

Chief Ombudsman's Final opinion

Summary

1. I have found that the lack of consultation by the Ministry for Culture and Heritage/Manatū Taonga (the Ministry) before forming a preference in August 2018 for Dove-Myer Robinson Park/Taurarua as the site for the National Erebus Memorial was unreasonable. Specifically, my view is that the Ministry should have consulted the wider local community and all Tāmaki Makaurau iwi comprising the mana whenua before forming a preference for any site in Auckland.
2. I also find that the Ministry acted unreasonably in failing to reply in October 2019 to correspondence about the resource consent.
3. I do not consider that the Ministry acted unreasonably in the design process that it undertook for the memorial.
4. I do not consider that the Ministry deliberately misled Ngāti Whātua Ōrākei or Waitematā Local Board members as to the level of support from Erebus family members for a memorial sited in the park.
5. While the Ministry has taken a range of steps to protect the physical health of a notable pōhutukawa tree in the park, strong views about the impact construction will have on the mana and mauri of the tree were conveyed to me during my investigation. I am satisfied that the Ministry is now cognisant of these.
6. While I am critical of the lack of community involvement prior to the Ministry preferring Dove-Myer Robinson Park, I do not consider that its own preference for that site can be said to be wrong. What the lack of consultation has done is deny an opportunity for wider community and Māori involvement in considering a range of possible locations for the national memorial. A sense of grievance over this continues to exist among some members of the local community.
7. Thus, while the project had moved swiftly up to August 2018 in an endeavour to begin work on site in time for the fortieth anniversary of the tragedy in November 2019, it moved much more slowly thereafter, taking more than two years before the park was finally confirmed as the location. I accept that unanimity was never feasible but seeking the views of the wider Auckland community and its iwi and building those into decision-making in 2018, even though this may have delayed the site selection slightly, would have been reasonable and could have led to faster progress for the project in the long-run. Though whether a start could ever have been achieved by November 2019 is doubtful.
8. In considering an appropriate recommendation I have had regard to a range of factors. There is a considerable sense of grievance amongst some members of the community which might reasonably be seen as tainting the memorial if no further steps are taken to resolve this before construction begins. The Ministry and Ministers have to balance this against several other factors, including the support for the site which does exist. My recommendation, which it is hoped is constructive in this complex context, is that

before a decision is made to begin construction on this site the Ministry undertakes reasonable steps to attempt to resolve the sense of grievance that the failure to consult more widely has created.

Background

9. The crash of Air New Zealand Flight TE901 into Mount Erebus on 28 November 1979 killing all 257 passengers and crew is New Zealand's worst civil disaster. The event was a traumatic experience for the country but especially, of course, for the family and friends of those lost in the disaster and for those involved in the recovery operation. It led to a Royal Commission that made findings of fault, subsequent judicial proceedings, and much anguish for all concerned.
10. The tragedy has never been commemorated by a single national memorial, though it is said that there are 28 memorials to it scattered throughout the country.
11. Following an approach from an advocacy group in 2016, the Ministry began work on establishing a national memorial that would list the names of all those lost in one location and offer a particular place to reflect on their loss. This work led to the then Minister for Arts, Culture and Heritage (Rt Hon Jacinda Ardern) announcing on 28 November 2017 the Government's intention to establish a National Erebus Memorial.
12. The project for the establishment of the memorial was led by the Ministry. A timeline of the principal events occurring in the course of the project is set out in Appendix 1 to this opinion.

Abbreviations

13. The following abbreviations are used in this opinion:

AC	Auckland Council
BM	Boffa Miskell
DMRP	Dove-Myer Robinson Park/Taurarua
WLB	Waitemata Local Board

The complaint

14. The site chosen for the memorial in Auckland is Dove-Myer Robinson Park (also known as the Parnell Rose Gardens) or Taurarua, a site within the rohe of Ngāti Whātua Ōrākei. The park contains important archaeological remains. It is the location of Mataharehare Pa which was abandoned or destroyed in the early part of the last century. It is also the site of the house and extensive gardens of a prominent nineteenth century settler, Sir John Logan Campbell, whose house was demolished in 1924. There are a large number of native trees in the park. In particular, there is one notable pōhutukawa tree that may be affected by the works that are proposed.
15. In these circumstances there is opposition from some Māori and members of the local community. This led to a rāhui being placed on the site and, on 26 July 2021, a

complaint being lodged with my office. I note Ngāti Whātua Ōrākei told me that the rāhui was not placed in accordance with its tikanga.

16. After discussion with the complainants, Dame Rangimarie Naida Glavish DNZM JP,¹ Joanne Malcolm, Steve Phillips, Margaret Brough, Anne Coney and Roger Burton, and consideration of advice I received from senior staff, I decided to investigate the Ministry's consultation with the various interested parties on the proposal and its response to the concerns about the potential impact on the pōhutukawa tree of the development. This investigation commenced on 4 October 2021. A separate investigation is underway relating to the Auckland Council's (which includes the Waitemata Local Board's) consultation on the proposal and the failure to notify the resource consent for the memorial.
17. During the course of this investigation my staff met with the complainants, the Ministry's Chief Executive and other staff involved in the project, members of a group representing some Erebus family members, and the Ngāti Whātua Ōrākei Trust Board.
18. A provisional opinion specifically identifying matters on which I was critical of the Ministry's actions was provided to the Ministry for comment of 2 December 2021. There have been ongoing exchanges of information with the Ministry throughout the investigation. The Ministry's comments on the provisional opinion have been taken into consideration in forming my final view. Where I considered it appropriate, I have referred to the Ministry's comments in the relevant sections below. A provisional opinion was also provided to the complainants on 1 March 2022. The complainants' comments on that opinion were also taken into consideration before I reached my final opinion.
19. An Ombudsman's investigation is not akin to obtaining an interlocutory injunction, and the Ministry (having obtained all the approvals required for the project) was on the point of starting work on the site when my investigation was notified. After discussion with the Chief Executive of the Ministry it was agreed that the start of irreversible work would be deferred for at least a month to allow time for this investigation to be undertaken. I am grateful for the Chief Executive's co-operation in this regard and for its general co-operation throughout the investigation.

Consultation

General

20. The first main allegation by the complainants was that the selection of Dove-Myer Robinson Park (DMRP) as the site for the National Erebus Memorial was determined by

¹ Dame Naida Glavish is a member of Pūhara Mana Tangata, an advisory group of Māori rangatira that provides guidance to the Chief Ombudsman on engagement and communications with Māori, as well as promoting the role of the Ombudsman to wider Māori audiences. The Terms of Reference for Pūhara Mana Tangata can be found on the Ombudsman's website (www.ombudsman.parliament.nz/resources/puhara-mana-tangata-terms-reference). While Pūhara Mana Tangata are not involved in investigations, Dame Naida's membership could potentially give rise to a perceived conflict of interest. I disclosed this potential conflict to the Ministry after notifying the investigation and outlined how it was being managed by my office. The Ministry have not raised concerns about the potential perceived conflict.

the Ministry without adequate wider consultation. They suggest that the outcome was predetermined. *Predetermination* I see as occurring when a decision-maker who is in the process of consulting on a matter has already decided what the outcome of that consultation will be or has a preferred outcome that is not disclosed as part of the consultation. In these circumstances the consultation is rendered pointless and those taking part in it are being misled.

21. From my reading of events in the critical period in 2018, it does not seem that this was the situation here. Rather than there being a predetermined outcome to a consultative process, what is at issue is whether there was consultation at appropriate stages at all. I prefer, therefore, to look at the matter from this perspective. This initially involves a consideration of what consultation might have been expected to occur at each stage and what form that consultation would take.
22. I accept, of course, that as a matter of law there is no general obligation to consult. That proposition is itself subject to exceptions that may arise in particular circumstances, and I put it wholly aside in an Ombudsman context. Whatever standards the law may permit, the principles of good administration embodied in the Ombudsmen Act 1975 require that on a matter of this significance there will be stages at which some form of consultation is necessary. I do not think that this would be disputed and, indeed, consultation has occurred at various stages of the Erebus memorial project. The question for me is: did it occur, and did it occur in a satisfactory form, at appropriate stages of the project?
23. I see this being addressed by considering various levels of the project as these moved from the more general to the more specific and by considering who if anyone could or should have been involved at those levels. Thus one would move from a general question – for example, should there be a memorial at all, which might involve the entire country - to a very specific question – whether to site it in a particular locality – which might only involve residents and mana whenua interests. The views of family members who lost loved ones at Erebus would, of course, be taken into account at every stage. In this regard, I can say at the outset that I am satisfied that the Ministry engaged with those Erebus family members who wished to participate (not all did or could be contacted) at every stage of the project. (I will say a little more about what “*Erebus family member*” means later in this opinion.)

24. A hierarchical table of consultation possibilities regarding the national memorial might look like this:

Stage of project	Potential consultees
Whether to have a memorial	Entire country
Which city or region in which to locate it	Entire country
Once a city or region is identified, where to locate it:	
1. By inviting suggestions at large	Residents of the city/Erebus families/all mana whenua with an interest in possible sites
2. By inviting suggestions at large after specifying criteria for the site	Residents of the city/Erebus families/all mana whenua with an interest in possible sites
3. After drawing up a short-list of potential sites	Residents in those localities/Erebus families/all mana whenua with an interest in those sites
4. After identifying one site	Residents of that locality/Erebus families/all mana whenua with an interest in that site

Consultation on finding a site

25. In this case, the Government at an early stage took the decision to have a National Erebus Memorial and I have seen little disagreement with this (though I am aware that feelings on this are not unanimous). As to which city or region it should be located in, on the basis of the information I have considered, there seem to have been only two strong alternatives. The fatal flight took off from Auckland and was scheduled to land first at Christchurch on its return, leaving these cities as the only likely suitable locations for such a memorial. There was no general community engagement on this question. Instead the Ministry sought approval for Auckland at ministerial level only. I am aware that there were some family members who would have preferred Christchurch, but I think that the arguments for Auckland are sufficiently strong that it was not unreasonable to omit community consultation before recommending it. I note the complainants have also made it clear to me that they do not oppose Auckland as the location for the memorial.
26. Having selected a preferred city, there was the question of finding a site in Auckland. the Ministry went about this by opening discussions with the Auckland Council (AC). This is an obvious place to start in any case, but it was made more so by the wish, if possible, to find a Council-owned site. I note that the preference for a Council-owned

site would not have precluded public consultation with that particular criterion identified.

27. It is really at the next stage of the project that I think that the lack of consultation over options is more serious. As a result of discussions between The Ministry and AC, 10 potential sites for the memorial were identified. DMRP was one of these options. Staff from Ministry and AC paid a visit to these locations on 12 June 2018. Following this visit a short-list of five sites was drawn-up and the then Minister for Arts, Culture and Heritage was briefed on them on 14 June 2018. On 23 August 2018 Ministry recommended DMRP to the then Minister as the site for the memorial, so it clearly formed its preference for DMRP at some point in the period 14 June – 23 August 2018.
28. In July 2018 Ministry commissioned Colmar Brunton to survey Erebus family members and those involved in the recovery operation. The survey was open from 24 July to 6 August. It sought their views on the features of a memorial. Participants were not specifically asked where they thought a memorial should be sited, though some expressed their views on this. Rather they were asked questions that sought their opinions on the qualities of a suitable site such as seclusion, trees, etc.
29. Preliminary survey results were available on 26 July and the final survey results were delivered on 14 August 2018. The Ministry claims that by this time no site had been selected as its preference and that the feedback from the survey was taken into account and was a critical factor in the decision on a preferred site.
30. I accept that the survey results were taken into account by Ministry but it seems to me more to validate or confirm a decision already provisionally arrived at than to lead it. As far as location was concerned, the preferences expressed in the survey were generic. They were consistent with a number of possible sites. There was nothing that would specifically lead one to DMRP though DMRP was arguably consistent with them (the complainants would not agree that it was). Of those who expressed a preference for a particular site (they were not specifically asked to do so), none identified DMRP. Within the Ministry, and before the survey ended, it is clear that a definite preference for DMRP as the site of the memorial had emerged. For example, on 31 July 2018, a Ministry official contacted environmental consultants, Boffa Miskell (BM), saying that site options were narrowing down and that there was one in particular that the Ministry would like it to take a look at - DMRP. Indeed having received the 36 page survey results on 14 August, only two days later BM was paying a visit to DMRP to report on its suitability. BM was only ever asked to report on the suitability of DMRP. It was never asked to report on any of the other possible sites that had been identified. I have never seen any comparative analysis of the other sites measuring them against the survey results. Attention has been concentrated solely on DMRP.

Auckland mana whenua and community consultation

31. It is clear that there was no consultation with either Auckland residents or mana whenua before the decision to support DMRP was made.

32. I find the lack of any contact with mana whenua interests prior to forming a preference particularly surprising given the obligations of consultation with indigenous peoples recognised at an international level and the Crown's partnership obligations under Te Tiriti/Treaty of Waitangi. Quite apart from whether it can be said that a legal obligation to consult mana whenua exists, my view is that before forming a preference for a site there should have been engagement with all mana whenua who had an interest in possible sites as a matter of good administration. That failure to do so here appears to me to be unreasonable.
33. I consider that consultation could have occurred by way of individual approaches to iwi within whose rohe potential sites had been identified. This was not done.
34. Apart from consultation with mana whenua there is also the question of involving the wider Auckland community in consideration of possible sites. I have seen no evidence that this was considered either. I consider that it should have been. I will discuss this further below.
35. In any event, the lack of consultation with either residents or mana whenua created problems for Ministry when, later, it submitted an application to the Waitemata Local Board (WLB) acting for AC, seeking landowner approval. The lack of consultation with mana whenua in particular was raised at a WLB workshop on 9 October 2018. Ministry tried to meet this objection by proposing that a condition be attached to any landowner approval making it subject to mana whenua consultation. WLB did not agree, insisting that such consultation be held before it gave its approval. The workshop also noted the lack of public consultation to date and queried Ministry as to whether other sites were being considered. By this time, of course, they were not. On 20 November 2018 the WLB did give in-principle support for DMRP but in the expectation of further mana whenua consultation, which was specifically noted in its minutes.
36. Consultation with Ngāti Whātua Ōrākei was initiated almost immediately after the workshop on the basis that DMRP was in its rohe. Its support was quickly obtained. The complainants submit that Ministry did not adequately consult other Tamaki Makaurau iwi at that time nor did they give Ngāti Whātua Ōrākei sufficient or fully accurate information that would enable it to give an informed consent.
37. In respect of the latter, I note Ministry's engagement with Ngāti Whātua Ōrākei has now extended over three years. The iwi has raised issues over this period with Ministry that the Ministry has responded to, apparently to the former's satisfaction. On 3 March 2021, the Chair of the Trust Board issued a statement reaffirming complete support for the project. This was reiterated to me in the course of this investigation. I accept that there may be different views within the iwi over how this consultation has been handled and whether its support should have been forthcoming. But these are matters for Ngāti Whātua Ōrākei not for me; my focus is on the adequacy of steps taken by Ministry. In these circumstances I do not consider that Ministry's consultation with Ngāti Whātua Ōrākei can be impuned.
38. The Ministry advised me that it intended to undertake '*consultation with local interests ...once a design has been selected*'. I note it did this in mid-2019. Nonetheless, I remain

of the view that not engaging all mana whenua who had an interest in possible sites before forming a preference for a particular site was unreasonable.

Design of the memorial

39. While final landowner approval still remained outstanding, attention shifted to the design of the memorial. There was a much wider community and mana whenua involvement on this issue than had occurred in choosing a site. The Ministry also had available to it the results of the Colmar Brunton survey. Matters progressed very quickly. The complainants contrast the length of time spent over the Christchurch earthquake memorial and the large number of expressions of interest that it attracted, with the time allowed for the design stage of this project and the consequently fewer expressions of interest that resulted. This speed is criticised by the complainants. It is true that events were moving at a fast pace. Ngāti Whātua Ōrākei was fully involved in the process leading to the decision on design, and the Ministry did seek views from other iwi on the design proposals. I do not feel that the pace of events (which might equally have attracted criticism if it had not been fast enough) on its own is enough to suggest a failure of process. The complainants were critical of the Ministry's engagement with Ngāti Whanaunga. In particular, they are concerned that Ngāti Whanaunga had indicated in mid 2019 that the site was of cultural significance to them as well and had requested an opportunity to review the Ministry's proposal which the complainants believe was not taken up. I explored this further with the Ministry and am satisfied that it took reasonable steps to seek the views of interested iwi at the design phase, including Ngāti Whanaunga, and its particular reliance on Ngāti Whātua Ōrākei for detailed feedback was not unreasonable. I thus do not consider that in choosing the appropriate design for the memorial the Ministry acted unreasonably. (I will return to the consequences of the design for trees in the park later.)
40. The difficulty, as I see it, is that the concentration on the design of the memorial obscured the lack of consultation on an issue of prior importance to which I have already referred - that is, where it was to be situated. This is illustrated by the Ministry's later claims (for example at a WLB workshop on 27 October 2020) that the design is site-specific and that if the site is changed it will have to start over again on the design. This is challenged by the complainants, and I am in no position to judge whether they or the Ministry is correct. But it is apparent to me that this question has arisen acutely because the issue of the site was not satisfactorily resolved through a consultative process before the question of the design was entered upon.

Later consultation

41. The proceedings at WLB led to an acknowledgement of a lack of community consultation and WLB resolved to carry out its own consultation before giving landowner approval (as it was claimed that it was obliged to do in any case under the Local Government Act). Later the Ministry withdrew its application for landowner approval until after it had obtained a resource consent. It was apparent by this time that there was considerable local opposition to another memorial in DMRP (there are other memorials located in the park). It seems to have been thought that a fresh

application for landowner approval backed by a resource consent would strengthen the case for approval by WLB on what had become a divisive issue.

42. On 18 March 2020 a resource consent was granted. The complainants have raised concerns about its non-notification but I am not concerned with it in this complaint (though I refer to aspects involving the Ministry later). On 20 September 2020 Heritage NZ granted an Archaeological Authority, leaving landowner approval as the last regulatory hurdle to be surmounted. Consultation had been carried out by WLB late in 2019. Even so, it was not until its meeting on 17 November 2020 that approval was given. At that meeting, WLB voted 4-3 in favour of granting approval (again there are complaints of irregularities with this decision and I refer to one later). AC conveyed the landowner approval to the Ministry some three weeks later.
43. There has thus been consultation on the specific site preferred by the Ministry. First, with Ngāti Whātua Ōrākei, on the basis that they were the mana whenua for which DMRP was in its rohe, conducted by the Ministry itself and, secondly, with the local community, conducted by WLB. But there was no wider community or mana whenua consultation *before* potential sites were whittled down to DMRP (other than the family survey, which I have discussed above). There has been specific mana whenua consultation at the design stage and, prior to lodging its application for a resource consent, the Ministry did initiate consultation with other Tamaki Makaurau iwi groups identified as having an interest in the site. I note one other iwi did indicate they wished to review the proposal in depth, which was acknowledged by the Ministry at the time. However, on the basis of the information I have reviewed, this does not appear to have been furnished to the Ministry in the end.
44. So while consultation did occur, whether it occurred early enough in the project and was extensive enough is a matter of real concern. It seems at least doubtful whether the site-specific community consultation would have occurred if there had not been a need for landowner approval by a political body. In the case of both mana whenua and the community, lack of consultation was identified as a deficiency at WLB proceedings. One might say that this regulatory stage did its job and cured a defective process. So it did to some extent. It was inevitable that consultation with the local community and mana whenua would be necessary at some stage. But this was only initiated to overcome objections raised as part of the formal approval process. I consider that it should have occurred earlier than this.

Conclusion on consultation

45. The Ministry's position is that it was reasonable to limit consultation on the site to those most closely affected by the accident – that is, the families of those killed on the flight and members of the recovery operation, Ice Phase. It says that other than this, there was no definable *community*, in contrast to the Canterbury earthquakes which affected the entire community and justified a broad consultation in that context. It says that its preferred site was selected on the basis of the preferences of the families and on the experience and expertise of its officials in creating significant national memorials.

46. Its approach was supported by an audit carried out for it by a senior lawyer in October 2020. In particular, counsel concluded that it was reasonable to limit consultation in the way that it did, particularly since the Ministry was not able to control whether a particular site would be available. Consulting on a particular site could have created an expectation that that site was definitely available. the Ministry reiterated to me that it did not engage in wider consultation or ask for nomination of potential sites as it could not guarantee that any particular site could be secured.
47. I am unable to accept the Ministry's position in this regard. It was perfectly legitimate for the Government to identify its preferred site and then to put its resources into securing the necessary approvals to give effect to that preference. This is what the Government did from September 2018 onwards. But even then there could be no guarantee that that site could be secured and, in fact, it took over two years from that point before DMRP was finally approved. I do not accept that because potential sites that might have been suggested as a result of a public consultation could not be guaranteed, this was an impediment to some form of consultation. That was a contingency which would be part of the background against which consultation was held.
48. While a smaller portion of the community was affected by Erebus than by the Canterbury earthquakes, the number who lost their lives was greater. This was to be a *national* memorial and I think that good administration required a wider degree of engagement with the community and iwi in deciding where in Auckland it should be placed. As I have noted above, engaging with iwi across Auckland before selecting a site was important, especially so given the Crown's partnership obligations under the Treaty of Waitangi. Yet I have seen no evidence that this was considered. Granted that the views of family members are vital, these could have been used to define the essential attributes of a site or to identify potential sites which appeared to the Ministry to possess these attributes, and consultation proceed accordingly. But so too are the views of Māori who have a vital relationship with the Crown, especially when it relates to decisions that may have cultural significance to them when identifying potential sites in Aotearoa New Zealand.
49. The Ministry asked me to clarify what form of consultation it should have undertaken. I do not consider it is necessary to do so in detail. Wider community and Māori involvement could have involved public meetings, circulars, advertising for submissions, a commissioned survey and online surveys and directly approaching mana whenua earlier. The fact is that here there was a failure to engage at all or even to consider opening it up in early to mid-2018, which in my view was unreasonable.
50. There are consequences flowing from the closed process that was followed up to the decision to prefer DMRP that I think have prejudiced those such as the complainants who disagree with the decision.
51. One is the drive that gets behind a project when a commitment is made to one site, aspirational as it may be. Governmental resources are then devoted to advancing it. It is difficult to change minds once such a decision is made. Opponents are necessarily on

the back foot from this point. All of this is understandable, indeed inevitable. But it makes it even more important to have followed an open process before this point is reached, so that those with a different point of view have an opportunity to express it when it can make a difference.

52. It is true that even after making the preference for DMRP, it still had to surmount regulatory hurdles and that failure at one of these might have caused it to be abandoned (failure to obtain landowner approval certainly would). But after September 2018, consideration was focussed exclusively on the merits or demerits of DMRP. What was denied by a closed process of selection prior to that time was a community debate on a wider selection of options.
53. In my view wider community and mana whenua input was essential by the very latest when information from the family survey was available in August 2018. It was not reasonable for the Ministry to refine its preference to a particular site with the lock-in that this led to in respect of a site-specific design for a memorial and the site-specific regulatory authorities that were then obtained without having done so.

Reason for speed of the project in 2018

54. It seems likely that the reason that the project proceeded so quickly to the preference for a particular location by August 2018 was an endeavour to have work start on the site by the fortieth anniversary of the tragedy in November 2019. I understand that this was identified as an aspiration in the submission to the then Minister by which she approved the project in November 2017. It accounts for the fast pace at which things proceeded through the first half of 2018.
55. It was in itself a laudable aim, but it could not justify omitting essential steps in the process. I have given my reasons above as to why I consider that essential steps of community and mana whenua involvement were omitted before a preference for DMRP was settled upon. There is some indication that, by October 2018, the Ministry had concluded that the project would not be completed in time for the anniversary. But, by this stage, the Government was firmly committed to DMRP.

The notable pōhutukawa tree

56. There is standing in DMRP a tree classified as a notable pōhutukawa (*metrosideros excelsa*) which is about 14m in height and said to be approaching 200 years old. It is regarded as tupuna rākau with the name Te Hā. The erection of the memorial will extend into the roots of this tree and there are likely to be annual cutbacks of the tree's branches to maintain access to the memorial. The complainants maintain that it is unreasonable to proceed with a project that could in any way endanger the mana and mauri of this taonga.

The development of the project

57. The controversy over the effect on the tree seems to have arisen when the project was well advanced and the placement of the memorial within the park and its encroachment on the tree began to be appreciated.

58. The BM report on DMRP in August 2018 identified the presence of the pōhutukawa and other native trees but at that time there was no conception of the size of the memorial or where it would stand in the park. In these circumstances no consideration was given to the possible impact on the tree at that point.
59. The design of the memorial that was approved in April 2019 was one that specifically took into account the contours and vegetation in the park. At the very latest it would have become apparent then that the development would have effects on the pōhutukawa and other trees in the park. These effects were then addressed by the Ministry as part of the process of obtaining a resource consent. the Ministry thus commissioned an arboricultural assessment from a specialist consultant.
60. The assessment was completed on 16 October 2019. It stated that the tree's root zone would be affected by the installation of a portion of the memorial and by the cleansing basin. For resource consent purposes this root zone work was assessed as a Restricted Discretionary Activity. The consultants considered that suitable procedures could be put in place so to manage the work that any adverse effect on the tree would be less than minor (and, as it did not say, thereby avoid notification of the application). As part of the resource consent process, the Ministry needed to obtain tree asset owner approval from AC. This was granted on 31 October 2019 following agreement as to the proposed works.
61. The Independent Commissioner who considered the application decided against notification and consent was granted on 18 March 2020. The resource consent noted that there would be an effect on the tree but, it was said, by making only a small encroachment into the root zone and that this would be undertaken following best arboricultural practice. The consent included arboricultural conditions drawn from the arboricultural assessment.

The complaint

62. The complainants state that the status of this tree is such that it should not be exposed to any activities that compromise it. It is acknowledged that at present the tree is in a healthy state, growing at the rate of about 1% each year. They fear that the proposed development may compromise the tree's health and, given its notable status, nothing should be done which could have an adverse impact on it.
63. They particularly emphasise the impact of cutting its roots on the mana and mauri of the tree. They note that Te Hā is a tuakana, an elder, to humans as teina, junior, and a tupuna rākau, as an ancestor. The connection between pōhutukawa in te Ao Māori and the whenua means it has spiritual significance relating to the beginning and end of human life. They state the roots are its connection to the whenua and mauri, and severing those roots will diminish its mauri and all those who connect to it will be impacted accordingly. The mana of the tree will also be significantly diminished by the construction and presence of the memorial.
64. The complainants suggest that given the extensive root system of pōhutukawa (particularly the sand variety such as Te Hā), its roots could extend many metres

beyond where the Ministry assumes they extend thus leading to damage to the tree that it has not anticipated. They say that the memorial's pathway extends well under the drip-line of the tree and should be moved. Shortening the structure by one metre (as the Ministry has proposed) will make no difference without an understanding of the tree's root structure.

65. The complainants also refer to potential damage from concrete leeching into the ground on which Te Hā feeds and maintain that this risk has not been fully considered.
66. The complainants were critical of the Ministry's engagement with and reliance on the advice of Ngāti Whātua Ōrākei solely on these matters. They took the view that all Tamaki Makaurau iwi views should have been included and the issues above should be the subject of a separate comprehensive cultural assessment report.
67. They make the point that the failure to notify the resource consent application meant that these issues could not be satisfactorily explored before consent was granted. Comments from the complainants are set out more fully in Appendix 2. These were conveyed to the Ministry during the course of the investigation. In its response to my provisional opinion the Ministry indicated it would take these views into consideration before beginning construction, taking advice from Ngāti Whātua Ōrākei.

Steps the Ministry has taken to protect the tree's physical health

68. The Ministry suggests that less than 1% of the root system of the tree will be affected and that the memorial poses no risk to its physical health and wellbeing. Since the original arboricultural assessment it has obtained a review by a range of qualified arborists. It says that this confirmed that the heritage trees, including the pōhutukawa, will be protected and preserved both during the construction and when the memorial is erected.
69. During the course of my investigation, the Ministry informed me of the following additional steps that I record here:
 - all works relating to the pōhutukawa, including any soil removal or excavation, will be done by hand and under the supervision of a qualified arborist;
 - the pōhutukawa will not be pruned for construction purposes;
 - all construction works have been specifically designed to avoid the root system of the pōhutukawa, and it is likely that no roots will be encountered;
 - an independent qualified arborist will be on site to supervise all earthworks in the vicinity of the tree to ensure it is protected. Regular consultation will take place with the Auckland Council heritage arborist and the Tree Asset Owner during this process;
 - the 'ice wall' of the memorial will be shortened by approximately one metre, so that the memorial completely avoids the protected root zone of the tree.

Ngāti Whātua Ōrākei's position

70. Ngāti Whātua Ōrākei has confirmed its support for the arboricultural management plan on arboricultural and cultural grounds. On 18 February 2021 it endorsed a National Erebus Memorial Cultural Monitoring Plan prepared by the Ministry, which gives it a leading role in safeguarding the tree. On 3 March 2021, the Chair of the Ngāti Whātua Ōrākei Trust Board issued a statement noting that there had been claims that there would be a greater impact on the tree than had been shared with Ngāti Whātua Ōrākei through the consultation process. Ngāti Whātua Ōrākei had sought clarification from the Ministry. As a result of the assurances it had received, it reaffirmed its complete support for the project.
71. Ngāti Whātua Ōrākei emphasised to me its experience in dealing with arborists reports in the context of resource consent applications. They said that theirs was the review from an Ao Māori perspective, and they as the mana whenua were the only ones who could carry out such a review. Considering the impact of construction on the mana and mauri of the tree was the whole point for them of their review. They recognised the tree as a tupuna rākau and that if anything were to happen to it, they would take responsibility. They saw no need for review by a Māori arborist. In their view conveyed to me during this investigation, sign-off by an arborist and by the Trust Board was sufficient.

Discussion

72. It seems to me that there is no solution that is likely to be satisfactory to all parties. A project of this nature in DMRP will inevitably have some impact on the natural life of the tree. While I have been critical of the lack of consultation in the early stages of this project, consultation at a multi-site Auckland-wide level is unlikely to have been specific enough to identify this particular problem.
73. I do not question the correctness of the Independent Commissioner's decision that resource consent proceed on a non-notified basis in this opinion. But I have some sympathy for the view expressed by the complainants that it is unfortunate that the resource consent did not proceed on a notified basis. A more contestable process at that point with the different views being aired before the Commissioner could have helped to identify, examine and reconcile the positions held by the parties. Without disparaging the arboricultural assessment that was made in October 2019, it was produced on behalf of the Ministry to assist it with its application for the resource consent. It is in the context of avoiding notification of the application that it argues that the effects on the tree are minor. It is understandable that in these circumstances it is not accepted by the complainants as a reassurance as to the proposed work in the park.
74. I do not pretend to be able to reconcile the conflicting technical and arboricultural views that I have recorded in this finding. Nor is it my role as Ombudsman to make a determination on competing views as to the impact construction will have on the tree from a te ao Māori perspective.
75. An investigation under the Ombudsmen Act is into the reasonableness or otherwise of the conduct of the agency under investigation – in this case the Ministry. I appreciate that the complainants do not consider DMRP as an appropriate site for the Erebus

Memorial, but that is a different question, one discussed later in this finding. The question here is: is it unreasonable of the Ministry to proceed with construction based on the regulatory approvals it has already obtained and in the face of apparently competing views on the impact construction will have from a te ao Māori perspective? In my view it is imperative that Crown agencies consider and include te ao Māori and tikanga in their advice and decision-making.

76. After giving this matter careful consideration I have formed the opinion that it cannot be said that the Ministry has acted unreasonably in this matter. It has not relied on a single arborist's report (the one it obtained as part of the resource consent process); it has commissioned subsequent reports in the light of submissions made to it. It has shown itself willing to make changes to the layout of the memorial so as to reduce the risk to the tree, not least during the course of the investigation that I have been conducting. As I have already noted, The Ministry has said to me that it will give further consideration to the complainants' concerns, and take further advice from Ngāti Whātua Ōrākei, before construction commences.
77. The Ministry has relied strongly on advice from the mana whenua, Ngāti Whātua Ōrākei, about the impact of construction on the mana and mauri of the tree. That said, it is necessary to be clear here that an agency cannot avoid being held responsible for unreasonable conduct by saying that it has relied on advice from a third party. The responsibility for accepting that advice remains with the relevant agency. It cannot abdicate its responsibilities simply by relying on the views of another party. It must always show justification for doing so. In this particular case, on the basis of the information I have considered, it seems to me that the Ministry has shown justification for relying on and accepting the advice provided by Ngāti Whātua Ōrākei given its position as the mana whenua of the site on which Te Ha lives and its proven experience in this area of activity. I engaged with Ngāti Whātua Ōrākei directly as part of my investigation. I am satisfied that it is an appropriate body to provide advice to the Ministry on the impact of construction on the mana and the mauri of the tree, and that it stands ready to intervene if it considers that actions are being taken that could compromise these. I accept that this engagement with Ngāti Whātua Ōrākei has not generated the form of cultural assessment "report" which the complainants expected, but I am satisfied that their engagement did include advice as to the impact that construction would have on the mana and mauri of the tree, and the Ministry included this when formulating its advice and decisions.
78. As a result, I do not consider, the Ministry has acted unreasonably by relying on the advice and support it has received from Ngāti Whātua Ōrākei during this particular part of the process.

Resource consent

79. An application for a resource consent in respect of the project was lodged by the Ministry on 16 September 2019. It was ultimately dealt with on a non-notified basis by the Independent Commissioner and granted on 18 March 2020. A complaint against AC's actions in respect of the granting of the resource consent has been made. It is

being investigated separately from this complaint and I express no views on it here. I have already referred to the consequences of non-notification in respect of the protection of the notable pōhutukawa tree.

80. However, there is another aspect of the resource consent process involving the Ministry that came to my attention during this investigation that I also wish to deal with.
81. On 1 October 2019, a firm of solicitors, acting for some of the complainants, wrote to the Ministry drawing attention to the Policy for Government Departments' Management of Historic Heritage 2004. Under this policy one of the means by which Government departments were to encourage public participation in the management of historic heritage of special significance was by supporting voluntary notification of resource consent applications. The solicitors suggested that, given the historic value of DMRP, the Ministry had to act in accordance with the policy and request notification of the resource consent application it had lodged with AC. A copy of the letter was also sent to AC.

Failure to reply

82. That letter was never replied to at the time. On 2 April 2020, apparently alerted by the fact that the resource consent had been granted the previous month on a non-notified basis, the solicitors wrote again to the Ministry pointing out that they had not received a reply to the letter. The Ministry replied to this reminder on 9 April 2020 through its Chief Legal Advisor. He apologised for the fact that the Ministry had not responded until then. He did not offer any direct explanation for this failure though he did add that *'timeframes for the Erebus Memorial project have changed recently'*. If this was an explanation for the lack of a response, it is difficult to see its relevance.
83. I will deal with the substantive issue raised by the solicitors in October 2019 and the Ministry's reply to this in April 2020 below, but the first point is to comment on the delay in replying. In almost any circumstances a department's failure to reply to correspondence (even on an acknowledgement basis) for six months is unacceptable. But in this case it was even more so. The complainants had raised an issue with the Ministry about the process for considering its resource consent application. They did this before the application was granted. But they were denied a response from the Ministry until that process had run its course and the application had been granted.
84. It is not clear how this lack of response hindered the complainants in taking steps that may have been open to them to advocate for notification of the application. They did write to AC requesting it to notify the consent application. The Ministry told me that the failure to send a final letter until April 2020 was due to human error during a busy period. It says that additional processes have been introduced to ensure it does not occur in the future. I accept the Ministry's explanation and assurances. Nevertheless, I indicated to the Ministry that I considered that the failure to reply to the lawyer's letter until after the resource consent was granted was a case of unreasonable conduct on the part of the Ministry.

85. In response, the Ministry questioned whether a failure to reply to correspondence could amount to *unreasonable conduct*. In its view *unreasonable* connoted a deliberate action or a flawed decision-making process. It could not result from simple human error.
86. Secondly, it submitted that the delay in responding did not disadvantage or prejudice the complainants in any way. The solicitors had followed up in April 2020 at which point the Ministry responded immediately.
87. I do not accept the Ministry's attempts to avoid responsibility on either of these grounds.
88. Unreasonable conduct can arise equally from a failure to carry out one's duty or to respond at all, as by carrying out that duty or responding negligently or carelessly. That is, unreasonable conduct can arise from omission as well as from commission. Indeed the Ombudsmen Act, in section 13(1), specifically envisages an Ombudsman investigating any 'act done or omitted' and making an adverse finding about any *omission* that has been investigated, under section 22(1). I accept that a *de minimis* principle will apply. An omission of a purely trivial nature could not amount to unreasonable conduct. I am satisfied that in the circumstances of this case, the failure to reply was not of a trivial nature.
89. As to whether the complainants were prejudiced by not receiving a timely reply, we simply do not know whether they were prejudiced or not. What use the complainants might have made of an early reply (that is, one received *before* the resource consent was granted) is not known. But, potentially, a reply from the Ministry may have been of significance.
90. Finally, I note that it is irrelevant whether or not the solicitors sent the Ministry a reminder. The obligation to respond to the correspondence always rested with the Ministry.

Support for non-notification

91. The Chief Legal Advisor in his reply on behalf of the Ministry of 9 April 2020 made the point that DMRP is owned by AC and is not managed by the Ministry. In these circumstances the Heritage Policy did not apply. I accept this as the correct position.
92. He went on to say that even if the Ministry had chosen to apply the policy to the application 'it is clear from the text of the policy that public notification of resource consent applications is discretionary'. I understand this to mean that, in the Ministry's view, even if the Ministry was responsible for managing the park, its support for notification of the resource consent would not be mandatory, it would still be a matter for its judgment as to whether it did so. (Though, as the applicant, if it did request notification, notification would be mandatory under the Resource Management Act.)
93. Again, I have no reason to challenge this view of the policy. In these circumstances I accept that, in the policy's application in respect of a resource consent, seeking notification is always a matter of discretion. But even if this is so, the Ministry would

have to turn its mind to whether to support notification, with a strong presumption that it would do so if the policy applied. In this case the policy did not apply, but I do not think that this would absolve the Ministry from at the very least considering whether to support notification, particularly where that possible course had been specifically raised with it as it had here. If the Ministry had replied to the letter shortly after receiving it, I do not think that it would have been satisfactory for it to have taken a stand just on the fact that the policy did not apply in this instance. I think that a department acting reasonably and fairly to a correspondent, would go on to consider whether or not to support notification even though not obliged to do so by the policy and, if it decided not to do so, to have explained why to that correspondent.

94. The Ministry told me that a response to the letter was prepared by its legal team in November 2019 giving consideration to the applicability of the guidelines and targeted consultation that had been undertaken by WLB. This draft is subject to legal professional privilege.

Misleading

95. In their complaint to me, the complainants allege that the Ministry has consistently misled Ngāti Whātua Ōrākei and the WLB as to the level of support for the project from Erebus family members.
96. As to Ngāti Whātua Ōrākei no specific evidence of misleading the iwi has been produced, and none of those from Ngāti Whātua Ōrākei who dealt with the Ministry have made any such allegation. As I remarked above, I do not intend to enter into consideration of the dealings between Ngāti Whātua Ōrākei and the Ministry.
97. As to the WLB, I have seen statements by or concerning three members of the board suggesting that they were misled by claims of the level of family support for DMRP made by the Ministry and that these were important, even decisive, factors in how they voted at the meeting of 17 November 2020 that granted landowner approval by a 4-3 majority. (Not all of them voted to give landowner approval, but a change of position by even one who did so, would have been decisive.)
98. In my view, it is quite clear that there was a misunderstanding as to the level of family support. But I do not believe that there is any evidence that the Ministry deliberately misled the board on this matter or acted unreasonably.
99. Since the beginning of the project the Ministry has regarded the concerns of families as paramount. This led it to commission the Colmar Brunton survey in July-August 2018, to it maintaining contact with a group representing some of the families as the project proceeded, and to it keeping families up to date with developments through direct communications. But the Ministry has always been clear that it has not had contact with representatives of all families. It has acknowledged too that not all families support the erection of a memorial.
100. The last occasion I have evidence of on which the Ministry discussions with WLB touched on the level of family support, is at a workshop held on 27 October 2020. Extensive notes were taken at the meeting and there are also the recollections of the

members who attended. One of the complainants, Margaret Brough in a submission on a Parliamentary petition she has lodged and provided to me during my investigation, sets out what seems to be a near verbatim rendition of the exchange that took place at that meeting. What she sets out is consistent with the workshop note and with a statement from a board member, and for the purposes of this investigation I am prepared to accept its accuracy.

101. In response to a question about the level of family support, this follows in Ms Brough's summation:

The Ministry	The vast majority of those we have contact with are [in favour of the site]. I don't recall any that are on our list that, sorry that is not 100% correct, almost without exception they are.
WLB	So that would be like, over 95% in favour?
The Ministry	Yes, quite easily that number.

102. The Ministry was in contact with the members of families of 151 of the 257 passengers and crew on the fatal flight. That amounted 288 family members from those 151 families. Only 116 of those 288 completed the Colmar Brunton survey (it is not known how many families this represents). Clearly, given this level of contact, the Ministry could only speak to the opinions held by members of just over half of the families involved. It could not speak for all of the families' opinions.

103. But it also clear that this is what the Ministry representative did in the exchange recorded above, by specifying that what was being asserted of the level of support was of *'those we have contact with'* and *'that are on our list'*. Of these there was something like 95% support. However, it is also clear that this 95% figure was understood by at least some of the WLB members to be 95% of all of the families involved. The Ministry did not say this, but given the circumstances and the complicated figures involved (a percentage of a percentage), it is easy to see how this impression could arise and it is unfortunate that it did. But I see no justification for a claim that the Ministry deliberately misled the WLB over this matter and exaggerated the level of support from families. There was a misunderstanding.

Family members

104. The complainants (drawing on correspondence between a WLB member and the Ministry) in their response to the provisional opinion questioned the definition of who was an Erebus family member – for example, a parent, sibling, child or spouse of a crew member or passenger on the flight. It was suggested that a number of those regarded as family members by the Ministry had more remote relationships to the deceased than these and that, even if their views should not be entirely discounted, greater weight

should be accorded the views of those closely related to Erebus victims and to those family members who lost more than one relative at Erebus. It was said that failure to clarify this had contributed to WLB being misled as to the level of family support.

105. I do not intend to enter into any analysis of the nature suggested. Forty-two years have now elapsed since the crash. Members of two generations unborn at the time can legitimately say that they are family members of Erebus victims. It seems to me that it would be wholly invidious to enquire into the bona fides of persons claiming a family relationship with some killed in the crash. Nor is it necessary to do so.
106. If I had seen any evidence that the numbers accorded family member status by the Ministry had been manipulated to achieve a desired consultative outcome then, of course, I would be concerned. I have seen nothing of the kind. While there is an element of self-identification as a family member involved, it is clear to me the Ministry has been ready to engage on this basis with anyone who wished to do so. Nor was this unreasonable on its part. Engagement with WLB over landowner approval extended over two years and involved discussions at a number of formal meetings and workshops. If clarification had been sought as how the status of a family member was recognised by the Ministry, and this had been responded to inaccurately that would be one thing. But the point never came up as far as I can see. In these circumstances there can be no cause to claim that the Ministry misled WLB as to the level of family support by inflating the concept of who is a family member.
107. A further suggestion has been made that the Ministry gave preference to the views of a small group of family members, thus misleading WLB as to the overall level of family support for a memorial in DMRP.
108. It is true that some family members have formed groups for mutual support. Indeed, my staff met with one at its request. Forming a group may well have enhanced those family members' ability to contribute to the development of a project like this. Indeed, that may be its object. But I have seen no evidence of any inappropriate relationship with the Ministry or that the overall level of family support, as known to the Ministry, was misrepresented due to a particular group's influence over it. I do not consider that this criticism can be sustained.

Whether the park was the wrong site for the memorial

109. I have discussed above what I consider to have been a defective process, due to the lack of community and mana whenua involvement, which led to the Ministry's own preference emerging by August 2018 for DMRP as the site for the memorial. From that point on no other site appears to have been actively considered by the Ministry, though AC did offer to look for others. In September 2018, the then Minister for Arts, Culture and Heritage confirmed the Ministry's preference as the site for the memorial and matters unfolded from that point as the various necessary approvals were acquired. I will discuss the implications for the Ombudsman of the Minister's approval later.
110. At this point, I want to focus on the preference formed by the Ministry. As I have said, I think that the process followed in reaching this point was unsatisfactory. But was the

preference for DMRP as to the site *wrong*? This is important because while I think the omission of community and mana whenua involvement was unreasonable, the preference formed for DMRP is a different question. A flawed process may lead to a decision that is wrong (and will often in law lead to that decision being quashed if challenged early enough in the process), but it need not necessarily do so. An Ombudsman, who is not judging matters on the strict basis of the law, therefore needs to consider whether the preference for DMRP can itself be said to be wrong (section 22(1)(d) of the Ombudsmen Act) or whether it can otherwise be justified. This comes down to a consideration of the fitness of DMRP as the site for the proposed Erebus memorial.

111. The main criteria against which the Ministry has claimed to measure the suitability of the site, are the August 2018 survey results and other consultation in which it has engaged with the Erebus families plus its own experience. The Ministry has relied strongly on matching the families' preferences with the site that it preferred. The most cogent criticism of this match-up that I have seen comes from one of the complainants, Margaret Brough (an Erebus family member), in her submission accompanying her petition. Ms Brough asserts that DMRP does not meet the wishes identified in the survey for a site with Erebus links that is secluded (quiet with few visitors), facing south, and a memorial that does not include lights, sounds or images. (Some of these factors would be addressed in the specific design of the memorial rather than in the selection of the site.)
112. The complainants cite the report of the Ministry's own consultants, BM, as demonstrating that DMRP was not suitable. Even the Ministry accepted that this report *'is not a glowing endorsement of the site'*. In essence, BM thought that there may be other sites more suitable for the memorial closer to the airport. The Ministry makes the point that BM was not informed of the range of factors that the Ministry considered important in making the location decision (for example, the families' wish to avoid a site involving Air New Zealand) and thus its site suggestions were not made on a fully informed basis. There is force in this submission. BM was commissioned to report exclusively on DMRP's suitability, it was not charged with identifying other potential sites.
113. Immediately after the BM report, AC interpreted it as saying that DMRP was *'workable'* but that a better site would be closer to the airport. I think that this is a fair assessment. Ms Brough, as I have said, presents strong arguments against DMRP. The Ministry still defends its preference as consistent with the views of the families. The BM report was discouraging but, as AC said, it did not rule DMRP out entirely. These different views are the very things that I would have expected to have been considered in a process of community consultation held before DMRP was finally identified as the preferred site and in the light of the Ministry's expressed preference for it. In fact, mana whenua consultation was not initiated until October 2018, after ministerial approval had been given, and community consultation did not result for another year, both consultations occurring as part of the landowner approval process. They did not influence DMRP's initial selection.

114. I reiterate that I find this lack of consultation unreasonable, but I cannot say that the decision to use DMRP was thereby *wrong*. If an Auckland-wide community and mana whenua iwi consultation had been held, it is conceivable that DMRP would still have been chosen, though it is also conceivable that a different site would have been. What the lack of consultation has done is deny the opportunity for wider community and iwi Māori involvement in considering a range of possible sites and prevented the general acceptance of DMRP as indisputably the best site for the memorial, because it was never publicly tested on a comparative basis against other possibilities.
115. But at the same time it is fair to record that, while there is significant disagreement with the choice of DMRP (for example, from the complainants and from many who participated in the consultation held by WLB), there is also considerable support for it – from the mana whenua representatives, from many who participated in the WLB’s consultation process and from a large number of Erebus families whose views are known.
116. Thus, for the reasons discussed above, I am unable to conclude that the Ministry’s own preference for DMRP as the site for the memorial was wrong.

Ministerial involvement

117. The Prime Minister (in her capacity as the Minister for Arts, Culture and Heritage at that time) confirmed the Ministry’s preference for DMRP in September 2018.
118. Under the Ombudsmen Act, the Ombudsman cannot examine or question the actions or decisions of Ministers of the Crown (the situation is different under the Official Information Act). Ministerial decisions may be significant to an Ombudsman’s investigation and will be noted as such in the course of it, but the Ombudsman’s jurisdiction extends only to the departmental actions associated with those decisions. Thus in this case I have examined the Ministry’s actions in forming its preference for DMRP by August 2018 and I have examined its actions in advancing the project over the next three years. The then Minister’s confirmation of DMRP as the site for the memorial is outside my remit.
119. A challenge to a ministerial decision must be made through the political process (or to a court). In fact, one of the complainants, Dame Naida Glavish, has raised her concerns in letters to the Prime Minister and another complainant, Margaret Brough, has lodged a parliamentary petition which to date has received some 24,000 signatures. These are the appropriate avenues for them to pursue their dissatisfaction with the ministerial involvement. I must leave the choice of DMRP as the location there.

Ombudsman’s role

120. Under section 13(1) of the Ombudsmen Act 1975, an Ombudsman has authority to investigate the administrative acts, decisions, omissions and recommendations of (amongst other bodies) Government departments. The Ombudsman’s function is to examine these matters of administration and form an opinion in terms of section 22(1) and (2) of the Act. These provisions are set out in Appendix 3.

121. Regardless of the other offices or qualifications held by an Ombudsman, the Ombudsman acting in that office is not a judge. The Ombudsman does not make findings or recommendations that are binding on anyone (again the situation under the Official Information Act is different).
122. An Ombudsman's conclusions and recommendations must themselves be rational and be reached after complying with the rules of natural justice, but in this regard the Ombudsman is in no different position to any other person exercising statutory powers.
123. During the course of this investigation the Ministry asked for guidance as to how the standards applied by the Office may be additional to those applied by way of judicial review. At a meeting with my representatives it was suggested that compliance with the law amounted to good administration. I acknowledge immediately that legal compliance is an essential condition of good administration, but it is not by any means a sufficient answer to an investigation under the Ombudsmen Act. This is apparent from the provisions of section 22(1) and (2) themselves, only some of which are directed to unlawful conduct.
124. The Ombudsman was established in New Zealand in 1962 (based on Scandinavian precedents). This was before the development of a modern system of judicial review. To a large extent the Ombudsman model was intended to compensate for the lack of an effective system of judicial review by providing the citizen with an inexpensive and informal means of challenging administrative acts that affected him or her and providing a wider set of criteria than did the law at that time against which those acts could be tested. Indeed, as section 22(1)(b) makes plain, legal compliance will not always be a complete answer to a complaint to the Ombudsman.
125. It is true that, with the development of judicial review and public law generally over the last 50 years, the possibility of legal redress for administrative action has increased enormously. The law to some extent may be said to have caught up with the Ombudsman model. But the two are still distinct and the potential for redress by the Ombudsman for perceived maladministration is (despite its non-binding nature) arguably more effective than the law by being cheaper, easier and wider than applies to purely legal scrutiny.
126. To revert to the point raised by the Ministry, the legal position is always relevant, at least as a starting point for an Ombudsman's investigation, but it is not (or not always) an answer to the complaint being investigated.

Recommendation

127. Where an Ombudsman makes a finding that an act or omission was unreasonable they may make any recommendations they think fit (section 22(3) of the Ombudsmen Act 1975).
128. The primary finding against the Ministry relates to the lack of consultation in 2018. If wider community and mana whenua consultation had been held it is conceivable that DMRP would still have been chosen, though it is also conceivable that a different location would have been. What the lack of consultation has done is deny the

opportunity for a wider community involvement in considering a range of possible locations and prevented the acceptance of DMRP as indisputably the best site for the memorial. This is a significant finding for an Ombudsman to make about the adequacy of the Ministry's process leading to the construction of a national memorial.

129. There is now some considerable grievance within the community which, if the development is to go ahead, could reasonably be seen as tainting the memorial and undermining the Government's objectives in erecting one.
130. As against that, it has to be recognised that the main failing highlighted in this investigation took place nearly three years ago, and several aspects of the complaint have not been upheld. In particular, I have not found the ultimate decision to proceed with DMRP to be wrong. Considerable work has taken place to give effect to the decision to use DMRP. The decision to use DMRP has been endorsed by the Minister for Arts, Culture and Heritage, and does have support among many in the community. Financial implications and the Erebus families' expectations have to be taken into account by the Ministry and Ministers. This investigation has not canvassed all of these issues and, in any case, an Ombudsman is not well placed to balance and resolve all the competing interests and 'rule' on the best resolution in such a case.
131. That being so, my recommendation is that before a decision is made to begin construction on the site the Ministry undertakes reasonable steps to attempt to resolve the sense of grievance that the failure to consult more widely has created. I recognise the Ministry's efforts to date, but I make this recommendation in the hope that it and the complainants can work together to attempt to resolve outstanding grievances so that any memorial that is constructed on the site is able to achieve the objectives the Government set out to achieve. In this regard, the complainants have indicated they would be willing to participate in a form of mediation. This may be a reasonable option open to the Ministry.
132. I therefore recommend, pursuant to section 22 of the Ombudsmen Act 1975, that before a decision is made to begin any construction on the DMRP site, the Ministry undertakes reasonable steps to attempt to resolve the sense of grievance that the failure to consult more widely has created.



Peter Boshier
Chief Ombudsman

Appendix 1. Timeline of principal events

28 November 2017	Government announces a National Erebus Memorial will be erected
<i>2018</i>	
12 March	The Ministry opens discussions with AC about a possible site
15 March	Minister approves Auckland as location for the memorial
12 June	The Ministry visits possible sites in Auckland
14 June	Minister briefed on possible sites
24 July	Survey sent to families and responders
26 July	Initial results received
14 August	Final survey results received by the Ministry
17 August	Report from environmental consultant BM on suitability of DMRP
23 August	The Ministry recommends DMRP to the Minister
3 September	The Ministry approaches WLB to obtain landowner approval for DMRP
12 September	Minister confirms support for DMRP
9 October	WLB workshop discusses proposal to site memorial at DMRP
11 October	The Ministry first approaches Ngāti Whātua Ōrākei regarding memorial site
6 November	The Ministry seeks expression of interest for the design of the memorial
12 November	Ngāti Whātua Ōrākei expresses its support for the site
20 November	WLB expresses in-principle support
21 November	Minister publicly announces DMRP as the site
25 November	Expressions of interest for the design close
17 December	Request for proposals sent out to short-listed designers
<i>2019</i>	
13 February	Closure of period for submitting concept designs

5 April	Announcement by Minister and Mayor of Auckland of design selected for memorial
6/13 August	WLB workshops discuss the project
14 August	The Ministry invites feedback from mana whenua groups in preparation of the resource consent application
10 September	WLB workshop discusses the project
16 September	Application for resource consent lodged
19 September	Heritage NZ grants an exploratory authority for earthworks at DMRP
September-October	WLB carried out public consultation on the proposal for landowner approval
19 November	WLB workshop discusses the project with the Ministry
2 December	The Ministry withdraws its application for landowner approval
<i>2020</i>	
18 March	Resource consent granted on non-notified basis
7 September	Archaeological authority granted by Heritage NZ
20 October	The Ministry submits its second application to WLB for landowner approval
27 October	WLB workshop discusses the project with the Ministry
17 November	WLB resolves 4-3 to give landowner approval
7 December	AC formally conveys landowner approval to the Ministry

Appendix 2. Comments from the complainants on the mauri of the pōhutukawa

Impact on the root system

With respect to the Ministry, their assessment of the impact (1%) of the root system is without foundation. Pōhutukawa, particularly the sand variety (as Te Hā is), are renowned for their extensive root system, extending many metres beyond the dripline².

The arboriculture operations manager for Auckland Council, has also verbally confirmed the root systems of pōhutukawa can extend up to 10-20 metres beyond the drip line. The proximity to the cliff means that the roots could extend to the lower path, encompassing the entire proposed memorial site.

The Ministry has made no attempt to scan or identify the extent of Te Hā's root system.

The Ministry has no idea how far the roots extend. There is no basis for their claim.

A request for a report by a Maori arborist in March 2021, was rejected because "they could not find one". There are of course many arborists who cut trees, but few are trained see them through the spiritual and cultural lens of Te Ao Maori.

As Rob McGowan (QSM) and Donna Kerridge³ make clear "to assume that severing some or part of the roots of a significant Pohutukawa as inconsequential to the health and wellbeing of the tree is akin to cutting off a person's legs and telling them they are still healthy."

This is the understanding that a Maori arborist would have provided at the outset. This is the advice that would have resulted in a different site being selected.

Given the status and importance of the much-loved tupuna rākau it seems astounding that the Ministry had no understanding of the cultural history or significance of Te Hā, prior to the selection of the site. Information on the cultural significance of Te Hā was never provided to any design team, or to any decision maker, throughout the process.

The information available now, was not made available at the time the designs were rushed through to meet the Ministry's deadline. When asked to confirm the site selected, the Prime Minister was not provided appropriate information in relation to the significant cultural history of the whenua or of Te Hā.

Once set in motion, and given time pressures, the needs of Te Hā were never prioritised as they should have been. The tupuna rākau's mana and mauri were ignored by the Ministry. The Ministry is attempting to promote a view that the design and the health of the tupuna rākau have remained central to all decision-making. That is disingenuous.

² <https://www.nzffa.org.nz/system/assets/1707/pohutukawa.pdf> page 10.

³ Email from Rob McGowan (QSM) and Donna Kerridge attached and sent to your offices on 21 November 2021, attached below.

The Ministry's additional undertakings

RESOURCE CONSENT

In the plans of the resource consent granted, the development of the pathway extends well under the dripline of the tupuna rākau (12 metres)⁴. There is no offer to move the path. The offer to shorten the structure by a metre when the structure itself is 28 metres in length, without any understanding of the root structure, is meaningless.

Further the offer to reduce the size of the structure is subject to the gaining of additional regulatory approvals, as is the commitment made to Ngāti Whātua Ōrākei to add a pou. These are commitments the Ministry has no authority to make.

ANNUAL CUTBACKS

The resource consent granted allows up to 10% of the tree to be cut back annually. There is no protection from these cutbacks. Once constructed the Ministry hand over responsibility for the ongoing management of the tupuna rākau to Auckland Council. Auckland Council have made no commitment in relation to future management of Te Hā.

ISSUES AND RISKS NOT CONSIDERED FULLY

According to resource consent plan tonnes of base coarse aggregate will be applied and compacted to 95%, together with geotextile and drainage material. The extent of the earthworks is 534sqm. The vibrations and shaking of the earth, will very likely destabilise the cliff face. "A tree such as Pohutukawa has roots that descend deep into the earth, cementing its connection to the whenua."⁵

This impact has not been considered in any of the reports we have seen.

There will be tonnes of concrete leeching poison into the whenua. The same whenua that feeds Te Hā. There has been no assessment of this or the slope reinforcement work on the tupuna rākau. There has been no assessment of the carbon footprint of the project. The haul road and fencing skirts the outside of the entire tree, wrapping it in fencing, potentially damaging branches as heavy machinery is dragged in. All these matters impact the immediate and future health and wellbeing of Te Hā. This is not how you would treat your grandfather. This is not how you should treat any living being you respect and treasure.

CONSIDERATION OF TE AO MAORI

Rob McGowan (QSM) and Donna Kerridge state:

"In Te Ao Maori our rākau are considered tuakana (elders) to the human species who are considered teina (junior) in their relationships within Te Ao Marama (the natural world). All living creatures are our brothers and sisters. It is our responsibility as the teina species or potiki, the last born, is to care for them and listen when they speak.

⁴ <https://the.Ministry.govt.nz/sites/default/files/projects/LUC60345670%20-%20Plans.pdf> site plan 2494 A-10-02 F.

⁵ Email from Rob McGowan (QSM) and Donna Kerridge attached and sent to your offices on 21 November 2021.

Caring for the whenua and the natural world is our first priority and all human actions will ultimately be measured against this responsibility”.

The Ministry has treated the tupuna rākau as an afterthought, not as tuakana.

NO ALLOWANCE FOR RECENT GROWTH

Further, all consents, reports and assessments refer to a topography plan, created in 2019. Te Hā, continues to grow rapidly. As we approach 2022, any assessments or commitments are out of date, as they relate to the potential impact on the tupuna rākau in 2019.

Tents pitched well clear of the tree just 6 months ago, now have branches brushing up against and growing over the top of them. Te Hā has not stopped growing while this process unfolds.

DAMAGE DURING CONSTRUCTION

Working by hand does not protect the mauri of the tupuna rākau. With all due respect to those arborists who may work with the tree and supervise construction, it is most likely that, should they encounter roots, inconvenient branches, or other issues, they will simply proceed to cut and cover up any evidence of damage caused. It is impossible to imagine, an arborist would stop work and force a redesign of the memorial, because an inconvenient root is discovered.

The CEO of the Ministry was unable to offer a guarantee that no damage would occur during construction of the memorial to the tupuna rākau during the Local Board Landowner Approval meeting in November 2020. There has been nothing to suggest that this position has changed. Once construction commences, damage due to human interference will almost certainly occur and that cannot be undone.

The only safe option is to not construct the memorial anywhere near Te Hā.

WAHI TAPU LISTING

The tupuna rākau has been submitted for wahi tapu listing with Pouhere Taonga. This important listing will be compromised if the proposed memorial proceeds. When listed, the status of the tree will conflict with plans to cut it back.

FUTURE GROWTH

Since 1940, aerial images show the Pōhutukawa has grown 72%⁶. That is nearly 1% per annum. The commitment of the Ministry to not cut back the tree during construction, has made no allowance for this likely additional growth and makes no allowance for the likely continued growth into the future.

The proposed structure is to be placed directly in the growth path of the tupuna rākau. A fact acknowledged by the Ministry. To protect the memorial, seating, pathways, and the access to the structure almost a quarter of the tupuna rākau will be unable to grow freely to the north and east. This is significant and brushed aside by the Ministry. Te Hā has grown equally on all sides and currently has the room to continue that growth, able to double in size over the next 200

⁶ Documentation provided in Margaret Brough’s submission.

years. This amounts to 25% of the future growth of this incredible, treasured tupuna rākau, being denied.

To impede this, is to steal the future from this tupuna rākau but also from our tamariki and mokopuna for generations to come.

MANA OF THE TUPUNA RĀKAU

There can be no doubt that the mana of the tupuna rākau is significantly diminished by the addition of steel slicing into the whenua, of white concrete, incongruous with the green and blue natural landscape, and the introduction of the sounds of Antarctica in contrast to the sounds of tui song.

We have also provided you with a letter from Dr Philip Simpson⁷, who says *“the proximity of these opposing experiences reduces the importance and clarity of both....they are incompatible”*. In his letter he outlines the general nature of the tree, its status, its importance into the future, and the place.

We have also attached a recent article from David Trubridge⁸ expressing his concern, but also highlighting how such a project could have been, with early consultation and engagement with those who know and love this whenua.

He states *“The whole process of selecting the site and the designers has been another ongoing form of colonial imposition: bureaucrats and politicians marched into an area they knew little about and imposed an external will that disregarded “local knowledge”*.

“In Aotearoa we have a better way that is of this land: in Te Ao Māori a solution is not dropped down from on high, but grows up inclusively from the base and from mātauranga, which embraces community and land.”

His views echo the views of Rob McGowan (QSM) and Donna Kerridge, Dr Simpson, and the now over 18,000 people who have signed the petition.⁹

Finally, but importantly, it is likely that in a further 100 - 200 years, this incredible tree would have completely covered the site the proposed memorial will occupy. Imagine the mana of such an incredible Tupuna Rākau then. Not for us and our immediate needs today but for the generations that come over the next 800 years of Te Hā’s expected life span.

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<https://static1.squarespace.com/static/6036d198c3e0453bf0f4e7c0/t/6170aeeabda89133977263f5/1634774703764/Dr+Philip+Simpson.pdf>.

⁸ <https://www.stuff.co.nz/opinion/300444242/erebus-memorial-should-offer-healing-not-sadness>.

⁹ Now 24,000 – see paragraph 119.

Appendix 3. Extracts from Ombudsmen Act 1975

13 Functions of Ombudsmen

- (1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the departments or organisations named or specified in Parts 1 and 2 of Schedule 1, or by any committee (other than a committee or the whole) or subcommittee or any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee, or member of any such department or organisation in his capacity as such officer, employee, or member.

22 Procedure after investigation

- (1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation-
- (a) appears to have been contrary to law; or
 - (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
 - (c) was based wholly or partly on a mistake of law or fact; or
 - (d) was wrong.
- (2) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.