:

136.1 Sir Hugh's translation to English of the Treaty of Waitangi as would have been understood by Māori in 1840, which differs materially from the original 1840 English version. For example, Sir Hugh considered that Māori would have had no conception of the word "kawanatanga" or "government" as used in Article 1 in the colonial context of sovereignty, and that Māori would have understood Article 2 to emphasise the Queen's intention to give chiefs complete control over lands and treasures according to their own customs;

136.2 the acknowledgement of the 1740 raupatu of Waiohua, and subsequent coming together of the Ngā Oho, Te Taoū and Te Uringutu hapū to what is today known as Ngāti Whātua Ōrākei;

136.3 the acknowledgement that Ngāti Whātua Ōrākei held ahi kā throughout the isthmus, and that doing so was an active

pursuit "governed by the reciprocal rights and duties between kin"; and

136.4 that Ngāti Whātua Ōrākei rangatira often made chiefly gifts – or qualified land transfers – in the nature of tuku rangatira, to create, secure and govern political relationships. Tuku rangatira meant "the mana or title being retained by the donor rangatira". I recall Sir Hugh remarking many times about the difficulty in achieving Crown acknowledgement about tuku rangatira in particular. His view was that the Crown did not wish to explicitly acknowledge that transfers of land could be made between Te Kawau and Hobson as the Queen's representative as equals. The Treaty, in the Crown's eyes, diluted and qualified the 'chiefly authority' of rangatira like Te Kawau. Ngāti Whātua Ōrākei obviously did not see it that way, as set out in Sir Hugh's influential interpretation of the Treaty that appears not only in our AHA but in the Cabinet Manual among other leadings texts.

137 Despite these differences, it is clear that the negotiations as recorded in the AIP left the Crown with the undeniable view that Ngāti Whātua Ōrākei held predominant interests in the Tāmaki Isthmus, and such interests justified the offer of an RFR that corresponds to the extent of those predominant interests. **[307.04693]; [307.04679]; [308.05316]**

Cross-claimants' challenge in the Waitangi Tribunal

138 Not long after entering into the AIP, various iwi with cross-claims into Ngāti Whātua Ōrākei's area of predominant interest filed an application for an urgent inquiry in the Waitangi Tribunal challenging the Crown's processes in negotiating a settlement with Ngāti Whātua Ōrākei.

139 The claimants made what the Tribunal described as "process failures"[29] by the Crown in only developing relationships with cross-claimants once the Crown had already formed a view about the

[29] Waitangi Tribunal *The Tāmaki Makaurau Process Settlement Report* (WAI 1362, 2007) **(Tāmaki Process Settlement Report)** at 1.

customary interests of the settling iwi – in this case Ngāti Whātua Ōrākei. **[319.12210]**

140 The Tribunal's report, released in June 2007, indicated that cross-claims issues had been considered by different Tribunals a number of times before. The Tribunal decided that "the time has come to step back from the narrow focus taken previously. If these problems keep arising, and are indeed getting worse, is there really something fundamentally wrong with the way Treaty claims are being settled?"[30] **[319.12210]**

141 So, what began as an urgent claim about the Crown's settlement processes morphed into an existential inquiry into the nature and justification of Treaty settlements generally. This was not the approach contended for by the parties making the application. For example, the statements of claim from both Marutuahu **[308.05415]** and Ngāti Te Ata **[308.05396]** show that the relief claimed was that the Crown was in breach of the principles of the Treaty of Waitangi when it entered into the AIP with Ngāti Whātua Ōrākei, that the AIP should not proceed to a Deed of Settlement in its current form and a recommendation that doing so would prejudice the claimants from reaching their own comprehensive Treaty settlement. The claims were essentially directed at the Crown's overlapping claims policy.

142 At this point I note that while I do not intend to retrace the detail of the claims before the Tribunal, I do want to make an observation about the nature and extent of evidence considered by the Tribunal. The claimants were able to provide comprehensive historical and tikanga evidence about the substance of their claims to hold interests in the area where Ngāti Whātua Ōrākei has always maintained a predominant interest. **[309.05725] [309.05738] [309.05748] [309.05731] [309.05822]**

143 Ngāti Whātua Ōrākei, on the other hand, provided evidence about its settlement processes with the Crown via its former Chief Executive Tiwana Tibble **[309.05685]** and a critique of historical

[30] Tāmaki Process Settlement Report at 1.

research provided on behalf of Marutuahu by Professor David Williams, who was a strategic advisor to Ngāti Whātua Ōrākei at the time. **[309.05620].** My understanding is that Mr Tibble and Professor Williams were cross-examined by claimants' counsel, and an account from the Ngāti Whātua Ōrākei Trust Board Secretary records that "the Tribunal over four days provided Ngāti Whātua with only 10 minutes of cross examination time" for other parties. **[309.06231]** We certainly were not expecting this, especially in an urgent inquiry about the Crown's *processes,* as distinct from the substance of interests in Tāmaki Makaurau. It also strikes me that the Tribunal's approach unfairly fostered a sense of 'us versus them' between the iwi parties to the claim, rather than seeking to find the right answer in the circumstances.

144 Against this background, the Tribunal made scathing findings about the Crown's settlement processes with Ngāti Whātua Ōrākei. It found the Crown had not complied with its own policy as set out in the *Red Book,* had not been transparent with the cross-claimants and had negotiated with them too late, which meant that their interests would not be considered or reasonably reflected in redress offered to Ngāti Whātua Ōrākei.

145 The Tribunal also levelled some criticism at Ngāti Whātua Ōrākei. For example, the fact that Ngāti Whātua Ōrākei had several small prior settlements led the Tribunal to characterise the Crown's actions to negotiate comprehensively with Ngāti Whātua Ōrākei as "the business of picking winners". The Tribunal explained:[31]

> Winners are groups who appear to offer the best chance of being able to deliver their constituency to a significant settlement.
>
> **[319.12210]**

146 Ngāti Whātua Ōrākei was a "winner" because:[32]

146.1 we had "already had success";

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31 Tāmaki Process Settlement Report, at 12.

32 Tāmaki Process Settlement Report, at 12-13.

146.2 we were "led by outstanding people like Sir Hugh Kawharu";

146.3 we were "high profile"; and

146.4 "when the winners are picked out, they feel and act more like winners. This can leave other tangata whenua groups in the district feeling like losers".

[319.12210]

147 Notwithstanding, and remembering that the Tribunal granted the claim an urgent hearing into matters of process, the Tribunal made substantive findings about customary interests in Tāmaki Makaurau. The Tribunal said:[33]

> In the pre-contact era, Tāmaki was likewise seen by Māori as a desirable place to live, no doubt because of its warm climate, multiple harbours, and good volcanic soil. Unsurprisingly, successive waves of invaders competed for dominance there down the centuries, and the early establishment of Pākehā settlement on the shores of the Waitematā only added to its attractions. Thus, it was – and remains – an intensively occupied part of the country, where constant habitation by changing populations of Māori as a result of invasions, conquests, and inter-marriage has created dense layers of interests. The disposition of those interests as between the various groups identifying as tangata whenua there in 2007 is the subject of controversy. The tangata whenua groups involved in that debate number about 10, of which six played an active part in our inquiry.
>
> We think that the combination of characteristics set out in the previous paragraph is unique. Moreover, unlike many other parts of the country that were intensively occupied by Māori, most land blocks did not go through the Native Land Court in the nineteenth century, and neither has the Tāmaki isthmus been the subject of a district inquiry by the Waitangi Tribunal. Compared with the usual situation, therefore, we have here less information about the occupation of the area by Māori in pre-contact times, and also about the effects of colonisation.
>
> We think that it would have been better if from the outset the Crown had recognised and acknowledged that the situation in Tāmaki Makaurau was and is complex.

[33] Tāmaki Process Settlement Report, at 13-14.

[319.12210]

148 Finally, the Tribunal criticised the Crown's approach to justifying cultural redress on the basis of "predominance of interests". The Tribunal said:[34]

> The use of 'predominance of interests' as a basis for giving exclusive rights in cultural sites to one group – even when other groups have demonstrable interests that have not been properly investigated – is a Pākehā notion that has no place in Treaty settlements. Where there are layers of interests in a site, all the layers are valid. They derive from centuries of complex interaction with the whenua, and give all the groups with connections mana in the site.

[319.12210]

149 I will make some preliminary comments about the "layers of interest" concept and return to it in more detail later in my statement where the approach was being played out. At this point it is enough to say that the layers of interest approach does not ground itself in tikanga Māori.

150 It is of course legitimate and true that, after an analysis of historical events and customary tenure, over the course of history more than one iwi or hapu would have had a connection with a piece of land or natural feature. The connection would be on the basis of a particular take, and may have been nurtured to the extent that group established mana whenua through ahi kā.

151 But two groups cannot hold mana whenua (or similar interests) at the same time. The very nature of mana whenua demands that it is held and maintained by one iwi and one iwi only. It is certainly a ridiculous notion that multiple iwi including those that have no whakapapa to each other can hold mana whenua for a particular place.

152 Take Maungakiekie for example. There is no dispute that Kiwi Tāmaki's people held that maunga in accordance with mana whenua up to about 1740. There is also no dispute that Te Taoū (the

[34] Tāmaki Process Settlement Report, at 96-97.

relevant hapu of Ngāti Whātua Ōrākei at the time) defeated Kiwi Tāmaki in battle and established themselves at Maungakiekie. Over generations, including through marriages with some Waiohua, namely the Ngāti Te Ata branch, Ngāti Whātua Ōrākei established mana whenua through ahi kā and occupied Maungakiekie continuously as its primary pā site. It is an absurd suggestion to me that those two distinct mana whenua relationships could be taken into account in a Treaty settlement process designed to provide redress in relation to an agreement signed between the Crown and Māori in 1840.

153 The Tribunal recommended, among other things:[35]

153.1 that the draft settlement with Ngāti Whātua Ōrākei should be put on hold "until such time as the other tangata whenua groups in Tāmaki Makaurau have negotiated with the Crown an agreement in principle, or a point has been reached where it is evidence that, best endeavours notwithstanding, no agreement in principle is possible";

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

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

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

(b) an appropriate distribution of the commercial redress available;

[35] Tāmaki Process Settlement Report, at 107-108.

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

(d) historical accounts of the groups' interactions with the Crown that either:

(i) properly recognise each other's existence and differing accounts; or

(ii) state that each reflects that group's reality, and is not intended to be reconciled with the others' accounts."

[319.12210]

154 The Tribunal also recommended:[36]

154.1 Crown policy and practice with respect to managing relationships with groups other than the settling group is explained more fully in the Red Book; and

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

[319.12210]

155 Ngāti Whātua Ōrākei was incredibly disappointed with the Tribunal's report. We felt the report unfairly penalised Ngāti Whātua Ōrākei for progressing the settlement of its historical grievances with the Crown. The cross-claims into its heartland were particularly offensive, and without any justifiable historical or tikanga basis.

156 Following the release of the Tribunal's report, Ngāti Whātua Ōrākei remained ready and willing to progress its settlement with the Crown and discuss any concerns with neighbouring iwi at the same time. **[309.06231] [332.21248]** Ngāti Whātua Ōrākei was open

[36] Tāmaki Process Settlement Report, at 108.

to discussions with other iwi about how the redress offered in its AIP could be amended, if the assertion of rights were justified by research and could be discussed kanohi-ki-te-kanohi.

157 However, the Crown appeared to understand the report as having an "irreversible" effect on the settlement landscape in Auckland, and sought to consult extensively with cross-claimants before it could decide on next steps. **[332.21248]**

158 That essentially had the effect of stopping our settlement in its tracks, which would not pick up again in earnest until 2009 under an entirely different framework.

The Crown reviews the Red Book

159 In the interim, I can see from documents disclosed by the Crown in this litigation that OTS was internally reviewing the overlapping claims policy in the *Red Book* in light of the Tribunal's report. **[O 332.21237], [332.21248], [332.21260], [332.21264], [332.21272], [332.21284], [332.21298], [332.21313], [332.21351], [332.21421]**

160 Notwithstanding the fairly in-depth review, it appears the Minister at the time was of the view that "current negotiations practice is within the current policy settings" and "is a more flexible interpretation of Government policy". The claimed flexibility would allow the Crown to take a "regional approach" to settlements by identifying groups within a region that the Crown should consult with much earlier in the negotiation process, to providing incentives to encourage concessions. The Crown "may ultimately still have to make a call as to whether it considers overlapping claims have been satisfactorily addressed." **[332.21411]**

161 The review of the policy settings does not appear to have engaged with how the Crown can better understand and take into account tikanga Māori or customary interests' issues that may arise out of the revised overlapping claims process. The concerns raised by one Te Puni Kōkiri official are exactly the sort of issues that the *Red Book* fails to address:

> I am concerned that there is something missing from the problem definition. It strikes me that part of the problem about mandate and overlapping claims is that the Crown may lack sufficient understanding of local circumstances and, in particular, the underpinning cultural dynamics (for example, we tend to talk about overlapping boundaries rather than the strength of the whakapapa relationship between neighbouring iwi; we sometimes fail to recognise that 'border' communities can whakapapa to neighbouring iwi, and that there are quite sophisticated mechanisms to manage this ... these aren't particularly sharp examples, but should illustrate my point).
>
> If we factor this into the problem definition, this has flow-on effects for the proposed objectives and options. For example, in the discussion of proposed objectives, the approach might be 'focusing on early, broad, inclusive and timely engagement, *that is built upon* a *thorough understanding of local circumstances and the cultural dynamics that drive these circumstances'.* At the moment, some of our enhanced role work is unpicking the cultural dynamics at the proverbial bottom of the cliff. It might be more constructive to do this at the front end. This approach would be the raison d'etre of proposed taumata kaumatua.
>
> **[332.21351]**

162 The Crown's policy is to simply 'make a call' if discussions between overlapping claimants does not show any appreciation of these complex issues, which were not considered in any depth (if at all) in the review of Treaty settlement policy.

163 OTS and its Minister did not consider that any revised approach to overlapping claims required an amendment of the *Red Book* itself. Rather, OTS adopted a communications strategy to reinforce the flexibility in Treaty settlement practice and policy. **[332.21411]**

164 An example of the communications strategy was approved by the Minister for Treaty of Waitangi Negotiations on 20 August 2008. The extract below sets out the Crown's "regional approach":

> As you will be aware, Crown negotiation practice for historical Treaty settlements has been evolving as the Government pursues the goal of completing the settlement process by 2020 and responds to sector feedback from claimant groups and the Waitangi Tribunal. Treaty settlement policies allow for considerable flexibility. Exploring this flexibility has been the principal focus of our efforts to expedite fair agreements and allow claimants to realise the potential of settlement packages as quickly as possible.

> Where this approach has been tested the results have been very encouraging. For this reason, *Ka tika a muri, ka tika a mua: Healing the past, building a future* remains the basis of Treaty settlement policy. Agencies have been directed to apply the policies within it more flexibly and to consider innovation and new approaches where they will achieve the intentions of these policies more quickly or effectively. This letter is intended to spell out in more detail the impact of this more flexible approach and some of the innovations that we have adopted.
>
> One major innovation is aimed at addressing overlapping claims and the different speeds at which groups within a region have entered the settlement process. In the future and where appropriate, the Crown will adopt a regional perspective, seeking to negotiate with multiple groups in a common geographic area. The Crown will seek to engage with all claimant interests in a region before a formal mandate or negotiations process starts. A regional overview and early engagement mean that the Crown can help claimants to explore whether a large natural group exists, and if not, how groups can co-operate and engage with the Crown collectively to advance their common and individual interests. Where claimant interests overlap, the Crown will facilitate discussion and resolution.
>
> The Crown's aim is to negotiate concurrently with as many groups in a region as possible, within as few negotiations as possible, and with each of the key negotiations milestones reached at the same time. While some groups may need to wait initially while neighbouring groups organise themselves, the co-operation between claimant groups should lead to swifter progress overall and help to ensure that no one gets left behind.
>
> **[332.21421]**

Treaty settlements in Auckland restarted

165 In the Auckland context, the Crown appointed Sir Douglas Graham to facilitate hui with wider Auckland iwi as well as those from Kaipara and Hauraki about the implications of the Tribunal's report, with a view to suggesting how a regional approach might work.

166 Sir Douglas' facilitation led him to conclude that;

> the objections to the Ngati Whatua o Orakei AIP in its current form are never going to be withdrawn particularly as they relate to parts of the cultural redress. It is equally clear that it will not be possible to reach settlements with the other groups without resolving with all groups the

very issues that had been objected to so vehemently in the Ngati Whatua o Orakei AIP.

[332.21443]

167 Sir Douglas considered there were two options:

167.1 First, to advise Ngāti Whātua Ōrākei that the Crown could not enter into a Deed of Settlement because it could never be able to treat the overlapping interests as having been addressed to its satisfaction. Option 1 would involve having to "start again from the beginning and proceed in tandem with all the other negotiations"; or

167.2 Second, "striving to see if the Ngāti Whātua o Ōrākei AIP could be renegotiated to take into account the 'layers of interest'." Option 2 would, in Sir Douglas' words, involve "grabbing the bull by the horns" and require "courage, a generosity of spirit and a desire to work together in the common interest". Option 2 was essentially how Sir Douglas saw the new regional approach playing out, and would require the Crown to negotiate simultaneously with all groups who claim interests in Auckland.

[332.21443]

168 Sir Douglas' report explained in relation to Option 2:

> 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 Maori 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/hapu at all times and must not prefer one over another. Any discretionary redress has to reflect any 'layers of interests'.

[332.21443]

169 The Minister's paper to the Treaty of Waitangi Cabinet committee described the state of play created as a result of the Tribunal's report:

> The proposal is a response to the stalemate that has prevented settlements in Tāmaki Makaurau since the previous Government signed an Agreement in Principle with Ngāti Whatua o Orakei. This stalemate reflects the complex layers of interests across the claim area, mandate disputes within Hauraki iwi, and the need to address the outstanding claims of hapu associated with Waikato-Tainui, including Ngati Te Ata.
>
> **[332.21427]**

170 The paper went on to describe:

> Sir Douglas has designed his proposal with the following principles in mind:
>
> - the best way to resolve shared interests is to offer simultaneously redress to all claimants who share those interests;
> - recognition of exclusive manawhenua for specific iwi and hapu is generally to be
> - avoided in favour of collective redress to minimise delay and inter-iwi conflict;
> - settlements will be comprehensive;
> - commercial value offered in settlement will be transparent;
> - the financial value of the Ngati Whatua o Orakei offer will be preserved; and
> - redress offers seek to build unity within iwi and restore damaged relationships within and between iwi and hapu.
>
> **[332.21427]**

171 Sir Douglas' proposal was "new", "ambitious" and "unorthodox". **[332.21427]** Still there was no update to the *Red Book.*

172 Practically for Ngāti Whātua Ōrākei Sir Douglas' proposal was a reset of our settlement negotiations. The negotiations were divided in two:

172.1 first, a renegotiation of our individual Ngāti Whātua Ōrākei settlement; **[332.21664]** and

172.2 second, negotiations with a group that became known as Ngā Mana Whenua o Tāmaki Makaurau (which I will call the **Tāmaki Collective**). **[332.21483]**

173 Both negotiations streams were happening at the same time.

The Ngāti Whātua Ōrākei Claims Settlement Act 2012

174 It is important to note that the AHA, as reflected in the AIP, did not change while our individual settlement was renegotiated. To us that is an important point, because it shows that the Crown did not update its understanding of our history and our tikanga in relation to the Tāmaki Isthmus, but did significantly alter the redress Ngāti Whātua Ōrākei ultimately received.

175 Now that the RFR over our traditional rohe was off the table, we sought an RFR over the Ōrākei Block and a significantly improved offer to buy and leaseback all NZ Defence Force housing on the North Shore. **[332.21504]**

176 The RFR over the Ōrākei Block was declined, because the Crown feared it would "set a precedent for the other members of the Tāmaki Collective to seek an exclusive RFR over their core areas of interest in Tāmaki". The Crown indicated that could "undermine the unity of the Tāmaki Collective". **[332.21504]**

177 Nor was the Crown able to meet our request for NZ Defence Force housing. It noted that other iwi had interests in the North Shore. That is of course correct, and Ngāti Whātua Ōrākei has never disputed that others have interests in the North Shore.

178 As I described earlier we do not and have never claimed predominant mana whenua on the North Shore other than in the inner upper Waitematā and in recent years have formally recognised Ngati Paoa as having predominant rights over Ngāti Whātua Orākei in most parts there. **[335.23463]** Seeing those other iwi with interests deeper in the North Shore settle their grievances was

important to us, and we considered it was 'tika' (right, truthful) to restrict our North Shore claims to those only within our rohe.

179 Instead of honouring any kind of exclusive RFR, our initial quantum of $10m was increased to $18m, with which we used as a deposit to finance the purchase of the following Crown Land:

179.1 99 Owens Road, Epsom;

179.2 the Wakakura Block on the North Shore;

179.3 the Narrow Neck Block on the North Shore (subject to a long-term leaseback);

179.4 the Beresford, Birchfield, Hilary, Marsden and Plymouth housing blocks on the North Shore.

[332.21504]

180 A particular blow to us was the removal of cultural redress in Maungakiekie, Maungawhau and Puketāpapa. My understanding of Treaty settlement policy is that groups must meet a higher bar of interest in order to justify an offer of cultural redress. After all the Red Book states "redress must be a meaningful expression of the relationship of the claimant group with the site". **[334.22521]**

181 As a direct result of the Tribunal's report and Sir Douglas Graham's revision of Treaty settlements in Auckland, these sites that are of high importance to Ngāti Whātua Ōrākei were to be dealt with in a mechanism specific to the Tāmaki Collective. I will describe this settlement process in the next section of my statement.

182 The maunga redress came after extensive efforts by Ngāti Whātua Ōrākei to propose a collective redress model that could appropriately reflect mana whenua and ahi kā interests in land, but equally secure redress for the Tāmaki Collective iwi within the wider Tāmaki Makaurau area. Proposals included a board managing the maunga comprising one representative from each of the three primary iwi groupings claiming interests in the broader Tāmaki Makaurau area (Ngāti Whātua, Marutuahu and Waiohua), and three

Auckland councillors. Title to the maunga would be vested in the iwi grouping with the predominant mana whenua interest, while management would occur by consensus. **[331.20846] [331.20882]**

183 All of these proposals were ultimately rejected by the Crown, consistent with Sir Douglas Graham's view that mana whenua should be put to one side in order for the Crown to successfully negotiate Treaty settlements in Auckland.

184 Accepting the revised settlement redress was an extremely difficult pill to swallow for the negotiators and ultimately for our whanau. We felt the Crown had profoundly compromised our relationship by now agreeing to acknowledge other historical interests in sites sacred to us as equal to ours. As uri of Hua Kaiwaka we understand the deep connections of Waiohua to those sites however we cannot understand how or why the Marutuahu Collective were treated as equals with us given the historic and tribal record does not feature them in Tāmaki.

185 On the other hand, we knew and it was made abundantly clear by the Crown that we were very unlikely to ever reach a settlement with the Crown at all if we did not accept the revised offer. While it was a significant compromise, we also believed we were entitled to rely on the Crown's proposal that collective redress in Tāmaki Makaurau would not seek to reflect mana whenua interests, nor would collective arrangements undermine our individual settlement.

186 Faced with that choice, and that we genuinely wanted all iwi to achieve their own settlement, in the end it was an exercise of our mana to agree to enter into a Deed of Settlement with the Crown some eight years after entering into comprehensive negotiations.

187 The Crown's apology, which is included in both the November 2011 Deed of Settlement and Ngāti Whātua Ōrākei Claims Settlement Act 2012 was profoundly significant and meaningful for us.

188 In particular, the Crown acknowledged:

188.1 that Ngāti Whātua Ōrākei transfers of land for settlement purposes contributed to the development of New Zealand and Auckland in particular, and that Ngāti Whātua Ōrākei sought to strengthen the relationship by expressing loyalty to the Crown;

188.2 the land alienation caused by the Crown diminished the ability of Ngāti Whātua Ōrākei to exercise mana whenua; and

188.3 the Crown did not adequately protect pa and urupā, Maungakiekie in particular.

[324.15728]

189 The Crown apology in the Settlement Act reads as follows:

> The Crown makes this apology to Ngāti Whātua Ōrākei and to their ancestors and descendants.
>
> 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.

190 The Crown's apology represents to us an apology for every single line of the AHA, which was the most comprehensive AHA the Crown had entered into in its 16 years of Treaty settlements to that date. Again I am reminded of Sir Hugh's insistence that the Crown ought to know what it was apologising for, which makes many of the Crown's subsequent actions that lead to this litigation all the more surprising.

The "Tāmaki Collective"

191 The negotiations towards the Tāmaki Collective settlement were progressing at the same time as our individual settlement. **[332.21529] [332.21537] [332.21539] [332.21533]**

192 Ngā Mana Whenua o Tāmaki Makaurau, or simply the Tāmaki Collective, is a collection of iwi that claim mana whenua interests in broader Auckland. The Tāmaki Collective was formed in 2010 and comprises 13 iwi in three groupings including:

192.1 Ngāti Whātua o Kaipara, Ngāti Whātua Ōrākei and Te Runanga o Ngāti Whātua in the Ngāti Whātua Ropu Limited Partnership;

192.2 Ngāti Maru, Ngāti Paoa, Ngāti Tamaterā, Ngāti Whanaunga and Te Patukirikiri in the Marutūāhu Ropu Limited Partnership; and

192.3 Ngāi Tai ki Tāmaki, Ngāti Tamaoho, Ngāti Te Ata, Te Ākitai and Te Kawerau ā Maki in the Waiohua-Tāmaki Ropu Limited Partnership.

193 The Tāmaki Collective is responsible for the management of maunga in Tāmaki Makaurau and also has a right of first refusal (RFR) to purchase a range of Crown land across the broader Auckland region.

Formation of the Tāmaki Collective

194 The basis for the Tāmaki Collective came after the Tribunal's report which impugned the Crown's AIP with Ngāti Whātua Ōrākei. As I have already explained, the Crown then changed their approach from recognising Ngāti Whātua Ōrākei's exclusive mana whenua rights in favour of collective redress.[37] **[332.21427]**

195 I was one of the representatives of Ngāti Whātua Ōrākei who was involved in the negotiations. As I have mentioned, the 'idea' of the Tāmaki Collective first came about in around June 2009 when Crown Facilitator Sir Douglas Graham presented a revised negotiation strategy and redress package for all claimants in Tāmaki Makaurau

[37] At [17].

at Ellerslie.[38] **[332.21427]** Mike Dreaver, the Chief Crown Negotiator then contacted the iwi involved in July 2009 to start negotiations around this proposal. **[332.21469] [332.21492]** Sir Douglas' proposal is very similar to what ultimately became the Tāmaki Collective.

196 Sir Douglas' proposal was challenging for Ngāti Whātua Ōrākei at first. The proposal asked for Ngāti Whātua Ōrākei to share the title and management of reserves and RFRs for areas of Auckland which it had mana whenua over, a position that was opposed by key figures in the iwi, including me. Around this period a significant portion of my work for Ngāti Whātua Ōrākei was dedicated to proposals for the Tāmaki Collective that could accommodate and reflect predominant and shared interests, which were all rejected by the Crown as unworkable and unmanageable. **[331.20846] [331.20882]**

197 Ngāti Whātua Ōrākei did feel very real political pressure to join the Tāmaki Collective. The Crown was adamant that the Tāmaki Collective should be established and Ngāti Whātua Ōrākei could either join or be left out entirely. The prospect of not being included in a collective which considered land within our rohe would have been an affront to our mana whenua.

198 There were some saving graces to the Tāmaki Collective negotiations, however, especially after it became clear that mana whenua would not be a primary driver of the ultimate settlement arrangements. That is consistent with, for example, the settlement not proceeding like an orthodox Treaty settlement. It did not include an Agreed Historical Account, and so did not involve the Crown or us acknowledging that other iwi held mana whenua and/or ahi kā in sites within our core rohe, nor did it mean that Ngāti Whātua Ōrākei was asserting mana whenua in the rohe of other iwi. This was an influential factor in Ngāti Whātua Ōrākei agreeing to be a reluctant member of the Tāmaki Collective – it was a pragmatic

[38] At [2]

solution to the settlement deadlock which put mana whenua to one side, as envisaged by Sir Douglas.

199 Another factor was us naively thinking that, when confirming their own settlement pathways along with a shared commercial opportunity across the wider Auckland region, other iwi would otherwise focus their attention in their own areas of primary mana whenua. However, that has generally not come to pass with most iwi in particular those of the Marutuahu Collective (less Ngāti Paoa) insisting on the same treatment by others as Ngāti Whātua Orākei in our heartland.

200 The ultimate structure of the Tāmaki Collective is also transactional and managerial in nature. The Limited Partnership arrangements do not purport to establish the Tāmaki Collective as the body that exercises mana whenua over Tāmaki Makaurau. That notion is incompatible with tikanga Māori because mana whenua cannot be exercised in the same area by more than one iwi or hapu. Further, the ultimate authority that would manage the maunga I list below was another example of the whenua rangatira model that Ngāti Whātua Ōrākei first introduced with respect to the land at Takaparawha/Bastion Point. The maunga authority would manage the maunga for Māori and all of New Zealand, which to us represented another example in history of Ngāti Whātua Ōrākei making resources available for the benefit of its neighbours.

201 It was with these points in mind that Ngāti Whātua Ōrākei agreed to join the Tāmaki Collective.

202 From this point, the Tāmaki Collective and the Crown entered into a Framework Agreement on 12 February 2010, a Record of Agreement on 5 November 2011 and the Collective Redress Deed on 5 December 2012. This Deed led to the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. The Collective Redress Act appropriately acknowledges that the maunga the subject of the Act are *all* sources of mana to *all* of the iwi involved, rather than specifying which particular maunga are sources of mana to each particular iwi.

Function of the Tāmaki Collective

203 As I mentioned, the Tāmaki Collective is responsible for the management of maunga. The Deed transferred 14 maunga to the Tāmaki Collective to be held in trust for the common benefit of iwi/hapu of the Tāmaki Collective and the people of Auckland. The maunga included are:

203.1 Matukutururu/Wiri Historic;

203.2 Maungakiekie/One Tree Hill Recreation;

203.3 Maungarei/Mount Wellington Recreation;

203.4 Maungauika/North Head Historic;

203.5 Maungawhau/Mount Eden Historic Recreation;

203.6 Mount Albert Recreation;

203.7 Mount Roskill Recreation;

203.8 Mount St John Recreation;

203.9 Ōhinerau/Mount Hobson Recreation;

203.10 Ōhuiarangi/Pigeon Mountain Historic Recreation;

203.11 Ōtāhuhu/Mount Richmond Recreation;

203.12 Rarotonga/Mount Smart Recreation;

203.13 Takarunga/Mount Victoria Recreation, Local Purpose (community buildings); and

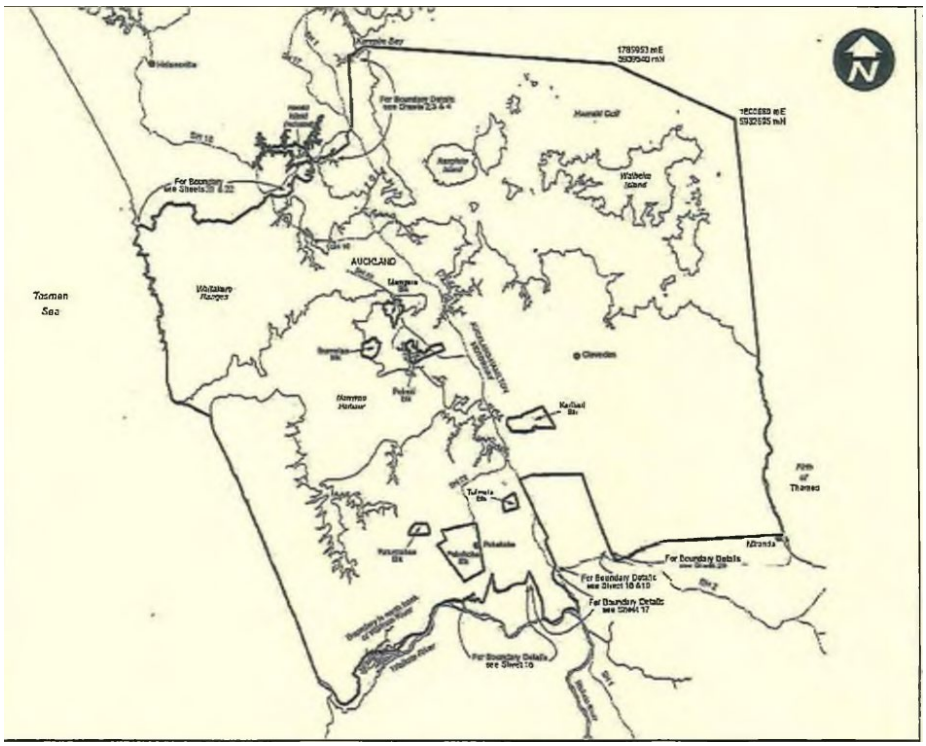
203.14 Te Tatua a Riukiuta Recreation.

204 The motu (islands) Rangitoto, Motutapu, Motuihe and Tiritiri Matangi were also vested in the Tāmaki Collective for a one month period then vested back to the Crown. Three areas on Rangitoto were vested permanently to the Tāmaki Collective, in particular the summit. Originally the proposal considered rights surrounding the

Waitematā and Manukau Harbours, but the eventual legislation specifically does not cover these areas.

205 The Deed also established co-governance bodies between the Crown and the Tāmaki Collective. For the administration and management of the maunga (except for Maungauika and Rarotonga), the body Tūpuna Maunga o Tāmaki Makaurau Authority was established. This included six representatives from the Tāmaki Collective and six from Auckland Council. The Tāmaki Collective also have a strategic relationship with the Department of Conservation, three seats on the Auckland Conservation Board and involvement in the development of conservation management plan for the motu.

206 The Deed did not provide any financial redress but it did provide for commercial redress in the form of rights of first refusal. The right of first refusal in general is for certain Crown-owned land (and certain Crown Entity-owned land that becomes surplus in the area shown in the map below:



207 This area is clearly much broader than Ngāti Whātua Ōrākei's traditional rohe and heartland based on the central Tāmaki isthmus.

208 The Tāmaki Collective RFR works by:

208.1 For acquisitions of assets worth $5,000,000, the Collective exercises the RFR; and

208.2 For acquisitions of assets worth less than $5,000,000, individual groups in the Collective can exercise the RFR. Which individual group is given the option to exercise the RFR is determined through a "carousel" process where each group takes turns. Where a group is first on the "carousel" but does not want to purchase the property, the other group next in line are given that opportunity.

209 The "carousel" is made up of three limited partnerships, which represent the three broad groupings of the Tamaki Collective members:

209.1 Ngāti Whātua Ropu Limited Partnership;

209.2 Marutūāhu Ropu Limited Partnership; and

209.3 Waiohua-Tamaki Ropu Limited Partnership.

210 The formation of the Tāmaki Collective and the Collective Redress Deed however was separate to the individual settlements with the iwi members. It did not settle any historical claims or extinguish claimant rights, or confer mana whenua.

211 However, land that falls within the definition of RFR land can be used for Treaty settlements under s 120 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. If the Crown wishes to use RFR land in Treaty settlements, then it must give notice to the RFR landowner and the Limited Partnership that the land ceases to be RFR land.

III. THE CROWN NEGOTIATES OTHER TREATY SETTLEMENTS

Ngāti Paoa

212 Following our own settlement and the creation of the Tamaki Collective, the Crown commenced negotiating other Treaty settlements involving land in Tāmaki Makaurau.

213 The first of these which involved offers of land within our heartland, was a proposed settlement with Ngāti Paoa. We learned in detail about this proposed settlement quite late in the piece, and by that time the Minister of Treaty Settlements had already made a preliminary decision regarding the offer of land in Tāmaki Makaurau to Ngāti Paoa. We were upset and disappointed to learn that the Crown had been negotiating settlements in Tāmaki Makaurau without proper notice to us. We then became shocked, and even horrified, to learn that the Crown was proposing to offer land that was within the area Apihai Te Kawau had gifted to the Crown as part of the settlement for Ngāti Paoa.

214 It was these actions by the Crown which first prompted Ngāti Whātua Ōrākei to issue these proceedings. Ngāti Whātua Ōrākei has attempted to engage repeatedly with the Crown in good faith to discuss what is to us a sacrilegious affront to our mana, but the Crown has consistently downplayed or outright ignored our concerns in response.

215 I will set out the correspondence history to demonstrate why I believe this is the case. I understand that the Crown has been guided in its negotiations by its 'overlapping claims' policy, set out in full in the Red Book and which I understand has been updated over the years. **[334.22866]**

216 Some of the correspondence I refer to has already been put before the Court in affidavits for Ōrākei through the strike out and other applications which have taken place.

217 The first document I refer to is a letter from the Crown advising Ngāti Whātua Ōrākei of the Minister's 17 August 2015 preliminary decision to offer to transfer 71 Grafton Road and 136 Dominion

Road, Auckland under s 120 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act. **[333.22427]**

218 As I explained earlier, there is a process under s 120 of the Tāmaki Collective legislation whereby the Crown can remove land from the Collective for us in other Treaty settlements. That is what was being proposed in the Minister's letter to us. I note that both the properties referred to in that letter fall within either the 1840 Transfer Land or the 2006 RFR Land.

219 Naturally this proposal was of huge concern to us and led to the issue of these proceedings on 27 August 2015. Following the issue of these proceedings, our lawyers sought assurances that the Crown would not proceed with the proposed transfers to Ngāti Paoa until our rights had been determined. I refer to September 2015 correspondence in which, in response to queries made by our lawyers, on 25 September 2015 senior Crown counsel Jason Gough assured us that the Minister would not make a final decision until Ngāti Whātua Ōrākei's legal challenge on that decision had been determined. **[333.22429]**

220 Following this exchange, the defendants issued a procedural challenge to our case which went before Justice Wylie. His Honour dismissed the challenge but directed Ōrākei to serve the proceeding on all members of the Tamaki Collective and certain other iwi, which was done.

221 In the meantime, we began to engage with OTS and the Minister.

222 Then, on 2 June 2016, our solicitors received a letter from Crown Law informing us that three weeks earlier the Minister had "revised" his preliminary decision on redress for Ngāti Paoa. **[334.22579]** Instead of transferring 71 Grafton Road and 136 Dominion Road, Auckland to Ngāti Paoa, the Minister proposed to offer Ngāti Paoa a right of first refusal over these two properties, following an act of Parliament. **[334.22568]**

223 The Minister advised that he had changed his mind, and would now not pursue a final decision under the Ngā Mana Whenua o Tāmaki

Makaurau Collective Redress Act. He advised that he intended to apply to strike out the Ngāti Whātua Ōrākei claim. **[334.22579]**

224 We were deeply troubled by this change of approach. It appeared to us that the Crown had come up with a clever way to try to get around dealing with us. It is extremely disappointing, when you are a Treaty partner, and have already suffered mightily at the hands of the Crown, to see history repeating itself. Especially so when so soon after seeing your own Deed of Settlement along with the Crown Apology pass in Parliament.

225 So, on 10 June 2016, our lawyers wrote a letter to Crown Law explaining our view that the Minister's "revised" decision was an effort to circumvent the assurances provided by Crown Law on 25 September 2015. **[334.22578]**

226 Crown Law's response arrived on 21 June 2016. **[334.22579]** It ignored any criticism of the Crown's approach and advised:

226.1 the revised decision of the Minister dated 21 May 2016 "supersedes" the August 2015 preliminary decision;

226.2 the assurances made by Crown counsel on 25 September 2015 do not apply to the 21 May revision;

226.3 the Minister would make a final decision on Ngāti Paoa redress, but that will not be under the Collective Act but by settlement deed and ensuing legislation; and

226.4 the new assurances apply to the 21 May revision.

227 We then received an 8 July 2016 letter recording the Minister's final revised preliminary decision of 21 May 2016. **[334.22582]** Despite requests, the letter was not copied to our lawyers.

228 My understanding of the Crown's change of approach was that:

228.1 the Minister's final decision on Ngāti Paoa's redress would only be implemented through legislation;

228.2 the Crown would not dispose of the properties prior to that legislation being enacted;

228.3 no legislation will be enacted without a deed of settlement; and

228.4 the Crown would provide us with four weeks' notice of any deed initialling.

229 This change of approach was distressing for us. I took the view that by his "revised" decision the Minister had reneged on Crown assurances made to us about his conduct while this matter was before the Court.

230 Further, the Crown's correspondence routinely mischaracterised our position by suggesting that we had offered no evidence for our position or had responded to requests to meet. The Crown has decades of evidence about our position, and we have always preferred to resolve matters with the Crown and other iwi where we can. Our historical and sacred tatau pounamu settlements with Ngati Paoa, in which the Crown played no part at all, is an example, as I will go on to explain.

Next comes Marutuahu

231 In conjunction with the disappointing experiences with the Crown over the Ngāti Paoa settlement, we learned that the Crown was proposing to do something similar for the Marutuahu settlement, including again offering land within the 1840 Transfer Land and the 2006 RFR area.

232 For us, this was even more insulting than the Ngāti Paoa proposal. We regard Ngāti Paoa as an iwi of Tāmaki, albeit to the east and as mentioned we allowed them access to fishing grounds in the upper harbour. They in turn gave us access to fishing grounds in their rohe in east Auckland such as at Te Whanganui o Toi (St Heliers Bay). We have always regarded the core rohe of the Marutuahu Collective as in the Thames area, which is obviously some distance from central Auckland. Their traditional lands are there, their urupā, their marae and their head offices.

233 I will once again go through our correspondence with the Crown on these developments.

234 On 3 March 2016 I attended a meeting at the Heritage Hotel in Auckland. With me were Margaret Kawharu, Rangimarie Hunia and Nick Wells of Chapman Tripp. We were meeting with Minister Finlayson and Mike Dreaver. I have seen a Crown file note which is broadly consistent with my recollection of the meeting. **[334.22483]** I note that in that meeting I again made all the same points we have made over so many years. The recorded comment by Rangimarie Hunia accurately summarises our position to this day: "I think we accept other iwi have claim to wider Tamaki. Not where we have ahi ka". I note the Minister concluded "[our] questions are legitimate" and suggested that respective historians should get together. That has not happened. I also recall a comment the Minister made about our generosity of spirit in not 'fighting' the Tribunal's report.

235 Our meeting was immediately followed up with a letter dated 4 March 2016 from OTS advising that the Crown had recommenced negotiations with Marutuahu and requested information from us. **[334.22486]** We were not expecting such a letter following our meeting, where we had been left with the impression that the Minister was taking us seriously and would be true to his word that "[it'll] take as long as it takes".

236 Shortly after this letter, our tribal chair received an email on 11 March 2016 from Mr Majurey for Marutuahu requesting to meet. **[334.22495]** On its face such a request may appear constructive, but I note in particular the comment that "we are close to finalising negotiations and this 'take' needs to be completed in a timely fashion". Again, this was not the impression we had received and suggested that the Crown and Marutuahu were pushing ahead without proper regard to our objections. I also note that Mr Majurey forwarded his email to Minister Finlayson on 19 March 2016, recording that he found it "heartening to receive your confirmation that the Crown recognises the interests of the Marutuahu iwi in central Auckland."

237 We had not been privy to this apparent change in the Minister's thinking in the course of a fortnight, from telling us that "[our] questions are legitimate" to apparently dismissing them without speaking to us again, or hearing from our historians.

238 Accordingly, on 22 March 2016, we wrote back to OTS. **[334.22496]** We advised that it was inappropriate to progress negotiations with Marutuahu while our claim was before the Court, and that we would not continue to meet with the Crown or Marutuahu about those negotiations so that we would not prejudice our position in the litigation.

239 From the Crown's discovery in this matter, I have seen an Aide Memoire provided to Minister Finlayson on 24 March 2016. **[334.22498]** It notes that Ngāti Whātua Ōrākei has written regularly through 2015 to facilitate resolution of overlapping claims with Marutuahu (paragraph 6). At paragraph 14 of the document, it sets out an extract from our 22 March letter which commented that the Crown should pause its negotiations with Marutuahu as it did with Ngati Paoa, given our proceedings were on foot.

240 At paragraph 15 of the document, it recorded that negotiations with Ngati Paoa had not been delayed because of our litigation. Accordingly, it is apparent that the Crown had not been honouring the assurance given by Senior Crown Counsel Jason Gough on 25 September 2015, or at least had not been telling us the full story of what was going on in the background. I note the Minister appears to have endorsed this paragraph by marking a "tick" beside it.

241 I also note on the final page of the Aide Memoire, the Minister has declined OTS' recommendations to continue negotiation efforts and has written "Enough opportunities have been provided. Please see me".

242 The Minister's dismissal of our position behind closed doors was consistent with direct correspondence with us. Our correspondence was to no avail. On 31 March 2016 the Minister wrote to us informing us that the Minister would proceed to make a preliminary decision on Marutūāhu redress under s 120 of the Ngā Mana

Whenua o Tāmaki Makaurau Collective Redress Act (that is, a similar decision to the 17 August 2015 Ngāti Paoa preliminary decision) in April. The Crown's proposed redress included land in the 2006 RFR Area. **[334.22510]** That same day we received a similar letter from OTS confirming that our litigation would have no impact on negotiations with Ngati Paoa and Marutuahu. **[334.22508]**

243 I have also now seen a letter from the Minister to Paul Majurey dated 31 March 2016. **[334.22511]** The Minister states:

> I acknowledge your recent attempt to engage with Ngāti Whātua Ōrākei to seek a resolution of overlapping claims and note you have had no direct response from Ngāti Whātua Ōrākei to your request to meet.
>
> The Ngāti Whātua Letter to my Lead Negotiator for Hauraki makes it clear they do not want to engage in overlapping claims discussions with the Marutuahu Collective or the Crown while they are involved in High Court proceedings. Based on this the Ngāti Whātua Ōrākei 22 March 2016 letter and the absence of a response to your request to meet, I have decided to make a preliminary decision.

244 I am surprised to see this correspondence with Marutuahu indicating that Ngāti Whātua Ōrākei had been unhelpful in this process, when our message about our core rohe and Treaty settlements has been consistent and frequently communicated since at least 2003.

245 Nonetheless, we responded to the Crown as quickly as possible the next day (1 April) in a letter from Chapman Tripp to Minister Finlayson, which we also sent to Mr Majurey for Marutuahu. **[334.22517]** Our letter confirmed our view that it was inappropriate for the Minister to make a preliminary decision in the face of litigation and previous assurances.

246 Our lawyers and Mr Majurey had an exchange of views about our position by email. **[334.22517]** I note Mr Wells refers to an issue of great frustration for us, namely the ongoing mischaracterisation of our position as one trying to delay, frustrate or stop other iwi settling their historic grievances with the Crown. We support all iwi

seeking settlement of historic grievances, but as Ms Hunia said at our 3 March meeting "not where we have ahi ka".

247 Through discovery I have now seen the documents sent to the Minister for the formation of his preliminary decision on the Marutūāhu redress. **[334.22521]** I note there is a briefing document prepared by OTS which the Minister appears to have reviewed.

248 The Minister has made various markings in the margin of the document. I note that most of these appear to be on comments adverse to our position, with little to no corresponding endorsement of comments favourable to us, or summarising our position.

249 For example, the Minister has highlighted paragraph 24 of the document where it refers to the Crown negotiators' impression that Ngāti Whātua Ōrākei representatives were apparently being relieved that the Fred Ambler lookout site was not within the Ōrākei block. At paragraph 46, the Minister has "ticked" the reference to the 2006 proposed RFR area being rescinded. At paragraph 60, where there is reference to Ngāti Whātua Ōrākei being advised that it would not receive an exclusive area of interest, the Minister has highlighted the paragraph and written "Copy please".

250 We then received two letters from the Minister advising that on 22 April 2016, he made a preliminary decision on redress to the Marutuahu collective despite our objection, and on 13 May 2016 he made a decision to finalise the redress offered to Marutuahu. **[334.22539] [334.22552]** The 22 April letter gave a deadline for response of 6 May 2016. We saw little point in responding at this stage – the Minister's mind appeared made up, and from what I have now seen in the Crown's discovery, I don't think we were wrong in that view.

251 I have also seen the OTS decision pack on the Minister's final decision on Marutuahu redress through the Crown's discovery, dated 12 May 2016. **[334.22542]** The recommendation to proceed to a final decision confirming the preliminary decision appears to have been automatic.

252 Again we responded quickly with a 19 May 2016 letter from our solicitors to Crown Law requesting that the Minister make the same assurances about the Marutūāhu redress that he did in respect of the 17 August 2015 Ngāti Paoa redress preliminary decision. In particular, our lawyers requested that the Minister does not proceed to implement the final decision pending conclusion of this proceeding. **[334.22557]**

253 Our lawyers sent a separate letter to the Minister on 19 May as well, reiterating our position that our litigation targeted the Minister's decision-making, which in our view is unlawful and offensive to our mana whenua, rather than an attempt to prevent Treaty settlements with other iwi claiming interests in Tāmaki Makaurau. **[334.22555]**

254 On 20 May 2016, the Crown wrote to our lawyers advising it would not provide the undertakings we sought in respect of the Marutūāhu redress. **[334.22564]** The letter set out:

- although the Crown intends to negotiate with the Marutūāhu collective with the aim of initialling a deed of settlement in 2016, that initialling will not alter Crown ownership of the properties. The Crown will not transfer the properties prior to settlement legislation being enacted, which is likely to occur during 2017 at the earliest;

- the Office of Treaty Settlements will provide four weeks' notice to Ngāti Whātua Ōrākei before the deed of settlement is initialled.

255 As is evident from those extracts, the Crown was adopting the same approach it had when it "revised" its position regarding the Ngati Paoa settlement.

256 On 2 June 2016 we received a letter from OTS. **[334.22569]** The letter advised that Marutuahu had challenged the Minister over the proposed withdrawal of the Gladstone Park redress offer and invited any further views or information from us by 17 June 2016.

257 Based on these changes in the Crown's position, the Crown then applied to strike out our claim. The strike out succeeded in the High Court and the Court of Appeal, but our claim was restored by the

Supreme Court provided we did not challenge any specific legislative proposals.

258 Just as with the correspondence around the Ngati Paoa redress, I consider the Crown mischaracterised and did not do justice to our position. As I hope is already evident, the land that is the subject of this claim is deeply significant to Ngāti Whātua Ōrākei. In its correspondence with us, the Crown appeared to place significance on whether land is offered as commercial or cultural redress. From our perspective, the label is irrelevant and that distinction provides no comfort whatsoever. All land in our rohe over which we have mana whenua is important to us.

259 In all our correspondence with the Crown, we continuously emphasised our rights through mana whenua and ahi kā. In our view, the Crown belittled these rights by treating us as just one of many iwi claiming mana whenua in Tāmaki Makaurau. Yes, there are many claims, but not all of those claims are equal. And in our view based on our history, there are no other valid claims to the 1840 Transfer Land. As noted above there are other iwi like Ngāti Te Ata whose interests in our heartland far exceed that of the Marutuahu Collective. We can find no legitimate history or whakapapa that should compel the Crown to use land from our heartland without our consent to be transferred to Marutuahu, to settle their grievances where they are claiming mana whenua rights at least similar to ours.

260 The Crown's approach, in negotiating Treaty settlements without proper regard for our rights, and without acknowledging and respecting the Crown's tikanga obligations to Ngāti Whātua Ōrākei, has caused profound damage to our relationship with the Crown, and is, in our view, a striking failure on the Crown's part to honour its commitment to deal with Ngāti Whātua Ōrākei in a manner that respects our mana and tikanga.

261 To add insult to injury, on 2 June 2016, Te Rūnanga o Ngāti Whātua wrote to OTS in support of our position. **[334.22566]** Te Rūnanga raised "serious concern" with the Crown's proposal to press on despite our litigation and urged the Crown not to vest the Gladstone

Road properties in Marutuahu. As noted above, wider Ngāti Whātua took part with Te Taoū in the taking of pā on the Waitematā including Taurarua (Gladstone Road) during the raupatu of Tāmaki. It was Waiohua in occupation of Taurarua – not Marutuahu, when the pā was taken. They have never occupied the pā on Gladstone Road. To me, this seems to be an example of the Crown saying one thing (that cultural redress requires a certain level of interest), and doing another (offering a piece of land as cultural redress without apparently engaging with the cultural redress policy).

262 On 8 June 2016, Kaipara wrote to OTS in support of our position. **[334.22574]** I note in particular, and agree with, Kaipara's view that "the Crown should take tikanga Māori into account when making decisions to transfer land between iwi in Treaty settlements, and that the Crown's commitment to a mutually respectful future relationship with iwi should not be an empty promise".

263 Through the Crown's discovery, I have also seen a summary of progress on overlapping claims for the Marutuahu settlement prepared by Mr Bryce Blair on 8 June 2016. **[334.22571]** For context, I understand Mr Blair is a Senior Analyst at OTS, and if I understand the documents correctly, he is also the author of the "decision pack" documents for the Minister's preliminary and final decisions on redress to Marutuahu to which I have referred.

264 Mr Blair's summary was emailed to Mr Majurey for Marutuahu, and copied, among others, to Leah Campbell who I understand at that time was the Deputy Director of Negotiations at OTS. Ms Campbell had signed both the decision pack documents for the Minister's preliminary and final decisions on redress to Marutuahu.

265 At the end of his email, Mr Blair writes "PS – Response to your table below. As you can see, it is all going according to plan". Below that comment there is a table purporting to summarise the status of overlapping claims objections. For each iwi listed, Mr Blair has pasted a photograph of Dame Edna Everage, the comedy persona of Australian comedian Barry Humphries. Next to the final entry, for Ngāti Whātua Ōrākei, Mr Bryce has pasted a photograph of Dame Edna with a grumpy expression.

266 While I understand that humorous or embarrassing correspondence does occur from time to time in Treaty settlement processes, I find this correspondence distasteful and concerning. Although I am sure it is intended to be funny, I do not find it so.

267 First, it is not internal correspondence within OTS. It is an OTS Senior Analyst engaging with the lead negotiator for another iwi, and belittling the objections OTS has received, in particular those of Ngāti Whātua Ōrākei. It suggests to me an uncomfortable and inappropriate closeness between OTS and the Marutuahu negotiator. I have seen no correspondence disclosed from Ms Campbell pulling Mr Bryce up for this "joke".

268 And, while the Crown appears to have signalled Ngāti Whātua Ōrākei as standing on its own, our position has been supported by other iwi also with interests in the wider Tāmaki Makaurau area.

More Treaty settlement offers in Central Tāmaki Makaurau: Te Ākitai Waiohua

269 On 4 October 2016, OTS asked Ngāti Whātua Ōrākei for its comment on one aspect of a further proposed Treaty settlement offer it intended to make to another iwi (Te Ākitai Waiohua) in Tāmaki Makaurau. OTS told us that it would be in touch about the full Te Ākitai Waiohua proposed redress package "shortly". **[334.22606]**

270 I am aware that Te Ākitai Waiohua's claimed rohe extends from South Auckland through the whole of Tāmaki Makaurau and into the Kaipara rohe at Muriwai.

271 On 7 October 2016, we, through our lawyers, sought from OTS clarification of the full details of any redress offer OTS or the Minister might make to Te Ākitai Waiohua and any other iwi or collective. In particular, we sought clarification of whether OTS was considering including any land in our primary area of interest (being the 2006 RFR Area I have previously explained) in any forthcoming Treaty settlements. **[334.22615]**

272 OTS declined to provide full details of the Te Ākitai Waiohua redress offer until the end of October that year. **[334.22627]** Instead, on 13 October 2016, our lawyers received a letter from Crown Law. **[334.22620]** The letter advised that OTS was giving us 4 weeks' notice of any deed initialling for Ngati Paoa and Marutuahu, although no dates had been set. OTS confirmed that position by letter the same day. **[334.22619]**

273 We received a response from OTS to our request regarding Te Ākitai on 30 November 2016. **[334.22648]** The appendix to that letter set out proposed redress sites. Many were of serious concern to us as they fell within our area of primary interest.

274 Therefore on 13 December 2016 our lawyers responded to OTS. **[334.22659]** We noted that four aspects of the offer were unsatisfactory to us. We recorded our affront that OTS was proposing to initial and Agreement in Principle with Te Ākitai in December 2016, leaving virtually no time to consult with us. We sought assurances that the three properties and one statutory acknowledgement which concerned us would not be included in their AIP.

275 The same day our lawyers also wrote to Crown Law. **[334.22657]** We sought the same assurances regarding the properties which concerned us.

276 Despite these letters, I note that the very next day, 14 December 2016, OTS provided to Minister Finlayson a decision paper entitled "Final overlapping claims decision and signing the agreement in principle". **[334.22662]** I note that parts of that document are redacted for reasons of privilege, which suggests that our correspondence had been received and noted, but once again, hastily ignored. I also note from that document that apparently the AIP signing ceremony had already been arranged for 16 December, along with a draft press release.

277 On 15 December 2016 our lawyers received letters from Crown Law **[334.22680]** and OTS **[334.22678]** confirming there were no changes to the Te Ākitai settlement package. Given this response

came within two days of our own, it appeared to us the Crown had given our position no thought at all.

278 On 16 January 2017 we received a letter from OTS confirming signing of the AIP and advising of a minor variation to it which did not affect us. **[334.22686]**

279 We responded through our lawyers on 28 February 2017. **[334.22697]** The OTS version of the letter has highlighting that is not ours. In our letter we recorded our ongoing disappointment at the hasty signing of the AIP without engagement with us, and reiterated our previous objections.

280 OTS wrote back on 7 March 2017. **[334.22703]** The letter largely quoted the *Red Book* back at us, and advised us of an invitation to meet from Te Ākitai. We also received a letter along similar lines from Crown Law on 9 March 2017. **[334.22708]**

281 We wrote to Crown Law on 23 March 2017 through our lawyers responding to that correspondence. **[334.22718]** In that correspondence, we identified our concerns with OTS impeding proper consultation with us by applying short timeframes for us to respond and engaging on a piecemeal basis with us.

282 On 11 April 2017 we received further correspondence from Crown Law. **[334.22727]** That letter corrected the position outlined to us on 30 November 2016, by advising of eight further statutory acknowledgement sites being offered to Te Ākitai, which had somehow been omitted by oversight from previous correspondence. While OTS, through Crown Law, at least expressed its regret for this oversight, this development rather proved our point regarding how OTS had been dealing with us.

Ngāti Paoa and Marutūāhu Deeds of Settlement

283 The Crown had previously indicated to us that it would provide Ngāti Whātua Ōrākei with four weeks' notice before initialling settlement deeds with either Ngāti Paoa or Marutūāhu.

284 On 13 October 2016, we received a letter from OTS which advised that the Crown expects the parties will be in a position to initial their

respective deeds in the "coming weeks", and gave notice that the Crown intends to initial deeds with both Marutūāhu and Ngāti Paoa "on or after 10 November 2016", though "no date has been set for the initialling of either deed". **[334.22619]**

285 It was unclear to me from that correspondence whether the Crown intended to initial settlement deeds with either Marutūāhu or Ngāti Paoa imminently, or not. On 18 August 2017 we received word, it appears by chance, that the Crown was proceeding to initial its Deed of Settlement with Ngati Paoa. I am advised that communication came by phone call between our legal representative Nick Wells, and the Crown negotiator Mike Dreaver. We heard that the initialling was to happen that very day.

286 We were also particularly shocked by this, given the Minister had said in Parliament, in the context of similar issues occurring between Tauranga Moana iwi and the Hauraki Collective, less than a month prior. In Parliament on 27 July 2017 the Minister said that he was "very conscious of the desire not to have any overlapping interests lead to further contention".[39] I note this particular exchange between the Minister for Māori Affairs and Minister Finlayson:[40]

> **Hon Nanaia Mahuta**: Is it reasonable for Tauranga Moana to request a tikanga-based approach with Pare Hauraki to determine matters of whakapapa, ahi kā, mana whenua, mana moana, and kaitiakitanga to determine a durable outcome for settlement redress options?
>
> **Hon CHRISTOPHER FINLAYSON**: Yes, most definitely it is, and that is exactly the kind of approach I am very keen, along with the Minister for Māori Development, to progress, because I cannot deal with those matters. I do not have the expertise. I think a tikanga-based approach is an excellent one.

287 On 8 August 2017 we wrote to the Minister acknowledging our gratitude for his recognition for this and hoped he would consider this in the settlements with Ngāti Paoa and Marutūāhu. **[334.22780].**

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39 Pare Hauraki Collective Settlement Bill (27 July 2017) 724 NZPD 19607.

40 Pare Hauraki Collective Settlement Bill (27 July 2017) 724 NZPD 19607.

288 After receiving the tip off on 18 August, on 21 August 2017 we wrote to the Minister expressing our astonishment at this development, and that no proper notice had been given to us. **[334.22782]**

289 The Minister replied to our 8 and 21 August 2017 letters to us on 31 August 2017. **[334.22784]** The Minister tried to defend this development by pointing to correspondence from Crown Law back in October 2016 advising that the Crown might proceed to initial a deed with Ngati Paoa. That correspondence though expressly gave no certainty on the date at which initialling might occur, and of course was 10 months old.

290 As far as we were concerned however, this process had been conducted in near secret, and was not transparent to us. We viewed the last-minute call from Mr Dreaver as an attempt by the Crown to hastily patch up a total and disrespectful communication failure.

291 I note that the general election was held that year on 23 September 2017.

292 Following the change of government, on 31 October 2017, we wrote to the new Minister seeking a positive relationship and explaining our situation. **[334.22795]**

293 Our lawyers also wrote to Minister Little and Minister Parker on 2 and 28 November 2017 explaining the litigation we are involved in and seeking a meeting. **[334.22803]**

294 As far as I am aware, we received no formal response to our correspondence in late 2017.

Our concerns in summary: the overlapping claims policy in Tāmaki Makaurau

295 These lengthy chains of correspondence are all examples of our experience of the Crown's Overlapping Claims Policy. The policy is contained in the 'Red Book' and mentioned in a number of contexts within. The most comprehensive explanation of the policy is:

> An overlapping claim exists where two or more claimant groups make claims over the same area of land that is the subject of historical Treaty claims. Such situations are also known as 'cross claims'. Addressing overlapping claims is a key issue for settlements, particularly in the North Island where there are many valid overlapping claims.
>
> The settlement process is not intended to establish or recognise claimant group boundaries. Such matters can only be decided between claimant groups themselves. For example, any maps used during the settlement process or in subsequent communications are used only for specific purposes, such as determining the area where protocols with government departments might apply.
>
> The Crown can only settle the claims of the group with which it is negotiating, not other groups with overlapping interests. These groups are able to negotiate their own settlements with the Crown. Nor is it intended that the Crown will resolve the question of which claimant group has the predominant interest in a general area. That is a matter that can only be resolved by those groups themselves.
>
> **[310.06280]**

296 The Red Book indicates the Crown is guided by two general principles:

296.1 the Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations; and

296.2 the Crown's 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.

[334.22866]

297 Quite clearly, our legal challenge claims that our Deed of Settlement and Settlement Act, which are the result of decades of collective effort from within Ngāti Whātua, confer rights on Ngāti Whātua Ōrākei with respect to acknowledged facts, tikanga and grievances. Our settlement documents place corresponding obligations on the Crown to respect our settlement. It is completely perplexing, and quite frankly offensive to me that the Crown does not consider that the settlement documents or any of the information provided to it

over the many years of negotiations constrain it from respecting our tikanga, our rohe and our rights. Again, when we entered into our AIP in 2006, Sir Hugh's view was that the Crown knew exactly what it was apologising for.

298 Despite those views, for the very first time in 2016 the Crown indicated that there was in fact a *third* general principle that guides Treaty settlement decisions. Minister Finlayson explained that "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".[41]

299 None of the Crown's actions that are the subject of this legal case demonstrate that the Crown takes our Treaty settlement seriously as a constraint on its decision-making. In my view, these are simply empty words.

300 The Overlapping Claims Policy does not encourage collaboration between settled groups and settling groups. In my experience, and as demonstrated by the many exchanges between the Crown and Ngāti Whātua Ōrākei, the Crown creates an incentive for settling groups to push on to settlement no matter what. That is because the Crown offers redress, in this case high value central Auckland redress, *before* it has an understanding of the tribal landscape in any particular area and *before* iwi have a chance to discuss their relationship and tikanga amongst themselves. The Crown essentially 'dangles the carrot' of redress for the settling group, which dilutes the benefit of a tikanga based process being carried out.

301 Additionally, the Crown appears to make no attempt to engage with tikanga concepts. I have heard on a number of occasions from Crown officials, the Waitangi Tribunal and iwi leaders within Marutuahu and others that tribal affiliations in Tāmaki Makaurau are

[41] Affidavit of Christopher Francis Finlayson in support of defendants' joint application to strike out dated 8 July 2016 at [35]..

so complex that decision-makers could not meaningfully engage with them.

302 While that may be the current outward facing view of Crown officials, that is certainly not the case. I have seen correspondence from historians within OTS that concludes Ngāti Whātua Ōrākei was the predominant iwi within our rohe as at 1840 **[332.21110]**, and, of course, I reference the lengthy negotiations towards our AHA.

303 The entire process is devoid of a recognition of tikanga, or a true commitment to honour the Treaty of Waitangi.

IV. TIKANGA PROCESSES

The Ngāti Paoa settlement and Kawenata

304 Towards the end of 2016 we began discussions with representatives of Ngāti Paoa about resolving our differences about the redress the Crown had offered to Ngāti Paoa.

305 These negotiations, which I will not describe in detail, were all held in accordance with tikanga and by reference to historical events and relationships between our two hapu since the 1700s.

306 On 21 January 2017, our two iwi came together at Ōrākei Marae to seal the agreement that our representatives had reached in principle.

307 I will describe my recollection of this ceremony at the time, because it demonstrates, in my view, how tikanga can resolve overlapping claims issues.

Haka pōwhiri

308 The day's proceedings began with the arrival of the waka taua – Te Kotūiti at Ōkahu Bay. Here my elder brother Renata, met the waka and greeted the Ngāti Paoa leaders just as our tupuna Te Reweti had done seven generations before. The Ngāti Paoa group numbering close to 100 people then made their way up the hill to Orākei Marae.

309 The ceremony began with an official welcome – a haka pōwhiri – performed by a large number of Ngāti Whātua Ōrākei whānau.

310 The haka pōwhiri laid down a wero (challenge) to Ngāti Paoa: it asked whether or not they came to the marae in peace.

311 The Ngāti Paoa leaders led the Ngāti Paoa contingent of manuhiri (guests) through the waharoa (entry) to the marae forecourt (ātea). Usually, at this point the manuhiri would proceed forward to the marae while the kaikaranga (female caller) from each side exchange mournful words of lament.

312 However on this day, I recall a Ngāti Paoa leader pausing for a long while after the wero had ended. He then gave a short mihi (acknowledgment) and said:

Kua tai mai a Ngāti Paoa ki te Hōhōu te Rongo.

313 This essentially means that "Ngāti Paoa comes in peace". It is unusual for manuhiri to give a speech before entering the marae, but if there was ever going to be an exception to that usual protocol then this was the occasion.

314 It is acceptable for manuhiri *not* to accept the challenge laid down to them during the pōwhiri. Doing so would not breach any established principle of tikanga – rather, it means that the guest group is not ready or able to commit to whatever is being discussed at the marae that day.

315 Following the Ngāti Paoa mihi, and accepting of the challenge, the Ngāti Paoa whānau proceeded onto the paepae and into the whare under the auspices of the kaikaranga. Our side of the house was filled with whanau from the Papakainga including most of our kaumātua.

Taonga

316 Once everyone had entered the marae and had positioned themselves seated on opposite sides of the whare, the Ngāti Paoa leaders and Morehu placed the two taonga they had brought for Ngāti Whātua Ōrākei on behalf of Ngāti Paoa at the back of the

marae at the Poutuarongo. This is the most sacred place in the marae, and signifies the gateway to heaven from where our tupuna (carved high on the walls of the marae) look down on us. Before they were placed at the pou tua rongo, they were blessed by Ngāti Paoa to clear the space of any residual harm.

317 The two taonga Ngāti Paoa brought with them were a paddle named tika and an adze named pono. These two gifts were symbolic of the historical relationship between Ngāti Paoa and Ngāti Whātua Ōrākei.

318 In the 1841, in the time of our tupuna Apihai Te Kawau, Ngāti Paoa came to attack Ngāti Whātua Ōrākei. They arrived in their waka, and brought adzes as their weapon of choice. The two groups eventually managed to settle their differences, and Ngāti Paoa gifted a paddle and an adze to Ngāti Whātua Ōrākei to cement the peace making. The taonga gifted by Ngāti Paoa to us on 21 January 2017 were reminiscent of these past events. Ngāti Whātua Ōrākei in return gifted a waka huia to Ngāti Paoa that would house the Kawenata once it was signed in their safe keeping.

Whaikōrero

319 Following the presentation of taonga, the kaumatua (male elders) from Ngāti Whātua Ōrākei made formal speeches (whaikōrero) welcoming Ngāti Paoa onto our marae. Speaking for Ngāti Whātua Orākei was Taiaha Hawke, a direct descendant of Apihai Te Kawau.

320 I do remember that the kaumātua called upon our ancestors in acknowledging the importance of the work done by the younger generation of Ngāti Whātua Ōrākei and Ngāti Paoa (i.e. the negotiators) in coming to the historical agreement they were about to embark upon. The kaumātua were pleased that the hard work they had done to repair the relationship over the years was coming to fruition.

321 Ngāti Whātua Ōrākei supported the kaumatua with a waiata following each speech.

322 Ngāti Paoa returned the whaikōrero on Ngāti Paoa's behalf. These, too, were followed by waiata, this time sung by Ngāti Paoa.

Harirū

323 After the whaikōrero, all members of each iwi exchanged hongi in a procession called a harirū. It begins with the kaumātua and kuia, followed by more senior members of each group, right down to the children. The harirū marks the end of the formal, sacred, and spiritual part of the ceremony.

Whakamārama

324 Following the harirū, everyone gathered near the back of the marae where *He Kawenata Tapu* was laid out on a table ready for signing.

325 At that point, Taiaha Hawke said a whakamārama – a short announcement to introduce the significance of the signing ceremony that was about to take place. Although not word for word, I remember him saying a whakamārama along these lines:

> *Tēnā rā koutou katoa. Kua tae tātou ki te wā kia waitohungia te Kawenata Tapu me te whakaaetanga kia anga whakamua ai i ngā moemoeā a rātou mā nga mātua tūpuna.*
>
> *Nō reira ko te Kawenata Tapu te wāhanga ki te ao wairua ka tika*
>
> *Ko te whakaaetanga te wāhanga ki te ao kikokiko nei.*

326 Broadly, this whakamārama acknowledges:

326.1 that the Kawenata and the Conciliation Agreement (whakaaetanga) are the manifestations of the dreams and aspirations our tupuna held for us;

326.2 that the Kawenata is the aspect of the relationship that operates in the spiritual world (te ao wairua);

326.3 that the Conciliation Agreement is the aspect of the relationship that operates in the physical word (te ao kikokiko); and

326.4 that together, the two bind us together.

327 Over the next twenty minutes or so, all attendees of Ngāti Whātua Ōrākei and Ngāti Paoa signed the Kawenata. **[335.23463]** During

that time we all sung waiata, and the feeling in the marae was one of joy, relief, and hope.

328 The Kawenata pledges our two iwi to a mutually beneficial future relationship, in accordance with the principles of tika, pono and aroha (doing things the right way, with integrity and honesty) in accordance with tikanga. The Kawenata also commits the two groups to acknowledging and respecting the lead and shared interests both iwi hold in Tāmaki Makaurau.

Karakia whakamutunga

329 At the end of every ceremony, there is a closing prayer (karakia whakamutunga). The karakia is usually preceded by a short speech.

330 On this day, Taiaha Hawke gave the closing speech and prayer. I do not recall the exact words of his korero, but I do recall that he echoed the following sentiments:

330.1 the historic signing of the Kawenata shows a way forward for Māori without being dictated to by the Crown and the courts;

330.2 that the Kawenata provided an opportunity for Ngāti Paoa and Ngāti Whātua Ōrākei to work together in accordance with tikanga, especially tika, pono and aroha;

330.3 that the country is watching Ngāti Whātua Ōrākei and Ngāti Paoa as the pioneers for the new future;

330.4 that the tupuna of both Ngāti Whātua Ōrākei and Ngāti Paoa hold the same expectations for the two groups today going forward, as they did in the 1830s when we were last together in peace.

331 The closing karakia Taiaha gave drew upon these specific sentiments, and asked Atua (God) and our tupuna to bind us together. The karakia he gave was:

> He hōnore, he kōroria, he hareruia ki a Ihoa o ngā mano. E te Mangai, e te tokotoru tapu me ā koutou Anahera Pono, kua rongo koutou i ngā

> inoingā ā tēnā a tēnā a mātou, kei te mōhio koe he aha te aronga whakaaro, he aha kei roto i te ngākau o te tangata. Arahina mai i a mātou katoa i runga i te ara o te tika me te pono kia hoe ngātahi ai a Ngāti Paoa me Ngāti Whātua Ōrākei i tēnei waka tangata kia tae atu mātou katoa ki te ahuru mōwai ki te wāhi e hiahiatia nei e koe. Paiheretia nei mātou i runga i te aroha noa. Whakatapua ēnei Kawenata e hono ai i a māua tahi i raro i tou manaakitanga, i roto i tōu ingoa tapu. Tuāuriuri whaioio, kii tōnu te rangi me te whenua i tou kororiatanga. E te māngai e tautoko mai, aianei, ake nei, ae.

332 It is difficult to translate this karakia into English. However, the broad meaning is as follows:

> You have heard our plea, of each and every one of us. You know what is in our thoughts and what is in our hearts. Guide us all on the path of truth and honesty, we of Ngāti Paoa and Ngāti Whātua Ōrākei, so that we may arrive at a safe haven, a place you desire for us. Join us in unconditional love, bless the sacred documents that bind us together beneath your care and in your holy name. Eternal, ancient, the heavens and the earth are testament to your glory.

Testing the Kawenata

333 As with any new relationship, it can take time to bed in, and the conflict of this proceeding was still fresh. Not long after we entered the Kawenata with Ngāti Paoa, we were required to issue a proceeding to have them stand by it. Happily though, we were able to resolve that proceeding and recommit to our sacred agreement.

334 That agreement is now operating as it should and is a source of pride for both iwi, allowing us to work together in a way that is tika. It is an example of how iwi can work matters like cross-claims out together, if given the respect, the time and the incentive.

What a tikanga process would look like from our perspective

335 In the Crown's discovery, I have seen an undated presentation entitled "Application of Overlapping Claims Policy to Settled Groups". **[331.20897]** It states that it has been prepared by the Strategic Policy Team at OTS. It notes that research has highlighted that the application of the Crown's overlapping claims policy to settled groups is not sufficiently clear. It also notes that the inconsistent application of the policy to settled groups is contributing to negotiation delays and litigation.

336 The document notes a key finding that the Crown must understand the interests each group has in a particular area, whether they are settled or unsettled, and that this includes interests in non-exclusive redress.

337 Importantly, the document also notes that the Crown must ensure settled groups are included in overlapping claims research and are engaged early so the full range of interests in an area is clear.

338 Although I have not seen the underlying research and do not believe it has been disclosed, I agree with these findings. They are what we have been saying for years, but the Crown has refused to listen or adjust its approach, despite its own research identifying the same problems.

339 To combat this approach, I have been involved in the Iwi Chairs Forum where senior members of iwi throughout the country gather at a hui to discuss matters of importance to all Māori. One of our kaupapa has been to try to develop, and get the Crown to adopt, an approach to dealing with overlapping claims in a way that is respectful of tikanga Māori.

340 Our efforts have been productive and helpful in my view. In May 2018 we developed a detailed overview of the issues and areas for change. **[334.22830]**

341 The "current issues" section of that overview document sets out many of the common complaints with the current Crown process, for example:

341.1 the Crown has little regard for the interests of settled groups;

341.2 objections are dealt with too late in the settlement process;

341.3 the Crown doesn't require evidence of historical or tikanga connection to land before making an offer;

341.4 settlements are rushed.

342 There are many other criticisms, but I note that these are not just criticisms by Ngāti Whātua Ōrākei, they come from the Forum itself.

343 The overview document records our sacred Kawenata with Ngāti Paoa as an example of the way iwi can settle their differences according to tikanga. It also sets out a tikanga-based approach to dealing with overlapping claims, which involves:

343.1 early engagement at the beginning of the settlement process, not once redress is already offered;

343.2 using independent facilitators to investigate interests;

343.3 iwi to iwi discussions, observed by the Crown;

343.4 an independent authority which can help to determine interests as one possible outcome in the event of an impasse;

343.5 using a "sphere of influence" model to assess where an iwi has ahi ka (its core area), an area of interest (lesser interests which may be resolved through memoranda of understanding), and an area of association (areas of least association but where consideration of the iwi's position might still be expected).

344 I consider the work done by the Iwi Chairs Forum is a positive example of how an overlapping claims process can be made to work in a way that enriches Māori relationships, rather than being destructive as is the current process. I recall that when the Iwi Chairs first proposed this to Minister Finlayson at Waitangi in 2017, he was gratefully accepting of the assistance by iwi, expressing that overlapping claims had become the "bain of my life".

345 I have a similar recollection of an interaction with Minister Little at Waitangi in 2018. I recall that Iwi Chairs was late in providing some information to the Minister for his consideration. Minister Little expressed that he was very eager to receive the work. I felt that was a promising sign from the new Minister, however as I have described above that was not to be the case.

Asking the Crown to respect a tikanga-based overlapping claims process

346 Following our contribution to this work, both our lawyers and Ngāti Whātua Orakei wrote again to Minister Little on 3 May 2018 and 18 May 2018. **[334.22857] [334.22860]** Both letters referenced our resolution with Ngāti Paoa and urged the Crown to adopt tikanga-based processes, which cannot occur when the Crown has already guaranteed a settlement outcome.

347 On 1 June 2018 we received a letter from Minister Little. **[334.23027]** Disappointingly, that letter picked up from where Minister Finlayson left off and even repeated the Crown's view that it had not dishonoured its September 2015 assurances. I need to emphasise that from our perspective the distinction between:

347.1 the Minister making a formal decision to offer properties to an iwi, which is then put to Parliament to consider; and

347.2 the Minister putting a formal proposal to offer the same properties to the same iwi to Parliament to consider,

is an exercise in semantics. As we see it, the same processes happen in the same way with the same result. We had viewed the Crown's assurances as substantive and not susceptible to procedural bypasses.

348 We responded by letter dated 6 June 2018. **[334.23029]** Our letter was critical of the Crown's approach to this matter which we felt had not only protracted the litigation, but had served to delay the settlements with other iwi. We received a letter from the Minister on 11 June 2018, however he did not respond to any of our points. **[334.23082]** Given his failure to address what was to us a simple clarification of the Crown's position, we sent a further letter on 22 June 2018 reiterating the points in our 6 June letter. **[334.23084]**

349 The Minister responded on 24 July 2018. **[334.23094]** The Minister did not accept any criticism of the Crown's conduct.

350 The Minister also denied that the Crown had restructured the redress offered to Marutuahu to maximise the chances of success of a strike out application. The Minister said there had been no change to the redress offered to Marutuahu. That statement though is simply incorrect. Rather than make a final decision which could be challenged in Court, the Crown elected to alter the settlement processes so that the redress offered to Marutuahu would only be considered by Parliament. That is both a restructuring and a change.

351 Notably also, the Crown's strike out application was made on 11 July 2016. The decision to refer the issue of redress to Parliament was made on 8 July 2016 according to Minister Finlayson's affidavit in support of the application, and communicated to us that day. The proximity of these events make it difficult to see what happened as anything other than the orchestrated strategy we described in our 6 June 2018 letter.

352 We next heard from the Minister on 26 July 2018. **[334.23099]** The letter advised us that the Minister had initialled the Marutuahu Iwi Collective Redress Deed.

353 On 17 September 2018, the Supreme Court restored our proceeding.

354 From this we sent letters to Minister Little and one to Prime Minister Ardern about the significance of this judgment. **[335.23204]** **[335.23202]** We received a letter from Minister Little on 4 October 2018, but he did not address the Supreme Court decision at all. **[335.23227]** We wrote again to Minister Little on 12 October 2018 seeking that he and his officials give careful consideration to the Supreme Court judgment and its implications. **[335.23229]**

355 The Minister responded on 23 November 2018. **[335.23255]** His letter did not revisit his decision on the concerns we had raised in our prior letters.

356 On 26 November 2018, we wrote to Karen Wilson of Te Ākitai, seeking to engage in a tikanga-based process to resolve our

overlapping claims concerns with them. **[335.23261]** This same day our lawyers told OTS about our engagement with Te Ākitai Waiohua **[335.23257].**

357 We wrote to Te Ākitai in similar terms again on 14 January 2019 and sought engagement as soon as possible. **[335.23288]**

358 On 29 March 2019, Crown Law wrote to us querying whether any engagement had taken place with Te Ākitai. **[335.23322]**

359 We replied to Crown Law on 5 April 2019. **[335.23323]** We enclosed copies of our previous letters to Te Ākitai seeking engagement.

360 At this point we still hadn't heard from Te Ākitai Waiohua and so on 9 April 2019 we sent a further letter for engagement. **[335.23325]** We finally heard from Te Ākitai on 18 April 2019, agreeing to meet with us. **[335.23337]**

361 We met with Te Ākitai representatives in May 2019 at their marae in an attempt to discuss our differences in accordance with tikanga Māori. We did not reach any agreement as a result of that hui, with Te Ākitai representatives rejecting our proposal for mutual recognition of our respective areas of predominant interest.

362 We next heard from the Minister Andrew Little on the Te Ākitai settlement negotiations on 19 November 2019, when he informed us of the Crown's preliminary decision to offer the following properties as redress to Te Ākitai: **[335.23399]**

362.1 Mt Eden Normal School site;

362.2 1350 Dominion Road; and

362.3 101A Hillsborough Road.

363 As with the previous Minister, Minister Little indicated the redress would not be "availed to Te Ākitai Waihoua unless and until Parliament has enacted legislation that authorises it". We were disappointed to see that the new Minister was perpetuating the

same approach to overlapping claims as his predecessor, despite a number of efforts by Ngāti Whātua Ōrākei and others to engage with the Crown on the shortcomings of the overlapping claims policy.

364 It's important to note again here that Kiwi Tāmaki is the eponymous ancestor of Te Ākitai Waiohua. We assume they are claiming the Mt Eden property given its close proximity to Maungawhau-Mt Eden which is where Kiwi was born and lived until he shifted his people to Maungakiekie as a young leader. As described above Kiwi was defeated comprehensively at Paruroa and his pā at Maungakiekie was then occupied by my tupuna, Tuperiri. It is a gross breach of tikanga for the Crown to now transfer Mt Eden Normal Primary School based on the association of Kiwi to Maungawhau-Mt Eden and the central isthmus without gaining the approval of Ngāti Whātua Ōrākei.

365 On 27 November 2019, our solicitor responded expressing our disappointment with the Minister's decision to progress the Te Ākitai settlement even after our legal case was successfully appealed to the Supreme Court, and approving our case to progress to trial. **[335.23402]** On our behalf, Mr Wells requested that the Minister reverse his preliminary decision.

366 Crown Law responded on 6 December 2019. **[335.23405]** Crown counsel Ms Moinfar-Yong stated that "the Crown does not consider that Ngāti Whātua Ōrākei's objections require it to halt negotiations with Te Ākitai Waiohua while the High Court litigation proceeds. … the Crown considers your client's claims about the Crown approach to overlapping claims are incorrect." I have always understood that the Crown disputed our view of the Overlapping Claims Policy, but that the merits of the dispute would be tested in court. However, the Crown's marching on with Te Ākitai was not surprising, but disappointing.

367 Our solicitors responded on 30 April 2019 reiterating our continued objection to the Minister's actions, and sought an update on the progress of the settlement. **[335.23408]**

Participation in the Hauraki Tribunal process

368 In the interim, Ngāti Whātua Ōrākei expressed its support for Ngāi Te Rangi in its joint challenge to the overlapping claims process as it has been applied in Tauranga Moana.

369 I provided an affidavit in support of Ngāi Te Rangi's claim in particular, because of the stark similarities between our experience and our Tauranga-based cousins. **[309.06258]**

370 The Tribunal's report was released in late 2019. **[322.13717]** It was critical of the Crown's approach to overlapping claims, and echoed many of the criticisms we hold, and that have been expressed to the Crown by us and others for many years.

371 In particular: **[322.13717]**

371.1 The Tribunal recommended halting any further progression in settlement legislation for the Pare Hauraki Collective and individual Hauraki iwi (including all groups that make up Marutuahu Collective).[42] The Tribunal did not make this recommendation lightly, but found that the Crown's settlement processes with the Hauraki Collective breached the principles of the Treaty so severely that the recommendation is required.

371.2 In particular, the Tribunal criticised the Crown for "expediting the Hauraki settlement over preventing further grievances",[43] while Ngai Te Rangi has put its own settlement on hold in a genuine effort at engaging in a tikanga-based process with Hauraki iwi on overlapping claims.[44]

371.3 The Tribunal criticised the Crown for its lack of transparency when negotiating with other parties. In some instances it relies on the Red Book (which it finds is "vague, unhelpful and

[42] Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019), at 118.

[43] Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019), at 93.

[44] Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019), at 33.

inaccurate",[45] while in other instances relying on unwritten policy and practical considerations that play out in real time.[46] This echoes the Crown's position to date in our cross-claims litigation.

371.4 The Tribunal endorses a tikanga-based process to resolve overlapping claims.[47] The Crown cannot be responsible for that process, but it cannot be a "passive bystander watching impatiently from the sidelines". The Tribunal suggests that all iwi/hapu groups engaging in a tikanga process "must act tika themselves". This suggestion comes after the Tribunal assessed attempts by Ngāti Wai to engage with Hauraki (led by Paul Majurey).

371.5 We note the Crown called upon its work in 2017 with the Iwi Chairs Forum to inject tikanga into the overlapping claims process.[48] The Crown says that progress from those working groups has led to significant changes in practice, but the Tribunal says these have not been made clear to the parties either by amending the Red Book or in correspondence.[49]

371.6 Timing is a key theme to the report. The Tribunal says it is unacceptable to delay a tikanga-based resolution process until after a deed is signed (unless that is agreed to by all those concerned).[50] This criticises the Crown 'dangling the carrot' of redress. Ironically, the Tribunal noted "had tikanga been engaged at an appropriate point, while all parties still

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45 Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019), at 31.

46 Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019), at 32.

47 Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019), at 90.

48 Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019), at 27.

49 Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019), at 32.

50 Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019), at 88.

had something at stake, delay to the Crown's agenda may have been minimal".[51]

371.7 The Tribunal also says it is inexcusable for the Crown to ignore the impact on tikanga on offering redress to one iwi within another's rohe: "When such redress is allocated, the effect can be that the recipient group is considered tangata whenua, with all the rights that status implies. The Crown cannot distance itself from the practical consequences of providing such redress".[52]

372 This report demonstrates that the overlapping claims problem is not unique, and the problems are imported into the rohe of others. On the other hand, it demonstrates a growing acceptance of those problems, and highlights the need for meaningful action and fast.

373 We wrote to the Minister on 10 February 2020 pointing the similarities out, and suggested a hui to discuss a way forward. **[335.23407]** We met on 7 May 2020, on a without prejudice basis.

V. NGĀTI WHĀTUA ŌRĀKEI TIKANGA

374 I have explained earlier the particular tikanga Māori concepts that are relevant to this litigation, and how they were demonstrated by Ngāti Whātua Ōrākei. To summarise these concepts, from the perspective of our iwi:

374.1 mana whenua means to receive mana from the land as a result of discharging obligations to it. Māori believe that human life is fundamentally tied to land, and that we cannot consider ourselves as separate to land. We are dependent on land, and must respect its life-sustaining qualities in order to have the privilege of receiving mana from it. Those with mana whenua may make important decisions about the land – they may invite people onto it temporarily, or share

[51] Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019), at 89.

[52] Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019), at 85.

resources with others. They may strengthen their relationship with the land by seeking to instigate important marriages in order to secure an alliance or they may, as an exercise of mana, allocate a piece of land to another iwi (or another people altogether). None of these decisions could be made by an iwi that does not enjoy mana whenua. A strong connection with the land is required – in Ngāti Whātua Ōrākei's case, that connection was established through whakapapa and raupatu, and maintained via ahi kā.

374.2 Ahi kā means to live on and tend to land, in order to sustain a way of life for an entire iwi or hapu. Considered together, all of the usual signs of a kinship based community are strong signals of ahi kā: fires for cooking and heating, pā, marae, urupā, kāinga, mahinga kai, fishing sites, and natural landscapes named and respected by the group with mana whenua. The key to ahi kā is a continuous and permanent presence in a particular area.

374.3 Tuku whenua is the act of allocating a piece of land to another iwi or group (including the Crown, or non-Maori). The tuku is a symbol of mana whenua itself – only the group with mana whenua could carry out such an act. Tuku does not sever mana whenua. Tuku could never operate that way, because the act of tuku is a symbol of mana whenua (or rangatiratanga). The group allocating land by tuku maintain their connection with that land. There was no concept of 'sale' in the minds of Ngāti Whātua Ōrākei in the mid-1800s, though I understand the term 'hoko' came to be considered as the equivalent of a sale as the Pākeha presence in New Zealand became more prevalent.

375 While Ngāti Whātua Ōrākei's mana whenua was established some centuries ago, it should not be considered solely through a historical lens. To be clear, Ngāti Whātua Ōrākei still live and breathe our mana whenua and ahi kā today, informed by our history as relayed to us over the generations. There is a whakatauki (Māori proverb) that describes this way of thinking and living: Ma mahara, ka marama – looking backward to live forward.

376 I should explain what I mean by 'our' tikanga. It's very simple – Ngāti Whātua Ōrākei tikanga is the expression of these tikanga concepts that are of general understanding across iwi in Aotearoa, by reference to Ngāti Whātua Ōrākei aural history, whakapapa, leaders, battles, rivers, hills and much more. Our tikanga extends beyond mana whenua and ahi kā – we have a Ngāti Whātua Ōrākei way of welcoming visitors onto our marae, hosting dignitaries, meeting with other iwi, celebrating occasions within our iwi and of farewelling those we lose. But mana whenua and ahi kā underpin all of those tikanga. Practising those rituals is living our tikanga, and is possible because of our mana whenua, and ahi kā.

377 At times in our history our mana has been tested to its limits by the Crown – the early land purchases, the Ōrākei Block inquiry, subsequent removal of our people from our lands, the pollution of our fishing grounds, the Bastion Point occupation and protest – and it has been challenging to live in accordance with our tikanga. But through the resilience of our people, our mana whenua and ahi kā has prevailed in our rohe.

378 The Crown's actions that led to this litigation are testing our tikanga yet again, but this time in a setting where Ngāti Whātua Ōrākei and the Crown have met over a number of decades for the purpose of familiarising the Crown and its many officials with our history and our tikanga. The Crown has acknowledged that its actions breached the Treaty, apologised to us for that, and promised to respect us in the future. For us, those apologies and acknowledgements include the Crown's actions in relation to the 1840 tuku, what it meant to Ngāti Whātua Ōrākei, and how that tuku set off a chain of land-related grievances, which impoverished our people over the course of 150 years of more. The apologies and acknowledgements also demonstrate the Crown's view that Ngāti Whātua Ōrākei's mana whenua and ahi kā remain intact in spite of the Treaty breaches. The apologies and acknowledgements were made to direct descendants of our rangatira who welcomed the Crown to Auckland, and made the tuku as an expression of our mana whenua. There is simply no way the Crown could not know what it was apologising for and acknowledging.

379 And so knowing full well what our tikanga is and what it means for us in our rohe, it is disrespectful and offensive for the Crown to either to refuse to engage with or ignore tikanga altogether when considering its Treaty redress decisions to others within our rohe. It is disrespectful and offensive to be painted as 'winners' and 'land-grabbers' with respect to our rohe in which we have fought hard to maintain our mana whenua and ahi kā for generations. And it is disrespectful for the Crown not to allow space for a tikanga-based process to occur between iwi, when such a process would repair and even enhance relationships between iwi, and even with the Crown.