

THE  
TE ARAWA  
MANDATE REPORT



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TE WAHANGA TUARUA

WAI 1150

WAITANGI TRIBUNAL REPORT 2005



The cover design by Cliff Whiting invokes the signing of the Treaty of Waitangi and the consequent interwoven development of Maori and Pakeha history in New Zealand as it continuously unfolds in a pattern not yet completely known

A Waitangi Tribunal report

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ABBREVIATIONS

app	appendix
c	circa
CA	Court of Appeal
ch	chapter
CNI	central North Island
doc	document
ed	edition, editor
J	justice (when used after a surname)
ltd	limited
MICOTOWN	Minister in Charge of Treaty of Waitangi Negotiations
MOMA	Minister of Maori Affairs
NZLR	<i>New Zealand Law Reports</i>
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
pt	part
roi	record of inquiry
s, ss	section, sections (of an Act)
sec	section (of this report, a book, etc)
SOC	statement of claim
TPK	Te Puni Kokiri
VIP	volcanic interior plateau
vol	volume
Wai	Waitangi Tribunal claim (when used with a number)

Unless otherwise stated, footnote references to claims, papers, transcripts, and documents are to the record of inquiry, which is reproduced in the appendix.

The Honourable Parekura Horomia  
Minister of Māori Affairs



The Waitangi Tribunal  
141 The Terrace  
WELLINGTON

and

The Honourable Mark Burton  
Minister in Charge of Treaty of Waitangi Negotiations  
Parliament Buildings  
WELLINGTON

29 March 2005

E ngā Minita o te Karauna, tēnā korua

Otira, ki a koe te Minita Māori, tēnā koe e tu ana i te tihi o tōu maunga tāpu a Hikurangi. Tēnā hoki koe e whai ake ana i ngā tapuwae o te hunga rongonui i mai atu i a koe.

He mihi he tangi anō hoki ki te hunga kua mene atu ki te po otirā kua huri atu ki tua o te arai. Haere atu rā, haere atu rā, e moe i te moenga roa. Kati kā hoki mai ki a tātou o te ao tangata, tēnā tātou katoa.

Enclosed is our report entitled the Te Arawa Mandate Report: Te Wahanga Tuarua. It has been prepared following the resumption of the Tribunal's inquiry into claims relating to the Crown's recognition of the mandate of Nga Kaihautu o Te Arawa Executive Council to negotiate Te Arawa's historical Treaty claims.

You will recall that the first Te Arawa Mandate Report was released on 10 August 2004. In that report, we found that there had been flaws in the process by which the Crown reached its decision to recognise the executive council's mandate, but that those flaws did not constitute a breach of the Treaty. We suggested that a hui of all Te Arawa kaihautu members be held to reconfirm the executive council's mandate. We also made a number of other suggestions by which outstanding mandate issues such as the proportionality of the executive council, and the rules governing its accountability to the kaihautu, might be addressed. We gave the claimants the opportunity to return to the Tribunal without further application for urgency should the Crown fail to respond adequately to our suggestions.

Following our report, the executive council, in consultation with Office of Treaty Settlements and Te Puni Kokiri officials, developed and implemented a mandate reconfirmation process. Dissatisfied with the approach taken by the Crown and the executive council, the Te Arawa taumata applied on several occasions to have the Tribunal resume its inquiry. It was

not until December 2004 that we agreed to hold a further hearing. At that hearing, in order to assess whether the Crown's response to our August 2004 suggestions had been adequate, we focused on two key issues:

- ▶ whether the substantive recommendations of the August 2004 Te Arawa Mandate Report had been addressed; and
- ▶ recent developments in the Te Arawa mandating process.

I advised the claimants and the Crown that, while broader issues such as the consistency of the Crown's negotiation and settlement policies with Treaty principles were beyond the scope of the inquiry, the Tribunal would hear claims regarding the particular application of those Crown policies. Evidence and submissions were heard at a one-day hearing on 12 January 2005. Closing and reply submissions were later received in writing.

We heard claims from members of the following iwi/hapu and groups: Te Arawa taumata, Ngati Whakaue, Ngati Rangiwewehi, Ngati Wahiao, Ngati Rangiteaorere, Ngati Rangitihia, Ngati Makino, Waitaha, Ngati Tamakiri, Ngati Hinekura, Ngati Rongomai, Ngati Tutaki a Koti, Ngati Tutaki a Hane, Ngati Rangiuuora, Te Takere o Nga Wai, Ngati Whaoa, and Ngati Tuteniu. The Crown and the executive council were also represented before us.

Although the claims were different in emphasis, all concerned alleged flaws with the reconfirmation process. Many of the claimants before us maintained that, despite the reconfirmation, the executive council did not have a mandate to represent them in negotiations with the Crown.

We have reviewed the process by which the executive council reconfirmed its mandate, and the submissions of the claimants, the Crown, and the executive council. The final chapter of this report contains our analysis, findings, and recommendations regarding the reconfirmation process and the wider Te Arawa mandating process. We consider the Crown's application of its negotiation and settlement policy (including its 'large natural groupings' policy) with respect to Ngati Makino and Waitaha. We also discuss, in light of the withdrawal of a number of iwi/hapu from the executive council's mandate, the Crown's proposal for managing the overlapping claims of iwi/hapu outside the executive council's negotiations.

We have found that, for the most part, the Crown and the executive council have responded adequately to our suggestion that a hui be held to reconfirm the executive council's mandate. While we are critical of aspects of the Crown's response, we acknowledge that for the 10 iwi/hapu that have reconfirmed the mandate of the executive council, their decision was a proper expression of their tino rangatiratanga. Consequently, we have found that there has been no breach of the Treaty of Waitangi with respect to the reconfirmation process.



However, we do have concerns for those Te Arawa groups remaining outside the executive council's mandate.

In relation to the Wai 996 claimants of Ngati Rangitahi, we have found that the Crown did not breach the principles of the Treaty by failing to require the executive council to conduct a further mandating hui for Ngati Rangitahi. The Tribunal is now hearing the generic aspects of the Wai 996 claim as part of its central North Island stage 1 inquiry. No prejudice as yet arises, nor is likely to arise in the near future, from the hearing of that claim while the Ngati Rangitahi representatives on the kaihautu pursue direct negotiations. However, we find that the Crown has a Treaty obligation to ensure that the Ngati Rangitahi kaihautu members consult with and report to the Wai 996 claimants, if that is the claimants' wish.

We have found that the Crown has acted in a manner inconsistent with the principles of the Treaty in relation to Ngati Makino and Waitaha. We therefore recommend that the Crown should now commence negotiations with Ngati Makino. Ngati Makino having agreed, these negotiations should also include Waitaha. In our August 2004 report, we suggested that Waitaha should be accorded priority in negotiations, even if the exact same priority as accorded to the executive council was impossible under current Office of Treaty Settlements resourcing. We continue to be of this view and believe that, unless appropriate priority is accorded to Waitaha, the Crown will be acting in a manner inconsistent with the principles of the Treaty.

We agree with many of the concerns of the other claimants before us. However, we note that their concerns relate to possible future Treaty breaches by the Crown.

We note that the executive council currently commands the support of only 'just over half' of the Te Arawa population. That leaves almost half of Te Arawa unrepresented in the Crown's 'Te Arawa' negotiation and settlement process. We do not believe that the Crown's proposed process for dealing with the overlapping claims of those Te Arawa groups outside the executive council's mandate, as outlined in the terms of negotiation, will be effective in protecting their interests.

We note that Crown officials have accepted the necessity of at least two additional Te Arawa settlements. We note also that Ngati Makino and Waitaha have agreed to work together towards negotiating and settling their claims. The Ngati Whakaue cluster, representing approximately a quarter of the population of Te Arawa, would on the face of it appear to constitute a 'large natural grouping' that could be used as the basis for another set of negotiations. We think that priority should be accorded to these additional negotiations, both as a matter of intrinsic fairness and to avoid disadvantaging the overlapping core Arawa claimants now outside the executive council's mandate.

With the exception of Ngati Makino and Waitaha, we have not upheld the claims of any of the hapu or iwi or individual claimants that appeared before us. Rather, we have recognised that the reconfirmation process for those who have agreed to it must continue for their benefit. That said, we have signalled that the Crown must now deal properly with the interests of those who have remained outside the executive council's mandate.

Furthermore, we agree with the claimants that, given the current state of the mandate, it is inappropriate to describe the Crown's negotiations with the executive council as a 'Te Arawa' settlement negotiation, regardless of how narrowly Te Arawa is defined in the terms of negotiation. In fact, it is a negotiation involving some iwi/hapu of the Te Arawa confederation, and it should be honestly and transparently presented as such. Should the Crown proceed to negotiate with just over half of Te Arawa, continue to refer to it as a comprehensive settlement of Te Arawa historical claims, and not properly safeguard the overlapping core claims of other Arawa groups, we believe that Treaty breaches and prejudice will inevitably arise. We also believe that it is within the power and capacity of the Crown to prevent such an outcome.

Finally, we note that our inquiry into the mandate of the executive council is now at an end. There is still the prospect of fresh claims being filed throughout the negotiation process. Whether or not the chairperson of the Tribunal will grant urgency depends on the circumstances of any future claim. To avoid the need for a future hearing, we have attempted to provide some direction to the Crown on how to advance the interests of all of Te Arawa. We believe that the Crown should act upon our advice. In that limited sense, the case as put by the taumata has been vindicated.



Na Judge Caren Wickliffe  
Presiding Officer

## CHAPTER 1

### BACKGROUND TO THE JANUARY 2005 HEARING

#### 1.1 INTRODUCTION

In June 2004, the Tribunal heard claims regarding the Crown's recognition of the mandate of the Nga Kaihautu o Te Arawa Executive Council (the 'executive council') to negotiate claims on behalf of all Te Arawa. We reported on these claims in August 2004. We found that there had been serious flaws in the process adopted by the Crown to assess and recognise the mandate of the executive council. We did not, however, consider that these flaws were so fundamental as to constitute a breach of the principles of the Treaty.

In our findings, we sought to provide a way forward for the Crown and Te Arawa, by which they could build on the progress they had already made toward negotiations, and resolve the outstanding mandating issues which had been the subject of our inquiry. Principally, we considered that the executive council needed to undertake a process of mandate reconfirmation. We suggested that a hui of kaihautu members be called at which they should discuss issues of the composition, representivity and accountability of the executive council, and vote on the reconfirmation of its mandate. We also made a number of other suggestions and recommendations relating to particular iwi/hapu, which are set out in section 1.3 below.

We gave the claimants the opportunity to return to the Tribunal without further application for urgency, should they consider the Crown had failed to respond adequately to our suggestions. On this basis, various applications for a resumption of the inquiry were received between September and December 2004. On 7 December, we granted the claimants' request for a resumption. The present report deals with allegations that the Crown failed to substantively address the suggestions and recommendations of the Tribunal contained in the *Te Arawa Mandate Report* of August 2004, and considers information provided by parties on recent developments to do with the Te Arawa mandate.

#### 1.2 BACKGROUND TO THE JUNE 2004 HEARING

A full description of the evolution of the VIP project was given in our *Te Arawa Mandate Report*.<sup>1</sup> Here we give a brief background to provide a context for the present inquiry.

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1. Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), pp1–38

In 1999, the volcanic interior plateau (VIP) project was initiated by prominent central North Island (CNI) iwi figures, namely Bishop Manuhuia Bennett, Tumu Te Heuheu, and Rangiuiira Briggs. Bishop Bennett was representative for the Rotorua or north region, Tumu Te Heuheu represented the Taupo or south region, and Rangiuiira Briggs represented the Kaingaroa or central region. The purpose of the VIP project was to expedite the settlement of Treaty claims relating to the substantial amount of forestry land in the district. In September 1999, Wai 791, a claim relating to the various land alienation themes present in the CNI region, was registered with the Waitangi Tribunal by the VIP leaders.

At the same time, counsel for the VIP project filed a memorandum with the Tribunal proposing a process which varied from normal Tribunal procedure of the time. In September 2001, after two judicial conferences, the Tribunal issued a direction according priority to all CNI claims, including Wai 791.

Meanwhile, in early 2000, discussions took place between the Wai 791 claimants and Crown officials over the possibility of CNI claims being progressed without any further involvement by the Tribunal. In 2002, a number of informal discussions were held between the Minister in Charge of Treaty of Waitangi Negotiations (MICOTOWN), Tumu Te Heuheu and others in order to consider the possibility of progressing CNI claims through direct negotiations. Rawiri Te Whare, presumably in his role as project manager of the VIP project, was apparently asked by Mr Te Heuheu to attend these discussions.

As a result of these meetings, Mr Te Whare was asked by Mr Te Heuheu to initiate contact with the five CNI iwi: Tuwharetoa, Te Arawa, Tuhoe, Ngati Manawa, and Ngati Whare. Two hui were held in November 2002 at which the progress of the VIP project to date was discussed. Twenty-three 'pre-mandating hui' were held by the VIP project on CNI marae in early 2003, at which attendees were asked to vote in support of the VIP's proposed process, and 'interim representatives' were elected to represent iwi/hapu.

The MICOTOWN met with CNI iwi again in Taupo on 23 April 2003. At the meeting, the Minister acknowledged the enormous amount of work that had been done to date, and made clear the Crown's wish that any settlement be comprehensive. She advised that iwi must now undertake a mandating process, and hoped that by early June 2003 each CNI iwi would be able to give a clear indication as to whether they would be progressing to formal negotiations.

In May 2003, Mr Te Whare began to develop a mandating plan for CNI iwi, to be implemented in the second half of the year. On 22 May, Mr Te Whare presented an outline of the plan to the Te Arawa interim representatives. About the same time, OTS officials met with a number of CNI interim representatives, emphasising the need for a robust mandating process, and noting that it was for claimant groups to run their own process. As we described in the *Te Arawa Mandate Report*, from this point a split within the VIP project manifested itself. Crown officials continued to deal with Rawiri Te Whare in respect of mandating matters relating to Te Arawa, eventually leading to recognition by the Crown of the mandate of Nga Kaihautu o Te Arawa Executive Council to negotiate the settlement of all Te Arawa claims.

Between July and September 2003, a series of mandating hui were held by the iwi/hapu of Te Arawa, resulting in the election of 98 delegates. These 98 elected hapu representatives were elected to a body called Nga Kaihautu o Te Arawa (the 'kaihautu'). In this report, we refer to the elected members of the kaihautu as 'kaihautu members'.

At a meeting on 16 September 2003, the kaihautu members met to elect delegates from their number to sit on a kaihautu executive council. The kaihautu executive council was the body which was to lead the mandating process and subsequent negotiations with the Crown. This was called Nga Kaihautu o Te Arawa Executive Council (the 'executive council'). The actual negotiations with the Crown, however, would be carried out by a negotiation team of between five and eight negotiators appointed by the executive council. This negotiation team was sometimes referred to as the 'kaiwhakarite'.

On 1 December 2003, the executive council submitted a deed of mandate to the Crown for assessment.<sup>2</sup> The iwi/hapu of Te Arawa which had mandated the executive council and were thus included in its deed of mandate were:

Iwi/hapu	Number of kaihautu members
Ngati Tuara/Ngati Kea	5
Tuhourangi/Ngati Wahiao	7
Ngati Tarawhai/Ngati Rongomai	6
Ngati Pikiao	10
Ngati Tahu–Ngati Whaoa	8
Ngati Te Roro o Te Rangi	8
Ngati Uenukukopako	6
Ngati Rangiteaorere	6
Ngati Tuteniu	11
Ngati Whakauae	11
Ngati Rangitahi	2
Ngati Te Ngakau/Ngati Tura	5
Ngararanui	2
Ngati Rangiwehehi	11
<b>Total</b>	<b>98</b>

Table 1: Te Arawa iwi/hapu that mandated the executive council

Additionally, the deed noted that the executive council did not yet represent Ngati Makino, Waitaha, and Tapuika, three iwi/hapu of Te Arawa which had not elected kaihautu members in September 2003. The deed noted that one executive council seat was being held open for each, to accommodate them should they resolve to mandate the executive council at any point in the future.

On 1 April 2004, after OTS officials had completed their mandate assessment, MICOTOWN and the Minister of Maori Affairs (MOMA) formally recognised the executive council's

2. Document A130

mandate. The claims that were the subject of the Tribunal's *Te Arawa Mandate Report* were made in response to this decision by the Crown. Some of the claims considered in that report were concerned with the overall Crown process leading to the recognition of the mandate, others with the consequences of the process for specific kin or claimant groups, and others with the Crown's settlement policy (especially its 'large natural groupings' policy). These claims were heard by the Tribunal in June 2004 at Rotorua, and were reported on in the August 2004 *Te Arawa Mandate Report*.

### 1.3 TRIBUNAL FINDINGS, SUGGESTIONS, AND RECOMMENDATIONS OF AUGUST 2004

In the following section, we summarise our findings, suggestions and recommendations from the *Te Arawa Mandate Report* in order to provide a foundation for our later discussion of the arguments of the claimants, the Crown and the executive council, when, as we will explain, the Te Arawa mandate inquiry was resumed in January 2005.

In our August 2004 report, we considered the role and responsibility of the Crown in the mandating process. We recognised that achieving a mandate is essentially an internal matter for iwi. However, we considered that the Crown has a duty to ensure that mandating processes are consistent with the principles of the Treaty of Waitangi. This requires the active scrutiny and immediate correction of errors at every stage of the mandating process, not just in the final mandate assessment. We saw the role of the Crown as particularly crucial where, as is the case within Te Arawa, there are already fragile relationships within and between iwi/hapu groups.

In the case of the Te Arawa mandate, we found that the Crown had failed adequately to identify and address critical issues surrounding the representivity and accountability of the executive council to the kaihautu (the members of which were ultimately accountable to the iwi/hapu), and that these were at the core of claimant dissatisfaction. In our view, the mandating process had not allowed the people of Te Arawa adequate opportunity to debate and discuss these important matters.

We did not, however, find that these flaws in the mandating process constituted a Treaty breach, resulting in actual prejudice to the claimants. Nor did we consider that the Te Arawa mandating process itself was beyond rectification. We recognised, for example, that the election of kaihautu members had for the most part been fair, and that these members generally had the authority to speak on behalf of their iwi/hapu. We believed that the process need not have returned to square one, but only as far back as was necessary.

Rather, in order to assist the Crown and Te Arawa build on their progress to date and move forward towards negotiations and settlement, we ended our report with a number of suggestions for correcting problematic aspects of the process.

We believed there was a fundamental need for reconfirmation of the executive council's mandate. To achieve this, we suggested that a properly advertised hui of all kaihautu members be held, at which members could vote to reconfirm the mandate.

We specifically suggested that only the 98 kaihautu members, not all members of Te Arawa iwi, should vote on reconfirmation:

The obvious question is how this 'reconfirmation' should occur. Unfortunately, we do not think it would be practical for a hui of all Te Arawa to make this decision, for two reasons. First, a mandating process has been gone through which has, for the most part, fairly elected kaihautu representatives. Those people, as noted by TPK, hold the mandate and should be able to speak on behalf of their iwi/hapu. Secondly, an open hui of all Te Arawa would run the severe risk of being overtaken by those whose agenda is only to take matters back to square one. This should not be allowed to occur, because we think that, if mandating had to begin anew, it would totally undermine the momentum now built up towards settlement amongst a significant number of Te Arawa. A return to square one would run the risk of destabilising matters further.<sup>3</sup>

We made a number of suggestions regarding the notification and conduct of the reconfirmation hui:

- ▶ it should be properly notified with no less than 14 days' notice of agenda, date, time and venue;
- ▶ it should have an independent chair, who should carefully manage the agenda;
- ▶ the Crown and the executive council should decide on an appropriate venue, possibly in consultation with the Te Arawa taumata and Te Pukenga Kaumatua o Te Arawa; and
- ▶ independent observers should be present to record all outcomes.

We also specifically suggested that, in developing a reconfirmation process, the Crown and executive council consult with the taumata, in recognition of the mana of its leaders.

We recognised that the proportionality of iwi/hapu representation on the executive council was a fundamental issue, and suggested that this may be addressed by a preliminary vote of kaihautu members on the following matters:

- ▶ whether any groups jointly represented on the executive council should be uncoupled and represented separately;
- ▶ whether any additional executive council seats for those hapu not currently represented would need to be created, and how such decisions should be made; and
- ▶ whether any such adjustments would demand a corresponding adjustment of the existing composition of seats.<sup>4</sup>

We suggested that there would then need to be a series of votes on the rules of the executive

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3. Waitangi Tribunal, *The Te Arawa Mandate Report*, p113

4. Ibid, p114



council, especially the rules governing the accountability of the executive council to the elected kaihautu, and of the negotiation team to the executive council.

In general, however, we recognised that it was for the iwi/hapu of Te Arawa themselves to decide how best to develop a reconfirmation strategy which accorded with tikanga. We considered that the crucial matter was that any decisions made by the executive council regarding its own composition and accountability had to be transparent, in order that the people of Te Arawa could see the process and rationale by which such decisions were reached.

We then made a series of findings and comments in response to each claimant group.

With respect to the taumata, we recognised that they had much to offer Te Arawa in assisting the executive council resolve issues of accountability and representivity. We did not make any specific recommendation in response to the taumata's key complaint that it had been sidelined and replaced as facilitator of the mandating process. However, in response to the taumata's concerns regarding facilitation, we suggested that Crown needed, at the outset of the reconfirmation process, to assure itself that the facilitators had a good measure of acceptance amongst the claimant community.

We then addressed the concerns of Ngati Makino, whose negotiations with the Crown had lapsed in 1998 and who had been waiting since then to resume negotiations. We considered that the Crown had both a moral and a Treaty obligation to negotiate with Ngati Makino separately and contemporaneously with the rest of Te Arawa. We suggested that, if Ngati Makino agree, Waitaha and Tapuika should be invited to join their negotiations. We also suggested that the Crown ensure that the deed of mandate expressly excluded the claims of Ngati Makino.

With respect to Waitaha, we disagreed with the argument that the Crown had altered its 'large natural groupings' policy to their disadvantage. We did, however, see a need for a more flexible application of Crown policy, particularly bearing in mind 'the extent of Waitaha's traditional differences with the rest of Te Arawa'. We suggested that the Crown should afford priority status to negotiations with Waitaha, dependent on the findings of the Tauranga Moana Tribunal. That Tribunal released its report in August 2004 and, with regard to Waitaha, found that:

Waitaha's rohe straddles two inquiry districts and they have, from the nineteenth century to the present day, been estranged from the mainstream of Te Arawa tribal organisation. It may therefore be preferable for Waitaha to negotiate a separate settlement with the Crown, if that is their desire and if their claims cannot be considered in the central North Island inquiry.<sup>5</sup>

Although at the time we were not aware of the Tauranga Moana Tribunal's findings, we nevertheless understood why Waitaha claimants felt that their mana had been usurped by the

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5. Waitangi Tribunal, *Tē Raupatu o Tauranga Moana Report* (Wellington: Legislation Direct, 2004), p 408



executive council's inclusion of their claims in the deed of mandate against their will. We suggested that the Crown ensure that the deed of mandate expressly excluded the claims of Waitaha.

With regard to Ngati Rangiwewehi, who did not file a claim in the inquiry but who nevertheless objected to aspects of the mandating process, we expected that their concerns would be addressed to some extent by the voting we proposed on the rules governing the accountability of the executive council to the kaihautu members.

In respect of the Wai 996 claimants of Ngati Rangitihi, who disputed the mandate of the elected Ngati Rangitihi kaihautu members to represent them, we acknowledged that Ngati Rangitihi had held a reconfirmation hui on 17 June 2004, but that the outcome of that hui was under dispute. We recommended that a further mandating hui be held for the iwi, at which they could decide whether or not to elect kaihautu members and participate in the executive council mandate. This hui was to be properly notified, and held at an appropriate venue with a neutral chair and independent observers and minute takers.

We did not see a need to comment on the claims of Ngati Tuteniu, Ngati Tamakari and Ngati Whaoa – all of whom objected to being jointly represented (or 'coupled') with other hapu on the kaihautu, and sought separate representation by their own kaihautu members – as they were to be addressed by the kaihautu at the reconfirmation hui. We did note that the issue of the coupling and uncoupling of hapu was an internal matter, but one which needed to be discussed and debated by kaihautu members.

Finally, we made provision for the claimants to apply for a resumption of the inquiry should the Crown fail to follow our suggestions:

we give the claimants the opportunity to return to the Tribunal, without having to make a further application for urgency, should the Crown fail to make an adequate response to our suggestions.

If it does so fail, not only will it be in breach of the Treaty but it could also risk promoting entrenched division between the claimants (and their not insignificant number of supporters) and the executive council that will take many years to overcome.<sup>6</sup>

### 1.3.1 Background to 12 January 2005 hearing

The next section describes events following the release of the Tribunal's August 2004 *Te Arawa Mandate Report*, leading up to the resumption of the Tribunal's inquiry on 12 January 2005. This section is concerned first and foremost with the overall reconfirmation process undertaken by the executive council. Specific issues regarding iwi/hapu are mentioned in passing here, but are addressed in greater detail under separate headings in chapter 3.

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6. Waitangi Tribunal, *The Te Arawa Mandate Report*, p112

**1.3.2 First OTS report to Ministers**

Immediately following the release of the Tribunal's report in August 2004, OTS officials reported to MICOTOWN and MOMA with their preliminary comment, including a summary and analysis of the Tribunal's recommendations.<sup>7</sup> They described the idea of a reconfirmation hui as 'reasonable', and noted that OTS officials were soon to meet with the executive council to discuss the practicalities of implementing the Tribunal's suggestion. With regard to the Tribunal's recommendation that the Crown negotiate separately with Waitaha and Ngati Makino, officials advised that the Tribunal's recommendations had been made with 'little analysis'<sup>8</sup> and warned that separate negotiations would have 'potentially significant implications for the stability of the executive council's mandate, the Crown's ['large natural groupings'] policy framework and resourcing of the Office of Treaty Settlements'.<sup>9</sup>

**1.3.3 Te Arawa taumata's 20 August paper**

In light of the Tribunal's suggestion that the executive council consult with the taumata in developing a reconfirmation process, the taumata sent a memorandum to OTS and the executive council on 20 August, setting set out its suggestions for an appropriate reconfirmation strategy.<sup>10</sup> The paper included quite a number of detailed suggestions, including, inter alia:

- ▶ the suggestion that an independent facilitator, or team of facilitators, should be appointed to lead the reconfirmation process, rather than just an independent chair;
- ▶ a proposed list of candidates for such a facilitation team;
- ▶ that, given the importance of the issues at stake in the reconfirmation process and the lack of proportionality on the kaihautu, a simple majority vote of kaihautu members would be insufficient. Instead, the taumata suggested 'a 75% majority of Kaihautu Hapu should be required for each of the votes to be passed';
- ▶ that a consultation paper should be produced and circulated to all kaihautu members, and such a paper should include the views of all interested parties, including the executive council, the Crown, and the Ngati Whakaue cluster;
- ▶ the suggestion that more kaihautu seats were required for Ngati Rangitihi;
- ▶ that a review of hapu representation on the kaihautu should take place, to take account of the resignation of some kaihautu members, and to accommodate separate representation for groups which were currently jointly represented;
- ▶ that hapu which were currently coupled should meet separately to determine support from within each hapu for uncoupling, before the issue be taken to the kaihautu for determination;

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7. Document c2, exhibit 1

8. Ibid, p7

9. Ibid, p2

10. Document c2, exhibit 6

- ▶ a model for proportionate representation of hapu on the kaihautu, with a total of 42 seats;
- ▶ provision for dispute resolution and arbitration between groups if required;
- ▶ the suggestion that debate occur within the kaihautu on a number of issues including rules of accountability, and whether to stay in the Tribunal process; and
- ▶ the need for consideration of whether groups should have a right of withdrawal from the kaihautu.

#### 1.3.4 Second OTS report to Ministers

On 30 August, OTS officials again reported to MICOTOWN and MOMA.<sup>11</sup> This report outlined a reconfirmation proposal that had been jointly developed by OTS and the executive council, in consultation with TPK, for the approval of the Ministers.<sup>12</sup> The proposed reconfirmation process consisted of three stages:

- (a) The first stage of the proposed strategy was the reassessment by the executive council of its own composition. The report noted that this reassessment had in fact already taken place, at a meeting of the executive council of 25 August 2004.<sup>13</sup> At this meeting, the executive council had resolved to make a number of changes to its composition, increasing the allocation of seats for Ngati Pikiao and Ngati Rangiwewehi, and removing the seats which had until then been held for Ngati Makino, Waitaha and Tapuika. The revised structure was later adopted, and is set out in table 2. The provision of extra seats was intended to bring the proportionality of representation on the executive council more into line with the size of population of each iwi/hapu (based on statistics from Te Ohu Kaimoana).
- (b) Next, the executive council would consult with key groups in Te Arawa on the revised executive council structure and the proposed reconfirmation process. These groups would include the Te Arawa Maori Trust Board, Te Pukenga Kaumatua, Te Kotahitanga o Te Arawa Waka, and the Te Arawa taumata. Officials from OTS and TPK were to attend these consultation hui.
- (c) Finally, four regional reconfirmation hui were to be held, at which the reconfirmation strategy would be discussed and voted on by kaihautu members. The 'four-region approach' was favoured over a single hui, officials stated, in order that regional issues could be better addressed and to allow kaihautu members greater opportunity to be heard. Only kaihautu members would be allowed to vote on the proposed reconfirmation strategy. The reconfirmation hui would be facilitated by an independent chair and attended by a TPK observer. The executive council would meet to review its rules,

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11. Document c2, exhibit 2

12. Document c5, p3

13. Ibid, p4

1.3.5

particularly those regarding accountability to the kaihautu and iwi/hapu, within four months of the reconfirmation hui.

The report made passing reference to the taumata's paper of 20 August, noting that the proposed strategy would 'demonstrate that measures have been taken to respond to the key concerns of the Te Arawa taumata, through both the revised executive council structure and the consultation process'.<sup>14</sup>

With regard to the Tribunal's recommendations in respect of Ngati Rangitihi, officials expressed the view that the reconfirmation hui of 17 June had in fact been sufficient to demonstrate Ngati Rangitihi's support for the executive council. Regarding Ngati Makino, Waitaha, and Tapuika, officials considered it appropriate that the executive council now cease to hold open seats for those iwi/hapu, thereby recognising their decisions to not mandate the executive council.

On 31 August, MICOTOWN wrote to the executive council, agreeing that its proposed reconfirmation strategy as outlined in the OTS report was a 'suitable way forward' for Te Arawa.<sup>15</sup> The same day, MICOTOWN wrote to the taumata encouraging their participation in the reconfirmation process.<sup>16</sup>

**1.3.5 Draft reconfirmation document**

The executive council released a draft reconfirmation document on 3 September, and circulated it to groups within Te Arawa.<sup>17</sup> Essentially, it reflected the three stage reconfirmation process outlined in the OTS report to Ministers of 30 August. With regard to the second stage of the reconfirmation strategy, the consultation stage, the document notified parties that two consultation hui would be held, at which the executive council would hear feedback from the trust board, Te Pukenga, Te Kotahitanga, and the taumata. The draft reconfirmation document stated that 10 days' notice of the consultation hui would be given, although we note that it is dated 3 September 2004, just six days before the first consultation hui was held.

Lastly, the draft strategy proposed that the four regional reconfirmation hui be held over the weekend of 2 and 3 October. A finalised reconfirmation document, setting out the reconfirmation process agreed to in the light of the consultation hui, was to be circulated to kaihautu members by 17 September 2004.

**1.3.6 Consultation hui**

The two consultation hui were duly held on 9 and 14 September at the Four Canoes Hotel in Rotorua. The first was attended by 34 people, including representatives of a number of

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14. Document c2, exhibit 2, p7

15. Document c2, exhibit 3

16. Document c2, exhibit 4

17. Document c2, exhibit 7

iwi/hapu, the Te Arawa Maori Trust Board, and the kotahitanga. While no taumata members were able to attend this hui, their counsel, Ms Hall and Mr Taylor, did attend. The second consultation hui was held at the same venue on 14 September and was attended by 44 people from a number of iwi/hapu, including taumata members Pihopa Kingi, Pirihira Fenwick, and Malcolm Short. Two OTS officials and an observer from TPK were present at both hui. The minute-taker was Nero Panapa, operations manager of the kaihautu.

Both hui began with a presentation by Rawiri Te Whare on the executive council's reconfirmation strategy, as described in the draft reconfirmation document, followed by discussion and feedback. Discussion focused on issues of the representivity and proportionality of the executive council. Counsel for the taumata, Ms Hall, expressed her views that the executive council was not adhering to Tribunal suggestions, that there should be hui at which the executive council and the taumata could both put forward their reconfirmation strategy proposals, and that the four-region approach did not reflect the structure of Te Arawa. Ms Hall's arguments were put to OTS officials in writing on 15 September, along with 17 signed submissions from individuals opposing the executive council's reconfirmation strategy.<sup>18</sup>

Following the consultation hui, the chair of the Te Arawa Maori Trust Board wrote to the Crown and executive council expressing support for the executive council's reconfirmation strategy.<sup>19</sup>

### 1.3.7 Ngati Whakaue cluster withdraw

At the same time that the consultation hui were held, there was an important development with respect to Ngati Whakaue, one of the two largest Te Arawa iwi. According to the statistics employed by the executive council, Ngati Whakaue constitute around 27 per cent of the total population of Te Arawa.<sup>20</sup> We understand that there are six koromatua (principal) hapu of Ngati Whakaue: Ngati Pukaki, Ngati Te Roro o Te Rangi, Ngati Tunohopu, Ngati Te Hurunga Te Rangi, Ngati Taeotu, and Ngati Te Rangiwhaho.<sup>21</sup>

Te Kotahitanga o Ngati Whakaue (the 'Ngati Whakaue cluster') represent 15 registered claims made on behalf of Ngati Whakaue constituent hapu. We understand that these hapu are: Ngati Te Hurunga Te Rangi, Ngati Taeotu, Ngati Te Kahu, Ngati Tunohopu, Ngati Pukaki, Ngati Karenga, Ngati Waoku, Ngati Rautao, Ngati Hika, Ngati Ririu, and Ngati Te Rangiwhaho. Whether or not the cluster represents Ngati Te Roro o Te Rangi, a koromatua hapu of Ngati Whakaue who do not have a specific registered claim, is a matter of contention between the cluster and the Crown.

On 12 September, Ngati Whakaue held a hui-a-hapu and resolved to withdraw from the kaihautu and the executive council mandate. Two days later, the chairman of the Ngati

18. Document C2, exhibit 13

19. Document C2, exhibit 11

20. Document C2, exhibit 15, p9

21. Documents C16–C18, C22

1.3.8

Whakaue cluster wrote to OTS to advise the Crown of this decision.<sup>22</sup> At a further hui on 21 November, Ngati Whakaue endorsed the resolution to withdraw. On 26 November, MICOTOWN wrote to the chairman of the Ngati Whakaue cluster, formally acknowledging the decision of 11 hapu of Ngati Whakaue to withdraw.<sup>23</sup> More detail on the withdrawal of the Ngati Whakaue cluster is given in section 1.3.13.

**1.3.8 Reconfirmation document**

Following the two consultation hui on 9 and 14 September 2004, and in advance of the four regional reconfirmation hui, the executive council circulated its finalised reconfirmation document to kaihautu members on 22 September, approximately 10 days before the first hui.<sup>24</sup> For the most part, the strategy remained essentially the same as in the draft reconfirmation document of 3 September. There was, however, one major change. After the four regional reconfirmation hui, a hui-a-kaihautu would be held, at which the executive council would report back to kaihautu members on the regional hui. Thus, to the original three-stage process was added a fourth stage.

The reconfirmation document set out the rules and procedure for voting at the regional reconfirmation hui. After the reconfirmation document had been discussed and debated by the hui, a single vote of kaihautu members would be held to receive and adopt the reconfirmation document. No proxy votes would be allowed. By voting to receive and adopt the reconfirmation document, the kaihautu members would be agreeing to implement the five proposals contained in it:

- ▶ to adjust the composition of the kaihautu executive council;
- ▶ to adjust the proportionality of the kaihautu executive council;
- ▶ to undertake a review of the executive council's deed of trust in terms of its accountability back to kaihautu members;
- ▶ that no further mandating hui be held for Ngati Rangitihi; and
- ▶ that no seats be formally retained for Ngati Makino, Waitaha, and Tapuika.

The proposed new composition of executive council seats (identical to that described in the 30 August OTS report to Ministers and the 22 September draft reconfirmation document) was shown in a table in the reconfirmation document. We reproduce it here as table 2.

**1.3.9 Regional reconfirmation hui**

The regional reconfirmation hui were held at four Rotorua marae over two days in early October. On 2 October, the east region hui was held at Ruamata Marae in the morning, and the

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22. Document c2, exhibit 38

23. Document c2, exhibit 45

24. Document c2, exhibit 15

## BACKGROUND TO THE JANUARY 2005 HEARING

1.3.9

Iwi/hapu claimant group	Percentage of Te Arawa population	Original number of seats	Proposed number of seats
Whakauae	27	<b>5 in total:</b>	<b>5 in total:</b>
Ngati Whakauae iwi		2	2
Ngati Te Roro o Te Rangi hapu		1	1
Ngati Tura/Ngati Te Ngakau hapu		1	1
Ngararanui		1	1
Pikiao	27	<b>2 in total:</b>	<b>5 in total:</b>
Ngati Pikiao iwi		1	4
Ngati Tarawhai/Ngati Rongomai		1	1
Tuhourangi	9	<b>3 in total:</b>	<b>3 in total:</b>
Tuhourangi iwi		2	2
Ngati Wahiao hapu		1	1
Ngati Rangiwewehi	9	1	2
Ngati Tahu–Ngati Whaoa iwi	7	1	1
Ngati Rangitahi iwi	6	1	1
Ngati Uenukukopako iwi	1	1	1
Ngati Rangiteaorere iwi	1	1	1
Ngati Tuteniu		1	1
Ngati Tuara/Ngati Kea	1	1	1
<b>Total</b>	<b>88*</b>	<b>17</b>	<b>21</b>

\* The remaining 12 per cent of the Te Arawa population are made up of Ngati Makino, Waitaha, and Tapuika, for which executive council seats were no longer being allocated

Table 2: Composition of executive council seats

coast region hui was held at Uenuku Punawhakareia Marae in the afternoon. On 3 October, the west region hui was held at Waiteti Marae in the morning, and the south region hui was held at Te Pakira Marae in the afternoon. Fifty-nine kaihautu members were among the 150 to 180 attendees at the four hui. According to the TPK report, all kaihautu members were sent notice of the hui and an agenda on 17 September 2004.<sup>25</sup>

Each hui followed the same agenda. First, Rawiri Te Whare presented the executive council's reconfirmation document. This was followed by an 'open floor' discussion, and then a vote by kaihautu members on whether to receive and adopt the reconfirmation document.

Following the Tribunal's suggestions, all hui were facilitated by an independent chair and minute taker, and were attended by an observer from TPK. Draft copies of the minutes were circulated to Donna Hall, Richard Charters of Ngati Rangiwewehi, and Nero Panapa of the kaihautu for clarification and correction. The minutes were then circulated to all parties.

At the first hui, Ms Hall sought to have a position paper she had prepared on behalf the taumata formally received. A motion to that end failed, but Ms Hall was able to refer to her paper as she responded to the executive council's proposal during the open floor discussion. Similarly, Ms Hall also spoke to her paper at the three remaining regional hui. Her position

25. Document C2, exhibit 18, p2

Region	Te Arawa iwi/hapu	Total number of Te Arawa kaihautu members	Number of Te Arawa kaihautu members who voted		
			For	Against	Abstentions
East Region	Ngati Whakaue	3			Did not participate in the voting
	Ngati Te Roro o Te Rangi	7	2	1	
	Ngati Uenukukopako	6	3	0	
	Ngati Rangiteaorere	6	0	4	
	Ngati Tuteniu	11	5	2	
	<b>Total for East Region</b>		<b>10</b>	<b>7</b>	
Coast Region	Ngati Pikiāo	10	5	2	
	Ngati Tarawhai/Ngati Rongomai	6	3	0	2
	<b>Total for Coast Region</b>		<b>8</b>	<b>2</b>	<b>2</b>
West Region	Ngati Whakaue	8			Did not participate in the voting
	Ngati Tuara/Ngati Kea	4	4	0	
	Ngati Tura/Ngati Te Ngakau	5	3	0	
	Ngararanui	2	2	0	
	Ngati Rangiwehewehi	11	0	7	
	<b>Total for West Region</b>		<b>9</b>	<b>7</b>	
South Region	Tuhourangi/Ngati Wahiao	6	1	3	1
	Ngati Rangitihi	2	2	0	
	Ngati Tahu/Ngati Whaoa	8	6	0	
	<b>Total for South Region</b>		<b>9</b>	<b>3</b>	<b>1</b>
<b>Overall total</b>		<b>95*</b>	<b>36</b>	<b>19</b>	<b>3</b>

\* We note that the total of 95 kaihautu members listed here differs by three from the total of 98 kaihautu members listed in the executive council deed of mandate of December 2003. Eight Ngati Te Roro o Te Rangi members were listed in the deed of mandate, whereas seven are listed here. Similarly, five members were listed in the deed of mandate for Ngati Tuara/Ngati Kea, here there are four; and seven members were listed for Tuhourangi/Ngati Wahiao, here there are six.

Table 3: Regional reconfirmation hui voting results by iwi/hapu



paper asserted that the executive council had failed to put alternate views to the kaihautu members during the reconfirmation process.<sup>26</sup> The key points raised in her paper were for the most part based on the issues raised in the taumata's paper of 20 August, referred to in section 1.3.3. They included:

- ▶ The need for the Te Arawa governance entity to be representative, proportional, and of a manageable size. To this end, Ms Hall attached the taumata's 20 August proposal for a 42-seat governance body.
- ▶ The issue of uncoupling hapu, especially Ngati Whaoa and Ngati Tahu, as suggested by the Tribunal in the *Te Arawa Mandate Report* of August 2004.
- ▶ The assertion that another mandating hui was required for Ngati Rangitihi, again, as suggested by the Tribunal in our August 2004 report.
- ▶ The proposal that a 75 per cent majority of kaihautu members should be required on key matters such as the signing of the terms of negotiation and the appointment of negotiators.
- ▶ The argument that the four-region approach was a 'divide and conquer strategy', splitting the interests of some large hapu. Instead, a full hui of all kaihautu members was required.
- ▶ The issue of whether Te Arawa should withdraw from the Tribunal process urgently needed to be discussed and addressed.

Of the 58 kaihautu members who voted on the resolution to adopt the executive council's reconfirmation strategy, 36 voted in favour, 19 against, and three abstained. The fifty-ninth kaihautu member attending the hui did not vote.<sup>27</sup>

The 11 kaihautu members for Ngati Whakaue did not participate in the voting at the regional reconfirmation hui. They did, however, briefly attend the east and west regional hui in order to table a letter confirming their withdrawal from the kaihautu. At the time of the regional reconfirmation hui, Ngati Whakaue had resolved to withdraw from the kaihautu and all 11 Ngati Whakaue kaihautu members tendered their resignation from the kaihautu shortly after the hui, on 6 October. We note that at the time of the regional reconfirmation hui the withdrawal of Ngati Whakaue from the kaihautu had not yet been formally recognised by MICOTOWN, and in fact was not recognised until 26 November. Nevertheless, we consider that Ngati Whakaue made their intention to withdraw quite clear to the kaihautu members at the regional reconfirmation hui. At the south regional hui, for example, Rawiri Te Whare advised the audience that Ngati Whakaue members had attended two earlier hui to announce their withdrawal from the kaihautu.

Table 2 of the OTS report to Ministers of 21 October 2004 gave the voting results by iwi/hapu. We reproduce it on the facing page as table 3.

The TPK observer reported to OTS on the four hui on 14 October, detailing, among other

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26. Document c2, exhibit 16, p1

27. Document c2, exhibit 21, p6

things, hui notification details, prior circulation of the reconfirmation document, the use of an independent chair and minute taker, issues raised in the general discussion following the executive council's presentation, and an analysis of the voting results.<sup>28</sup> The TPK report concluded that the hui were conducted in an 'open, transparent and fair manner', and that the results of the hui demonstrated 'significant support amongst the people of Te Arawa for the kaihautu executive council's proposal'.<sup>29</sup>

#### 1.3.10 Hui-a-kaihautu

The hui-a-kaihautu was held on 20 October at Kearoa Marae in Rotorua. At the hui, the executive council presented a report to kaihautu members on the results of the four regional reconfirmation hui.<sup>30</sup> All kaihautu members were notified of the date and venue of the hui-a-kaihautu on 5 October. Once again, there was an independent chair and minute-taker, and an independent TPK observer who later reported to OTS officials.<sup>31</sup> Between 40 and 50 kaihautu members attended the hui-a-kaihautu.

The executive council report presented at the hui outlined the reconfirmation process to date and the outcome of voting at the four regional hui. It concluded that the resolution at the regional hui to adopt the reconfirmation document had been passed by a 'convincing majority', and that 'the composition of the kaihautu executive council and its proportionality of representation have been reconfirmed'.<sup>32</sup> In the report, the executive council expressed its commitment to addressing specific iwi/hapu issues and generic procedural issues which had arisen out of discussion at the regional hui.

The TPK observer present at the hui-a-kaihautu recorded that several issues regarding the support of various iwi/hapu for the executive council were also discussed:

- ▶ Te Ururoa Flavell advised the hui that eight of the 11 Ngati Rangiwehewhi kaihautu members had resolved to withdraw from the kaihautu, and that Ngati Rangiwehewhi would now pursue their claims through the Waitangi Tribunal (detailed in section 1.3.18);
- ▶ there was some discussion over the ramifications for the kaihautu of Ngati Whakaue's withdrawal, and it was concluded that there were no ramifications as the Crown was still prepared to negotiate with the executive council; and
- ▶ with regard to the position of Ngati Tamakari (a Ngati Pikiao hapu which opposed Ngati Pikiao's support for the kaihautu as described in section 5.3.5), it was considered that this was an issue for Ngati Pikiao to resolve internally. A Ngati Pikiao kaihautu member at the hui-a-kaihautu advised that this matter had been addressed.<sup>33</sup>

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28. Document C2, exhibit 18

29. Ibid, pp 10–11

30. Document C2, exhibit 19

31. Document C2, exhibit 20

32. Document C2, exhibit 19, p 9

33. Document C2, exhibit 20

**1.3.11 Third OTS report to Ministers**

On 21 October, OTS officials reported to MICOTOWN and MOMA on the progress of reconfirmation, outlining the outcomes of the four regional hui and the hui-a-kaihautu.<sup>34</sup> They noted continuing opposition to the executive council's reconfirmation strategy from the taumata, the Ngati Whakaue cluster and a number of other iwi/hapu, including Ngati Rangiwewehi, Ngati Rangiteaorere, Ngati Wahiao, and the Wai 996 claimants of Ngati Rangitahi. The report also noted that a number of hapu of Ngati Pikiao opposed the executive council, namely Ngati Tamakari, Ngati Te Takinga, Ngati Rongomai, and Ngati Hinekura. We describe the positions of each of these groups in chapter 3. Despite the opposition of these groups, the report concluded that the reconfirmation had demonstrated that there was 'broad support' among Te Arawa for the executive council's mandate to negotiate.<sup>35</sup>

After considering the OTS report, MICOTOWN and MOMA advised the executive council and the taumata in letters of 22 October that they considered that the reconfirmation had been fair and robust, and that the executive council had the 'broad support of the people of Te Arawa'.<sup>36</sup>

**1.3.12 Amendment of executive council deed of trust**

The executive council held a special meeting on 27 October to formally amend its deed of trust, making provision for the adjustments to its composition. Three seats were added for Ngati Pikiao, and one for Ngati Rangiwewehi.<sup>37</sup>

**1.3.13 Ngati Wahiao withdraw**

On 29 October, Ms Hall advised OTS officials that kaihautu members for Ngati Wahiao and Ngati Rangiteaorere had resigned from the kaihautu, signalling the withdrawal of their iwi/hapu from the executive council mandate.<sup>38</sup> Subsequently, on 19 November, Ngati Wahiao held a hui at which a majority voted to withdraw from the kaihautu. Their decision was formally recognised by MICOTOWN in a letter of 26 November.<sup>39</sup>

**1.3.14 Fourth OTS report to Ministers**

On 23 November, OTS officials reported to MICOTOWN and MOMA, updating them on progress with the executive council mandate.<sup>40</sup> This report noted the recent withdrawal of Ngati

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34. Document C2, exhibit 21

35. Ibid, pp 8–12

36. Document C2, exhibits 22, 23

37. Document C5, exhibit 47

38. Document C2, exhibit 49

39. Document C2, exhibit 51

40. Document C2, exhibit 35

Whakaue and Ngati Wahiao from the kaihautu, anticipated the imminent withdrawal of Ngati Rangiwewehi, and noted the division among Ngati Rangiteaorere. It estimated that the executive council mandate currently represented just over half the total population of Te Arawa. After evaluating both the strategic policy implications and practical viability of continuing to negotiate with the executive council, the report recommended that the Crown proceed to settlement negotiations with the executive council. We discuss this report further below, where we examine officials' reasoning in making this recommendation.

### 1.3.15 Terms of negotiation

Three days later, on 26 November, terms of negotiation between the executive council and the Crown were signed.<sup>41</sup> The terms of negotiation are not legally binding and do not create a legal relationship, but rather set out the scope, objectives and general procedures for formal discussions between the Crown and executive council.

The key section of the terms of negotiation, for the purposes of the current inquiry, was the definition of Te Arawa. Clause 6 of the terms of negotiation listed the following iwi/hapu as being included under the executive council mandate. The structure of the list of iwi/hapu was quite different to that given in the executive council deed of mandate of December 2003 (described in section 1.2). Many more individual hapu were listed, Ngati Tarawhai and Ngati Rongomai were listed separately where they had been coupled in the December 2003 list, and most significantly, two 'levels' of iwi/hapu were given:

- ▶ *Ngati Tuara/Ngati Kea*: Ngati Ngata.
- ▶ *Tuhourangi*: Ngati Hinemihi, Ngati Tumatawera, Ngati Taoi, Ngati Tuohonoa, Ngati Uruhina, Ngati Tionga, Ngati Te Apiti.
- ▶ *Ngati Whakaue*: Ngati Te Roro o Te Rangi, Ngati Ngararanui, Ngati Tuteaiti, Ngati Tura, Ngati Te Ngakau.
- ▶ *Ngati Rangiwewehi*: Ngati Kereru, Ngati Te o Kotahi (contingent on the outcome of the 12 December 2004 hui-a-iwi to reconsider support for the executive council).
- ▶ *Ngati Uenukukopako*: Ngati Te Kanawa, Ngati Hauora.
- ▶ *Ngati Rangiteaorere*: Ngati Tuteniu.
- ▶ *Ngati Tahu/Ngati Whaoa*: Ngati Tahu, Ngati Whaoa, Ngati Pareauru, Ngati Rahurahu, Ngati Mataarae, Ngati Maru, Ngati Te Rama.
- ▶ *Ngati Rangitihi*: Ngati Mahi, Ngati Tionga.
- ▶ *Ngati Pikiao*: Ngati Te Takinga, Ngati Paruaharanui, Ngati Rangiunuora, Ngati Tamateatutahi, Ngati Kawiti, Ngati Whakahemo, Ngati Wahatuoro, Ngati Hinekura.
- ▶ *Ngati Tarawhai*: Ngati Hinehua.
- ▶ *Ngati Rongomai*: Ngati Rakeiao.

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41. Document c2, exhibit 46

Clause 7 specifically excluded the following iwi/hapu:

- ▶ Ngati Makino, Waitaha, and Tapuika.
- ▶ *Ngati Whakaue*: Ngati Te Hurunga Te Rangi, Ngati Taeotu, Ngati Te Kahu, Ngati Tunohopu, Ngati Pukaki, Ngati Karenga, Ngati Waoku, Ngati Rautao, Ngati Hika, Ngati Ririu, Ngati Te Rangiwhaho.
- ▶ Ngati Wahiao.

Clause 10(c) listed every registered claim to be included in the negotiations. It gave a comprehensive list of all Te Arawa claims, even those which had been registered by groups outside the executive council mandate. However, clause 10(c) specified that the claims listed would only be negotiated 'insofar as they relate to Te Arawa (as defined in paragraph 6 above)'.<sup>42</sup> In other words, the comprehensive list of claims in clause 10(c) was qualified by the definition of Te Arawa in clauses 6 and 7.

Briefly, the rest of the terms of negotiation included, inter alia:

- ▶ a definition of the Crown for the purposes of the negotiations;
- ▶ a background of events leading to the mandate to negotiate;
- ▶ guidelines for reporting by the executive council to OTS on mandate maintenance matters;
- ▶ proposed subject-matter for negotiations;
- ▶ definitions of negotiation milestones;
- ▶ an outline of the executive council's strategy, 'Whakakotahitanga', by which it proposed to ensure that the diversity of views and interests of Te Arawa iwi/hapu would be represented in negotiations;
- ▶ guidelines for communication between the executive council and the Crown;
- ▶ guidelines for managing overlapping claims in the negotiation process;
- ▶ a recognition that the executive council did not have a mandate to act as a governance structure to receive settlement assets; and
- ▶ a waiver of other avenues of redress, specifically the Tribunal's CNI inquiry.

### 1.3.16 Ngati Te Roro o Te Rangi

Ngati Te Roro o Te Rangi is one of the six core 'koromatua' hapu of Ngati Whakaue. Following the signing of the terms of negotiation, the chairman of the Ngati Whakaue cluster wrote to MICOTOWN expressing 'great regret and concern' at the inclusion of Ngati Te Roro o Te Rangi and certain Ngati Whakaue registered claims in the terms of negotiation.<sup>43</sup> On 21 December, MICOTOWN replied, noting that Ngati Te Roro o Te Rangi had not voted on the resolution of the 12 September hui at which Ngati Whakaue resolved to withdraw from the kaihautu.<sup>44</sup>

42. Ibid, p 4

43. Document C2, exhibit 47

44. Document C2, exhibit 48

1.3.17

Further, MICOTOWN understood that Ngati Te Roro o Te Rangi continued to support and actively participate in the executive council, and accordingly, the Crown continued to recognise their mandate for the executive council.

**1.3.17 Ngati Rangiteaorere**

On 29 October, Ms Hall had advised OTS officials of the resignation of kaihautu members for Ngati Wahiao and Ngati Rangiteaorere, signalling the withdrawal of both groups from the executive council mandate.<sup>45</sup> Subsequently, the withdrawal of Ngati Wahiao was formally recognised by MICOTOWN, as we described in section 1.3.13. At the 5 December annual general meeting of the Mataikotare Trust (Mataikotare is a marae of Ngati Rangiteaorere), a vote was taken on Ngati Rangiteaorere's support for the executive council mandate.

OTS officials considered that notification for the hui of 5 December at which a vote was taken on withdrawal from the kaihautu 'did not meet the standards for mandating purposes'. Nevertheless, officials considered that the outcome of the vote at the hui was indicative of 'ongoing core support' within Ngati Rangiteaorere for the executive council mandate, and that there had been no valid resolution to withdraw.<sup>46</sup> They advised the Ministers that they would continue to monitor the situation.<sup>47</sup>

**1.3.18 Ngati Rangiwehehi withdraw**

On 19 October, the chairman of Te Maru o Ngati Rangiwehehi wrote to OTS advising the Crown of the 10 October decision of the executive committee of Te Maru o Ngati Rangiwehehi to withdraw from the kaihautu.<sup>48</sup> Officials replied to the letter, seeking clarification on the process by which the decision was reached. In response, Ngati Rangiwehehi held a well-advertised hui on 12 December 2004 at which attendees voted unanimously in favour of withdrawing from the kaihautu. Accordingly, on 21 December 2004 MICOTOWN formally recognised Ngati Rangiwehehi's withdrawal.<sup>49</sup>

While Ngati Rangiwehehi were provisionally included in the terms of negotiations of 26 November 2004 (described in section 1.3.15), OTS manager Heather Baggott advised us that they will be removed from the terms of negotiation in due course.<sup>50</sup>

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45. Document c2, exhibit 49

46. According to OTS figures, 60 attendees voted against the motion that Ngati Rangiteaorere withdraw from the kaihautu and 53 voted in favour.

47. Document c2, exhibit 37, p3

48. Document c2, exhibit 53

49. Document c2, exhibit 59

50. Document c2, p19

**1.3.19 Fifth OTS report to Ministers**

On 20 December, a further report to Ministers from OTS officials provided an update on mandate issues.<sup>51</sup> It noted the withdrawal of Ngati Rangiwewehi, unanimously confirmed at a well-advertised hui of 12 December. As we described in the previous section, officials considered that the Ngati Rangiteaorere hui of 5 December did not meet appropriate standards for mandating purposes, and that there was ongoing support for the kaihautu.

The report also noted an ongoing debate within Ngati Tuteniu over support for the executive council mandate, and the desire of a number of individual Te Arawa registered claimants to pursue claims through the Waitangi Tribunal rather than support the executive council mandate.

**1.4 SUMMARY**

The key points made in this chapter are as follows:

- ▶ In our August 2004 *Te Arawa Mandate Report*, we found that there had been serious flaws in the process by which the Crown recognised the mandate of the executive council to negotiate claims on behalf of all Te Arawa. However, we did not find that these flaws were so fundamental that the Crown was in breach of the principles of the Treaty of Waitangi.
- ▶ We suggested in our report that the executive council call a hui of all kaihautu members to reconfirm its mandate. In respect of this reconfirmation hui, we made a number of suggestions relating to notification, conduct, and other procedural details. We also suggested that another mandating hui be called for Ngati Rangitahi, and that the Crown negotiate contemporaneously with Ngati Makino and afford priority status to negotiations with Waitaha. We suggested that, if Ngati Makino agree, Waitaha and Tapuika should be invited to join their negotiations.
- ▶ On 3 September 2004, the executive council circulated to parties a draft reconfirmation document, which described the strategy by which they proposed to reconfirm their mandate. This document had been developed jointly with Crown officials from OTS and TPK.
- ▶ The draft reconfirmation document was discussed with other Te Arawa groups at two consultation hui held on 9 and 14 September.
- ▶ Following this consultation process, the executive council prepared a final reconfirmation document on 22 September. This document detailed proposed changes to the representation of iwi/hapu on the executive council (including the removal of seats being

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51. Document c2, exhibit 37



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held open for Ngati Makino, Waitaha, and Tapuika); proposed that a review of the rules governing the accountability of the executive council to the kaihautu take place; and proposed that no further mandating be held for Ngati Rangitihi.

- ▶ At four regional reconfirmation hui held on Rotorua Marae on 2 and 3 October, a majority of kaihautu members voted to adopt the executive council's reconfirmation document. From a total of 98 kaihautu members elected in September 2003, 58 voted at the reconfirmation hui: 36 voted in favour of the executive council's reconfirmation document, 19 against, and three abstained.
- ▶ A final hui-a-kaihautu was held on 20 October, at which the executive council reported back to kaihautu members on the outcome of the reconfirmation hui.
- ▶ The executive council amended its deed of trust on 27 October to reflect the changes to its composition which had been approved at the regional reconfirmation hui.
- ▶ On 26 November, the terms of negotiation between the executive council and the Crown were signed. The terms of negotiation included a list of all iwi/hapu of Te Arawa which the Crown considered were currently represented by the executive council.
- ▶ Between the release of our August 2004 report, and the January 2005 hearing at which the inquiry was reconvened, three Te Arawa iwi/hapu had their withdrawal from the executive council mandate formally recognised by MICOTOWN. The withdrawal of Ngati Wahiao and Ngati Whakaue was recognised on 26 November. The withdrawal of Ngati Rangiwehi was recognised on 21 December 2004.
- ▶ Members of other iwi/hapu dispute their inclusion in the executive council mandate.
- ▶ In April 2004, the executive council was mandated to represent approximately 88 per cent of Te Arawa. As at January 2005, the Crown considered that the executive council was mandated to represent 'just over half' of Te Arawa.



## CHAPTER 2

### THE APPLICATIONS FOR RESUMPTION AND THE PARTIES INVOLVED

#### 2.1 APPLICATIONS FOR RESUMPTION

In our August 2004 *Te Arawa Mandate Report*, we gave the claimants ‘the opportunity to return to the Tribunal, without further application for urgency, should the Crown fail to make an adequate response to our suggestions’.<sup>1</sup> Between September and December 2004, a number of requests for the resumption of the inquiry were received by the Tribunal.

##### 2.1.1 Initial resumption request and Crown response

The first request was made by the taumata in a memorandum dated 10 September 2004, on the basis that the regional reconfirmation hui discussed above had been scheduled for 2 and 3 October, but the executive council had not yet made available its reconfirmation document.<sup>2</sup>

In a memorandum of 14 September, the Crown responded to the taumata memorandum.<sup>3</sup> It stated that the taumata had been given an opportunity to participate in the reconfirmation, through the consultation hui and through the opportunity to provide written submissions during the process. It argued that to have resumed the inquiry at that stage would have been premature.

The taumata responded to the Crown’s memorandum the next day.<sup>4</sup> It denied that the resumption request was premature, and reiterated in more detail its objections to the reconfirmation on the following grounds:

- ▶ that the executive council’s consultation was ‘a sham’, and that key decisions such as the adoption of the four-region approach had been taken before consultation with the taumata had occurred;
- ▶ that to allow the reconfirmation hui to proceed on a basis that had been strongly objected to, then seek to have the Minister overturn the process, would be ‘ridiculous’ and ‘an irresponsible waste of resources’;

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1. Waitangi Tribunal, *Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p ix

2. Paper 3.2.2

3. Paper 3.2.3

4. Paper 3.2.4

2.1.2

- ▶ that the executive council was proceeding with undue haste, for example by planning for the signing of terms of negotiation by mid-October; and
- ▶ that the Crown's decision to accept the outcome of the 17 June hui of Ngati Rangitahi was in direct conflict with the suggestion of the Tribunal.

**2.1.2 Parties file responses to initial resumption request**

On 16 September, the Tribunal then requested that all counsel file replies to the recent taumata and Crown memoranda, regarding the taumata's resumption request. The executive council filed its response on the required date of 20 September 2004.<sup>5</sup> In its response, the executive council outlined its consultation process and the reconfirmation strategy, advising that the reconfirmation document was to be circulated to kaihautu members no later than 22 September. The executive council considered that to resume the Tribunal inquiry before the reconfirmation hui had taken place would be premature.

In a memorandum also dated 20 September, the taumata restated its objections to the reconfirmation process. It also referred to a joint letter received that day from OTS and the executive council which advised of the outcome of the consultation hui, outlined amendments to the reconfirmation strategy, and asserted that the executive council had followed the Tribunal's suggestions in developing its reconfirmation strategy.<sup>6</sup>

In addition to the points it raised in its initial memorandum of 10 September, the taumata argued that the executive council had failed properly to address the issue of its own proportionality, that the taumata should have had greater input into the reconfirmation, and noted that a number of groups had withdrawn or were considering withdrawal from the executive council as a result of their dissatisfaction with the process.

Subsequently, on 21 September and 23 September, the taumata filed further memoranda attaching relevant documentation: first, the executive council's notification of the regional reconfirmation hui, and secondly, the executive council's reconfirmation document.<sup>7</sup> The 23 September memorandum set out the taumata's specific criticisms of the reconfirmation document:

- ▶ that the lack of proportional representation of iwi/hapu on the kaihautu would potentially allow 'completely unrepresentative domination' of the reconfirmation hui by smaller groups with large numbers of Kaihautu members;<sup>8</sup>
- ▶ that the reconfirmation document had been provided to kaihautu members with insufficient notice, less than 10 days' notice as opposed to the Tribunal's suggested 14 days;

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5. Paper 3.2.5

6. Paper 3.2.6, exhibit A

7. Papers 3.2.10, 3.2.12

8. Paper 3.2.10, p2

- ▶ that the Ministerial endorsement attached to the reconfirmation document was ‘a cynical attempt to influence the kaihautu’;
- ▶ that Ngati Whakaue had been split into two regional hui, against their wishes;
- ▶ that the process would not allow the views of Ngati Wahiao to be heard as they had been unwillingly clustered with other groups; and
- ▶ that the result of the final 20 October hui-a-kaihautu would be irrelevant, as the voting on reconfirmation would already have occurred at the four ‘isolated’ regional reconfirmation hui.<sup>9</sup>

### 2.1.3 Tribunal requests further updates from parties

On 24 September, Judge Wickliffe issued a direction giving counsel the opportunity to file memoranda responding to the documentation filed by the taumata.<sup>10</sup> These memoranda were due on 27 September, in order that the Tribunal would have time to make a decision on the taumata’s request for resumption before the scheduled regional reconfirmation hui on 2 and 3 October.

Memoranda were received by a number of claimant groups in reply, advising the Tribunal of their positions regarding the reconfirmation and the taumata’s request for resumption. We summarise those here.

A memorandum was filed by the Ngati Whakaue cluster on 27 September noting that the executive council had not yet complied with Ngati Whakaue’s request that specific changes be made to the reconfirmation process (relating to references to Ngati Whakaue hapu and registered claims in executive council documentation).<sup>11</sup> This request had been made in an earlier memorandum of 20 September, which also notified the Tribunal of Ngati Whakaue’s decision to withdraw from the executive council mandate.<sup>12</sup>

On 20 and 27 September, two memoranda were filed by Michael Rika on behalf of Ngati Whaoa, which claimed that neither the executive council nor the Crown had sought to address the issue of the uncoupling of Ngati Tahu and Ngati Whaoa. He endorsed the taumata’s request for a resumption of the inquiry.<sup>13</sup> A third memorandum on behalf of Ngati Whaoa in support of the taumata’s request was filed by Peter Saite on 27 September.<sup>14</sup>

Counsel for the Wai 996 claimants of Ngati Rangitihi filed memoranda on 21 and 27 September expressing his clients’ doubts as to the ability of the kaihautu member for Ngati Rangitihi to fairly represent their interests, objecting to the Crown’s acceptance of the outcome of

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9. Paper 3.2.12

10. Paper 2.3.30

11. Paper 3.2.20

12. Paper 3.2.9

13. Papers 3.2.8, 3.2.17

14. Paper 3.2.18

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the 17 June mandating hui for Ngati Rangitihi, and supporting the taumata's request for a resumption.<sup>15</sup>

On 27 September, counsel for Ngati Makino filed a memorandum in support of the taumata's request for a resumption, arguing that OTS had done little or nothing to implement the Tribunal's recommendation that they be afforded priority in negotiations.<sup>16</sup>

A memorandum was filed by counsel for Tuhourangi on 28 September in support of the reconfirmation.<sup>17</sup> Finally, counsel for Tapuika filed a memorandum noting that they would not be participating in an urgent hearing.<sup>18</sup>

Both the Crown and executive council filed brief memoranda in response, holding to the views they had expressed earlier.<sup>19</sup> Both parties opposed the taumata's request for urgency on the grounds that it would be premature to resume the inquiry before the reconfirmation hui had been held.

**2.1.4 Tribunal direction of 1 October**

In a direction of 1 October, Judge Wickliffe responded to all memoranda from claimants, the Crown and the executive council regarding the requests for resumption.<sup>20</sup> The direction summarised the memoranda received from counsel to date, and declined the request for resumption on the following grounds:

- ▶ that it was open for the kaihautu members to reject the reconfirmation document at the regional reconfirmation hui, and for the Tribunal to intervene before this discussion had taken place would not be helpful;
- ▶ that the views of the taumata were likely to be considered by the executive council and the Crown in their consideration of the outcome of the hui;
- ▶ that, while the Tribunal was concerned that no further hui had been held for Ngati Rangitihi, consultation between the Ngati Rangitihi Wai 996 claimants and the executive council was underway;
- ▶ that Ngati Whakaue had not yet made a decision as to whether a resumption of the inquiry was necessary;
- ▶ that the concerns of Ngati Whaoa were due to be addressed at the regional reconfirmation hui; and
- ▶ that the concerns of Ngati Makino could be deferred until the outcome of the reconfirmation hui.

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15. Papers 3.2.11, 3.2.19

16. Paper 3.2.14

17. Paper 3.2.21

18. Paper 3.2.24

19. Papers 3.2.22, 3.2.23

20. Paper 2.3.32

Finally, the direction invited reports to the Tribunal from the taumata, the executive council and the Crown with respect to the outcome of the regional reconfirmation hui of 2 and 3 October.

### 2.1.5 Reports on the regional reconfirmation hui

The reports to the Tribunal were filed by the Crown, the executive council and the taumata on 6 October 2004. The Crown report noted that OTS and TPK officials had yet to report to Ministers on the reconfirmation hui, that the hui-a-kaihautu had yet to be held, and that the Crown would file a further memorandum once officials had obtained the views of the Ministers.<sup>21</sup> The executive council advised that it would provide a full report on the reconfirmation process as soon as possible after the hui-a-kaihautu scheduled for 20 October.<sup>22</sup>

The taumata memorandum provided more detail on the outcome of the regional reconfirmation hui.<sup>23</sup> It noted:

- ▶ that all four regional reconfirmation hui voted to adopt the executive council's reconfirmation strategy;
- ▶ that prior to the regional reconfirmation hui, Ngati Whakaue had withdrawn from the kaihautu;
- ▶ that kaihautu members for Ngati Rangiteaorere, Ngati Rangiwehewhi, Ngati Wahiao, and Ngati Te Takinga (a hapu of Ngati Pikiao) voted against the reconfirmation strategy; and
- ▶ that Ngati Rongomai representatives abstained from voting as they objected to the composition of the executive council.

The taumata argued that there had been insufficient support shown for the executive council at the regional reconfirmation hui to continue with the Te Arawa-wide mandate, and requested that the inquiry be reconvened.

In addition to these reports, several other claimant groups filed memoranda in respect of the outcome of the reconfirmation hui. On 6 October, Michael Rika filed a memorandum objecting to the coupling of Ngati Whaoa and Ngati Tahu.<sup>24</sup> The next day, counsel for the Wai 996 claimants of Ngati Rangitihi filed a memorandum outlining their frustration at the unwillingness of the Ngati Rangitihi kaihautu member to consult, or even meet, with them in relation to mandating issues. Despite some efforts on the part of the executive council, there had been no improvement in the situation.<sup>25</sup>

On 12 October, counsel for Ngati Tamakari, a hapu of Ngati Pikiao, filed a memorandum advising of the resignation at the coast region reconfirmation hui of kaihautu members

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21. Paper 3.1.130

22. Paper 3.1.131

23. Paper 3.1.132

24. Paper 3.1.133

25. Paper 3.1.134

2.1.6

David Whata-Wickliffe and his brother, Fred Whata.<sup>26</sup> Both had been elected as kaihautu members for Ngati Pikiao at the July 2003 Ngati Pikiao mandating hui but had resigned because of the executive council's refusal to address the issues of separate representation for Ngati Tamakari. The memorandum also stated Ngati Tamakari's continuing support for the taumata.

Then, in a memorandum of 20 October, the taumata advised parties of the resignation of the Ngati Rangiteaorere and Ngati Wahiao members of the kaihautu.<sup>27</sup> A further memorandum was filed by the taumata on 26 October, in response to correspondence from MICOTOWN which had expressed the view that the reconfirmation process was undertaken in a fair and open manner, and that the executive council continued to have the broad support of the people of Te Arawa.<sup>28</sup> The memorandum noted the withdrawal or pending withdrawal of a number of groups from the executive council mandate, and again requested a resumption of the inquiry on the basis of the number of groups which had sought to withdraw.

**2.1.6 Tribunal direction of 28 October**

In a direction of 28 October, Judge Wickliffe commented on the Crown and executive council reports on the regional reconfirmation hui, and on the taumata's further request for a resumption of the Tribunal inquiry.<sup>29</sup> The direction noted that the reports of the Crown and executive council had provided relatively little information on the regional reconfirmation hui and the hui-a-kaihautu, asked both parties to provide further reports on the process within seven days, and requested that these reports be as full and informative as possible. In particular, the judge requested information on whether the executive council considered that its mandate still covered hapu who claimed to have withdrawn, and the current target date for the signing of the terms of negotiation.

On 1 November, the Tribunal received a memorandum from Ngati Rangiwewehi advising that they had recently voted to 'withdraw unconditionally from the current direct negotiations being conducted by Nga Kaihautu O Te Arawa Executive Council'.<sup>30</sup>

On 5 November, the executive council filed a memorandum in response to the judge's direction of 28 October, attaching the reports of the executive council chairperson and the independent chair on the regional reconfirmation hui.<sup>31</sup> The chairperson of the executive council considered that the suggestions of the Tribunal's August 2004 report had been complied with, and noted that the executive council had not received sufficient information from those groups who had purported to withdraw from the kaihautu to recognise their

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26. Paper 3.1.135

27. Paper 3.1.136

28. Paper 3.1.137

29. Paper 2.3.33

30. Paper 3.2.25

31. Paper 3.1.138

withdrawal. The executive council considered that the application to resume the inquiry should be declined, as the Tribunal's August 2004 suggestions regarding the reconfirmation process had been followed.

The same day, the Crown filed a memorandum on the progress of the reconfirmation, attaching an affidavit of evidence from OTS manager Heather Baggott.<sup>32</sup> With respect to Ngati Wahiao, Ngati Rangiteaorere, Ngati Rangiwehewhi and Ngati Whakaue, Ms Baggott noted that processes relating to these iwi were still underway. Attached to the affidavit were a number of relevant documents. These included a copy of the OTS officials' report to Ministers of 21 October 2004 (referred to in section 1.3.11). Also attached were:

- ▶ letters from MICOTOWN to the executive council and taumata, advising that the Crown had recognised the result of the regional reconfirmation hui;
- ▶ letters to Ngati Makino, Tapuika and Waitaha advising them that the Crown would not accord priority to separate negotiations with each of them, but that it would be 'more likely' to accord priority if all three iwi joined together for negotiations;
- ▶ the TPK report on the regional reconfirmation hui;
- ▶ correspondence from Donna Hall notifying OTS and the executive council of the withdrawal of Ngati Rangiteaorere and Ngati Wahiao from the kaihautu;
- ▶ correspondence from Te Maru o Ngati Rangiwehewhi notifying OTS and the executive council of the withdrawal of Ngati Rangiwehewhi from the kaihautu;
- ▶ correspondence from the Ngati Whakaue cluster notifying OTS of the withdrawal of Ngati Whakaue from the kaihautu; and
- ▶ responses from OTS to the letters from Ngati Rangiwehewhi and Ngati Whakaue.

The memorandum addressed Judge Wickliffe's questions on whether or not the executive council still represented groups which had sought to withdraw from the kaihautu. It noted that the executive council and Crown were continuing to work to resolve outstanding mandate maintenance issues, and that the Crown required that any group wishing to withdraw from the mandate would have to meet the same standard required to attain recognition of the mandate in the first place. Finally, it argued that as the Crown and executive council were continuing to monitor the mandating process, there was no need to resume the inquiry.

### 2.1.7 Tribunal direction of 10 November

On 10 November, Judge Wickliffe issued a direction following the receipt of the further reports from the Crown and executive council.<sup>33</sup> The direction noted that a number of the Tribunal's August 2004 recommendations had been adopted in the reconfirmation process, but that there was still significant mandate work to be done. In particular, Judge Wickliffe

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32. Paper 3.1.139; doc B8

33. Paper 2.3.34



noted that there were issues to be addressed with regard to the executive council's mandate to represent certain iwi/hapu, specifically: the Ngati Whakaue cluster, Ngati Rangiwewehi, Ngati Rangiteaorere, Ngati Wahiao, Ngati Rangitihi, Ngati Whaoa, and four hapu of Ngati Pikiao (Ngati Tamakari, Ngati Te Taringa, Ngati Rongomai, and Ngati Hinekura). Essentially, these were the groups whose opposition to the executive council was identified in the 21 October OTS report to Ministers. The direction stated that there would be little to be gained by resuming the inquiry at that time, and finally requested that the Crown provide copies of the officials' reports to MICOTOWN and MOMA referred to in the Crown memorandum.

On 12 November, the Ngati Whakaue cluster filed a memorandum in response to the issues raised in the executive council memorandum of 5 November, regarding the validity of Ngati Whakaue's withdrawal from the kaihautu.<sup>34</sup> The memorandum set out the process by which Ngati Whakaue sought to withdraw from the kaihautu, including the hui of 12 September at which representatives of all Ngati Whakaue hapu and registered Treaty claims resolved to withdraw, and noted that a further hui had been scheduled for 21 November to seek further endorsement of the resolution of the 12 September hui.

On 16 November 2004, a letter from Mita Pirika (acting kaihautu representative for Ngati Tuteniu) to Rangitauira and Company (counsel for Ngati Whakaue) was copied to the Tribunal.<sup>35</sup> The letter advised that, at hui-a-hapu on 11 September and 12 November 2004, Ngati Tuteniu had reaffirmed their support for the kaihautu.

Counsel for Ngati Whakaue and the taumata made submissions at a judicial conference of the Tribunal's CNI inquiry on 17 November 2004, when they commented on the reconfirmation process to date.<sup>36</sup> In their submissions, both parties sought a resumption of the Te Arawa mandate urgent hearing in light of the imminent signing of the terms of negotiation by the Crown and executive council. Also at the CNI judicial conference, the executive council filed a memorandum which listed all the registered claims which it understood currently to be in support of the executive council mandate.<sup>37</sup>

On 19 November, Judge Wickliffe issued a direction acknowledging the submissions made at the CNI judicial conference on behalf of Ngati Whakaue, the taumata and the executive council.<sup>38</sup> She requested that a memorandum be filed by the Crown in 'response to the issues related to the Te Arawa mandate urgency claim' by 24 November.

On 23 November, the Crown filed a memorandum as an interim response to the judge's directions of 10 and 19 November.<sup>39</sup> The Crown's memorandum argued that it would be

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34. Paper 3.1.147

35. Paper 3.2.26

36. Papers 3.1.142, 3.1.143. A number of the parties which had chosen to withdraw from or remain outside the executive council were pursuing their claims through the Waitangi Tribunal CNI inquiry. In late 2004, judicial conferences were being held for the CNI inquiry in order to prepare for the hearings, which were due to begin in early 2005.

37. Paper 3.1.141

38. Paper 2.3.35

39. Paper 3.1.144



inappropriate to provide copies to the Tribunal of officials' reports to Ministers within 24 hours of their provision to Ministers, and before the Ministers had taken decisions on them. The Crown did commit to providing copies or extracts of these reports 'within a reasonable time after Ministers have taken decisions on them' and after a copy had been provided to the mandated group.

The same day, the Ngati Whakaue cluster filed a memorandum regarding the outcome of the Ngati Whakaue hui of 21 November.<sup>40</sup> The outcome of this hui, counsel argued, clearly demonstrated the desire of Ngati Whakaue to withdraw from the kaihautu. The memorandum requested that the executive council amend its deed of trust, deed of mandate, and proposed terms of negotiation, to recognise the withdrawal of Ngati Whakaue.

### 2.1.8 Response to signing of terms of negotiation

On 26 November, the executive council and Crown signed terms of negotiation. On 30 November, the taumata filed a memorandum in response.<sup>41</sup> According to the taumata, some of the claimants whose registered claims had been included in the terms of negotiation had not been made aware of this until three days before the signing. The memorandum outlined the recent High Court litigation by the taumata, Ngati Rangiwehi, Ngati Rangiteaorere, and Ngati Wahiao against the executive council in respect of the signing of the terms of negotiation. It also noted that the signing brought up new issues:

- ▶ Whether the Crown should continue to use the name Te Arawa in relation to negotiations with the executive council;
- ▶ Whether the Crown had any intention to negotiate with Te Arawa groups outside the executive council; and
- ▶ Whether the Crown would use the threat of delayed negotiations to force groups to rejoin the executive council.

The taumata argued that should the Crown undertake direct negotiations with the executive council without 'protection' for other groups in Te Arawa, discrimination and prejudice for those groups outside the executive council would result. It suggested that the urgent inquiry should be resumed in the week of 10 January 2005.

### 2.1.9 Application for resumption is granted

In a direction of 7 December, Judge Wickliffe granted the taumata's application for a resumption of the urgent inquiry into the Crown's recognition of the mandate of the executive council.<sup>42</sup> The request was granted on the basis of the inadequacy of the information supplied

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40. Paper 3.1.145

41. Paper 3.2.27

42. Paper 2.3.36

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by the Crown and executive council in their reports of 23 and 26 November. In particular, the Tribunal was concerned by the Crown's failure to provide the officials' reports to Ministers which had been requested. Without this information, the Tribunal could not be sure that the Crown had responded adequately to its August 2004 suggestions and the various concerns raised by claimant counsel in their memoranda. The Tribunal decided that a resumption of the inquiry was necessary to consider the matter properly. A one-day hearing was set for 12 January 2005, to be held at Wellington.

**2.1.10 The January 2005 hearing**

In a direction of 17 December, Judge Wickliffe outlined the scope of the reconvened inquiry and identified key issues to be addressed at the hearing.<sup>43</sup> First, the hearing would focus on whether the substantive recommendations of the *Te Arawa Mandate Report* had been addressed by the Crown and executive council. Secondly, the hearing would be an opportunity for the Tribunal to receive an update from the Crown and executive council on recent developments in the mandating process. She directed that broader issues – for example, the matter of the Crown's 'large natural groupings' policy – would be outside the scope of, and time available for, the hearing. At the teleconference of all counsel held immediately prior to the 17 December direction, Judge Wickliffe had made it clear that the Tribunal would hear evidence and submissions on the particular application of Crown policy as it affected particular claimants.

The hearing was held in the hui room of the Tribunal, at its offices in Wellington, on Wednesday 12 January 2005. The Tribunal sat from 9am to 5pm. Counsel for claimants and respondents presented their opening submissions orally, and responded to questions from the Tribunal members. Closing submissions of claimant counsel were filed in writing on 24 January, and those from the Crown and executive council on 26 January. Claimant submissions in reply were filed on 28 January.

**2.2 PARTIES TO THE JANUARY 2005 HEARING**

**2.2.1 Claimants**

**(1) The *Te Arawa taumata***

The Wai 1150 claim was filed by Pihopa Kingi, Pirihiira Fenwick, and Malcolm Short on behalf of the *Te Arawa taumata*.

The term 'taumata' was originally used in respect of the three Wai 791 claimants referred to in section 1.2. In early 2002, the 'VIP taumata', as it was called, was expanded to nine members,

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43. Paper 2.3.37

three for each of the three regions. The three members for the northern district were Bishop Whakahuihui Vercoe, Sir Howard Morrison (whose place was later taken by Pihopa Kingi), and Pirihira Fenwick. This group effectively constituted a Rotorua district, or Te Arawa taumata within the larger vīp taumata. The named claimants in Wai 1150, Pihopa Kingi, Pirihira Fenwick, and Malcolm Short, are in a sense the successors to the Te Arawa representatives on the original vīp taumata.

At the June 2004 Tribunal hearings, the taumata had opposed the Crown's recognition of the executive council's mandate. They argued that the Crown had failed to recognise the mandate they held at the beginning of 2003, and 'sidelined' the taumata, preferring to deal with Rawiri Te Whare, and later with the executive council. The taumata's claims in this inquiry relate to what it argues are fundamental flaws in the executive council's reconfirmation process, and the failure of the Crown to correct these errors.

### **(2) Ngati Whakaue cluster**

Ngati Whakaue is one of the two largest (with Ngati Pikiao) iwi/hapu of Te Arawa. The Ngati Whakaue cluster, or Te Kotahitanga o Ngati Whakaue, represents a number of claims committees, responsible for the following claims: Wai 94, Wai 155, Wai 268, Wai 293, Wai 316, Wai 317, Wai 335, Wai 384, Wai 391, Wai 410, Wai 533, Wai 693, Wai 893, Wai 1101, and Wai 1204. It represents the majority of Ngati Whakaue hapu. According to Hamuera Mitchell's affidavit, the cluster represents all six koromatua hapu of Ngati Whakaue: Ngati Pukaki, Ngati Te Roro o Te Rangi, Ngati Tunohopu, Ngati Hurunga Te Rangi, Ngati Taeotu, and Ngati Rangi i Waho.<sup>44</sup>

Mitchell stated that the cluster was first established in late 2001, and re-emerged in February 2004 as 'a forum for all claimants and Ngati Whakaue in general to participate in full discussion on the progress of their claims'. The claims of the Ngati Whakaue cluster concern the inclusion of the Ngati Te Roro o Te Rangi hapu and certain Ngati Whakaue registered claims in the executive council's terms of negotiation.

### **(3) Ngati Makino**

In our first report, we found that Ngati Makino had a legitimate expectation of entering their own separate negotiations. We suggested that the Crown must find a way to negotiate with them contemporaneously with the rest of Te Arawa. In September 2004, Ngati Makino and Waitaha agreed to join together for the purposes of negotiations. Their claim in this inquiry relates to the Crown's failure to implement the Tribunal's August 2004 suggestions.

### **(4) Te Takere o Ngai Wai**

Te Takere o Nga Wai are a cluster of claimants with whakapapa links to Raukawa and Tuwharetoa as well as Te Arawa. Three registered claimants from Te Takere o Nga Wai cluster

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44. Document C16

THE TE ARAWA MANDATE REPORT: TE WAHANGA TUARUA

2.2.1(5)

are claimants in this inquiry: the Hodge whanau (Wai 1141), Tom Eric Walters (Wai 1195) and Kiri Potaka Dewes (Wai 319). Their claims here concern the inclusion against their wishes of their registered claims in the terms of negotiation, and the lack of consultation on the matter from the Crown or executive council.

**(5) *Ngati Hinekura, Ngati Tutaki a Koti, Ngati Tutaki a Hane, Ngati Rongomai, and Ngati Rangiunuora***

Ngati Hinekura, Ngati Tutaki a Koti and Ngati Tutaki a Hane, and Ngati Rangiunuora are hapu of Ngati Pikiao who oppose the executive council mandate. The Ngati Rongomai hapu are closely related to Ngati Pikiao, although they held a separate mandating hui in July 2003, and were listed as a separate iwi/hapu in the terms of negotiation. The claims of all these groups relate specifically to the lack of provision for separate reconfirmation hui for each hapu and in general to flaws in the executive council's reconfirmation process.

**(6) *Ngati Tamakari***

Ngati Tamakari is a hapu of Ngati Pikiao. The named claimant in Wai 1173 is David Whata-Wickliffe, who was elected as a kaihautu member at the Ngati Pikiao mandating hui of 15 July 2003. The claims of Ngati Tamakari relate to their opposition to the executive council mandate and the refusal of the Ngati Pikiao Kaihautu Committee to recognise Ngati Tamakari as a hapu.

**(7) *Ngati Rangitihi***

The Wai 996 claimants belong to Ngati Rangitihi. The named claimants, Andre Patterson and David Potter, do not support the kaihautu. They argue that they have been sidelined by the Ngati Rangitihi Wai 524 claim. One of the named claimants in the Wai 524 claim, Henry Pryor, is also a Ngati Rangitihi member on the kaihautu. The Wai 996 claimants object to being represented by kaihautu members who, they argue, cannot properly speak on their behalf. The Wai 996 claimants also dispute the validity of the outcome of the hui of 17 June 2004, at which the majority of Ngati Rangitihi voted to support the executive council mandate. Their claims relate to the Crown's failure to implement the Tribunal's suggestion that a further mandating hui be held for Ngati Rangitihi.

**(8) *Waitaha***

Waitaha are a coastal Bay of Plenty iwi. The position of Waitaha is that they are of the Te Arawa waka, but they are not part of the Te Arawa confederation, and that their raupatu claim is wholly unrelated to the claims of Te Arawa. The Tauranga Moana Tribunal recommended that Waitaha's claims be negotiated separately from those of Te Arawa. The named claimant in Wai 1180 is Tame McCausland. In September 2004, Waitaha and Ngati Makino agreed to join together for the purposes of negotiations. Like those of Ngati Makino, the claims of

Waitaha in this inquiry concern the Crown's unwillingness to discuss a way forward towards separate negotiations.

**(9) Ngati Whaoa**

Ngati Whaoa are a hapu of Te Arawa which, for the purposes of mandating, have been coupled with Ngati Tahu. At the mandating hui of 17 July 2003, eight kaihautu members were elected for Ngati Whaoa-Ngati Tahu. The claims of Ngati Whaoa concern their desire to be uncoupled from Ngati Tahu.

**2.2.2 Other parties**

**(1) Executive council**

The subject of the first Te Arawa mandate hearing was the Crown's recognition of the executive council mandate. In our August 2004 report, we suggested that the executive council undertake a process to reconfirm its mandate. While the claims before us at the resumed urgency inquiry were directed at the Crown, they obviously related to the actions of the executive council as well. Counsel for the executive council presented submissions in defence of the reconfirmation process, and filed an affidavit of evidence from Rawiri te Whare in support of these submissions.

**(2) The Crown**

At the hearing, the Crown was represented by the Crown Law Office, and Heather Baggott of OTS appeared as a witness.

**2.3 SUMMARY**

The key points made in this chapter are as follows:

- ▶ In our August 2004 *Te Arawa Mandate Report*, we gave the claimants 'the opportunity to return to the Tribunal, without further application for urgency, should the Crown fail to make an adequate response to our suggestions'.
- ▶ The first request for a resumption of the inquiry was made by the taumata on 10 September 2004, on the basis that inadequate notification of the regional reconfirmation hui had been given by the executive council.
- ▶ On 1 October, the Tribunal issued a direction declining the taumata's request for resumption, on the grounds that it would not be helpful for the Tribunal to intervene before kaihautu members had had the chance to vote on the executive council's reconfirmation document at the regional reconfirmation hui of 2 and 3 October.
- ▶ On 6 October, the taumata reported back on the regional reconfirmation hui, and again

requested a resumption of the inquiry, on the grounds that the reconfirmation hui had demonstrated that the executive council no longer had sufficient support to continue towards conducting Te Arawa-wide negotiations with the Crown.

- ▶ On 5 November, the executive council and Crown filed a memoranda and evidence relating to the reconfirmation hui. Both were satisfied that the hui had been conducted in such a way as to comply with the Tribunal's August 2004 suggestions.
- ▶ In a direction of 10 November, the Tribunal declined the taumata's request for resumption, and requested that the Crown provide the Tribunal with copies of OTS officials' advice on mandating issues.
- ▶ The taumata filed a memorandum on 30 November, again requesting a resumption of the inquiry, on the grounds that in the 26 November terms of negotiation, the Crown and the executive council were seeking to negotiate claims outside the executive council mandate.
- ▶ In a direction of 7 December, the Tribunal granted the taumata's request for a resumption of the inquiry. The request was granted on the grounds that the Crown had failed to provide the Tribunal with officials' reports as requested, and that only by a resumption of the inquiry could the Tribunal properly assess whether or not the Crown had responded adequately to its August 2004 suggestions. The hearing date was set for 12 January 2005.

## CHAPTER 3

### THE CASES OF THE CLAIMANTS

#### 3.1 INTRODUCTION

A number of claimant groups were represented at the hearing, all of which argued that the reconfirmation process was flawed. The criticisms of the reconfirmation process fell into three broad categories. First, general submissions were made by claimants challenging the legitimacy of the reconfirmation process as a whole, including criticisms of the consultation, the conduct of the reconfirmation hui themselves, and the failure to address accountability rules. Secondly, there were specific criticisms from certain iwi/hapu that the Crown and executive council had failed to recognise their resolutions to withdraw from the kaihautu. Thirdly, Ngati Makino and Waitaha argued that the Crown had failed to respond adequately to the Tribunal's suggestions that it negotiate contemporaneously with Ngati Makino, and afford priority status to Waitaha.

In this section, we run through the arguments of each claimant group in the order they appeared before us, beginning with the taumata. As much as possible we have tried not to repeat similar arguments made by different groups.

#### 3.2 TE ARAWA TAUMATA

The taumata was the lead claimant in the inquiry. It was the taumata's request for resumption which was accepted by the Tribunal, and the taumata's submissions addressed the reconfirmation process as a whole.

Counsel for the taumata, Mr Taylor, opened his submissions by emphasising that the taumata's claim was focused not on the actions of the executive council, but on those of the Crown. He argued that the Crown had failed to discharge its duty to ensure that the reconfirmation process was implemented in an open, inclusive and robust manner. He repeated the Tribunal's August 2004 guidelines that the Crown must 'scrutinise actively every stage of the mandate process' and 'require the correction of errors and proper application of tikanga throughout the mandating process'.<sup>1</sup> He argued that this had not happened, and therefore that any flaws in the reconfirmation process were the responsibility of the Crown.

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1. Paper 3.3.26, p3

**3.2.1 Criticisms of the reconfirmation process**

Mr Taylor then detailed what were, in his submission, the failures of the reconfirmation process:

- ▶ first, discussion, debate and consultation over the reconfirmation strategy had been inadequate, and the views of parties other than the executive council had not fairly and properly been made part of the debate;
- ▶ secondly, the ideas and support of the taumata had been marginalised in the process in spite of the support it enjoyed;
- ▶ thirdly, the Crown had focused on approving the executive council's reconfirmation strategy, rather than on the needs and interests of Te Arawa iwi/hapu;
- ▶ fourthly, the Crown had been driven by its desire to achieve a Te Arawa settlement within two years, rather than to ensure that the reconfirmation process was fair, robust and inclusive; and
- ▶ lastly, there were a number of other factors which further undermined the validity of the reconfirmation process, including the failure to address issues regarding Ngati Rangitihi and Ngati Whaoa, the failure to ensure that the reconfirmation document was circulated with sufficient notice prior to the regional hui, and the adoption of the four-region approach.<sup>2</sup>

The primary concern of the taumata, Mr Taylor argued, was that the reconfirmation process had been 'closed', and thus had not complied with the Tribunal's suggestion that the process must be open and robust. The views of the taumata had not been taken into consideration by the Crown and executive council, despite the taumata's willingness to engage in the reconfirmation process, its clear support among Te Arawa iwi/hapu, and the specific suggestion by the Tribunal that the executive council consult with the taumata.

Mr Taylor then responded to the Crown's counter argument that the taumata's views had been taken into account. He rejected the suggestion that the executive council had altered its reconfirmation strategy following consultation with the taumata. He pointed out the differences between the taumata's paper of 20 August and the executive council's 22 September reconfirmation document, with regard to composition and proportionality of the executive council.

Mr Taylor also argued that the Crown had failed to ensure that there was opportunity for groups to raise issues and alternative approaches at the regional reconfirmation hui. The executive council had given its own views priority over any others in the reconfirmation. First, the reconfirmation document circulated to kaihautu members presented the executive council strategy only. Secondly, at the regional reconfirmation hui, the reconfirmation document was formally tabled for discussion but competing perspectives, such as that of the taumata's, could be presented only from the floor. Thus, in counsel's submission, the executive council,

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2. Paper 3.3.26, pp 4–5



in managing the reconfirmation process, had failed in its fiduciary duty to all of Te Arawa to provide all relevant information (including the perspectives of all groups in Te Arawa) to the kaihautu members in order for them to make informed decisions.

Mr Taylor then dealt with several of the taumata's specific concerns with the reconfirmation process. He argued that in their reports to the Ministers, OTS officials had deliberately omitted information about the taumata's paper of 20 August. Specifically, they left out the taumata's suggestion of a multi-stakeholder process incorporating the views of a number of groups into the reconfirmation strategy. The Ministers' endorsement of the executive council's reconfirmation strategy was, therefore, made without all relevant information.

Next, Mr Taylor argued that the reconfirmation process had been undertaken with undue haste, and that this seriously undermined its validity. According to Mr Taylor, kaihautu members had only seven days from the time they received the reconfirmation document in which to consult with their hapu, before voting at the reconfirmation hui.<sup>3</sup>

In his submission, the Crown should properly have adopted some strategy to ensure the continued participation of those groups which disagreed with the executive council process, such as dispute resolution or enforcing a slowing down of the process. Instead, counsel submitted, the Crown 'adopted a policy which simply cuts off those who do not agree with the Executive's take it or leave it approach'.<sup>4</sup>

Mr Taylor then referred to further criticisms of the reconfirmation process contained in the affidavit of taumata member, Pihopa Kingi. These criticisms related to the executive council's adoption of the four-region approach in the reconfirmation process. In his affidavit, Mr Kingi referred to the paper prepared by Ms Hall for presentation at the consultation hui of 9 and 14 September 2004.<sup>5</sup> In the paper, Ms Hall had objected to the four-region approach on these grounds:

- ▶ that it diminished the power of larger hapu and concentrated power in certain smaller hapu;
- ▶ that the issue of the proportionality of the executive council affected all of Te Arawa and therefore could only be fairly and properly addressed by all hapu sitting together;
- ▶ that the four-region approach did not accord with Te Arawa tikanga, which has always seen decisions made by the confederation as a whole;
- ▶ that the decision to adopt the four-region approach was made by a small group of people in secret; and
- ▶ that the approach was based on a misapplication of historical research, and that this research was disputed in any case.<sup>6</sup>

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3. Ibid, p5

4. Ibid, p15

5. Document c26

6. Document c26, attachment PK2

In his affidavit, Mr Kingi also argued that the executive council had failed to address a number of interrelated constitutional issues. These constitutional issues concerned the size and representivity of the kaihautu, and voting rules of the reconfirmation hui. Mr Kingi described the current proportionality of representatives on the kaihautu as ‘arbitrary’.<sup>7</sup> He argued that because the proportionality of the kaihautu was itself imperfect, a simple majority of kaihautu members was not sufficient to make an important decision such as reconfirming the executive council mandate.

With respect to the size of the executive council, Mr Kingi argued that the executive council had underrated the importance of proportionality of representation, and was instead preoccupied with limiting its size to 21 members.<sup>8</sup> A larger executive council would be necessary to appropriately reflect the proportionality of the different iwi/hapu of Te Arawa. Finally, in his affidavit, Mr Kingi argued that the executive council had failed to disclose to kaihautu members its commitment to withdrawing from the Waitangi Tribunal process in order to enter direct negotiations with the Crown.

Mr Taylor then submitted a reinterpretation of the voting results at the four regional reconfirmation hui, notwithstanding the taumata’s position that the reconfirmation process itself was fundamentally flawed.<sup>9</sup> His reinterpretation was based on the premise that those kaihautu members who had resigned since the last hearing could be counted (hypothetically) as definite votes *against* the reconfirmation strategy. Using this approach, Mr Taylor concluded that barely 50 per cent voted in favour of the reconfirmation strategy. Adopting the same premise, Mr Taylor argued that approximately 45 per cent of the population of Te Arawa opposed the executive council mandate, the support of 15 per cent was contested by the taumata, and only 40 per cent of Te Arawa definitely supported the executive council.<sup>10</sup> On the grounds of his reinterpretation of the reconfirmation hui, Mr Taylor submitted that support for the executive council within Te Arawa was marginal at best.<sup>11</sup>

He argued that the Crown and executive council had together applied a double standard in requiring a higher ‘burden of proof’ of groups resolving to withdraw from the kaihautu than from those groups reconfirming their support for it:

The decision of Hapu representatives is sufficient for the ‘reconfirmation’ of the Executive Council, and alteration of the Executive Council’s proportionality, even where there is clearly not time to consult the Hapu membership, as in this reconfirmation process. Yet where, as with Ngati Rangiteaorere and other objecting Hapu, those Hapu representatives determine to withdraw from the Executive Council, that is not good enough.<sup>12</sup>

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7. Document c26, p12

8. Ibid, p13

9. Paper 3.3.26, pp16–18

10. Ibid, p17

11. Ibid, p18

12. Ibid

In closing, Mr Taylor addressed the issue of cross claims which may arise from a settlement between the Crown and the executive council. He cited the Whakarewarewa village and geothermal area and the Whakapoungakau Ranges as examples of assets which were claimed by groups within and outside the executive council mandate. He argued that cross-claim issues:

will be a major concern now that there are two opposing Te Arawa groupings. As a matter of practicality, it is submitted, the only realistic way for the Crown to adequately inform itself [on cross-claim issues] is to ensure that there are mandated groups who can speak on behalf of these 'cross claimants'. This, it is submitted, is the only way to ensure that cross claim discussions are detailed, realistic, and properly identify the desires of cross claimant groups.<sup>13</sup>

He then made submissions in respect of the position of Ngati Rangiteaorere and Ngati Tuteniu. The taumata submitted that both Ngati Rangiteaorere and Ngati Tuteniu had resolved to withdraw from the kaihautu, and sought recommendations from the Tribunal, requiring either that the Crown must recognise the withdrawal of these iwi or that further hui-a-iwi must be held at which the iwi members may confirm their withdrawal.<sup>14</sup>

Mr Taylor then argued that, if the Crown would not negotiate with Te Arawa groups who were 'in the Tribunal process', then it should respect the unity of Te Arawa by 'refusing to negotiate with any part of the confederation for the short time that it will take to go through [the Tribunal CNI stage 1 inquiry process]'.<sup>15</sup>

### 3.2.2 Relief sought

Finally, by way of relief, counsel for the taumata sought the following findings and recommendations from the Tribunal:

- ▶ that the Crown withdraw the mandate from the executive council;
- ▶ that the withdrawals of Ngati Rangiteaorere and Ngati Tuteniu from the executive council be recognised;
- ▶ that there be facilitation between the different factions of Ngati Rangitahi;
- ▶ that a process be developed to resolve the issue of the uncoupling of jointly represented hapu, especially in respect of Ngati Whaoa and Ngati Tahu; and
- ▶ that an independent facilitator or team of facilitators be appointed to address and resolve outstanding issues with the overall mandate process.<sup>16</sup>

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13. Paper 3.3.30, p13

14. Ibid, pp16–17

15. Ibid, p14

16. Ibid, pp20–21

**3.3 NGATI WHAKAUE**

Counsel for the Ngati Whakaue cluster, Mr Rangitauira, began his opening submissions with a chronology of events relating to the cluster's resolution to withdraw from the kaihautu, and efforts to have their withdrawal recognised by the executive council and Crown. We summarise that chronology here.

**3.3.1 Ngati Whakaue cluster hui of 12 September**

According to counsel, there was doubt among members of Ngati Whakaue as to the executive council reconfirmation process from an early stage. At the first consultation hui of 9 September 2004, Ngati Whakaue elder Dooley Kahukiwa raised a number of concerns regarding the iwi's representation on the executive council.

Soon afterwards, on 12 September, at a hui of Ngati Whakaue attended by 10 out of 11 kaihautu members, the iwi voted to withdraw from the kaihautu.<sup>17</sup> According to witness Hamuera Mitchell, representatives of Ngati Te Roro o Te Rangi were present at the 12 September hui but did not vote or sign the attendance register.<sup>18</sup> On 14 September, the Ngati Whakaue cluster informed OTS and the chairperson of the kaihautu of the decision.<sup>19</sup>

In a letter of 22 September 2004, OTS officials responded, asking for clarification on which hapu and registered claims were represented by the cluster, and documentation of the process by which the decision to withdraw was reached.<sup>20</sup> This material – minutes and attendance registers of the Ngati Whakaue cluster hui of 12 September and another cluster hui of 29 August at which kaihautu matters were discussed – was furnished by the cluster to OTS on 1 October.<sup>21</sup> On 6 October, copies of the letters of resignation of all 11 Ngati Whakaue kaihautu members were forwarded to the executive council. At this time, the cluster also requested:

- ▶ that the executive council remove all references to Ngati Whakaue from the deed of mandate;
- ▶ that the Crown be notified of this, and that Ngati Whakaue be listed instead under the exclusionary clause of the deed;
- ▶ that the executive council vary its trust to remove any participation or inclusion of Ngati Whakaue; and
- ▶ that these changes be formalised within four weeks.<sup>22</sup>

Meanwhile, Ngati Whakaue kaihautu members attended the east and west regional reconfirmation hui on 2 and 3 October. They did not cast votes at the hui but rather tabled a letter confirming Ngati Whakaue's withdrawal from the kaihautu.<sup>23</sup>

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17. Paper 3.3.23, p5

18. Document c16, para 7.6

19. Document c2, exhibit 38

20. Document c2, exhibit 39

21. Document c2, exhibit 41

22. Document c2, exhibit 40

23. Document c2, exhibit 17, pp153, 173

In their report of 21 October, OTS officials advised the Ministers of the Ngati Whakaue cluster's intention to withdraw, noting that the cluster represented the majority of key Ngati Whakaue registered claims, constituent hapu, and overall population. Officials considered that the withdrawal of Ngati Whakaue constituted a 'significant risk to the level of support for the mandate of the kaihautu executive council'.<sup>24</sup> They advised that the cluster had stated that it did not act for Ngararanui or Ngati Te Roro o Te Rangi, and therefore that 'the resignations impact on two of the five kaihautu executive council seats that affiliate to Ngati Whakaue'.<sup>25</sup> The two executive council seats referred to were those allocated to 'Ngati Whakaue Iwi' under the adjusted executive council composition approved at the regional reconfirmation hui. Officials did not consider that the cluster's withdrawal affected the three executive council seats which had been allocated to certain specific Ngati Whakaue hapu: Ngati Te Roro o Te Rangi, Ngati Tura/Ngati Te Ngakau, and Ngararanui.

When, on 27 October 2004, the executive council met to amend its trust deed to give effect to the outcome of the reconfirmation hui, the resulting amendment of trust did not incorporate the withdrawal of Ngati Whakaue, as requested by the cluster on 6 October.<sup>26</sup> We note that at this time MICOTOWN had not yet formally recognised Ngati Whakaue's withdrawal from the kaihautu.

### 3.3.2 Ngati Whakaue cluster hui of 21 November

A few weeks later, on 21 November, a 'well advertised' hui was held for Ngati Whakaue, with the purpose of bringing members up to date with the cluster's work. At the hui, a motion was put to reconfirm the resolution of the 12 September hui regarding Ngati Whakaue's withdrawal from the kaihautu, and was passed unanimously. According to the cluster, at least six members of Ngati Te Roro o Te Rangi were present at this hui. The hui minutes record Barney Meroiti, a member of Ngati Te Roro o Te Rangi, speaking in support of the cluster's withdrawal, but noting that his hapu was 'split over this decision'. On 24 November, the cluster wrote to OTS and the executive council advising them of the outcome of the hui, and attaching the minutes and attendance register of the hui.<sup>27</sup>

On 23 November, OTS officials again reported to MICOTOWN and MOMA, and identified the withdrawal of Ngati Whakaue as a key development in the mandating process.<sup>28</sup> The report advised that Ngati Te Roro o Te Rangi continued to support the kaihautu.

On 26 November, MICOTOWN wrote to the cluster, formally recognising Ngati Whakaue's withdrawal from the kaihautu.<sup>29</sup> The letter listed the hapu of Ngati Whakaue that were

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24. Document C2, exhibit 21, p10

25. Ibid

26. Document C5, exhibit 47

27. Document C2, exhibit 43

28. Document C2, exhibit 35

29. Document C2, exhibit 45

## 3.3.3

recognised as having withdrawn from the kaihautu: Ngati Hurunga Te Rangi, Ngati Taeotu, Ngati Te Kahu, Ngati Tunohopu, Ngati Pukaki, Ngati Karenga, Ngati Waoku, Ngati Rautao, Ngati Hika, Ngati Ririū, and Ngati Te Rangiwaho. This list did not include Ngati Te Roro o Te Rangi.

The terms of negotiation between the Crown and the executive council were signed on 26 November. Clause 6 of the terms of negotiation included Ngati Te Roro o Te Rangi as one of the iwi/hapu included in the definition of 'Te Arawa' for the purposes of executive council–Crown negotiations.<sup>30</sup> The other Ngati Whakaue hapu included in clause 6 under the definition of Te Arawa were: Ngati Ngararanui, Ngati Tuteaiti, Ngati Tura, and Ngati Te Ngakau.

Clause 7 explicitly excluded the following Ngati Whakaue hapu from the terms of negotiation: Ngati Hurunga Te Rangi, Ngati Taeotu, Ngati Te Kahu, Ngati Tunohopu, Ngati Pukaki, Ngati Karenga, Ngati Waoku, Ngati Rautao, Ngati Hika, Ngati Ririū, and Ngati Te Rangiwaho.

Clause 10 listed the following Ngati Whakaue registered claims as included in the terms of negotiation, in so far as they related to the definition of Te Arawa given in clause 6: Wai 268, Wai 316, Wai 317, Wai 533, and Wai 1101.

### 3.3.3 Further correspondence between the cluster and the Crown

On 15 December 2004, Ngati Whakaue wrote to MICOTOWN expressing their 'great regret and concern' at the inclusion of Ngati Te Roro o Te Rangi and the claims listed above in the terms of negotiation.<sup>31</sup> The letter stated that the Ngati Whakaue cluster also wished to remove any suggestion that they would rejoin the kaihautu in the future.

On 20 December, OTS officials again reported to the Ministers.<sup>32</sup> The report summarised the Ngati Whakaue cluster's letter of 15 December, providing the background to their withdrawal from the kaihautu. With regard to Ngati Te Roro o Te Rangi, officials advised the Ministers that because the 21 November hui resolved to endorse the resolutions of the earlier 12 September hui, and because representatives of Ngati Te Roro o Te Rangi did not vote at the earlier hui, the resolution of the 21 November hui did not include them either. Furthermore, officials noted the continuing support for, and active involvement in the kaihautu by, Ngati Te Roro o Te Rangi.<sup>33</sup> With reference to the inclusion of Ngati Whakaue registered claims in the terms of negotiation, officials noted that the terms of negotiation explicitly excluded, in whole or in part, the registered claims of those iwi/hapu which the Crown recognised to be outside the executive council mandate. Finally, officials advised that they would continue their dialogue with the cluster and, if appropriate, encourage them to rejoin the kaihautu.

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30. Document c2, exhibit 46, p3

31. Document c2, exhibit 47

32. Document c2, exhibit 37

33. Ibid, p6

MICOTOWN wrote to the Ngati Whakaue cluster on 21 December expressing the view that the resolutions of the hui of 12 September and 21 November 2004 did not include Ngati Te Roro o Te Rangi, and that Ngati Te Roro o Te Rangi continued to support and participate in the executive council.<sup>34</sup> The letter then noted that the terms of negotiation included all registered claims in which mandated hapu (including Ngati Te Roro o Te Rangi) had an interest, and further that the terms of negotiation explicitly excluded the registered claims of groups which were not covered by the executive council mandate. Finally, MICOTOWN noted the wish of Ngati Whakaue to remove any suggestion that it may rejoin the executive council in the future, reminded Ngati Whakaue that the Government could not accord priority to separate negotiations with the iwi, and encouraged them to continue speaking with OTS officials.

### 3.3.4 Submissions

Having outlined the chronology of events given by counsel for Ngati Whakaue, we now turn to their submissions. Essentially, their argument was that the Crown had ignored Ngati Whakaue's decision to withdraw from the mandate, and that there was now a danger of prejudice to Ngati Whakaue arising as a result of their claims being negotiated by the executive council, outside their control and against their express wishes. In the submission of counsel, the terms of negotiation provided:

prima facie evidence of the Crown's continued recognition that [the executive council] has mandate for certain Ngati Whakaue cluster interests and/or claims, in whole or in part, against the expressed wishes of the cluster, wishes which were made abundantly clear throughout the reconfirmation process.<sup>35</sup>

Mr Rangitauira then argued that MICOTOWN had 'intentionally disregarded' OTS officials' advice in their report of 23 November to sign a letter stating the cluster's claims would not be included in the terms of negotiation.<sup>36</sup> Instead, MICOTOWN's letter to the cluster of 26 November did not specify that Ngati Whakaue claims would be excluded from the terms of negotiation, and, in the submission of counsel, was deficient in that it did not provide for processes to ensure the protection of Ngati Whakaue interests in overlapping claims.

Thus, counsel submitted, by allowing Ngati Whakaue claims to be included in the terms of negotiation, the Crown had breached Treaty principles in the following ways:

- ▶ by undermining the mana and rangatiratanga of Ngati Whakaue over their whenua;
- ▶ by denying the right of Ngati Whakaue to freely elect properly mandated representatives and adopt strategies to progress their claims as they wish;

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34. Document c2, exhibit 48

35. Paper 3.2.23, p18

36. Document c2, exhibit 35, p5



## 3.3.5

- ▶ by attempting to straitjacket the people of Ngati Whakaue into unnatural groups for the sake of convenience;
- ▶ by creating the potential for further loss of land and taonga by negotiating Ngati Whakaue's claims without consent; and
- ▶ by eroding claimants' faith in and relationships with the Crown and each other.

**3.3.5 Ngati Te Roro o Te Rangi**

Counsel then addressed the inclusion of Ngati Te Roro o Te Rangi in the terms of negotiation. He began by disputing the advice of OTS in its report to Ministers of 21 October that the Ngati Whakaue cluster had stated that it did not act for Ngati Te Roro o Te Rangi.<sup>37</sup> Ngati Whakaue tikanga, he argued, determined that Ngati Te Roro o Te Rangi, as a koromatua hapu of Ngati Whakaue, were implicitly expected to attend any hui of Ngati Whakaue, such as that of 12 September. He then cited the evidence of Hamuera Mitchell that members of Ngati Te Roro o Te Rangi, including their kaihautu members, were present at the 12 September hui which resolved to withdraw from the kaihautu.<sup>38</sup> He noted also that members of Ngati Te Roro o Te Rangi were present and voted at the Ngati Whakaue hui of 21 November. In the submission of counsel, therefore, Ngati Te Roro o Te Rangi were part of the cluster, and participated in and supported the resolutions of the hui to withdraw from the kaihautu.<sup>39</sup>

In closing submissions, Counsel responded to the view of Crown officials that the outcome of the 21 November hui did not demonstrate Ngati Te Roro o Te Rangi's desire to withdraw from the kaihautu, because the resolutions passed merely endorsed the decision of the 12 September hui, in which that hapu was not involved. He described this view as an 'extremely legalistic interpretation of the matter [which attempted to] distort these outcomes to enable the Crown to ignore and brush aside the concerns of the cluster'.<sup>40</sup> Instead, he argued, members of Ngati Te Roro o Te Rangi had participated fully in the well advertised hui of 21 November, and the outcome of that hui made it quite clear that the hapu concurred with the cluster's decision to withdraw from the kaihautu.

In response to the advice of officials that Ngati Te Roro o Te Rangi kaihautu members continued to participate in the executive council, counsel argued that the decisions of these members were 'at odds with the concerns of the cluster, and thus they could not be representative of the cluster's concerns'.<sup>41</sup> Further, he argued, the Crown ought to have ascertained this through active scrutiny of the reconfirmation process, but instead it had relied on information provided by the executive council.

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37. Paper 3.3.23, pp 20–21

38. Ibid, p 21

39. Ibid, p 22

40. Paper 3.3.29, p 10

41. Ibid, p 19



**3.3.6 Inclusion of Ngati Whakaue claims in terms of negotiation**

Counsel then addressed the Crown's position that certain Ngati Whakaue registered claims were included in the terms of negotiation. The Crown policy is that all claims of any Ngati Whakaue hapu which are covered by the executive council mandate would be the subject of negotiations. He countered this argument on two grounds. First, he reiterated that Ngati Te Roro o Te Rangi were no longer part of the executive council mandate, so the Crown policy of including their claims should not apply. Secondly, and notwithstanding the first point, he noted that none of the members of Ngati Te Roro o Te Rangi were registered claimants for those claims included in the terms of negotiation.<sup>42</sup> Therefore, Ngati Te Roro o Te Rangi did not have a mandate to represent any of those claims as listed in the terms of negotiation.

**3.3.7 Misrepresentation of support for executive council**

Counsel then argued that, despite the clearly expressed desire of the Ngati Whakaue cluster to withdraw from the kaihautu, the Crown and executive council had continued to emphasise that seats were being held open for them should they wish to rejoin. Such references had continued despite the cluster's specific and repeated requests that any suggestion that Ngati Whakaue may rejoin the kaihautu be removed.<sup>43</sup>

Counsel argued that the Crown's failure to ensure that the cluster's concerns were addressed was intentional. He argued that the Crown had sought to create a façade of Ngati Whakaue participation in the kaihautu through:

- ▶ the inclusion of Ngati Te Roro o Te Rangi in the terms of negotiation;
- ▶ the inclusion of Ngati Whakaue registered claims in the terms of negotiation; and
- ▶ continuing to emphasise the availability of seats for Ngati Whakaue representatives on the executive council, and alluding to the possibility of Ngati Whakaue rejoining the kaihautu.<sup>44</sup>

Counsel argued that the Crown sought to maintain this façade in order to pursue its agenda of a substantial settlement with Te Arawa through the executive council. In the opinion of counsel, the Crown's claim, outlined in the section below on Crown submissions, that the executive council represents a 'substantial portion' of Te Arawa, is inflated and misleading.<sup>45</sup> Counsel noted that only 36 out of 95 kaihautu members had voted in favour of the reconfirmation strategy, and argued that this did not constitute the 'broad support' of the Te Arawa people.<sup>46</sup>

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42. Ibid, p15

43. Paper 3.3.23, p25

44. Ibid, pp25–56

45. Ibid, p31

46. The footnote to table 3 (see p14) describes the difference in the number of kaihautu members listed in the executive council's December 2003 deed of mandate (98) and the number of kaihautu members listed in the 21 October 2004 ORS report on the outcome of the regional reconfirmation hui.

Counsel also argued that by asserting that Ngati Whakaue ‘did not participate’ in the reconfirmation process, instead of acknowledging Ngati Whakaue’s explicit opposition to the executive council mandate, the Crown had overstated the true level of support for the executive council.<sup>47</sup> While it was true that Ngati Whakaue kaihautu members had not voted at the reconfirmation hui, and their opposition to the executive council mandate was clear, counsel argued hypothetically that, if the 11 Ngati Whakaue kaihautu members were factored into the vote, there would have been 36 votes for the reconfirmation strategy and 33 against.<sup>48</sup> In counsel’s submission, this painted a very different picture of support for the executive council among the people of Te Arawa than the Crown’s ‘distorted calculations’.

### 3.3.8 Relief sought

Finally, by way of relief, Counsel asked for the following from the Tribunal:

- ▶ a finding that the Crown has breached the principles of the Treaty;
- ▶ a recommendation that the Crown undertake that none of Ngati Whakaue’s claims be negotiated, settled, or prejudiced in any negotiations or settlement between the executive council and the Crown;
- ▶ a recommendation that the Crown remove all references to Ngati Whakaue, Ngati Te Roro o Te Rangi, and all Ngati Whakaue’s registered claims from the executive council deed of mandate, the terms of negotiation, and other relevant documents;
- ▶ a recommendation that any suggestion that Ngati Whakaue will rejoin the kaihautu be removed;
- ▶ a finding that, contrary to the position of the Crown, the executive council does not represent ‘a substantial portion’ of Te Arawa; and
- ▶ a recommendation that the executive council only holds a mandate for those iwi/hapu that have clearly demonstrated their support for it.<sup>49</sup>

### 3.4 NGATI HINEKURA, NGATI TUTAKI A KOTI, NGATI TUTAKI A HANE, NGATI RONGOMAI, NGATI RANGIUNUORA, TE TAKERE O NGA WAI, AND NGATI MAKINO

Ms Sykes and Mr Pou represented several claimant groups at the hearing. Their submissions dealt with the factual background to each group in turn, then made submissions making the same general points on behalf of all of their clients. In summarising their submissions, we have adopted the same approach.

47. Paper 3.3.23, pp 27–30

48. Ibid, p 29. We presume that Mr Rangitauira’s 33 hypothetical votes against the strategy consisted of the 19 members who voted against it at the hui, plus the three who abstained and the 11 Ngati Whakaue members who had resigned from the kaihautu before the vote was taken.

49. Ibid, pp 33–34

### 3.4.1 Ngati Hinekura, Ngati Tutaki a Koti, Ngati Tutaki a Hane, Ngati Rongomai, and Ngati Rangiunuora

The first group represented by Ms Sykes and Mr Pou are a number of Ngati Pikiao hapu – Ngati Hinekura, Ngati Tutaki a Koti, Ngati Tutaki a Hane, Ngati Rangiunuora, and Ngati Rongomai – that, it was argued, did not support the executive council mandate. Counsel argued that none of these hapu had the opportunity to meet independently or collectively to confirm its assent either to the proposed executive council reconfirmation strategy or to the inclusion of its claims in the executive council's deed of mandate.<sup>50</sup>

At the Coast Region reconfirmation hui of 2 October, a number of members of these hapu made known their dissatisfaction and concerns with aspects of the reconfirmation process. Their concerns related to:

- ▶ the haste of the process and the insufficiency of time available for kaihautu members to take the reconfirmation proposal back to their hapu for consultation;
- ▶ the sufficiency and appropriateness of Ngati Pikiao representation on the executive council, particularly the need for more seats;
- ▶ the complex whakapapa relationships between Ngati Pikiao and Ngati Rongomai;
- ▶ the voting rules which only allowed kaihautu members to vote and which did not allow proxy voting;
- ▶ the perception that the reconfirmation document was being presented by the executive council as a *fait accompli*, and that there was no scope for the strategy to be adjusted;
- ▶ the lack of information available to kaihautu members and iwi/hapu by which they might assess the extent of hapu claims and cross-claim issues;
- ▶ the lack of communication between kaihautu members and the iwi/hapu that they represent;
- ▶ the fact that some registered claimants objected to the inclusion of their claims among those to be negotiated by the executive council.<sup>51</sup>

The claims of these Ngati Pikiao hapu relate to the Crown's alleged failure to actively monitor the reconfirmation process by addressing the above issues and correcting any errors. Thus, it was submitted, the Crown had failed to meet its obligation to ensure that the reconfirmation process was undertaken in a fair, transparent way, in accordance with the *tikanga* of Te Arawa.

In the submission of counsel, the Crown had actively attempted to displace the *rangatira-tanga* of the hapu by allowing a reconfirmation process which breached *tikanga*. It did so by failing to allow the opportunity for all tribal members at the reconfirmation hui to vote on the reconfirmation process.<sup>52</sup>

The affidavits of witnesses called in support generally argued:

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50. Paper 3.3.24, pp 2–3

51. Ibid, pp 6–7

52. Claim 1.1.9, p 7

## THE TE ARAWA MANDATE REPORT: TE WAHANGA TUARUA

## 3.4.2

- ▶ that hui-a-hapu should have been held at which each hapu of Ngati Pikiao could have reached their own autonomous decisions with regard to the reconfirmation process;
- ▶ that all hapu members should have participated in the decision making, preferably by voting on reconfirmation; and
- ▶ that as a result of these deficiencies in the process, the claims of their hapu would now be negotiated by the executive council against their wishes.<sup>53</sup>

More specifically, Ngati Rongomai claimants disputed the outcome of a hui held on 29 November, at which, according to the kaihautu member for Ngati Tarawhai/Ngati Rongomai, Ruka Hughes, the hapu resolved to reconfirm their support for the executive council mandate.<sup>54</sup> Ngati Rongomai registered claimant Dennis Curtis, however, disputed the validity of the outcome of the hui.<sup>55</sup> He argued that the hui had not been sufficiently notified, that information regarding the signing of the terms of negotiation had not been circulated to hapu members, and that a series of hui were required before the hapu of Ngati Pikiao could commit to the executive council process. Similarly, witness Colleen Skerrett-White argued that the executive council did not have a mandate to negotiate the claims of Ngati Rongomai.<sup>56</sup>

## 3.4.2 Te Takere o Nga Wai

The second group represented by Ms Sykes and Mr Pou were three registered claimants who are members of Te Takere o Nga Wai cluster. These claimants are: the Hodge whanau (Wai 1141), Tom Eric Walters (Wai 1195), and Kiri Potaka Dewes (Wai 319). The members of Te Takere o Nga Wai cluster have whakapapa links to Tuwharetoa and Raukawa as well as Te Arawa and on that basis do not wish their claims to be encompassed in the executive council mandate.<sup>57</sup>

According to counsel, all three of these registered claimants advised Crown officials of their desire for their respective claims to remain outside the executive council's mandate. Attached to the affidavit of Kiri Dewes was a letter from her counsel to the director of ORS dated 30 January 2004, in which she requested that her claim remain outside the kaihautu mandate.<sup>58</sup> In his affidavit, Eric Hodge expressed the view that Rawiri Te Whare had accepted that the Hodge whanau claim was not included under the kaihautu mandate at the east region reconfirmation hui of 2 October.<sup>59</sup> The Te Takere o Nga Wai registered claimants consider that they should have been personally contacted about the inclusion of their claims in the executive council mandate, and argue that this never occurred.

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53. See, for example, documents C9, C10, C12, and C20.

54. Document C4, exhibit D

55. Document C13

56. Document C8

57. Paper 3.3.24, p3

58. Document C14, attachment A

59. Document C21, p3

### 3.4.3 Ngati Makino

Ms Sykes and Mr Pou presented submissions on behalf of Ngati Makino. They began by referring to those sections of the 12 and 30 August OTS reports to Ministers, which outlined officials' concerns with the Tribunal's suggestion that the Crown negotiate with Ngati Makino (and, possibly, Waitaha and/or Tapuika) contemporaneously with the rest of Te Arawa.<sup>60</sup> In the reports, OTS officials were concerned that entering into separate negotiations with Ngati Makino would:

- ▶ risk the splintering of Te Arawa and the derailing of negotiations;
- ▶ set a policy precedent for the rest of the country and increase the total number of remaining settlements; and
- ▶ bring with it challenges such as negotiating jointly with groups such as Ngati Makino and Waitaha, which were not geographically contiguous.

Counsel noted that Ngati Makino had met with Waitaha in September 2004, and resolved to 'work together to progress their claims and to design an appropriate negotiation strategy which would respect the mana of their respective positions while recognising their close whakapapa and historical ties'.<sup>61</sup> Ngati Makino advised OTS of this decision in a letter of 22 September.<sup>62</sup> According to counsel, the Crown had not taken the opportunity to meet with Ngati Makino to discuss the negotiation process since this letter. Instead, in a letter of 4 November, OTS officials advised Waitaha that the Crown could not accord them the same priority in negotiations as it accorded to executive council negotiations, and that it was more likely to accord priority if Waitaha, Ngati Makino, and Tapuika joined together.<sup>63</sup>

The position of the Ngati Makino claimants was that it was inappropriate for the Crown to insist that Tapuika be included in negotiations with Ngati Makino, since the inclusion of Tapuika 'blurs the historical alliances of the parties and ignores the realities of Raupatu and its effects on Waitaha and Ngati Makino'.<sup>64</sup> In other words, Ngati Makino was prepared to join together with Waitaha for the purposes of negotiations, based on their shared whakapapa and history, but was not prepared to join with Tapuika on the same grounds.

### 3.4.4 Generic submissions

Counsel then moved on to make generic submissions regarding the impact of the reconfirmation on the interests of their clients.

Counsel argued that the reconfirmation had not been fair and robust, and therefore that the Crown was incorrect in its decision to recognise the reconfirmation of the executive council mandate. Counsel then identified general flaws in the reconfirmation. It was argued that

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60. Paper 3.3.24, pp 8–9

61. Ibid, p 9

62. Document c25, exhibit A

63. Document c2, exhibit 32

64. Paper 3.3.24, p 10

3.4.5

the Crown's monitoring of the reconfirmation had been driven by haste and convenience, and that it had failed in its duty to undertake an in-depth and independent inquiry of the status of each hapu, and the nature and extent of their interests.

As a result of the Crown's decision to accept the reconfirmation of the executive council mandate, registered claims had been included in the terms of negotiation against the wishes of the claimants themselves, and there was now a risk that the Crown would negotiate with the executive council over interests which the executive council did not genuinely represent. By doing so, the Crown would be displacing or usurping the rangatiratanga of the claimants, and therefore breaching the Treaty principles of good faith, partnership, and active protection.<sup>65</sup> The process had served to exacerbate inter- and intra-iwi/hapu disputes.

**3.4.5 Relief sought**

Counsel sought a finding from the Tribunal that the Crown had breached the principles of the Treaty in recognising the reconfirmation of the executive council mandate, and requested the following recommendations:

- ▶ the removal of claims from the terms of negotiation, where the named claimants wish their claims to be removed;
- ▶ the rectification of Crown settlement policy to ensure that it is consistent with Treaty principles;
- ▶ a Treaty-based framework and process for settlement of the claims of all hapu and iwi in CNI; and
- ▶ the cessation of negotiations until outstanding mandate issues are resolved.<sup>66</sup>

**3.5 NGATI TAMAKARI**

Ms Patuawa presented the claim of David Whata-Wickliffe on behalf of Ngati Tamakari. The essence of his claim was that the Crown had breached the principles of the Treaty by recognising the reconfirmation of the executive council mandate.<sup>67</sup>

In his evidence, Mr Whata-Wickliffe argued that he did not consider that the executive council held a mandate to negotiate the claims of Ngati Tamakari, a hapu of Ngati Pikiao. He and his brother, Fred Whata, had been elected as kaihautu members for Ngati Pikiao in July 2003. In order to make it clear that Ngati Tamakari did not support the executive council mandate, they both resigned from the kaihautu at the coast region hui of 2 October 2004.<sup>68</sup>

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65. Paper 3.3.24, pp 10–11

66. Ibid, pp 19–20

67. Paper 3.3.25

68. Document C23, p 2

According to Mr Whata-Wickliffe, there were ‘no supporters of the Kaihautu from the hapu encompassed within Ngati Tamakari’.<sup>69</sup> Further, he disputed the outcome of the reconfirmation process as a whole for Ngati Pikiao, given the absence of a number of Ngati Pikiao kaihautu members from the coast region hui, and the low level of participation in the reconfirmation process in general.

On 3 October 2004, a hui-a-iwi for Ngati Pikiao was held. According to Ngati Pikiao kaihautu member and witness for the executive council Eva Moke, at this hui Ngati Pikiao resolved to ‘decline to give recognition to Ngati Tamakari as a hapu/tribal entity’.<sup>70</sup>

The Ngati Pikiao hui-a-iwi was initially notified in a newspaper advertisement on 18 September, placed by Tutewehiwehi Kingi and Te Poroa Malcolm.<sup>71</sup> A week later, on 25 September, Mr Whata-Wickliffe and Mr Whata placed an advertisement which purported to cancel the scheduled meeting, claiming that it would be rescheduled at another venue at a later date.<sup>72</sup> Then, on 2 October, the day before the hui, Tutewehiwehi Kingi and Te Poroa Malcolm placed a third newspaper advertisement, confirming that the hui would go ahead as originally planned.<sup>73</sup>

Neither Mr Whata-Wickliffe nor Mr Whata was present at the hui. In his evidence, Mr Whata-Wickliffe claimed that he did not know of the advertisement of 2 October, and therefore did not attend. He also argued that other key members of Ngati Tamakari were not present. He objected to a meeting of 27 people ‘wiping out the existence of [the] hapu’ in his absence.<sup>74</sup> According to Mr Whata-Wickliffe, Ngati Tamakari could no longer put its trust in the executive council to represent its claims.

Counsel submitted that, by permitting Ngati Pikiao to treat Ngati Tamakari in this way, the executive council had failed to show procedural fairness in its reconfirmation process. Therefore, she argued, the Crown’s acceptance of the reconfirmation of the executive council mandate was erroneous.<sup>75</sup>

### 3.6 NGATI RANGITIHI

Mr Boast was counsel for the Wai 996 claimants of Ngati Rangitihi. He began his submissions by noting the August 2004 recommendation of the Tribunal that a further mandating hui be held for Ngati Rangitihi, which had been made because the outcome of the hui of 17 June 2004 was in dispute. Counsel submitted that this had not happened, but instead the Crown

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69. Ibid, p2

70. Document C15, p2

71. Document C15, exhibit A

72. Document C15, exhibit B

73. Document C15, exhibit C

74. Document C23, p4

75. Paper 3.3.25, p4



had accepted the outcome of the 17 June hui. He noted the Crown's view, expressed in the OTS officials' report to Ministers of 21 October, that 'the resolutions passed at the 17 June 2004 Ngati Rangitihi mandate hui clearly demonstrated that the Kaihau Executive Council has the mandate of the people of Ngati Rangitihi'.<sup>76</sup> Counsel noted that the Crown had admitted that the Tribunal's recommendation had not been accepted or implemented.<sup>77</sup>

In support of his submissions, counsel referred to the affidavit of Andre Patterson, in which Mr Patterson described what he saw as the inadequacies of the 17 June hui. Briefly, Mr Patterson claimed that the hui had been held at a time that was very inconvenient for many members of Ngati Rangitihi, that the hui was inadequately notified and poorly attended, and that the hui was 'loaded' with executive council supporters, some of whom were not Ngati Rangitihi. Mr Patterson concluded that the outcome of the 17 June hui was 'completely unreliable as a gauge of support [for the kaihau] by Ngati Rangitihi as a whole'.<sup>78</sup> He also noted that, at the first Tribunal hearing of June 2004, the Wai 996 claimants had not been able to challenge the outcome of the 17 June hui, because the Crown itself at that point had not yet decided whether or not it was valid.<sup>79</sup>

With respect to the outcome of the regional reconfirmation hui of 2 and 3 October, counsel submitted that these did not constitute 'mandate reconfirmation hui' because only kaihau members were allowed to vote – a situation he referred to as 'little short of farcical'.<sup>80</sup> This aspect of the reconfirmation hui voting rules affected the Wai 996 claimants in particular, he argued, because Ngati Rangitihi kaihau members refused to meet with them. There was, therefore, no proper mandate for the kaihau to represent and settle Ngati Rangitihi's claims.

In his evidence, Mr Patterson noted that representatives of the Wai 996 claimants had twice met with members of the executive council to discuss its negotiation and settlement plans, and their problem in communicating with the Ngati Rangitihi kaihau member, Henry Pryor. Despite some effort on the part of executive council members to resolve the issue, the Wai 996 claimants allege that Mr Pryor still refused to communicate with them.<sup>81</sup>

Mr Patterson argued that, as the Wai 996 claimants had never mandated the kaihau to negotiate their claims, they should be removed from the terms of negotiation. He noted that a letter had been sent by the Wai 996 claimants to the executive council and OTS to this effect, but that as yet there had been no reply.<sup>82</sup>

Finally, counsel submitted that the way out of the situation was not for another reconfirmation hui to be held, but rather that the mandating process needed to begin afresh. He asked

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76. Document C2, exhibit 21, p11

77. Paper 3.3.33, p2

78. Document C1, p4

79. Ibid, p5

80. Paper 3.3.27, p3

81. Document C1, p8

82. Ibid, p11



the Tribunal to call for submissions on a new process, then issue specific directions on building a restructured mandate for all of Te Arawa.

### 3.7 WAITAHA

Ms Feint acted as counsel for Waitaha. In support of her submissions, she referred to the evidence of Thomas McCausland.<sup>83</sup> Counsel opened her submissions by noting the views of both the Te Arawa Mandate and the Te Raupatu o Tauranga Moana Tribunals that the Crown should negotiate separately with Waitaha. She then noted that in September 2004 Ngati Makino and Waitaha had agreed to negotiate jointly with the Crown. While Crown officials had been informed of this decision by letter on 22 September, she argued, there had as yet been no direct response from the Crown.<sup>84</sup>

In fact, Ms Feint argued that Crown officials had reached a decision as early as 12 August not to accept the Tribunal's recommendations, but made no attempt to inform Waitaha of this decision until 4 November. In her submission, the Crown had rejected 'out of hand' the suggestions of the Tribunal with respect to Waitaha and Ngati Makino.

Counsel then referred to the letter of 4 November 2004 from OTS to Waitaha which noted that the Crown could not accord the same priority to negotiations with Waitaha as to negotiations with the executive council, and that it was more likely to accord priority if Waitaha, Ngati Makino, and Tapuika entered joint negotiations.<sup>85</sup> In counsel's submission, the implication of this letter was that priority was conditional on Waitaha forming an alliance with both Ngati Makino and Tapuika.<sup>86</sup> Ms Feint argued that the Crown was focusing on matters of its own convenience, rather than working with 'natural' groupings.

Counsel then submitted that the Crown had acted in bad faith by failing to adopt the recommendations of the Tribunal. At the heart of the issue, she contended, was the Crown policy of settling with 'large natural groupings'. This policy, she argued, is inherently flawed and is inconsistent with the principles of the Treaty. She reiterated her submissions from the first hearing that existing Crown policy did not meet the needs of border tribes on the geographical and political margins of Te Arawa, and that flexibility in the application of the policy was required.<sup>87</sup> Furthermore, the Crown should give weight to the seriousness of the prejudice suffered by iwi when according priority to negotiations. Finally, she asked that the Tribunal undertake analysis of, and make findings on, whether the Crown's settlement policy was 'Treaty compliant'.

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83. Document c7

84. Paper 3.3.22, p3

85. Document c2, exhibit 33

86. Paper 3.3.22, p4

87. Ibid, p5

**3.8 NGATI WHAOA**

Mr Taylor opened his submissions on behalf of Ngati Whaoa by arguing that the Crown had failed to follow the Tribunal's suggestions in the August 2004 *Te Arawa Mandate Report* that the kaihautu must address the issue of joint representation, or 'coupling', of hapu on the kaihautu. He noted that Ngati Whaoa adopted the general submission of the taumata in respect of the Crown's monitoring of the reconfirmation process.

Mr Taylor then set out the Ngati Whaoa claim. First, he disputed the outcome of the July 2003 mandating hui, which elected kaihautu members to jointly represent Ngati Whaoa and Ngati Tahu on the kaihautu. Secondly, there had been no communication from the Crown, executive council or Ngati Tahu, to ascertain the position of the members of Ngati Whaoa regarding mandate reconfirmation. Lastly, he argued that, to address the issue of the composition and proportionality of the executive council before addressing the uncoupling of Ngati Whaoa and Ngati Tahu, as the executive council had done, was 'back to front' and not in accordance with tikanga.<sup>88</sup>

Counsel submitted that Ngati Whaoa had made their desire to uncouple from Ngati Tahu clear, and that neither the executive council nor the Crown had taken significant steps to address the issue. He argued that the only reference to the matter in executive council papers was the brief mention in the minutes of a meeting of 10 September, in which the outcome of the original mandate hui of July 2003, at which Ngati Tahu and Ngati Whaoa were 'coupled', was simply accepted at face value.<sup>89</sup> The matter was not discussed further at any subsequent executive council meetings.

Mr Taylor noted that Ngati Whaoa member Richard Charters had raised the issue at the south region hui of 3 October 2004. Mr Charters had made reference to the Tribunal's August 2004 suggestion that the matter be addressed in the reconfirmation process, but was advised by the chair that the matter was not on the hui agenda and could not be discussed.<sup>90</sup>

Counsel submitted that the Crown had failed to ensure that the executive council address the issue, as had been suggested by the Tribunal, but instead, had simply relied on the executive council's position. This reliance was reflected in the OTS officials' report to Ministers of 23 November 2004, which advised that opposition to the executive council mandate from within Ngati Whaoa came only from a minority of individuals.<sup>91</sup> Because no further scrutiny had been given to the matter, counsel argued that the Crown's position continued to be based on the disputed outcome of the July 2003 hui.

In his closing submissions, Mr Taylor referred to the outcome of a hui-a-iwi held on 22 January 2005, in order to form an independent administrative body for Ngati Whaoa. The hui was described in the affidavit of evidence of Michael Rika, filed on 26 January 2005.<sup>92</sup>

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88. Paper 3.3.28, p2

89. Document c5, exhibit 7

90. Document c2, exhibit 17, p164

91. Document c2, exhibit 35, p7

92. Document c38

Finally, by way of relief, Ngati Whaoa sought the removal of their claims from the terms of negotiation, and a recommendation from the Tribunal that the Crown negotiate separately with Ngati Whaoa. A further recommendation was sought, that Ngati Whaoa not be forced to bundle with any other iwi/hapu in the future for claims settlement purposes or otherwise.<sup>93</sup>

### 3.9 SUMMARY

The key points made in this chapter are as follows:

- ▶ The taumata argued that it had been shut out of the reconfirmation process, despite the Tribunal's August 2004 suggestion that the executive council consult with it in developing a reconfirmation strategy. It further argued that the Crown had unfairly favoured the views of the executive council over other Te Arawa groups, and had been motivated primarily by haste when it approved the reconfirmation process.
- ▶ The taumata made further specific criticisms regarding the reconfirmation process. They concerned the adequacy of notification given by the executive council for the regional reconfirmation hui, the adoption of the four-region approach, the lack of representivity of the executive council, and the failure of the executive council to address rules governing its accountability to the kaihautu.
- ▶ Overall, the taumata claimed that the reconfirmation process had been neither fair nor robust, and therefore failed to meet the standards which the Crown should have applied in its monitoring of the process and its outcomes.
- ▶ The Ngati Whakaue cluster argued that the Crown and executive council had failed to recognise the withdrawal of all six koromatua hapu of Ngati Whakaue. As a result, Ngati Whakaue claims had been included in the terms of negotiation and would be negotiated and settled by the executive council, without Ngati Whakaue consent.
- ▶ Claimants from various Ngati Pikiao hapu (Ngati Hinekura, Ngati Tutaki a Koti, Ngati Tutaki a Hane, Ngati Rongomai, Ngati Rangiuuora, and Ngati Tamakari) also objected to the inclusion of their claims in the terms of negotiation. They disagreed with the position of the Ngati Pikiao kaihautu members, who had voted to mandate the executive council.
- ▶ Similarly, the Te Takere o Nga Wai claimants objected to the inclusion of their registered claims in the terms of negotiation without the consent of the named claimants.
- ▶ The Wai 996 claimants of Ngati Rangitahi argued that the Crown had failed to follow the Tribunal's August 2004 suggestion that another mandating hui be held for Ngati Rangitahi. They continued to dispute the outcome of the 17 June hui and objected to the inclusion of their claims in the terms of negotiation.

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93. Paper 3.3.31, paras 20–22

THE TE ARAWA MANDATE REPORT: TE WAHANGA TUARUA

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- ▶ Both Ngati Makino and Waitaha argued that the Crown had failed to respond adequately to the Tribunal's suggestion that priority status be accorded to separate negotiations with them.
- ▶ Claimants from Ngati Whaoa argued that the Crown had failed to ensure that the issue of joint representation of hapu on the executive council be addressed by the executive council. As a result, Ngati Whaoa continued to be jointly represented on the executive council with Ngati Tahu, despite their wishes to be uncoupled from Ngati Tahu and to withdraw from the executive council mandate.

## CHAPTER 4

### THE CASES OF THE CROWN AND EXECUTIVE COUNCIL

#### 4.1 THE CROWN

Mr Doogan presented the Crown's case in this inquiry. In broad terms, he submitted that the Crown had accepted the Tribunal's finding that there were procedural flaws in its original assessment and recognition of the executive council's mandate, and the Tribunal's suggestion that there be a reconfirmation process. The Crown had made a 'proper and full response' to the Tribunal's suggestions and therefore had not breached the Treaty or its principles.<sup>1</sup> In accordance with the Tribunal's 17 December 2004 direction, Mr Doogan addressed two key issues in his submissions. First, he made submissions on the Crown's response to the Tribunal's August 2004 suggestions, and secondly he provided an update on recent mandate developments. In both cases, he referred extensively to the affidavit of OTS manager Heather Baggott.

##### 4.1.1 Crown's response to the Tribunal's August 2004 suggestions

Mr Doogan submitted that the reconfirmation process had substantially accorded with the August 2004 suggestions of the Tribunal. He focused in particular on the Tribunal's suggestion that the Crown and executive council consult with the taumata in an open and transparent manner in developing a reconfirmation process. Mr Doogan argued that this had occurred, and submitted that the robustness of the consultation process was evidenced by the fact that the executive council's draft reconfirmation document was 'significantly amended' as a result of its consultation process.<sup>2</sup>

Mr Doogan then noted that during the reconfirmation process, certain iwi/hapu had undertaken formal processes to withdraw from the kaihautu. He submitted that the withdrawal of these groups had been recognised by the Crown, and that their claims would not be included in negotiations with the executive council. In this respect, he argued, the terms of negotiation of 26 November 2004 reflected the outcome of the reconfirmation process

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1. Paper 3.3.20, p3

2. Ibid, p4

4.1.2

as a whole. Nevertheless, the Crown's view was that the executive council still represented a 'substantial proportion' of Te Arawa, and it has afforded priority to its negotiations with the executive council. In respect of those iwi/hapu outside the executive council mandate, Mr Doogan advised that the Crown respected 'the right of those who have decided to withdraw from the [executive council] to progress their claims before the Tribunal or to seek direct negotiations with the Crown at a future date'.<sup>3</sup>

With respect to the Tribunal's August 2004 suggestions relating to Waitaha, Ngati Makino, and Tapuika, Mr Doogan advised that the Crown had written to all three groups, advising them that their prospect for priority in negotiations would be enhanced if they joined together for the purposes of negotiations.<sup>4</sup> He also noted that the Crown's understanding was that Waitaha and Ngati Makino intended to pursue their claims through the Tribunal's CNI hearings.

**4.1.2 Update on recent mandate developments**

In respect of recent developments in the mandating process, Mr Doogan referred to the affidavit of Ms Baggott. We turn now to summarise the Crown's position with respect to those Te Arawa groups which have withdrawn from, never mandated, or dispute their inclusion in, the executive council mandate.

**(1) Ngati Rangiteaorere**

According to Mr Doogan, the Crown did not consider that the 5 December hui held by Ngati Rangiteaorere to vote on a motion to withdraw from the executive council had met requisite standards of public notification. Therefore the Crown did not recognise any resolutions passed at it. Nevertheless, the Crown considered that the hui suggested 'a level of ongoing core support' for the kaihautu.<sup>5</sup> In her evidence, Ms Baggott also noted that a process had been put in place to appoint new Ngati Rangiteaorere kaihautu members to fill the vacancies left when five out of six members resigned in October 2004.<sup>6</sup>

**(2) Ngati Rangiwehewehi**

With respect to Ngati Rangiwehewehi, Mr Doogan noted that a well advertised hui-a-iwi of 12 December 2004 had voted unanimously in favour of withdrawing from the kaihautu.<sup>7</sup> In her evidence, Ms Baggott advised that on 21 December MICOTOWN formally recognised the withdrawal of Ngati Rangiwehewehi from the kaihautu, after considering officials' advice on the

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3. Paper 3.3.20, p4

4. Ibid, p5

5. Ibid, p4

6. Document c2, p17

7. Paper 3.3.20, p5

notification and conduct of the hui.<sup>8</sup> She advised that the terms of negotiation, which still included Ngati Rangiwewehi under the clause 6 definition of Te Arawa, would be appropriately amended by agreement between the Crown and executive council in due course.<sup>9</sup>

### (3) *Ngati Whakaue*

Mr Doogan then discussed the recent developments concerning the Ngati Whakaue cluster. He noted that the cluster had recently written to the Crown advising that they would not consider rejoining the kaihautu in the future, and questioning the inclusion of Ngati Te Roro o Te Rangi and certain Ngati Whakaue registered claims in the 26 November terms of negotiation. In her evidence, Ms Baggott noted that MICOTOWN had formally recognised the withdrawal of 11 Ngati Whakaue hapu on 26 November. This decision was based on the outcome of hui-a-iwi held on 12 September and 21 November. However, she advised that officials did not consider that the results of these hui demonstrated that Ngati Te Roro o Te Rangi had endorsed the resolution to withdraw. Accordingly, the Crown considered that Ngati Te Roro o Te Rangi and four other Ngati Whakaue hapu continued to support the executive council.

With respect to the inclusion of certain Ngati Whakaue registered claims in the terms of negotiation, Ms Baggott advised that:

It is consistent with the Crown's policy preference for comprehensive settlements that all the historical claims of those Ngati Whakaue hapu who remain with the [executive council] will be the subject of negotiations, including all registered claims (in whole or in part) that those hapu have an interest in; and

The Terms of Negotiation explicitly exclude the claims (in whole or in part) of those groups who the Crown has formally recognised are not covered by the mandate of the [executive council].<sup>10</sup>

We take this to mean that because the Crown considers that five Ngati Whakaue hapu support the executive council mandate, it has included all registered claims of Ngati Whakaue in the terms of negotiation, but that it will seek to avoid negotiating and settling the interests of those hapu of Ngati Whakaue who are outside the executive council mandate. In his closing submissions, Mr Doogan argued that the inclusion of all Ngati Whakaue claims in the terms of negotiation 'ensure[d] transparency and reflect[ed] the Crown's policy of negotiating comprehensive and final settlements'. He noted that the list of registered claims in clause 10 of the terms of negotiation needed to be read in conjunction with the definition of Te Arawa in clause 6.<sup>11</sup>

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8. Document c2, p18

9. Ibid, pp18–19

10. Ibid, p16

11. Paper 3.3.34, p3

4.1.2(4)

**(4) *Ngati Rangitihi***

With respect to Ngati Rangitihi, Mr Doogan reiterated the Crown's position that, despite the Tribunal's August 2004 suggestions, it did not consider that a further mandating hui was necessary. He submitted that the 17 June 2004 hui-a-iwi had followed due process and clearly demonstrated Ngati Rangitihi's support for the executive council. More specifically, he argued that the 17 June hui 'substantially complie[d]' with the Tribunal's suggestions in respect of notification, venue selection, and neutrality of chair, observers, and record takers. Further, he advised that the Crown did not require the agreement of the individual registered claimants before negotiating the claims of a hapu, where it had recognised the mandate of hapu representatives for that purpose.<sup>12</sup>

**(5) *Ngati Whaoa***

With respect to the submissions of counsel for Ngati Whaoa to the effect that a 22 January 2005 hui-a-iwi had voted to withdraw from the kaihautu, Mr Doogan argued that these submissions concerned matters which had taken place since the 12 January Tribunal hearing, and were therefore beyond the scope of this inquiry. He argued that matters concerning Ngati Whaoa were in the nature of 'ongoing mandate maintenance', and that they would continue to be monitored by the Crown in accordance with both Crown policy and the Tribunal's August 2004 suggestions.<sup>13</sup>

**(6) *Ngati Wahiao***

With regard to Ngati Wahiao, Ms Baggott noted that, following the well advertised hui-a-iwi of 19 November 2004, MICOTOWN formally recognised Ngati Wahiao's withdrawal in a letter of 26 November 2004.<sup>14</sup>

**(7) *Ngati Tuteniu***

With respect to the positions of both Ngati Tuteniu and Ngati Tamakari, Ms Baggott advised that the Crown agreed with the Tribunal's August 2004 finding that the concerns of these groups were 'truly within the domain of Te Arawa to decide'.<sup>15</sup> With respect to the Crown's position regarding Ngati Tuteniu, she referred to the 20 December OTS officials' report to Ministers:

- ▶ six of 11 Ngati Tuteniu kaihautu members had recently been removed following a hui to assess their performance;
- ▶ that three hui had been called for Ngati Tuteniu within three months, with conflicting results regarding the hapu's support for the executive council mandate; and

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12. Paper 3.3.34, p 4

13. Ibid

14. Document c2, p17

15. Ibid, p12



- that officials continued to monitor the situation with respect to Ngati Tuteniu's support for the executive council.<sup>16</sup>

#### **(8) Ngati Tamakari**

With regard to Ngati Tamakari, Ms Baggott noted that the 23 November OTS officials' report advised that a hui of Ngati Pikiao had recently been held at which Ngati Tamakari's concerns about their lack of representation on the executive council were discussed, although Ngati Tamakari did not attend.<sup>17</sup> Officials considered that the views expressed in recent correspondence of legal counsel – that Ngati Tamakari and Ngati Te Takinga were not part of the kaihautu – were the views of individuals, and were not broadly endorsed by Ngati Tamakari.<sup>18</sup>

#### **4.1.3 Ongoing mandate maintenance**

Mr Doogan also made a number of general submissions around the reconfirmation, and the Crown's monitoring of the mandating process. He reiterated the Crown's view that the reconfirmation had been fair, robust and in accordance with the Tribunal's August 2004 suggestions, and rejected any allegation of bad faith on the part of the Crown.<sup>19</sup> He submitted that the Crown would continue to monitor mandate issues concerning iwi/hapu where appropriate.

Ms Baggott also addressed the issue of mandate maintenance, and argued that mandates were 'rarely attained and held in an uncontested environment'.<sup>20</sup> The Crown had an expectation that levels of support for mandated groups would fluctuate over time, and had processes in place for assessing the decisions of iwi/hapu to withdraw their support for a mandated group. She emphasised to us the importance of this process being rigorous and fair:

The Crown has a number of processes it requires to be followed for an iwi to formally withdraw from a mandated group. These processes reflect the importance of any decision to withdraw and ensure that the affected Maori community has a full opportunity to participate in the decision making process. They are designed to ensure that decisions of such significance are taken by the appropriate community.<sup>21</sup>

Finally, the Crown sought a finding from the Tribunal that, because there had been substantial compliance with its findings and recommendations, no breach of the Treaty had occurred and that this inquiry was now at an end.<sup>22</sup>

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16. Document c2, exhibit 37, p 4

17. Document c2, exhibit 35, p 7

18. Ibid

19. Paper 3.3.34, p 3

20. Document c2, p 19

21. Ibid, pp 19–20

22. Paper 3.3.34, p 5

**4.2 THE CASE FOR THE EXECUTIVE COUNCIL**

The executive council is not an agent of the Crown. Nevertheless, as the body which was responsible for implementing our August 2004 suggestions, the executive council presented submissions in response to claimants' criticisms of the reconfirmation process. Mr Colson and Mr Stone presented submissions on behalf of the executive council. They opened their submission with two key points:

- ▶ that the executive council had complied or substantively complied with the Tribunal's recommendations; and
- ▶ that mandate matters were 'organic', and were being dealt with appropriately by the Crown and executive council.<sup>23</sup>

He went on to review the Tribunal's suggestions from our August 2004 *Te Arawa Mandate Report*, and the steps the executive council had taken to implement those suggestions. He divided the Tribunal's suggestions into four parts:

- ▶ first, the discussion and reconfirmation of the composition and proportionality of the executive council by the kaihautu;
- ▶ secondly, that the issue of the accountability of the executive council to the kaihautu be addressed;
- ▶ thirdly, that the Crown should negotiate with Ngati Makino contemporaneously with the rest of Te Arawa; and
- ▶ fourthly, that one more mandating hui be held for Ngati Rangitihi.

The bulk of Mr Stone's submissions were concerned with the first of these suggestions, that an open and robust reconfirmation process be implemented by the executive council. Counsel argued that the executive council had met the Tribunal's suggestion through a four-stage process:

- ▶ developing a reconfirmation strategy which addressed the issues of composition and proportionality of seats on the executive council;
- ▶ consulting on the proposed reconfirmation strategy with major Te Arawa groups, including the taumata, at well advertised hui, and amending the strategy to incorporate some of their suggestions;
- ▶ holding a series of four well advertised hui at which kaihautu members could discuss the executive council's reconfirmation document and alternative approaches; and
- ▶ adopting and implementing the reconfirmation strategy, with the support of the majority of kaihautu members who voted at the reconfirmation hui.<sup>24</sup>

Counsel addressed these four stages of the reconfirmation process in more detail. With respect to the development of the reconfirmation strategy, the executive council had conducted an internal review of its composition and proportionality in August 2004, in response to the *Te Arawa Mandate Report*. Counsel submitted that it was entirely appropriate for the

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23. Paper 3.3.35, p6

24. Paper 3.3.21, pp16–17

executive council to form a preliminary view on its composition at this stage, and noted that its proposal was to form the basis of further discussion, and was therefore open to amendment by kaihautu members.<sup>25</sup> Similarly, the four-region approach to the reconfirmation hui was open to amendment, and, according to counsel, was ‘reconfigured based on feedback from Kaihautu members during [the consultation process]’.<sup>26</sup>

Counsel then noted that two well-advertised consultation hui had been held, and were attended by representatives of the trust board, Te Kotahitanga, Te Pukenga, and the taumata. Counsel for the taumata had attended these hui, tabled a paper and spoken to it. In the submission of counsel, the executive council gave consideration to the taumata’s suggestion that a hui of all kaihautu members be called prior to the reconfirmation hui in order to discuss the composition of the executive council, but considered that such a large hui would not provide reasonable opportunity for all the members to speak.<sup>27</sup>

Counsel then turned to the Tribunal’s suggestion that a preliminary hui of the kaihautu members from core Te Arawa groups be held prior to the main reconfirmation hui, in order to address issues regarding the uncoupling of iwi/hapu, and whether any additional iwi/hapu should be represented on the executive council. Counsel argued that that suggestion had been followed in substance.<sup>28</sup> He claimed that these issues had been considered during the development of the reconfirmation strategy, and that the executive council had consulted with major Te Arawa groups (including the taumata, Te Pukenga, Te Kotahitanga, and Te Arawa Maori Trust Board) in developing this strategy.<sup>29</sup> He also argued that the executive council’s suggested changes to its own composition, contained in its reconfirmation document, had been approved of by a majority of kaihautu members at the four regional reconfirmation hui.

Counsel then turned to the four regional reconfirmation hui. He began by noting that the executive council had followed the Tribunal’s August 2004 suggestions with respect to the notification and conduct of the hui, namely:

- ▶ all kaihautu members received 14 days’ written notice of the agenda, date, time and venue of the hui, and a copy of the reconfirmation document;
- ▶ an independent chair and minute taker were appointed; and
- ▶ independent observers were present to record the outcome of the hui.<sup>30</sup>

Mr Stone noted that counsel for the taumata had the opportunity to present an alternative proposal to the hui, and submitted that kaihautu members had the opportunity to vote against the executive council proposal if they thought the taumata strategy had more merit.<sup>31</sup>

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25. Ibid, p6

26. Ibid

27. Ibid, p8

28. Ibid, p13

29. Ibid, p14

30. Ibid, p15

31. Ibid, p9

He also noted the report of the TPK observer present at each of the regional reconfirmation hui, who considered that the reconfirmation hui had been conducted in an 'open, transparent and fair manner' and that '[a]mple time was set aside at each of the four hui for attendees to ask questions, to make comments, and to discuss relevant events'.<sup>32</sup>

With respect to voting rights at the hui, counsel noted that the executive council had decided that only kaihautu members would vote on the reconfirmation strategy. Counsel submitted that to have held a single hui at which all attendees voted on reconfirmation would have been impractical, and was not required by the Tribunal.<sup>33</sup>

Counsel then submitted that the outcome of the vote of kaihautu members in favour of accepting the executive council's reconfirmation document was emphatic.<sup>34</sup> He also noted that a hui-a-kaihautu was held on 20 October, at which the executive council reported back to kaihautu members on the result of the reconfirmation process. In his submission, the executive council had improved on the Tribunal's suggestions by holding a total of five hui, including four regional reconfirmation hui at which substantive debate on issues of concern to each region could occur.<sup>35</sup>

Counsel then addressed the rest of the Tribunal's suggestions. With regard to the Tribunal's second suggestion, that the issue of the accountability of the executive council to the kaihautu members, and of the negotiation team to the executive council, be addressed, counsel submitted that any such issues were to be dealt with in an upcoming review. Counsel submitted that the executive council undertook to complete this review within four months of the executive council being reconstituted.<sup>36</sup>

Counsel noted that the third of the Tribunal's suggestions, that the Crown negotiate with Ngati Makino contemporaneously with the rest of Te Arawa, did not directly concern the executive council. However, he did note that in response to this recommendation, the executive council no longer held seats open for Waitaha, Ngati Makino, or Tapuika.

Counsel then turned to the Tribunal's August 2004 suggestion that one more mandating hui be held for Ngati Rangitihi. He noted the Crown's position that Ngati Rangitihi's 17 June hui had clearly demonstrated their intention to participate in the executive council mandate, and that no further hui was necessary.<sup>37</sup>

Counsel then expressed the executive council's view on the position of a number of iwi/hapu in respect of the executive council mandate. He noted that the executive council and the Crown:

- had formally recognised the withdrawal of Ngati Wahiao and Ngati Rangiwewehi from the mandate;

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32. Paper 3.3.21, p9

33. Ibid, p14

34. Ibid, p10

35. Ibid, p14

36. Ibid, p15

37. Ibid, p18

- ▶ considered that Ngati Rangiteaorere had resolved not to withdraw from the kaihautu (we assume this refers to their hui of 5 December 2004);
- ▶ had formally recognised the withdrawal of certain hapu of Ngati Whakaue, but noted that other hapu remained within the executive council mandate, including, in his submission, Ngati Te Roro o Te Rangi;
- ▶ considered that Ngati Tuteniu had recently reconfirmed their mandate for the executive council at a hui-a-hapu;
- ▶ understood that a recent hui-a-iwi for Ngati Pikiao had resolved that Ngati Tamakari is a hapu of Ngati Pikiao and is represented on the kaihautu by the Ngati Pikiao kaihautu members; and
- ▶ considered that the issue of the uncoupling of Ngati Tahu and Ngati Whaoa is one which should properly be dealt with by the hapu themselves, and that this was currently taking place.<sup>38</sup>

In closing, counsel submitted that the focus of much of the material filed for the claimants was on the substantive outcome of the reconfirmation process rather than on the process itself.<sup>39</sup> He argued that, if the Tribunal were to adopt such an approach in its findings, it would risk substituting its view of what should be the result for that of the duly elected kaihautu members.<sup>40</sup>

Finally, counsel submitted that the Tribunal's continued involvement in mandate matters while negotiations continued was adversely affecting those iwi/hapu which wanted to enter direct negotiations with the Crown. To avoid any prejudice to these hapu, it was submitted, the Tribunal should find that its suggestions in our August 2004 *Te Arawa Mandate Report* had been complied with and conclude the inquiry.<sup>41</sup>

#### 4.3 SUMMARY

The key points made in this chapter are as follows:

- ▶ The Crown and executive council argued that the executive council's reconfirmation process had complied with the substance of the Tribunal's August 2004 suggestions.
- ▶ Counsel for the executive council described the reconfirmation process in some detail, concluding that it had complied with the Tribunal's suggestions in respect of: consultation with key Te Arawa groups; addressing the matter of the representivity of the executive council; notification of reconfirmation hui; and use of an independent chair and observers at hui. The Tribunal's suggestion that the executive council review the rules

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38. Ibid, p19; paper 3.3.35, p5

39. Ibid, p6

40. Ibid, p3

41. Ibid, p7

governing its accountability to the kaihautu was to be addressed within four months of the executive council being reconstituted.

- ▶ The executive council argued that the reconfirmation process had been robust and therefore that its mandate to represent Te Arawa had been reconfirmed.
- ▶ The Crown argued that the withdrawal of certain iwi/hapu had been formally recognised where appropriate. Regarding those iwi/hapu which disputed their inclusion in the executive council mandate, but whose withdrawal had not been formally recognised, the Crown noted that it continued to monitor the situation in respect of these groups.
- ▶ In respect of Ngati Te Roro o Te Rangi, Ngati Rangiteaorere, Ngati Tuteniu, Ngati Whaoa, and Ngati Tamakari, the Crown considered that none of these groups had met the requisite requirements for their withdrawal to be recognised. Therefore, the executive council would continue to represent them in negotiations.
- ▶ In respect of Ngati Rangitihi, the Crown considered that the mandating hui of 17 June 2004 had clearly demonstrated the iwi's support for the executive council mandate. Therefore, the Crown did not consider it necessary to follow the Tribunal's August 2004 suggestion that a further mandating hui be held.
- ▶ The Crown had written to Ngati Makino, Waitaha, and Tapuika, advising them that executive council seats would no longer be held open for them, that it was not possible for the Crown to accord them the same priority in negotiations as had been accorded the executive council, and that their prospects for priority would be increased should all three iwi agree to join together for negotiations.

## CHAPTER 5

### ANALYSIS, FINDINGS, AND RECOMMENDATIONS

#### 5.1 INTRODUCTION

In our *Te Arawa Mandate Report* of August 2004, we gave claimants the opportunity to return to the Tribunal, without further application for urgency, should the Crown fail to make an adequate response to the suggestions contained in that report.<sup>1</sup> In order to assess whether the Crown's response to our August 2004 suggestions has in fact been adequate, in this chapter we focus on two key issues:

- ▶ whether the substantive suggestions of the *Te Arawa Mandate Report* have been addressed; and
- ▶ the information provided to us at the reconvened inquiry on recent developments in the Te Arawa mandating process.

Although the broader issues concerning the consistency of the Crown's negotiation and settlement policies with the Treaty of Waitangi were beyond the scope of the inquiry, the presiding officer did advise claimants and the Crown that the Tribunal would consider the more specific issues of the implementation of the policy in the context of the claims before us.

It was these issues that became the focus of the January 2005 hearing.<sup>2</sup> The present chapter begins by briefly considering submissions of counsel regarding the proper role of the Tribunal in reviewing the Crown's reconfirmation of mandate policy and practice. Next, we discuss the Treaty principles relevant to this inquiry. We then consider in turn each of the two key issues identified above, firstly the Crown's response to our suggestions and secondly recent mandate developments. As part of this discussion, we consider the Crown's application of its 'large natural groupings' policy in respect of Ngati Makino, Waitaha, and Tapuika, and we review the process for managing overlapping claim issues contained in the terms of negotiation. Lastly, we make findings and recommendations regarding the reconfirmation process and the wider Te Arawa mandating process.

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1. Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p112

2. Paper 2.3.37

**5.2 JURISDICTIONAL ISSUES**

In chapter 2, we set out the process by which we reached our decision to grant the requests of the taumata and other claimants to resume the Te Arawa mandate inquiry. In a nutshell, the Tribunal granted the request because it had not been provided with sufficient information by the Crown regarding the reconfirmation process.<sup>3</sup> We considered that only by a resumption of the inquiry could we fully assess whether or not our suggestions had been followed.

In our August 2004 report, we discussed the jurisdictional issues relating to our hearing of the claims before us at the June 2004 hearing. We emphasised that claims must be directed at the actions of the Crown, rather than the executive council. We commented that:

The claims [before us at the June 2004 hearing] also concerned the actions of Nga Kaihautu o Te Arawa Executive Council. While we believe our jurisdiction to hear them was clear, we nevertheless have borne this reality in mind in reporting on them and have focused on the omissions or actions of the Crown. We have considered the actions of Mr Te Whare and the executive council only where they have impacted on the responsibility of the Crown. We acknowledge, as other Tribunals have, that there is an air of artificiality about claims of this nature being advanced in the Tribunal. That air of artificiality relates to the Tribunal's concern that it not be used as a forum for ventilating what are in reality internal disputes between closely related kin groups rather than claims against the Crown.<sup>4</sup>

We adopted the same position at the January 2005 hearing in relation to our jurisdiction to hear the claims. We again focused on what are genuinely claims against the Crown. We agree with counsel for the Crown that the Tribunal should not be drawn into an open-ended 'monitoring' or 'supervisory' role in respect of the question of mandate recognition and maintenance.<sup>5</sup> The Tribunal is not usually placed in a position where it must monitor or supervise the mandating process. Nevertheless, in our August 2004 report we did advise the claimants that they could return to the Tribunal and request a resumption of the inquiry to determine whether or not the Crown had made an adequate response to our substantive suggestions.<sup>6</sup> Therefore, we consider that our function in this context is to review and assess the reconfirmation process.

We consider that all matters which have occurred during the reconfirmation process, including the withdrawal of iwi/hapu from the executive council mandate, are appropriate issues for our consideration in making such an assessment. For this reason, we give consideration to the substantive outcome of the reconfirmation process itself, in terms of the current level of support for the executive council mandate.

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3. Paper 2.3.36

4. Waitangi Tribunal, *The Te Arawa Mandate Report*, p93

5. Paper 3.3.20, p7

6. Waitangi Tribunal, *The Te Arawa Mandate Report*, p112



### 5.3 RELEVANT TREATY PRINCIPLES

In our August 2004 report, we listed the principles of the Treaty of Waitangi relevant to the claims.<sup>7</sup> We did not feel the need to discuss the principles in detail for the purposes of that report, because we believed that the jurisprudence on them had been sufficiently traversed in other Tribunal reports. However, we now elaborate on some of these principles to more fully explain the context within which we make our present findings and recommendations.

#### 5.3.1 The principle of reciprocity

The Maori cession of kawanatanga to the Crown was made in exchange for the Crown's recognition of tino rangatiratanga. In the words of the Mohaka ki Ahuriri Tribunal, the 'Crown's exercise of kawanatanga ("sovereignty" in the English text) has to be constrained by respect for Maori rangatiratanga'.<sup>8</sup> The Crown's right to govern, which must include the right to make decisions regarding public expenditure, the resourcing of Treaty settlements, and setting criteria for determining priorities for negotiations, is not an absolute right. The right to govern was in exchange for the protection of the 'rangatiratanga' of hapu over all their lands, villages, and taonga. Therefore, the Crown must provide for hapu and iwi to exercise their tino rangatiratanga in the settlement of their claims. It follows that the Crown must also consider its Treaty obligation to a particular group or groups, if their circumstances warrant an alternative approach to the Government negotiation policy, processes, and targets for the settlement of claims.

To attain true reciprocity, there must be consultation and negotiation in practice as well as in name, and flexibility in the application of policies where shown to be strictly necessary. Such reciprocity is the key to durable Treaty settlements. We think that the aspirations of the Te Arawa tribes, and their preferred mode of exercising their tino rangatiratanga in the settlement process, emerged clearly during the reconfirmation process and other hui, and at our January hearing. The Crown now knows whether most Te Arawa wish to negotiate their claims through the kaihautu. Reciprocity requires a careful, fair, and practical response from the Crown. This is the context for our findings later with regard to Ngati Makino, Waitaha, Tapuika, the Ngati Whakaue cluster, and other claimants outside the executive council's mandate.

#### 5.3.2 The principle of partnership

The principle of partnership carries with it an obligation for each Treaty partner to act towards the other with the utmost good faith. Fundamentally, the principle of partnership is

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7. Ibid, p94

8. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol1, p22

about the post-1840 relationships between Maori and the Crown, based on the reciprocal obligations of each partner to the other. The Muriwhenua Fishing Tribunal described the Treaty's ongoing role in mediating future relationships between the Crown and Maori in these terms:

It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.<sup>9</sup>

Similarly, the Motunui–Waitara Tribunal found that:

The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.

We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles.<sup>10</sup>

Thus, we consider that the principle of partnership envisages that, far from ending relationships, a Treaty settlement will lay the foundation of an ongoing mutually beneficial partnership. The Crown risks significantly curtailing its ability to forge such a renewed partnership with some Te Arawa, if they are left too far behind in the settlement process. We address this important point below.

We note here that the obligations of partnership are not one-sided, and nor should negotiation and settlement processes be decided unilaterally. Both Treaty partners should make reasonable decisions during the settlement process. In order to ensure that their future relationship is mutually beneficial, the Crown should not pursue its nationwide Treaty settlement targets at the expense of some of its Treaty partners. Where the particular circumstances of a group or groups warrant a more flexible approach, the Crown must be prepared to apply its policies in a flexible, practical, and natural manner. We accept that the Crown has financial and other practical constraints. In our assessment of the claims below, we suggest a practical way forward for the Crown, to assist it in meeting its partnership obligations.

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9. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p192

10. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p52

**5.3.3 The principle of active protection**

The principle of active protection arises from reciprocity and partnership. The Crown's obligation to protect Maori rights under the Treaty was discussed by the president of the Court of Appeal in 1987:

The Treaty signified a partnership between Pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith. The relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. The duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.<sup>11</sup>

We have had particular regard to this principle in determining whether the reconfirmation process met our August 2004 suggestions. Our findings on the reconfirmation process, and the Crown's monitoring and acceptance of it, are set out below. Here, we note the Crown's obligation to actively protect the just rights and tino rangatiratanga of all Te Arawa.

**5.3.4 The principles of equity and equal treatment**

The principles of equity and equal treatment were neatly summarised by the Foreshore and Seabed Tribunal:

The principle of equity is that the protections of citizenship apply equally to Maori and non-Maori. Sometimes expressed as the principle of equal treatment, it requires the Crown to treat Maori and non-Maori fairly and equally, and to treat Maori tribes fairly vis-à-vis each other.<sup>12</sup>

This principle places an obligation on the Crown to act fairly and impartially towards Maori by ensuring it treats Maori hapu/iwi fairly vis-à-vis each other.<sup>13</sup> This logically extends to not allowing one iwi an unfair advantage over another. Under this principle, in seeking to negotiate a comprehensive settlement of all the historical claims of Te Arawa, the Crown must deal fairly with all claimant groups within Te Arawa, and not allow one group an unfair advantage over another. This does not mean treating all groups exactly the same, where they have different populations, interests, leadership structures, and preferences. Tino rangatiratanga must be respected. What it does mean is that the Crown must treat each group fairly vis-à-vis the others, and in doing so, it must do all in its power not to create (or exacerbate) divisions and damage relationships.

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11. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA)

12. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p133

13. *Ibid*

In practical terms, this principle consists of two duties: the duty to act fairly and impartially towards Maori and the duty to preserve amicable tribal relations. Both of these duties have been discussed in Tribunal reports. In relation to the first, the duty of the Crown to act fairly and impartially towards Maori, the Maori Development Corporation Tribunal stated:

There is, in our view, a duty arising from the Treaty that the Crown act fairly and impartially towards Maori. This Treaty principle derives from the large concession made by Maori in 1840 of the gift of governance to the Crown, in return for which it is reasonable to assume that Maori would receive good governance and laws and policies that would be beneficial to them all. The guarantee of rangatiratanga then, with which the Crown responded, was a guarantee to all of the iwi, not to a selected number. Implicit in this is a guarantee that the Crown would not, by its actions, allow one iwi an unfair advantage over another.

... The onus of fairness and impartiality was thus created. Transported to modern times, the principle remains the same but is now to be applied in different circumstances. A critical feature of today's circumstances, however, is the continuing vitality of Maori tribal organisation and identification. From our own knowledge and experience we are able to confirm to the Crown a fact of which it is no doubt already aware: tribal rivalry remains healthy and dynamic.

The Court of Appeal has characterised the Crown's Treaty relationship to Maori as that of a fiduciary thereby setting a very high standard of performance for its Treaty obligations (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641). It is fundamental that a fiduciary must act fairly as between beneficiaries rather than allowing one of the group to be favoured.<sup>14</sup>

In the context of this inquiry, we consider that to fulfil its duty to act fairly and impartially towards Maori, the Crown must not prefer to negotiate and settle with one group of Te Arawa over another. It must act fairly and impartially towards all groups in Te Arawa.

The second duty – the duty of the Crown to preserve amicable tribal relations – is closely related to the first. Should it fail in the first duty, the Crown will run the risk of entrenching or worsening extant tensions and divisions between groups within Te Arawa. The Crown's duty to preserve amicable tribal relations is discussed in the *Ngati Awa Settlement Cross-Claims Report*:

We think that the Crown should be pro-active in doing all that it can to ensure that the cost of arriving at settlements is not a deterioration of inter-tribal relations. The Crown must also be careful not to exacerbate the situations where there are fragile relationships within tribes.

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14. Waitangi Tribunal, *Maori Development Corporation Report* (Wellington: Brooker's Ltd, 1993), pp 31–32

Inevitably, officials become focused on getting a deal [in seeking to settle cross-claims]. But they must not become blinkered to the collateral damage that getting a deal can cause. A deal at all costs might well not be the kind of deal that will effect the long-term reconciliation of Crown and Maori that the settlements seek to achieve.

... The simple point is that where the process of working towards settlement causes fall-out in the form of deteriorating relationships either within or between tribes, the Crown cannot be passive. It must exercise an 'honest broker' role as best it can to effect reconciliation, and to build bridges wherever and whenever the opportunity arises. Officials must be constantly vigilant to ensure that the cost of settlement in the form of damage to tribal relations is kept to the absolute minimum.

We do not underestimate the difficulty of this task. But neither do we underestimate the potential for harm to Crown–Maori relations if this area of risk is not carefully and positively managed.<sup>15</sup>

While the comments of the Ngati Awa Settlement Cross-Claims Tribunal relate mainly to the cross-claims of different iwi, rather than different overlapping groups within an iwi, we consider that their analysis of the Crown's duty remains relevant to our present inquiry.

#### 5.4 THE CROWN'S RESPONSE TO OUR AUGUST 2004 FINDINGS AND SUGGESTIONS

We now turn to address the matter of whether the Crown substantively complied with our suggestions regarding reconfirmation of the executive council mandate. In order to do this, we consider each of our August 2004 suggestions in turn. For the sake of convenience, we have divided these into three sections:

- ▶ First, that the executive council hold hui of all kaihautu members to reconfirm its mandate. We also made various procedural suggestions relating to this hui.
- ▶ Secondly, that a further mandating hui should be held for Ngati Rangitihi.
- ▶ Thirdly, that the Crown should seek to enter contemporaneous negotiations with Ngati Makino, and afford priority status to negotiations with Waitaha. We contemplated the possibility that some or all of Ngati Makino, Waitaha, and Tapuika may wish to join together for the purposes of negotiations.

For each of these, we begin by outlining the suggestion, then summarise the Crown and claimant positions on how it was implemented, and finally we provide our comment on the adequacy in Treaty terms of the Crown's response to our suggestions.

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15. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), pp87–88

**5.4.1 Reconfirmation hui**

The principal suggestion contained in our August 2004 report was that a hui-a-kaihautu be held to reconfirm support for, and the composition of, the executive council. We set out our suggestion as follows:

We believe that the Crown and the executive council should now allow some time for the kaihautu to discuss and ‘reconfirm’ the composition of the council and the proportionality of the seats on it. We also believe that the kaihautu should be allowed to address the issue of accountability from the council to the kaihautu and to its constituent iwi and hapu.

... we do not think it would be practical for a hui of all Te Arawa to make this decision, for two reasons. First, a mandating process has been gone through which has, for the most part, fairly elected Kaihautu representatives. ... Secondly, an open hui of all Te Arawa would run the severe risk of being overtaken by those whose agenda is only to take matters back to square one.

... So our suggestion is that a hui of kaihautu members be called to ‘reconfirm’ acceptance.<sup>16</sup>

We then made a number of suggestions regarding procedural aspects of such a hui. We reproduce our proposals here at some length, to provide a full context for our later comments. With respect to the planning, notification, and rules of the reconfirmation hui, we proposed:

The Crown and the Executive Council should take joint responsibility for planning the hui. For its part, the Crown must ensure that the issues as to representivity and accountability are fully addressed. ... Both the Crown and the council should also consult with the Taumata, in recognition of the mana of its leaders.<sup>17</sup>

... We believe this hui should be properly notified with no less than 14 days’ notice of agenda, date, time, and venue. It should have a suitable and independent chair who should carefully manage the agenda. Given what we heard during the hearing, it may be appropriate to conduct that meeting at Tamatekapua, but again that is for the Crown and the Executive Council to decide, possibly in consultation with the Taumata and Te Pukenga Kaumatua. There should be independent observers present to record the outcomes.<sup>18</sup>

With respect to the rules around voting rights at the reconfirmation hui, we considered that thought would ‘need to be given to who should be permitted to vote’:

In this respect, in view of the very disproportionate numbers of representatives elected across the iwi/hapu, we wonder whether it is equitable for voting rights at the hui to be extended to all Kaihautu members. In other words, is it really fair that 11 representatives of Ngati Tuteniu should be able to outvote seven representatives of Tuhourangi/Ngati Wahiao?

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16. Waitangi Tribunal, *The Te Arawa Mandate Report*, p113

17. Ibid

18. Ibid, p114

Or, is it better and in accordance with tikanga for each iwi/hapu to have equal voting rights? Perhaps Ngati Whakaue and Ngati Pikiao, who are manifestly the two largest iwi within the confederation, should have double the number of votes of each other group, but that is for Te Arawa to decide.<sup>19</sup>

With respect to outstanding issues regarding the representation of iwi/hapu on the executive council, we commented:

Other questions include whether there are groups not represented on the executive council who should be there, whether all the groups currently there are entitled to representation, and what justification there is for the current composition. These are issues that must be rationalised and articulated so that Te Arawa whanui can see that there are real and transparent reasons for the current composition of the council.

Obviously, some groups within Ngati Whakaue, such as Ngati Te Ngakau/Ngati Tura and Ngararanui, now also have seats on the council, and this too may skew the proportionality of the voting pattern that we have just suggested. That is another issue that will need to be carefully considered. One possible way of dealing with it is through the preliminary step of having the kaihautu representatives for the 10 core groups named by Mr Te Whare in his mandating plan (this excludes Ngati Makino, Waitaha, and Tapuika) vote first on:

- ▶ whether any of the groups joined together should be uncoupled (such a vote should address the concerns of some members of Ngati Whaoa);
- ▶ whether any additional groups should be added to the list (this should address the concerns of the Wai 1173 claimants, for example) or whether the iwi/hapu groups affected by any such inclusion (such as Ngati Whakaue, were Ngararanui included) should be able to exercise a right of veto; and
- ▶ whether, if any additional groups are added, there would subsequently be a need to reduce the votes of Ngati Whakaue and Ngati Pikiao in the voting that would follow.

If agreement is reached on the groups to be represented on the executive council, the next possible step would be for those groups to vote on which – if any – among them should have more than one seat.<sup>20</sup>

Finally, in response to concerns expressed over the accountability of the executive council to the people of Te Arawa, we thought:

there should perhaps be a series of votes on those aspects of the council's rules that we believe warrant attention. Foremost amongst these should be the accountability of the council to the kaihautu and of the kaiwhakarite or negotiators to the council. The opportunity might also usefully be taken for voting on other matters, such as the passing of resolutions

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19. Ibid, pp113–114

20. Ibid, p114



5.4.2

(in terms of Mr Baird's discussion with Mr Te Whare that we mentioned above); whether there should be any right of withdrawal from the process and, if so, the protocols governing how and when that could occur; and so on.<sup>21</sup>

We now turn to review the Crown's response to our suggestions.

**5.4.2 Crown response**

At the January 2005 hearing, Mr Doogan argued that the Crown had accepted and substantially implemented the overall course of action suggested by the Tribunal – that the executive council call a hui of kaihautu members to reconfirm its mandate. He submitted that, despite minor variances from the detail of our recommendations, the reconfirmation which took place had substantially accorded with the Tribunal's views.<sup>22</sup> He noted that the strategy, as it was ultimately implemented, provided for:

- ▶ The adjustment of the executive council structure, namely the addition of three executive council seats for Ngati Pikiao, one seat for Ngati Rangiwewehi, and the removal of seats for Ngati Makino, Waitaha, and Tapuika.
- ▶ Consultation on the reconfirmation process with key Te Arawa groups, including the taumata, at hui attended by officials from OTS and TPK.
- ▶ The convening of four reconfirmation hui, at which kaihautu members voted on the adoption of the reconfirmation strategy, and on adjustments to the composition of the executive council.
- ▶ A final hui-a-kaihautu at which the executive council reported back to kaihautu members on the results of the regional reconfirmation hui (added after consultation with the taumata and other key Te Arawa organisations).

Mr Doogan argued that the ability of the Crown to scrutinise actively every stage of the mandate process, and to insist upon the proper application of tikanga, varied from time to time and place to place. It was dependent on the resources and expertise available to the Crown, and the transparency or otherwise of tribal politics in any particular region.<sup>23</sup> Nevertheless, he submitted that the Crown had acted to implement the Tribunal's suggested course of action, and therefore that no Treaty breach had arisen.

**5.4.3 Claimants' submissions**

The claimants were not satisfied that the Crown had ensured that the reconfirmation process followed the Tribunal's suggestions. A number of criticisms were commonly made by

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21. Waitangi Tribunal, *The Te Arawa Mandate Report*, p114

22. Paper 3.3.20, pp 3–4; doc c2, pp 3–4; doc c2, exhibits 1–2

23. Paper 3.3.20, pp 2–3



claimants in respect of the Crown's response to our proposal of a reconfirmation hui. Briefly, claimants alleged that:

- ▶ the process by which the executive council mandate was reconfirmed was a closed one, and did not provide for input from groups other than the executive council;
- ▶ consultation with Te Arawa groups, such as the taumata, was perfunctory and ineffective;
- ▶ in general, the reconfirmation process was carried out with undue haste, and that this haste seriously compromised the validity of the process (more specifically, insufficient notice was given of the reconfirmation hui);
- ▶ OTS officials had not fully informed the Ministers of perspectives of groups other than the executive council;
- ▶ the four-region approach did not accord with Te Arawa tikanga; and
- ▶ at no point in the reconfirmation process were constitutional issues such as the joint representation of hapu, and the rules governing the accountability of the executive council to the kaihautu, addressed.

We consider these criticisms in more depth in our general comments on the reconfirmation process, contained in the next section.

#### 5.4.4 Tribunal comment

Before we begin our assessment, we believe it is important to place our findings and recommendations in the context of the Crown's strategy to negotiate and settle claims in the central North Island (CNI). We have discussed the background to this in chapter 1. That background is relevant here, because it seems to us that OTS officials were concerned with pursuing the CNI strategy during the reconfirmation process. In assisting in the development and implementation of the reconfirmation process, officials evaluated proposals in terms of the extent to which they deviated from CNI settlement targets. As officials reminded the Ministers, those targets were:

developed to resolve, as quickly as possible, the claims of all CNI iwi, including the claims to licensed Crown forest land. The core of the strategy was a concept, jointly developed with claimant leaders, of a single, comprehensive settlement for each of the five generally recognised CNI iwi. A key risk to deviating from this concept is the consequential escalation of the number of negotiations, resulting in settlements not being completed for many years.<sup>24</sup>

#### (1) *Planning phase*

In our August 2004 report, we began our concluding remarks by reviewing the Crown's duty to actively scrutinise the mandating process and we stated:

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<sup>24</sup> Document C2, exhibit 35, p7

THE TE ARAWA MANDATE REPORT: TE WAHANGA TUARUA

5.4.4(1)

In our view, the role of the Crown should be to scrutinise actively every stage of the mandating process. The Crown should require the correction of errors and the proper application of tikanga throughout the mandating process, rather than wait until the receipt of submissions to make its assessment. This would clearly be in the interests of both the claimants and the Crown. A more active role in monitoring and scrutinising is required to ensure the Crown's actions in recognising a mandate remain Treaty-compliant.<sup>25</sup>

We consider that there is evidence that the Crown was very active during the reconfirmation process. Officials from OTS assisted the executive council to design the reconfirmation strategy.<sup>26</sup> They, along with TPK officials, attended key hui.<sup>27</sup> They provided detailed advice to Ministers in five reports.<sup>28</sup>

We note that OTS officials summarised our August 2004 suggestions in their 12 August report to Ministers. The report also included some preliminary comment on the Tribunal's suggestions.<sup>29</sup> Officials recognised that some measures ought to be taken by the Crown and the executive council to address the concerns and suggestions made by the Tribunal with respect to representivity and accountability of the council. With respect to our suggestion that a reconfirmation hui be held, officials considered that this appeared to be 'a sensible way forward', which could 'well provide the opportunity to address the concerns raised by the claimants, enable reconciliation between the factions within Te Arawa and assist the durability of the mandate'.<sup>30</sup> However, they were concerned that there was a risk that:

a hui that revisits fundamental questions of the Executive Council's accountability and composition may further exacerbate tensions and polarise factions within Te Arawa. There is also a risk that such a hui may provide dissatisfied hapu with the opportunity to withdraw from the process, although this risk is likely to exist anyway.<sup>31</sup>

Officials were also concerned that the reconfirmation be carried out 'without compromising the current momentum with Te Arawa, including the signing of the Terms, and without jeopardising the guiding objective of reaching a settlement agreement within two years'.<sup>32</sup> We note that at this early stage after the release of our report – and before they had met with the executive council – officials were concerned that our suggestion of a reconfirmation hui could lead to instability of the executive council's mandate, and affect the Crown's target of achieving a Te Arawa settlement within two years.<sup>33</sup>

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25. Waitangi Tribunal, *The Te Arawa Mandate Report*, p111

26. Document C2, exhibit 2, p7

27. Document C2, pp6–10; see also doc C2, exhibit 18

28. Document C2, exhibits 1, 2, 21, 35, 37

29. Document C2, exhibit 1, p2

30. Ibid, p7

31. Ibid

32. Ibid

33. Ibid, p11

In their next report to Ministers, on 30 August, officials recommended that Ministers approve the executive council's proposed reconfirmation strategy.<sup>34</sup> Officials from both OTS and the Crown Law Office had assisted the executive council to develop the proposed strategy.<sup>35</sup> Officials advised that while some aspects of the strategy were 'slightly different' from the Tribunal's suggestions, they were comfortable that the proposal was 'robust and appropriate', given that ultimately the proposal would be 'considered and agreed by Te Arawa themselves'.<sup>36</sup> We presume this comment refers to the vote of kaihautu members at the regional reconfirmation hui.

The officials also believed that the proposal would address the majority of the Tribunal's concerns, and would 'minimise the risk that the Crown will be found to be in breach of the Treaty by not acting on the Tribunal's suggestions'.<sup>37</sup> We note that this is the only evidence of an assessment being made in reports to the Ministers of whether the proposed reconfirmation strategy was consistent with Treaty principles.

OTS officials did not advise Ministers of at least one major development during the planning process. The officials did not mention in their report the extensive comments made by the taumata in their 20 August paper.<sup>38</sup> It seems to us that an objective outline of those proposals and the reasons given for rejecting or accepting them would have been a fair approach to take. Instead, the report of 30 August did not record the comments at all. However, MICOTOWN appears to have been aware of the 20 August memorandum because she wrote to the taumata and thanked them for their contribution.<sup>39</sup>

The end result was that a reconfirmation strategy was approved that substantially varied from our original suggestions. The major variations were:

- ▶ The executive council conducted its own review of its composition, rather than putting the matter to the kaihautu in the manner we suggested. Without that first step, the council members went ahead and confirmed their own hapu representation on the executive council. They then determined they should increase the number of seats for Ngati Pikiāo by three and Ngati Rangiwehē by one. This process of internal review was not in keeping with our suggestion at all, as it was completed in isolation from the rest of Te Arawa and so could not be described as an open and transparent process.
- ▶ The four-region hui approach was adopted where voting on the reconfirmation proposal would take place, rather than a combined meeting of all kaihautu representatives.<sup>40</sup> Initially, there was not going to be a large hui-a-kaihautu. That later stage was added only following consultation with the taumata and other Te Arawa organisations.<sup>41</sup>

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34. Ibid, pp7-9

35. Document c2, exhibit 2, p7

36. Ibid

37. Ibid

38. Document c2, exhibit 6

39. Document c2, exhibit 4

40. Document c5, pp6-7

41. Ibid, p12

## 5.4.4(1)

However, the combined hui of all kaihautu representatives was only to be a discussion and report-back session.<sup>42</sup> The executive council believed that adopting the four-hui regional approach, rather than one big hui, was more in accord with tikanga.<sup>43</sup> The executive council argued that this approach was broadly reflective of the four natural clusters of the Te Arawa iwi/hapu identified in the historical research of Dr Paul Tapsell.<sup>44</sup> There was a general view among the council that sensitive issues concerning its composition and proportionality were more appropriately dealt with at the regional level.<sup>45</sup> Furthermore, OTS officials and the executive council considered that to hold a hui of all 98 kaihautu members would preclude meaningful discussion and opportunities to be heard.<sup>46</sup>

- In our August 2004 report, we suggested that a preliminary hui of kaihautu members could be held, prior to the reconfirmation, at which matters such as the rules governing the accountability of the executive council and negotiators, and whether hapu should have a right of withdrawal from the kaihautu, could be discussed and put to a vote.

Instead, OTS officials and the executive council agreed that the revision of the rules would take place within four months of the executive council being reconstituted. Counsel for the executive council advised us that this review would be carried out by the council itself, and that it would also address any issues of accountability from the kaihautu to its constituent iwi/hapu.<sup>47</sup>

Officials advised the Ministers that ‘while some of the elements of the proposed reconfirmation strategy are slightly different from what the Tribunal suggested in its Report, officials are comfortable that the strategy is robust and appropriate’.<sup>48</sup> Accordingly, the Ministers agreed to proceed with the reconfirmation strategy.

Officials also expressed concerns about the stability of the executive council’s mandate.<sup>49</sup> In particular, they were concerned that in not requiring that executive council seats be held open for Ngati Makino, Waitaha, and Tapuika, the Crown might be perceived as willing to implement the Tribunal’s suggestion of separate and priority negotiations. Officials advised that such a perception would ‘pose a serious threat to the stability of the Executive Council’s mandate’, and that a strategy was needed to mitigate this risk.<sup>50</sup> It is clear to us that officials’ concerns that the Crown’s CNI settlement strategy be preserved intact, underpinned their advice to Ministers.

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42. Document c5, pp 3, 22

43. Ibid, p7

44. Document c2, exhibit 2, pp 4, 6–7

45. Ibid, p 4

46. Ibid; doc c5, pp 6–7

47. Paper 3.3.21, p17

48. Document c2, exhibit 2, p7

49. Ibid, p 6

50. Ibid

**(2) Consultation phase**

We note that our suggestion that the executive council consult with the taumata in planning the reconfirmation strategy was complied with, and that in fact two consultation hui were held. Along with the taumata, other key Te Arawa organisations such as the Te Arawa Maori Trust Board, Te Kotahitanga o Te Arawa Waka, and the Pukenga Kaumatua o Te Arawa were invited to participate.<sup>51</sup> During the consultation round a draft reconfirmation strategy (at this point only comprising three stages) was sent out to participants seven days before the first consultation hui.<sup>52</sup> OTS and TPK officials attended these hui on 9 and 14 September 2004.<sup>53</sup> Those officials asked that the taumata provide a written submission on the reconfirmation strategy.<sup>54</sup> Others who attended were given the opportunity to submit their views in writing following the hui.<sup>55</sup> Written responses were received from the Te Arawa Maori Trust Board and Te Kotahitanga o Te Arawa Waka.<sup>56</sup> Since they have not appeared before us raising any concerns, we can only assume they are at ease with the process. The chairperson of the Te Arawa Maori Trust Board supported the work of the executive council.<sup>57</sup> As a result of the consultation round, a hui for all kaihautu representatives was added to the reconfirmation strategy.<sup>58</sup>

One of the complaints of the taumata was the fact that they were not consulted in accordance with their special status.<sup>59</sup> In addition, it was their view that their ideas had been marginalised. We agree that the taumata's 20 August comments (some of which were consistent with our suggestions, such as those pertaining to a hui-a-kaihautu to address the issues concerning composition and proportionality of the executive council) appear to have been given only perfunctory consideration by the OTS officials, the Ministers, and the executive council during the initial planning process. None the less, we consider that enough was done to ensure that the views of the taumata were subsequently taken into account during the implementation process.<sup>60</sup> Furthermore, shades of their comments and their views are to be found in the reconfirmation strategy. These aspects are:

- That the seriousness of the issues identified by the Tribunal required more than one hui.<sup>61</sup> The reconfirmation strategy allowed for four regional hui and one large hui-a-kaihautu.

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51. Document c5, pp7–13

52. Ibid, pp8–9

53. Ibid, p9

54. Ibid, p12

55. Ibid, p9

56. Ibid, p11

57. Document c2, exhibit 11

58. Document c5, p12

59. Document c2, exhibit 8, pp1–2

60. Document c5, exhibits 9, 10

61. Document c2, exhibit 6, p2

## 5.4.4(3)

- ▶ That a consultation paper should be produced identifying all the issues to be determined, their implications, and a range of possible solutions.<sup>62</sup> A consultation paper was produced for the reconfirmation strategy.
- ▶ That those groups already represented at the negotiation governance level (ie, the executive council) should remain represented at that level, unless they wished to withdraw or merge.<sup>63</sup> The executive council voted in favour of all those represented retaining their seats.
- ▶ That the question of whether groups should be unbundled (particularly Ngati Whaoa and Ngati Tamakari) should be determined by hui called by those groups alone to determine whether there was a majority from those groups in favour of unbundling.<sup>64</sup>

We are generally satisfied that this stage of the reconfirmation process was completed appropriately and did accord with the spirit of our suggestions that key organisations be consulted. We note also that the draft reconfirmation strategy was amended as a result of that consultation. In our first report, we said that the taumata had much to offer Te Arawa in assisting the executive council to resolve issues of accountability and representivity. We considered that there was good reason to believe that their status demanded more than the bare right to be consulted. However, in our view, their status was recognised. It seems to us that the executive council gave the taumata and their counsel ample opportunity to influence the consultation process on the draft reconfirmation strategy, and subsequently throughout the reconfirmation process.

**(3) Notice and procedure of reconfirmation hui**

The reconfirmation hui were held on 2 and 3 October 2004. The hui were held in the morning and afternoon. The kaihautu members were directly notified in writing by way of letter from the executive council, dated 17 September 2004. In effect, 14 days' notice was given.<sup>65</sup> That letter advised kaihautu members that the hui was to reconfirm the composition and proportionality of the executive council, and it requested their attendance.<sup>66</sup>

We assume that on 22 September 2004, the executive council released its final reconfirmation discussion document to all the kaihautu for consideration.<sup>67</sup> We make this assumption because its foreword is dated 22 September.<sup>68</sup> This was only 10 days before the weekend round of regional hui. We considered whether this gave sufficient time for consultation between kaihautu members and their hapu, which was a matter of complaint before us. We were concerned to see that these very important hui were held over one weekend. We agreed with

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62. Document c2, exhibit 6, p3

63. Ibid, p5

64. Ibid, pp5–6

65. Document c5, p13

66. Ibid

67. Document c2, exhibit 15

68. Ibid

the advice of the Crown Law Office that to conduct the four regional hui over one weekend involved a risk that discussion would be constrained by time pressure. We note, however, the view expressed by OTS officials that, given the ‘clearly defined discussion parameters and small number of agenda items’, this risk was negligible.<sup>69</sup>

In the end, our concerns were allayed by reports of the actual hui. The TPK report on the regional hui dated 14 October 2004, suggests that sufficient time was available for full discussion.<sup>70</sup> Furthermore, the minutes and independent reports of these hui show that the kaihautu representatives were very informed and aware of the positions of their respective hapu or iwi, and that they voted, abstained or did not attend in accordance with the instructions of their hapu or iwi.<sup>71</sup> In addition and before the vote, the participants had the benefit of a presentation by counsel for the taumata.<sup>72</sup>

We turn now to the issue of an independent chair and minute taker. We note that all the regional hui were chaired by Willie Te Aho and the minutes were taken by Linda Te Aho of Indigenous Corporate Solutions.<sup>73</sup> Both these people were independent and neither claimed to be beneficiaries of any Te Arawa hapu.<sup>74</sup> TPK observers were also present at the regional reconfirmation hui and provided a separate report on the outcomes of those hui.<sup>75</sup>

We are satisfied that the executive council ran the regional reconfirmation hui in an open and transparent manner, meeting our basic procedural requirements in that respect.

#### ***(4) Voting rules at reconfirmation hui***

The reconfirmation was ultimately decided upon by a vote of kaihautu members. The rules adopted for the reconfirmation hui were announced in the reconfirmation document.<sup>76</sup> Voting was by show of hands at the hui and no postal or proxy voting was allowed. Kaihautu members had to vote in their own regions.

The problem with this approach was that it did not address the Tribunal’s findings that the kaihautu membership did not and does not reflect the composition of the population of Te Arawa. The result of the hui was that 58 out of 95 kaihautu members recorded votes. Of those, 36 voted for the resolution, 19 were against and 3 abstained. In addition to this simple majority of all votes cast, the resolution was also passed by a majority at each hui. They voted that ‘the reconfirmation document proposal as presented be tabled, be received and adopted’.<sup>77</sup> We note that Ngati Whakaue koromatua representatives attended the regional hui only to withdraw from the process and to state that the executive council had no mandate to

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69. Document C2, exhibit 2, p7

70. Document C2, exhibit 18, p5

71. Document C2, exhibits 17, 18

72. Document C2, exhibit 18, p5

73. Document C4, p15

74. Document C2, exhibit 17, p2

75. Document C2, exhibit 18

76. Document C2, exhibit 15, p12

77. Document C2, exhibit 18, pp7–8



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settle their claims.<sup>78</sup> Because they did not participate, their opposition to the process was not reflected in the outcome of the vote on reconfirmation. We reflect further on this outcome below.

**(5) Representation of iwi/hapu on executive council**

We were concerned that no vote on the composition and proportionality of the executive council was undertaken, and the matter was instead addressed by an internal executive council review. The council decided upon adjustments to its own composition early in the piece and behind closed doors. The executive council clearly rejected our suggestion that there should be a meeting of the 10 core groups named in Mr Te Whare's initial mandating plan. These groups were to vote on the uncoupling of groups such as Ngati Whaoa and Ngati Tahu, and they were to address the proportionality of the executive council.<sup>79</sup> We do, however, acknowledge that the adjustments improved the representation of Ngati Pikiao on the executive council, and were acceptable to those kaihautu members who voted in favour of the reconfirmation process.

We remain concerned about issues of proportionality, and the fact that only 36 members voted in favour of the reconfirmation document. None the less, we have determined that, for those hapu and iwi who agreed and voted for the executive council's reconfirmation proposal, they accept any process deficiencies and wish to abide by their decision. That is a valid exercise of their rangatiratanga, and it is not appropriate for this Tribunal to try to unsettle their positions. Instead, we focus below on what the outcome was for those hapu and iwi who do not support the executive council.

**(6) Hui-a-kaihautu**

We note that the executive council also held a hui-a-kaihautu on 20 October. The hui-a-kaihautu was held for the purposes of reporting back to kaihautu members on the reconfirmation process, and no substantive decisions were taken at it.

**(7) Crown assessment of the reconfirmation process**

On 21 October, OTS officials reported to Ministers on the progress of reconfirmation, outlining the outcomes of the four regional hui and the hui-a-kaihautu.<sup>80</sup> They noted that a majority of kaihautu members who voted, voted in favour of the reconfirmation document. They also noted continuing opposition to the executive council's reconfirmation strategy from the taumata, the Ngati Whakaue cluster, and a number of other iwi/hapu, including Ngati Rangiwehi, Ngati Rangiteaorere, Ngati Wahiao, the Wai 996 claimants of Ngati Rangitahi, and certain hapu of Ngati Pikiao. Despite the opposition of these groups, officials

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78. Document c2, exhibit 18, p 5

79. Document c5, p16

80. Document c2, exhibit 21



concluded that the reconfirmation had demonstrated that there was ‘broad support’ among Te Arawa for the executive council’s mandate to negotiate. They stressed that the majority of the voting kaihautu members, and 10 out of 14 Te Arawa iwi/hapu, had approved the reconfirmation.<sup>81</sup>

We note that the officials assessed the outcome of the reconfirmation hui results by adopting a similar approach to that taken for Crown assessments of governance entity ratification results.<sup>82</sup> In our view, the use of this measure was not appropriate, given that governance entity ratification is usually uncontroversial, as in the case of Ngati Awa. This is because, by the time governance entity ratification occurs, most of the controversial aspects of a negotiation have been settled by a group of negotiators who hold the confidence of the hapu or iwi. The ratification of governance entities has, in the past, usually occurred after the ratification of a settlement. That explains why participation ratings and support or disapproval ratings would be lower, and why it is not a useful measure for assessing mandate support.

We consider that to comment that the executive council still represented 10 out of 14 of the groups of Te Arawa without discussing the level of support in terms of the population of Te Arawa, as OTS officials did in their 21 October report, did not give Ministers a full picture of the situation. While the withdrawal of Ngati Whakaue and other iwi/hapu had not been formally recognised at this point, officials were aware that there was a good chance that a number of groups would withdraw in the near future. It seems to us that their advice failed to convey to Ministers the full significance of the probable withdrawal of these groups, in terms of the percentage of the total Te Arawa population represented by the executive council mandate.

The Ministers, without this knowledge, agreed that there was broad support for the executive council to negotiate a settlement package.<sup>83</sup> In letters of 22 October, they advised the executive council and the taumata that they considered that the reconfirmation had been ‘fair and robust’, and that the executive council had the ‘broad support of the people of Te Arawa’.<sup>84</sup>

### **(8) Conclusion**

The variations to our suggestions regarding the reconfirmation process would have been a major concern for us if there had not been sufficient support among Te Arawa for the executive council. For those hapu/iwi kaihautu representatives who did vote in favour of the reconfirmation proposal, they exercised their tino rangatiratanga in favour of the executive council. We agree (despite the understatement on the extent of the variations) with the underlying sentiment expressed by OTS officials in their report to the Ministers, dated 30 August 2004, when they advised:

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81. Ibid, p5

82. Ibid, pp7–8

83. Ibid, p16

84. Document C2, exhibits 22–23

5.4.5

While some of the elements of the proposed reconfirmation strategy are slightly different from what the Tribunal suggested in its Report, officials are comfortable that the strategy is robust and appropriate, given that, once the strategy is implemented, these elements will have been considered and agreed by Te Arawa themselves.<sup>85</sup>

That is exactly what happened with respect to those hapu and iwi of Te Arawa whose kaihautu representatives have reconfirmed their support of the executive council. While we have criticisms, they do not detract from the position that 10 hapu/iwi of Te Arawa agreed to reconfirm the mandate of the executive council, and they are obviously satisfied that that council and the Crown should proceed to settle their claims. In our view, so far as those iwi/hapu are concerned, there has been no breach of the principles of the Treaty of Waitangi. We do have concerns for the remaining 48 per cent of the Te Arawa population and make findings in that regard below. We now turn to examine the Crown's response to our suggestions with respect to particular iwi.

**5.4.5 Ngati Rangitihi**

In respect of Ngati Rangitihi, we recommended that the reconfirmation hui 'should not take place until Ngati Rangitihi have held one more hui at which they, finally and in the fairest of circumstances, either elect kaihautu representatives or choose to stand apart'.<sup>86</sup>

**(1) Crown response**

Crown counsel admitted that the Crown chose not to follow the Tribunal's recommendation in respect of Ngati Rangitihi.<sup>87</sup> This decision was reached after the Crown reviewed the 17 June 2004 hui. It was the Crown's view that the hui had been properly advertised and that a TPK official had attended and then reported on it.<sup>88</sup> The TPK observer at the hui concluded that the hui itself was conducted in an open and fair manner.<sup>89</sup> Ms Baggott stated that the majority of those in attendance voted to confirm the mandate of the executive council and the Ngati Rangitihi kaihautu members.<sup>90</sup>

Finally, it was contended that the Wai 996 claimants were no more than individuals, and that the Crown did not require their agreement to list their claim in the terms of negotiation. It had recognised the mandate of hapu representatives to pursue a negotiated settlement of all the Ngati Rangitihi claims, and in the Crown's view the Wai 996 claim must be considered as one of those hapu claims.<sup>91</sup>

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85. Document C2, exhibit 2, p7

86. Waitangi Tribunal, *Te Arawa Mandate Report*, p118

87. Document C2, pp10–11

88. Ibid

89. Document C2, exhibit 27

90. Document C2, pp10–11

91. Paper 3.3.34, p4

**(2) Claimant submissions**

The Wai 996 claimants noted that the Crown had chosen not to follow the Tribunal's recommendation to hold a further hui for Ngati Rangitihi. As we have previously noted, the evidence from Andre Patterson challenges the reliability of the 17 June 2004 hui.<sup>92</sup>

Counsel reiterated that the Wai 996 clients want to have their claims heard by the Tribunal in the CNI inquiry, and then settled comprehensively and fairly by the Crown and properly mandated representatives.<sup>93</sup> It was the Wai 996 claimants' position that they had never mandated the executive council to negotiate their claims. They requested that their claims be removed from the terms of negotiation. They also expressed frustration at the refusal of the Ngati Rangitihi kaihautu member who sits on the executive council to meet with them and discuss their concerns.<sup>94</sup>

**(3) Tribunal comment**

Officials advised the Ministers that, at the time that it made its recommendation with respect to Ngati Rangitihi, the Tribunal had not seen any supporting information regarding the notification and conduct of the 17 June 2004 hui. Therefore, they considered that the Tribunal's recommendation had not been made with a full awareness of the facts. Officials advised that they were in fact satisfied that the hui had been held in a fair and open manner.<sup>95</sup>

It is clear that the Crown has ignored our recommendation. But the Wai 996 claimants themselves no longer want another hui to be called. Rather, they want the entire process for all of Te Arawa to begin afresh. We cannot agree to that. What we can assure the Wai 996 claimants of is that their claims will and are being heard by the CNI Tribunal. It is unlikely that any settlement with the executive council will be given legislative effect until well after that Tribunal reports on stage 1 of its inquiry. Consequently, there is at this stage, no prejudice being suffered by the Wai 996 claimants over and above that of other claimants, such as Te Takere o Nga Wai.

In the meantime, the Ngati Rangitihi representative on the kaihautu must be sure to represent all Ngati Rangitihi interests on the executive council. That by necessity means that he should be actively engaged in dialogue with the Wai 996 claimants, if that is their wish. The evidence for the Wai 996 claimants was that this was not happening.<sup>96</sup> The Crown has a duty to ensure that the executive council requires that he perform his obligations in this regard. This is doubly so, given the Crown's position that the Wai 996 claim will be settled as a result of its negotiations with the kaihautu. It follows that there is a Treaty obligation for the Crown to ensure that the kaihautu and executive council member consults with and reports to the Wai 996 claimants, as they have sought in the past.

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92. Document C1

93. Paper 3.3.33

94. Document C1, p8

95. Document C2, exhibit 2, p5

96. Document C1, p8

5.4.5(4)

**(4) Conclusion**

Given the position now taken by the Wai 996 claimants, we find that the Crown did not breach the Treaty when it failed to require the executive council to conduct a further hui for Ngati Rangitihi.

The Tribunal will now proceed to hear the generic aspects of the Wai 996 claim as part of its CNI stage 1 inquiry, as per our statutory obligations and the wishes of the Wai 996 claimants. No prejudice as yet arises nor is likely to arise in the near future, from the hearing of that claim while the Ngati Rangitihi representatives on the kaihautu pursue direct negotiations. We think that there will be time and opportunity for the Wai 996 claim to be resolved in a manner compliant with the Treaty.

We do, however, find that the Crown has a Treaty obligation to ensure that the kaihautu members consult with and report to the Wai 996 claimants, if that is the claimants' wish.

**5.4.6 Ngati Makino, Waitaha, and Tapuika**

We comment on the Crown's response to our recommendations regarding Waitaha, Ngati Makino, and Tapuika in some detail, because we consider the issues involved to be very important. We begin by repeating our August 2004 suggestions in respect of these three iwi:

As for Ngati Makino, we think that their legitimate expectation of entering their own separate negotiations for some years now means that the Crown is obligated, both morally and under its Treaty duty of good faith conduct, to honour that undertaking at last. It means, effectively, that the Crown should now find some way to negotiate with Ngati Makino contemporaneously with the rest of Te Arawa. Furthermore, if Ngati Makino agree, Waitaha and Tapuika should be invited to join those negotiations.

... With respect to Waitaha, we do not believe that the Crown has in fact altered its 'large natural groups' settlement policy to their disadvantage. To the extent that we need to consider this policy in any detail, we simply adopt the essential stance of the Tribunal in its *Mohaka ki Ahuriri Report* that there is clearly a need for a flexible Crown policy, which should be applied in a practical yet natural manner. The current application of the policy, however, may well give Waitaha a legitimate sense of grievance. For example, we think it vital to bear in mind the extent of Waitaha's traditional differences with the rest of Te Arawa (as explained persuasively by Tame McCausland). In those circumstances, the Crown should perhaps have anticipated that Waitaha would choose to stand apart and have accordingly come up with a contingency plan. In conclusion, and depending on the decision of the Tau-ranga Moana Tribunal, which we understand is imminent, we believe that Waitaha should be afforded 'priority' status, even if the exact same priority as the rest of Te Arawa is impossible under ours' current level of resourcing.<sup>97</sup>

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97. Waitangi Tribunal, *The Te Arawa Mandate Report*, p117

**(1) Crown response**

According to Heather Baggott, our suggestions that the Crown negotiate contemporaneously with Ngati Makino and afford priority status to Waitaha, presented the Crown ‘with a number of concerns about the practicality and desirability of this approach’. The Crown’s concerns included the ‘potentially significant implications for the stability of the KEC’s [executive council’s] mandate, the Crown’s policy framework and resourcing of OTS’.<sup>98</sup> We address these matters in more detail below, in our discussion of OTS officials’ analysis of the implications of our August 2004 report.

In essence, the Crown responded to our suggestions by writing to each iwi, advising them that:

- ▶ the Crown and executive council agreed that it was no longer appropriate for the executive council to hold seats open for Ngati Makino, Waitaha, and Tapuika;
- ▶ at a special meeting on 27 October, the executive council amended its deed of trust so that there was no longer provision for those seats to be held open;
- ▶ the Crown would not currently accord the same priority to separate negotiations with Ngati Makino, Waitaha, and Tapuika as to negotiations with the executive council;
- ▶ the Crown remained willing to discuss the matter, including the proposal that Ngati Makino and Waitaha negotiate jointly; and
- ▶ the Crown was more likely to accord them priority if all three iwi joined together for negotiations.

Ms Baggott noted that the Crown had not yet received a response to these letters.

**(2) Claimant submissions**

Ms Sykes for Ngati Makino argued that the Crown’s actions subsequent to the Tribunal’s August 2004 report fly in the face of our suggestions with respect to Ngati Makino. She also made extensive submissions regarding the Crown’s settlement policies.

Ms Feint for Waitaha submitted that the reports to the Ministers of August 2004 indicated that the Crown had rejected ‘out of hand’ the recommendations of the Tribunal with respect to Waitaha and Ngati Makino.<sup>99</sup> She pointed to the 12 and 30 August 2004 reports of OTS officials to the Ministers, and the letters of 4 November 2004 to Ngati Makino and Waitaha, noting that the Crown never changed its position on the priority, or lack of it, to be accorded to these two groups.<sup>100</sup> This was, in her view, a *prima facie* indication of bad faith on the part of the Crown.<sup>101</sup>

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98. Document C2, p12

99. Paper 3.3.22, p3

100. Ibid

101. Ibid, p5

**(3) Tribunal comment**

We agree with Ms Feint that it was unlikely that the Crown would change its position regarding Ngati Makino and Waitaha, unless it was persuaded that the application of its settlement policies were in breach of the Treaty of Waitangi.

Consistent with the Tribunal's 17 December 2004 direction, and despite requests by counsel for Ngati Makino and Waitaha, we have not considered the broad issue of whether the Crown's general settlement policies are in breach of Treaty principles.<sup>102</sup> We have restricted our consideration to the evidence concerning the application of the 'large natural groupings policy' to Ngati Makino and Waitaha. Our aim is to determine whether the way in which the policy was applied inhibited or prevented the Crown from responding appropriately to our August 2004 suggestions.

In its booklet *Ka Tika a Muri, Ka Tika a Mua*, OTS explains the rationale behind the 'large natural groupings' policy thus:

The Crown strongly prefers to negotiate settlements with large natural groups of tribal interests, rather than with individual hapu or whanau within a tribe. This makes the process of settlement easier to manage and work through, and helps deal with overlapping interests. The costs of negotiations are also reduced for both the Crown and claimants.

Comprehensive negotiations with large natural groups also allow the Crown and mandated representatives to work out a settlement package that includes a wide range of redress. Redress is the term we use for all the ways the Crown can make amends for the wrongs it has done. For instance, many of the Statutory Instruments available for cultural redress (see Part 3) are only workable and cost-effective for large natural groupings. Having a wide range of redress means that the settlement is more likely to be lasting because it meets a greater number of needs.

Attempts to have the Waitangi Tribunal or the High Court reject the Crown's preference for negotiating settlements with large natural groupings and endorse negotiations with specific hapu and whanau have not been upheld by either body. In its *Pakakohi and Tangahoe Settlement Claims Report 2000* (page 65), the Waitangi Tribunal says of the Crown's preference for dealing with large natural groupings, that 'this is an approach with which we have considerable sympathy. There appear to us to be sound practical and policy reasons for settling at iwi or hapu aggregation level where that is at all possible.'<sup>103</sup>

As noted above, the Pakakohi and Tangahoe settlement claims Tribunal considered that there were sound practical reasons for the 'large natural groupings' policy. That Tribunal also

102. Paper 2.3.7

103. Office of Treaty Settlements, *Ka Tika a Muri, Ka Tika a Mua: He Tohutohu Whakamarama i nga Whakataunga Kereme e pa ana ki te Tiriti o Waitangi me nga Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: Office of Treaty Settlements, [2002]), p44

adopted the view of the Whanganui River Tribunal that, ‘While Maori custom generally favours autonomy, it also recognises that, on occasion, the hapu must operate collectively’.<sup>104</sup> We adopt and endorse these views.

We did not feel the need to review the large natural grouping policy in depth in our August 2004 report, as we believed that the Crown had not altered its policy at that time to the disadvantage of Waitaha, and had already in fact recognised the mandate of Ngati Makino. Nevertheless, we expressed the view that there was clearly a need for the policy to be flexible, and encouraged the Crown to apply the policy ‘in a practical yet natural manner’. We then gave an indication of what a flexible, practical, and natural application of the policy might look like.

We suggested that the Crown find some way to negotiate with Ngati Makino contemporaneously with the rest of Te Arawa. If Ngati Makino agreed, we suggested that Waitaha and Tapuika should be invited to join together with them for those negotiations.<sup>105</sup> As we discuss below, our suggestions were based on our understanding of the particular historical circumstances of these iwi. We noted that Waitaha’s circumstances warrant ‘priority’ status, even if the exact same priority as the rest of Te Arawa was impossible under the current level of OTS resourcing.

We have considered the evidence presented to us on the Crown’s application of its policy in this context. In particular, we have read closely the various OTS officials’ reports to Ministers. We now turn to review those reports, to provide some context for our findings concerning whether the Crown responded adequately to our suggestions for Ngati Makino and Waitaha.

In their 12 August report to Ministers, OTS officials reported on the Tribunal’s August 2004 findings.<sup>106</sup> They advised that our suggestion to accord priority to separate or joint negotiations with Waitaha and Ngati Makino had been made with ‘little analysis’.<sup>107</sup> Officials were also concerned that the Tribunal had not responded to the Crown’s evidence regarding its prioritisation and large natural groupings policies. They advised that the Tribunal’s suggestions presented a number of problems to the Crown’s settlement policy and its CNI strategy, and that these would require careful consideration. A number of issues would need to be addressed before reaching a final position on whether to accept the Tribunal’s suggestions. Officials advised that prioritising negotiations with Ngati Makino, Waitaha, and Tapuika would have the following impacts:

- ▶ the executive council mandate may be destabilised;
- ▶ increased pressure would be placed on OTS resources;
- ▶ a reshuffling of priority claims would be required;

104. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p 65; Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p 13

105. Waitangi Tribunal, *The Te Arawa Mandate Report*, p 117

106. Document c2, exhibit 1, p 2

107. Ibid, p 7



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- ▶ there would be a 'precedent effect' for other Te Arawa iwi/hapu and the rest of the country, which would increase the total number of remaining settlements; and
- ▶ the Crown's settlement policy framework would possibly be undermined.<sup>108</sup>

Officials advised that there should be a deferral of any decision on separate negotiations with Ngati Makino and Waitaha.<sup>109</sup>

In their 30 August report to Ministers, OTS officials described the reconfirmation strategy proposed by the executive council, and recommended that the Ministers agree to that strategy.<sup>110</sup> They noted that, from the date the deed of mandate was recognised, officials had encouraged Ngati Makino, Waitaha, and Tapuika to take up seats available to them on the executive council.<sup>111</sup> Following the release of the Tribunal's August 2004 report, the executive council had advised officials that neither Ngati Makino nor Waitaha wished to take up their seats. Accordingly, the executive council proposed to remove the seats allocated.<sup>112</sup>

Officials advised that there were risks to the stability of the executive council's mandate if the Crown agreed that it should not hold seats open for Ngati Makino, Waitaha, and Tapuika. They considered that there was:

a danger that not requiring the seats to remain available might be perceived as the Crown being willing to implement the Tribunal's suggestion for separate and priority negotiations. Such a perception would pose a serious threat to the stability of the Executive Council's mandate.<sup>113</sup>

On balance, however, officials considered that it would be inappropriate for the Crown to continue to advocate that the three iwi join the executive council negotiations. They advised the Ministers to approve the executive council's proposal to cease to hold open seats for Ngati Makino, Waitaha, and Tapuika.

In their 21 October report to Ministers, officials provided an update on the regional reconfirmation hui and recommended that the Ministers agree that results of the hui demonstrated majority support for the executive council's reconfirmation strategy.<sup>114</sup> The report also advised that the executive council had ceased to retain seats for Ngati Makino, Waitaha, and Tapuika, and that OTS officials had ceased encouraging these iwi to mandate the executive council.<sup>115</sup>

In their 23 November report, officials updated the Ministers on recent mandate developments and, in the light of the recent withdrawal of a number of groups, provided a detailed

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108. Document C2, exhibit 1, p8

109. Ibid, p9

110. Document C2, exhibit 2, p2

111. Ibid, p6

112. Ibid

113. Ibid

114. Document C2, exhibit 21, p2

115. Ibid



analysis of the viability of entering negotiations with the executive council grouping, taking into account the following factors:

- ▶ the Crown's 'large natural groupings' policy and settlement targets;
- ▶ the risk of multiple Te Arawa settlements; and
- ▶ the likelihood that a larger collective of Te Arawa could be found.<sup>116</sup>

Officials considered that the executive council grouping in its current state still constituted a 'large natural group', in terms of its:

- ▶ cohesiveness, distinctiveness, and natural community of interest;
- ▶ population;
- ▶ size and spread of geographical interests; and
- ▶ coverage of licensed Crown forest claims.<sup>117</sup>

With respect to the risk of multiple Te Arawa settlements, officials considered that there would be at least two more Te Arawa settlements in addition to that of the executive council.<sup>118</sup> One would be with Ngati Makino, Waitaha, and Tapuika, while the other would include those iwi/hapu which had recently withdrawn from the kaihautu. Officials acknowledged that it was possible that a greater number of settlements could eventuate. Nevertheless, they considered that the executive council grouping continued to be 'an effective means of advancing the Crown's objective of limiting the number of future settlements as far is appropriate'.<sup>119</sup> They also advised that 'as the bulk of the iwi or hapu outside the mandate are clustered around Lake Rotorua and Rotorua township in particular, rather than being scattered throughout the rohe, strategies could be designed and implemented to accommodate these matters'.<sup>120</sup>

Officials considered that there was little or no chance that a larger collective of Te Arawa iwi/hapu than the executive council grouping could be assembled at that time. They advised that the executive council represented approximately 22,000 people, and 10 of the 14 hapu who initially mandated the executive council in 2003.<sup>121</sup> Further, the executive council grouping covered a significant geographical area and represented the bulk of the Te Arawa licensed Crown forest land claims.<sup>122</sup> Officials reminded the Ministers of the possibility that groups may yet rejoin the executive council mandate.<sup>123</sup>

Based on this analysis, officials recommended to Ministers that the Crown continue towards negotiations with the executive council. They advised that 'significant cross-claim, forest lands and cultural redress issues' would arise, but that these matters could be managed with standard policies.<sup>124</sup>

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116. Document c2, exhibit 35, p2

117. Ibid, p8

118. Ibid, pp8–9

119. Ibid, p13

120. Ibid, p10

121. Ibid, pp8, 12

122. Document c2, exhibit 35, p8

123. Ibid, p10

124. Ibid

## 5.4.6(3)

In their 20 December report to Ministers, officials provided an update on mandate developments, including the recent withdrawal of Ngati Rangiwewehi.<sup>125</sup> Officials reported that letters had been sent to Ngati Makino, Tapuika, and Waitaha on 4 November. These letters advised the iwi, first, that executive council seats were no longer being held open for them and, secondly, that the Crown could not accord to them the same priority in negotiations as it accorded to negotiations with the executive council.<sup>126</sup> Similarly, letters had also been sent to Ngati Whakaue and Ngati Rangiwewehi, advising them that the Crown could not accord priority to negotiations with them.<sup>127</sup> Officials also noted that, at the 10 December judicial conference for the Tribunal's CNI stage 1 inquiry, Ngati Makino and Waitaha had indicated that they would pursue their claims before the Tribunal. Officials had advised all claimants that the Crown would not enter negotiations with them while they pursued their claims through the Tribunal process.<sup>128</sup>

We have considered all the evidence presented to us regarding the Crown's application of its 'large natural groupings' policy in the context of our August 2004 suggestions regarding Ngati Makino and Waitaha. We do not believe that the Crown's actions constitute a flexible, practical, and natural application of this policy, as we suggested in our August 2004 report.

We are concerned that in none of the material presented to us is there any detailed analysis of the Crown's Treaty obligations to these iwi. It appears to us that, in the absence of any detailed analysis of its Treaty obligations, the Crown allowed itself to focus almost exclusively on its concerns that entering any new negotiations might lead to the further splintering and derailment of the executive council negotiations, and that this would create a precedent for settlements in the rest of the country.<sup>129</sup> It seems that ORS did have the resources to deal with negotiations involving Ngati Makino (at the least). As we pointed out in our August 2004 Report, Ngati Makino should have been in negotiations some years ago, and contemporaneous negotiations were now incumbent upon the Crown. We thought that Waitaha should be added to those negotiations if Ngati Makino agreed, and we understand that they have so agreed.

It is clear to us, then, that the Crown's response to our August 2004 suggestions was unsatisfactory and inadequate. We consider that, effectively, the Crown rejected our suggestions regarding Ngati Makino and Waitaha.

The fact that the Crown has advised these iwi that it remains 'willing to discuss matters' does not convince us that it intends to accord priority to separate negotiations with these iwi in the near future. In its letters of 4 November 2004, the Crown clearly signalled to Ngati Makino and Waitaha that they will not be accorded the same priority in negotiations as the executive council. This is despite the unique circumstances of these two groups, which

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125. Document C2, exhibit 37, p 2

126. Ibid, pp 6–7

127. Ibid, p 9

128. Ibid

129. Document C2, exhibit 1, p 8

warrant their immediate elevation on the prioritisation list for negotiations. These unique circumstances were amply demonstrated in the evidence presented at the Tribunal's June 2004 hearing. Briefly, with respect to Ngati Makino, we note that they have had a Crown-recognised deed of mandate since 1997, and have a history of attempting to negotiate with the Crown. With respect to Waitaha and their history of raupatu, we simply reiterate our August 2004 comments:

we think it vital to bear in mind the extent of Waitaha's traditional differences with the rest of Te Arawa (as explained persuasively by Tame McCausland). In those circumstances, the Crown should perhaps have anticipated that Waitaha would choose to stand apart and have accordingly come up with a contingency plan.<sup>130</sup>

We note also that the Tauranga Moana Tribunal found that:

The position of Waitaha is not one that lends it to being 'naturally grouped' with the other hapu of Tauranga Moana or elsewhere. . . . Waitaha's rohe straddles two inquiry districts and they have, from the nineteenth century to the present day, been estranged from the mainstream of Te Arawa tribal organisation. It may therefore be preferable for Waitaha to negotiate a separate settlement with the Crown, if that is their desire and if their claims cannot be considered in the central North Island inquiry. Though Waitaha are numerically relatively small, the Crown has shown a willingness to negotiate settlements with Taranaki groups of a similar size, and we consider it appropriate that the Crown hold open the possibility of doing the same with Waitaha.<sup>131</sup>

Furthermore, since September 2004, Ngati Makino and Waitaha have agreed to cooperate, and seek to enter joint negotiations with the Crown.

#### **(4) Conclusion**

Essentially, we believe that, in its approach to our suggestion of separate negotiations with Ngati Makino and Waitaha, the Crown has preferred to follow its CNI settlement targets rather than seek to act in accordance with Treaty principles. As a result, we consider that the Crown has breached the principles of partnership and of equal treatment in relation to Ngati Makino and Waitaha.

Prejudice is likely to have arisen from the failure to negotiate with Ngati Makino during the years since the recognition of their mandate, although we had no direct evidence on that point. During that time, other tribes such as Ngati Awa and Ngati Tuwharetoa ki Kawerau have progressed their negotiations towards settlement. Now it seems that Ngati Pikiao, whose overlapping interests with Ngati Makino were of such concern to the Crown in the past, will also proceed to a negotiated settlement before Ngati Makino. We find that prejudice is likely

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<sup>130</sup>. Waitangi Tribunal, *The Te Arawa Mandate Report*, p117

<sup>131</sup>. Waitangi Tribunal, *Te Raupatu o Tauranga Moana Report* (Wellington: Legislation Direct, 2004), p 408

to result from the long delay in negotiating with Ngati Makino, combined with the present refusal to consider concurrent negotiations with them.

We therefore recommend that the Crown should now commence negotiations with Ngati Makino. Ngati Makino having agreed, these negotiations should also include Waitaha. Tapuika could perhaps be joined to those negotiations as well, if the Crown and tribes together accept that that would be a natural grouping. However, Ngati Makino and Waitaha should not have to wait for Tapuika if the latter do not wish to participate.

In our August 2004 report, we suggested in any case that Waitaha should be accorded priority, even if the exact priority vis-à-vis Te Arawa was impossible under current OTS resourcing. We continue to be of this view and believe that, unless an appropriate priority is accorded to Waitaha, the Crown will be acting in a manner inconsistent with the Treaty of Waitangi.

#### 5.4.7 Update on mandate issues

We now turn to consider the information provided to us by the Crown and executive council on recent developments in the mandating process for Te Arawa. Our analysis of recent mandate developments is comprised of three parts. First, we review and comment on the Crown's position with regard to each of the Te Arawa groups who have withdrawn from, or sought to withdraw from, or continue to dispute their inclusion in, the executive council mandate. We do so to demonstrate why we have found that the executive council mandate cannot be representative of a Te Arawa-wide collective. Secondly, we describe the reduction in the size of the executive council mandate as it occurred between April 2004 when its deed of mandate was recognised by the Crown, and our 15 January 2005 hearing. Thirdly, we comment on the implications for the Crown in negotiating and settling with the executive council, given the current size and nature of its mandate. Specifically, we address the matter of 'overlapping claims' management, which we consider will be a key issue for the Crown.

##### *(1) Ngati Wahiao, Ngati Whakaue, and Ngati Rangiwehehi*

These three iwi withdrew from the executive council mandate during the reconfirmation process. According to the executive council's figures reproduced in table 2, Ngati Whakaue represent 27 per cent of the population of Te Arawa.<sup>132</sup> Ngati Rangiwehehi represent 9 per cent of Te Arawa. No figure is given for Ngati Wahiao, but we note that the combined figure for Tuhourangi and Ngati Wahiao is 9 per cent of Te Arawa. Consequently, the withdrawal of these iwi must have been a significant blow to the Crown and the executive council. We also appreciate that the decision to withdraw from the executive council mandate is a very significant one for any hapu or iwi. The recognition by the Crown of the withdrawal of each

132. We note that this figure includes Ngati Te Roro o Te Rangi, whose support for the executive council is under dispute, and four other hapu – Ngati Ngararanui, Ngati Tuteaiti, Ngati Tura, and Ngati Te Ngakau – that support the executive council.

of these groups followed well advertised hui-a-iwi. We are satisfied that the Crown was right and showed proper diligence in requiring that hui-a-iwi met requisite standards of notification and conduct, before recognising resolutions of these iwi to withdraw from the executive council's mandate. We commend the Crown for recognising the withdrawal of these hapu or iwi once duly notified.

As outlined in chapter 1, Ngati Wahiao's withdrawal was formally recognised by MICOTOWN on 26 November.

The withdrawal of the Ngati Whakaue cluster was also recognised on 26 November. We note that the Crown and the Ngati Whakaue cluster continue to dispute the inclusion of Ngati Te Roro o Te Rangi in the executive council's terms of negotiation. We agree with Ngati Whakaue that their tikanga demands that the six koromatua hapu should be considered the core of the Ngati Whakaue confederation, and that it is not appropriate to have their primary tribal name recorded in the terms of negotiation given the extent of their opposition. At the least, the terms of negotiation should be amended to delete any reference to Ngati Whakaue and their registered claims, leaving only the hapu names and the claims of those who have clearly signed up to the reconfirmation of the executive council's mandate.

The withdrawal of Ngati Rangiwehewi was formally recognised by MICOTOWN on 21 December 2004. Ms Baggott assured us that the terms of negotiation would be amended to reflect the withdrawal of Ngati Rangiwehewi in due course.

### **(2) *Ngati Rangitihi***

The Crown's position with respect to Ngati Rangitihi, based on the outcome of the 17 June 2004 mandating hui, is that the majority of the iwi support the executive council mandate. It does not consider that there is wide support within Ngati Rangitihi for the Wai 996 claimants.<sup>133</sup>

We agree that the majority of active Ngati Rangitihi appear to support the executive council mandate. This conclusion is inescapable given the voting at the 17 June 2004 hui. On the other hand, the Wai 996 claimants do have a list of over 1500 people, whom they claim support them. They cannot, therefore, be readily dismissed. As we noted above, their claims will and are being heard by the CNI Tribunal. In the meantime, the Ngati Rangitihi representative on the kaihautu and executive council must be sure to represent all Ngati Rangitihi interests. The Crown has a duty to ensure that the executive council requires that he perform his obligations in this regard.

### **(3) *Ngati Tuteniu***

The Crown continues to monitor the situation as regards Ngati Tuteniu's support for the executive council mandate. In their 20 December report, ORS officials advised the Ministers that a

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133. Document c2, exhibit 37, p5

## 5.4.7(4)

hui-a-iwi for Ngati Tuteniu held on 11 September resolved to support the executive council. Then, at a November hui, six out of 11 Ngati Tuteniu kaihautu members were removed. A further hui had been held on 5 December at which a majority of attendees voted to withdraw from the executive council mandate, but the turnout at the hui was relatively low.<sup>134</sup>

The situation in respect of Ngati Tuteniu certainly appears fluid. While it is not clear to us that there is strong Ngati Tuteniu support for the executive council, nor do we consider that there has yet been a clear resolution by this hapu to withdraw its support. We note the executive council has yet to address issues of accountability and develop a process of withdrawal. When it does so during its review of its rules in May 2005, the Crown should ensure that there is provision made for hapu such as these to withdraw or properly affirm their support for the executive council's mandate.

**(4) *Ngati Tamakari, Ngati Hinekura, Ngati Tutaki a Koti, Ngati Tutaki a Hane, Ngati Rongomai, and Ngati Rangiuuora***

The Crown's position with respect to these hapu of Ngati Pikiao is similar to its position regarding Ngati Rangitahi. According to the Crown, the contention that these hapu do not support the executive council is the view of individuals, and is not widely endorsed by the hapu concerned. The Crown also considers that Ngati Pikiao as a whole mandated the executive council, and that it is for Ngati Pikiao to resolve such internal disputes.<sup>135</sup>

We note that in our August 2004 report, we specifically suggested a preliminary hui of kaihautu members to discuss matters of decoupling and representation of iwi or hapu on the kaihautu and the executive council. As our review of the Crown's responses suggests, the Crown did not ensure that this took place before the four regional reconfirmation hui. Instead, the adjustments made to the executive council's composition (including provision of three extra seats for Ngati Pikiao and one for Ngati Rangiwewehi) were initially made by the executive council in isolation, albeit subsequently accepted by those who voted in support of the reconfirmation document. We note that kaihautu representatives were given a package deal in this respect – they could not vote on the individual components of it. This may well have meant that some interests or issues were sacrificed to achieve an overall outcome. If Te Arawa thought that certain hapu should be uncoupled, for example, they would have had to reject the whole reconfirmation.

In accepting this aspect of the reconfirmation process, and allowing certain issues and interests to be subsumed, the Crown might have been in breach of the Treaty principle of equity and equal treatment. The position is saved, however, because the executive council has yet to address issues of accountability and develop a process of withdrawal. When it does so in May 2005, the Crown should ensure that there is provision made for hapu such as these to

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134. Document c2, exhibit 37, p 4

135. Document c2, exhibit 35, p 7



withdraw or affirm their support for the executive council's mandate. This will enable the Crown to avoid a Treaty breach.

**(5) *Ngati Rangiteaorere***

In October 2004, five out of six Ngati Rangiteaorere kaihautu members resigned from the kaihautu. On 5 December, a hui was held at which a resolution was put that Ngati Rangiteaorere should withdraw from the executive council's mandate. However, OTS officials did not consider that this hui met the requisite standards of notification and conduct for its result to be recognised. Notwithstanding this, in their 20 December report, officials advised the Ministers that 'the results indicate there is ongoing core support for the executive council'.<sup>136</sup> Accordingly, officials told us that they were continuing to monitor the situation.

We note that officials are trying to have it both ways by not recognising the result of the hui, while at the same time, taking from it that there is ongoing core support for the executive council. The most that can be said about this iwi is that support either for or against the mandate is disputed. According to the evidence, a vote was conducted and it resulted in 60 votes against the resolution to withdraw, and 53 in favour of it. We reiterate our comments with regard to Ngati Tuteniu. We note that Tuteniu and Rangiteaorere are represented together in the terms of negotiation, and together constitute one per cent of Te Arawa population.

**(6) *Ngati Whaoa***

The Crown's position in respect of Ngati Whaoa is similar in some respects to its position regarding the various hapu of Ngati Pikiao discussed in section 5.4.7(4). The Crown's view, expressed in the 20 December officials' report to Ministers, is that the Ngati Whaoa claimants Peter Staite and Richard Charters have expressed opinions as individuals, and do not represent the position of the majority of Ngati Whaoa.<sup>137</sup>

We believe that Ngati Whaoa's situation is a good example of uncoupling that should have been addressed at a preliminary hui of kaihautu members, as we suggested in August 2004. The claimants maintained that they were not a part of Ngati Tahu and deserved representation in their own right. In May 2005, when the executive council reviews its accountability rules and develops a process by which hapu may withdraw from its mandate, the Crown should ensure that provision is made for coupled hapu to be uncoupled, should they wish.

On 26 January 2005, we were advised that a Ngati Whaoa hui-a-iwi had been held on 22 January. However, because it took place after our January 2005 hearing, we do not consider that the outcome of that hui is a proper matter for our consideration in the present inquiry. We note that the Crown has advised that it will continue to monitor issues relating to Ngati Whaoa's support for the executive council, as part of its ongoing mandate maintenance.<sup>138</sup>

<sup>136</sup>. Document c2, exhibit 37, p3

<sup>137</sup>. Ibid, p5

<sup>138</sup>. Paper 3.3.34, p4

5.4.7(7)

**(7) *Ngati Makino, Waitaha, and Tapuika***

The Crown has accepted that the executive council is not mandated to represent these three iwi, and they have been expressly excluded from the definition of Te Arawa in the terms of negotiation.<sup>139</sup> We note that, according to the executive council's figures, Ngati Makino, Waitaha, and Tapuika together represent 12 per cent of the Te Arawa population. As discussed in section 5.4.6, we believe that by refusing to conduct concurrent negotiations with Ngati Makino and accord Waitaha an appropriate priority, the Crown has breached the principles of the Treaty.

**(8) *Te Takere o Nga Wai***

In their report to Ministers of 20 December, Ots officials stated their position with respect to the Te Takere o Nga Wai claimants:

In accordance with their obligation under the Terms of Negotiation, the Kaihau Executive Council is in the process of writing to all registered Wai claimants that will be covered by the negotiations, to request that they do not pursue their claims and to withdraw from inquiries before the Tribunal. While this is an important signal to those registered Wai claimants, as you are aware, neither the Kaihau Executive Council nor the Crown can compel these individuals to withdraw their claims. If those claimants do not withdraw, it is at the discretion of the Tribunal as to whether or not they will continue to hear claims that are in simultaneous negotiations with the Crown.

In accordance with the Crown's policy for comprehensive settlements, all claims (registered or unregistered) of iwi/hapu groups that continue to mandate the Kaihau Executive Council will continue to be covered by the negotiations, notwithstanding the position of Wai claimants in the Tribunal.<sup>140</sup>

In a sense, the situation of the Te Takere o Nga Wai claimants is analogous to that of the claimants discussed above, who dissent from the majority position of their hapu. The Crown's policy is to negotiate and settle with mandated claimant groups, not to negotiate on the basis of individual registered Wai claims. Thus, where the views of registered claimants (be they individuals or whanau) conflict with the views of their hapu, or where there is little evidence of support for a claimant from their hapu, we believe that the Crown is right to consider that the view of the hapu provided at a duly convened hui should take precedence.

However, the reality is that section 6 of the Treaty of Waitangi Act 1975 provides for any Maori to file a claim with the Tribunal. We have a statutory duty to hear those claims. In our view, claimants of this type are, at the least, entitled to be consulted regarding the negotiation and settlement of their claims. The evidence is that there was no consultation with individual claimants before the terms of negotiation were signed by the Crown and the executive

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139. Document c2, exhibit 46, p3

140. Document c2, exhibit 37, p5



council. This is a matter we did not address in our August 2004 report, but it is a logical extension of the guidelines to good practice that we appended to that report. The Crown should ensure that there is a process that enables these claimants to be consulted.

Also, we draw a distinction between individually filed claims that are in fact about the same generic issues as the broad historical claims, and those which raise genuinely distinct and individual issues. We note the Crown's settlement of the 'ancillary' Ngai Tahu claims, alongside and in conjunction with its settlement of the main historical claims. The central North Island is a region with very many such 'ancillary' claims, all of them dear to the hearts of those who have brought them to the Tribunal. We note the caution contained in the *Ngati Awa Raupatu Report* in respect of such claims:

As to these matters generally, we can find no proper basis for incorporating the claims of particular persons into general tribal settlements. One should not be compromised by the other. The broad principle of law must apply: where plaintiffs are not the same and the causes of action and the subject-matters are distinct or severable, the cases must be handled separately.<sup>141</sup>

As a matter of general principle, we caution the Crown and executive council to ensure the proper treatment of such 'ancillary' whanau and individual claims in their negotiations.

#### **(9) Current state of the executive council mandate**

We now turn to our discussion of the incremental reduction of the executive council mandate. The executive council was established with the express purpose of 'entering into negotiations with the Crown for settlement of all Te Arawa historical claims'.<sup>142</sup> As we described in section 1.2, the executive council's 1 December 2003 deed of mandate contained a list of 14 hapu/iwi which it represented. The deed of mandate specifically noted that the executive council did not represent Ngati Makino, Waitaha, and Tapuika. Together, these three iwi constitute approximately 12 per cent of the total population of Te Arawa. Thus, in April 2004, when its deed of mandate was formally recognised, the executive council represented 88 per cent of the population of Te Arawa.

Based on the evidence presented to us at the June hearing, in our August 2004 report we expressed confidence that the majority of Te Arawa supported the executive council, and had approved its mandate to represent them in negotiating and settling the historical claims of Te Arawa.<sup>143</sup> However, between 1 April 2004 (when the executive council deed of mandate was formally recognised by Ministers) and 26 November 2004 (when the terms of negotiation between the Crown and executive council were signed) the level of support within Te Arawa for the executive council dropped.

141. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p142

142. Document A130, p1

143. Waitangi Tribunal, *The Te Arawa Mandate Report*, p112

We note that OTS officials advised in their report to Ministers of 23 November 2004 that, taking into account the recent withdrawal of the Ngati Whakaue cluster and Ngati Wahiao, and the then imminent withdrawal of Ngati Rangiwehewhi, the executive council mandate represented ‘just over half of the total Te Arawa population’.<sup>144</sup> We also note Mr Doogan’s comment along similar lines made during Tribunal questioning. Based on the executive council’s population figures taken from table 2, the combined total population of groups which are expressly excluded from the definition of Te Arawa in the terms of negotiation is around 48 per cent.<sup>145</sup> We also note that there is some uncertainty over support for the executive council from other hapu or iwi, as discussed above. Therefore, we consider that the Crown’s conclusion that ‘just over half’ of Te Arawa support the executive council is realistic.<sup>146</sup> However, we consider that to comment that the executive council still represented 10 out of 14 of the groups of Te Arawa – as OTS and TPK officials have done – misrepresents the true level of support for the executive council among the people of Te Arawa. Nevertheless, by the time the terms of negotiation were signed, the Ministers had properly been advised that the executive council represented 10 groups, and that those groups comprised 22,000 people, or ‘just over half’ of Te Arawa.<sup>147</sup>

The Crown signed the 26 November 2004 terms of negotiation in the knowledge that the executive council was mandated to represent ‘just over half’ of Te Arawa, and conversely, that 48 per cent of Te Arawa did not support the executive council. Further, in their 23 November report, officials had advised Ministers of the risk of additional iwi/hapu withdrawing from the mandate before the terms of negotiation were signed.<sup>148</sup> In particular, officials advised that Ngati Rangiteaorere continued to be divided over their support for the executive council.

Thus, the Ministers made their decision to proceed to signing the terms of negotiation in the knowledge that the executive council had lost a considerable portion of its support since April 2004, and that uncertainty remained over the support of some iwi/hapu for the executive council.

#### **(10) *Managing overlapping claims***

The Crown has identified that there will be ‘significant cross-claim, forest lands and cultural redress issues’ arising from negotiations with the executive council.<sup>149</sup> We do not believe that we would be properly exercising our role if we were to leave the Crown and executive council to proceed with the negotiations without our views on these issues.

Given that the executive council is now mandated to represent ‘just over half’ of Te Arawa,

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144. Document c2, exhibit 35, p8

145. The figure of 48 per cent is comprised of: Ngati Makino, Waitaha, and Tapuika (12 per cent); Ngati Whakaue (27 per cent); and Ngati Rangiwehewhi (9 per cent). This figure does not include Ngati Wahiao, whose withdrawal from the executive council’s mandate has been formally recognised but for whom we do not have a population figure.

146. Document c2, exhibit 35, p8

147. Ibid

148. Ibid, pp 4–7

149. Ibid, p10

we have asked ourselves how the Crown will deal with their interests fairly and impartially. Clearly, the issue of ‘cross-claims’ is critical, and has been identified as such by the Crown and claimants to this inquiry alike.

We should say at the outset that we do not consider that this is a cross-claim issue in the same sense as those previously considered by the Tribunal, for example in the *Ngati Awa Settlement Cross-Claims Report*. Previous Tribunals have generally considered cases which involved distinct iwi which share a common border, and perhaps distant ancestry. The present inquiry concerns the overlapping core interests of related iwi/hapu. There is no question that there will be significant overlap between the interests of Te Arawa groups within the executive council and outside it. This is even more the case for iwi like Ngati Whakaue and Ngati Pikiao, with some hapu supporting the council, and some outside its negotiations. We have no doubt that it will be extremely difficult for the Crown to settle the claims of those iwi/hapu of Te Arawa who have mandated the executive council, without prejudicing the interests of other Arawa groups.

Counsel for the taumata provided two examples to demonstrate this point. The first was the Whakarewarewa village and geothermal area, which is claimed by both Tuhourangi, who have mandated the executive council, and Ngati Wahiao, who have withdrawn. Secondly, Mr Taylor provided the example of the Whakapoungakau Ranges, which are claimed by both Uenukukopako, who have mandated the executive council, and by Ngati Rangiteaorere and Ngati Tuteniu, whose support for the executive council is under dispute.<sup>150</sup>

We understand that the registered claims of certain iwi/hapu who have clearly signalled their withdrawal from the executive council mandate, are still listed in the terms of negotiation. These claims have been included because they also deal in part with the issues and interests of iwi/hapu which have mandated the executive council. The terms of negotiation, however, do not purport to negotiate a settlement for groups who have not mandated the council. Their claim issues will remain to be settled, presumably after the settlement of those parts of their claims relating to their kin. Inevitably, identical issues will thereby be settled for some but not others. We do not see a way for the Crown and kaihautu to avoid this outcome, by following the process set out in the terms of negotiation.

We believe that Ngati Whakaue, for example, will be put in a position where they have to protect their interests during the executive council’s negotiations, in the same way as other ‘overlapping’ claimants. Despite the fact that their withdrawal from the executive council mandate has been formally recognised by the Crown, Ngati Whakaue will be required to ascertain the nature and extent of their claims, and seek to ensure that their own interests are not settled. With a minority of Ngati Whakaue hapu participating in negotiations but most of that kin group remaining outside, the situation will be very difficult to manage.

The Crown is aware of the need to manage what it calls overlapping claims, and has sought to deal with the issue by developing a process by which the claims and interests of all Te

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<sup>150</sup>. Paper 3.3.30, p13

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Arawa iwi/hapu will be considered, before the deed of settlement is finalised. This process is written into the terms of negotiation in clauses 60 and 61:

60. The Kaihautu Executive Council and the Crown agree that overlapping claim issues over redress assets will need to be addressed to the satisfaction of the Crown before a Deed of Settlement can be finalised. The parties also agree that certain items of redress provided to Te Arawa as part of the Deed of Settlement may need to reflect the importance of an area or feature to other claimant groups.

The process by which the claims of overlapping claimants will be assessed is, in summary:

- a. following the signing of this document:
  - i. the Crown will inform potential overlapping claimants of the Crown's intention to negotiate a comprehensive settlement of Te Arawa Historical Claims, seek the overlapping claimants' views as to their interests in Te Arawa's area of interest, and outline the Crown's overlapping claims policies and processes; and
  - ii. the Kaihautu Executive Council will initiate dialogue with overlapping claimants and seek to establish a process for addressing issues of common interest;
- b. prior to making an initial redress offer for the settlement of Te Arawa Historical Claims, the Crown will ensure that it:
  - i. has knowledge of the interests of both Te Arawa and overlapping claimants; and
  - ii. has considered if redress can be provided in a way that accommodates these interests; and
- c. following the signing of an Agreement in Principle, the Crown will undertake a consultation process with overlapping claimants;
  - i. if Te Arawa and the overlapping claimants are unable to reach an agreement as to their respective interests, the Minister in Charge of Treaty of Waitangi Negotiations will make a provisional decision on contested redress. The Minister will invite overlapping claimants and the Kaihautu Executive Council to comment on that provisional decision; and
  - ii. the Minister will make a final decision on contested redress after taking any additional responses into consideration.

61. The Crown may be in Treaty settlement negotiations with overlapping claimants. Issues arising in those negotiations, including issues concerning licensed Crown forest land, may be relevant to these negotiations and vice versa. The Crown will ensure that Te Arawa is kept informed of these issues (subject only to the confidentiality of matters specific to the other negotiations).<sup>151</sup>

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151. Document c2, exhibit 46, pp 14–15. Note that the term 'Te Arawa' as used here is defined as those iwi or hapu of Te Arawa that have mandated the executive council.

The Crown considers that this process will enable it to treat fairly and impartially with those iwi/hapu of Te Arawa which have withdrawn from or have not mandated the executive council. We are concerned, however, that the process described in the terms of negotiation may put groups outside the executive council mandate at a disadvantage relative to groups within it. We now elaborate on these concerns.

Groups within the executive council mandate have the opportunity to engage fully in the negotiation process itself, to negotiate the Treaty breaches that the Crown will acknowledge, and to discuss the nature and extent of the redress they seek, before the signing of an agreement in principle. The provisions to protect the interests of groups outside the mandate where those interests overlap with the executive council grouping, however, appear to be weak.

In the early stages of its negotiations with the executive council, the Crown's responsibility with respect to addressing the concerns of overlapping claimants is simply to 'seek the overlapping claimants' views as to their interests in Te Arawa's area of interest'. Similarly, the executive council is obliged to 'initiate dialogue' with the overlapping claimants. Before the Crown makes its initial offer of redress to the executive council, it must ensure that it 'has knowledge of the interests of both Te Arawa and overlapping claimants' and 'has considered if redress can be provided in a way that accommodates [the interests of both groups]'.<sup>152</sup>

Thus, at no point before the signing of an agreement in principle is there a requirement that the Crown ensure that there has been full and effective consultation with overlapping claimants. There is an onus on the executive council simply to 'seek to establish a process for addressing issues of common interest'. We believe that by following this process the Crown cannot help but give secondary consideration to the views of the so-called overlapping claimants relative to those of the executive council.

The provisions for consultation after the signing of the agreement in principle between the Crown and executive council offer little more by way of protection for the interests of overlapping claimants. If the discussions between the executive council and overlapping claimants fail to produce a satisfactory resolution to cross-claim issues, MICOTOWN will make a provisional decision on contested redress. The executive council and overlapping claimants are invited to comment on the provisional decision. Then, after a consideration of these responses, MICOTOWN makes a final decision.

Ultimately, then, decision to provide any redress for overlapping claimants who are outside the executive council mandate rests with the Minister, whose decision will be based largely on the advice of ORS officials and, indirectly, from the executive council. Thus, the executive council is in the privileged position of being a party to, and potential beneficiary of, negotiations over 'cross-claims' on the one hand, and a de facto provider of specialist advice to the Crown on the other.

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152. Document c2, exhibit 46, pp14–15

5.4.7(11)

The Crown's proposed process for managing overlapping claims leaves us concerned for those iwi/hapu who have never mandated the executive council or who have withdrawn from its process. We consider that the process will unfairly favour those at the negotiation table over those who are not.

This might be acceptable if the Crown had a contingency plan to negotiate with those who have withdrawn from the executive council process, but it does not. In their 23 November report to Ministers, OTS officials discussed the likelihood that the Crown would eventually need to negotiate with at least two Te Arawa groups in addition to the executive council. Nevertheless, we are not aware that the Crown has seriously considered how and when it may approach these additional negotiations. As we mentioned above in our discussion with respect to Ngati Makino and Waitaha, the overriding imperative behind the Crown's actions appears to be its objective 'to limit as far as appropriate the number of future settlements'.<sup>153</sup>

In short, we believe that the Crown has made it clear which group it prefers to negotiate with. In fact, this position is explicitly stated in the terms of negotiation:

8. The Crown wishes to make clear it is according priority to negotiate a settlement with the iwi/hapu that have mandated the Kaihautu Executive Council to negotiate a settlement of their claims.<sup>154</sup>

Such an approach may have been appropriate where the mandated body is challenged by only a small minority, such as in the Pakakohi and Tangahoe situation. But it is now clear to us that this is no longer the case in respect of the Te Arawa mandate. As we discussed in section 5.4.7(9), the level of support for the executive council has now dropped to the point where, and by the Crown's own admission, 'just over half' the population support it. Conversely, 48 per cent of the population, including one of the largest Te Arawa groups, have withdrawn from the executive council, or they have never joined it.

We agree with the Crown's comments that 'achieving a larger collective of Te Arawa iwi/hapu is probably unrealistic at this time'. We do not, however, consider this a valid reason to leave the considerable proportion of Te Arawa hapu and iwi who do not support the mandate 'out in the cold'.

**(11) *Implications of Crown negotiation and settlement with executive council***

In our 17 December direction, we defined the scope of the reconvened inquiry. We stated that the January 2005 hearing would focus firstly on the issue of whether the Crown had followed the substance of our August 2004 suggestions, and secondly on recent developments in the Te Arawa mandating process.

During the January 2005 hearing, our attention was drawn to two issues which we now

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153. Document c2, exhibit 35, p9

154. Document c2, exhibit 46, p4



consider to be key, as a result of hearing evidence from both claimants and the Crown, updating the Tribunal on developments. First, it became clear that divisions within Te Arawa remain as strong as they were at the time of our June 2004 hearing. In our August 2004 report, we expressed the view that, should it fail to respond adequately to our suggestions regarding the reconfirmation of the executive council mandate, the Crown would risk entrenching division between the supporters of the executive council, and its opponents. We feared any such split could take many years to overcome.<sup>155</sup> Having seen and heard from the parties, we now consider it very unlikely that bridges can be mended between iwi/hapu outside the executive council mandate and those who support it. There is no point in recommending mediation or alternative dispute resolution for them. To attempt to force them to work together now will merely frustrate the negotiation process rather than expedite it. Nor is there any point in the executive council holding open seats for those iwi/hapu who have resolved to withdraw. Secondly, the extent of the reduction in the level of support for the executive council became clear to us only during the January hearing.

We acknowledge that the executive council presently represents a substantial proportion of the Te Arawa population. In fact, it is one of the largest groups ever represented in negotiations with the Crown. We encourage the Crown to continue to assist the executive council to maintain, and where possible build upon, its mandate. However, we do not believe that to proceed with negotiations with just over half of Te Arawa, and to leave the other groups waiting indefinitely for the opportunity to negotiate and settle their claims, would be consistent with Treaty principles. Rather, in the current context, where almost half the population of Te Arawa are not represented by the executive council, the principle of equal treatment suggests that the Crown negotiate the historical claims of Te Arawa contemporaneously with more than one mandated group.

This suggestion should not conflict with the Crown's 'large natural groupings' policy. Rather, we consider that the Treaty obligation on the Crown requires that the policy be applied with some flexibility, and in a practical and natural manner. After all, it appears to us that, with the possible exception of the Wai 996 claimants, all the claimants in this inquiry are prepared to negotiate with the Crown. Even before the terms of negotiation were signed, Crown officials had identified two additional Te Arawa groupings with whom it may have to negotiate in the future. We note that Ngati Makino and Waitaha have agreed to work together towards negotiating and settling their claims. We note also that the Ngati Whakauae cluster, representing approximately a quarter of the population of Te Arawa, would on the face of it appear to constitute a 'large natural grouping'.

While the Crown is extremely reluctant to negotiate with more than one group at this time, by avoiding this in the context of the Te Arawa negotiations, it is creating a very serious set of problems for itself in attempting to manage so-called 'overlap' issues. It is possible that

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155. Waitangi Tribunal, *The Te Arawa Mandate Report*, p112

5.4.7(12)

managing overlapping claims in a way that is consistent with Treaty principles may turn out to be just as much work as mandating additional Te Arawa groups and proceeding to negotiations with them.

We believe and have recommended that the Crown should commence negotiations with Ngati Makino. With the latter's agreement, Waitaha and perhaps Tapuika could be joined to those negotiations. That recommendation is consistent with our August 2004 suggestions.

As far as the future arrangements are concerned, we note that another group based around the Ngati Whakaue cluster has formed. Ngati Rangiwehewhi and Ngati Wahiao could be given the option of joining with the Ngati Whakaue cluster for the purposes of concurrent negotiations. We also note that there are outstanding issues in respect of Ngati Rangiteaorere, Ngati Tuteniu, and Ngati Te Roro o Te Rangi, and that some or all of these groups may choose to join with a mandated Ngati Whakaue grouping.

**(12) Concluding comments**

It follows from our discussions above that, with the exception of Ngati Makino and Waitaha, we have not upheld the claims of any of the hapu or iwi or individual claimants that appeared before us. Rather, we have recognised that the Crown's monitoring and acceptance of the reconfirmation process was not in breach of the Treaty of Waitangi. That process will now continue with the re-evaluation of the executive council's rules and accountability, for the benefit of those Arawa groups who have exercised their tino rangatiratanga by reconfirming their mandate of the council. We wish them well.

That said, we have signalled that the Crown must now deal with the positions of those who have remained outside the executive council mandate. Furthermore, we agree with the claimants that given the current state of the mandate, it is not appropriate to describe the negotiations with the executive council as a Te Arawa settlement negotiation, however narrowly defined in the terms of negotiation. At the most, it is a negotiation involving some hapu or iwi of the Te Arawa confederation, and it should be honestly and transparently presented as such. Should the Crown proceed to negotiate with just over half of Te Arawa, continue to call that a comprehensive settlement of Te Arawa historical claims, and not properly safeguard the overlapping core claims of other Arawa groups, we believe that Treaty breaches and prejudice will inevitably arise. We also believe that, as we have outlined above, it is within the power and capacity of the Crown to prevent such an outcome.

Finally, we note that our inquiry into the mandate of the executive council is now at an end. There is still the prospect of fresh claims being filed throughout the negotiation process. Whether or not the chairperson will grant urgency depends on the circumstances of any future claimant group. To avoid the need for a future hearing, we have attempted to provide some direction to the Crown on how to advance the interests of all of Te Arawa. We believe that the Crown should act upon our advice. In that limited sense, the case as put by the tau-mata has been vindicated.



**5.5 SUMMARY**

The key points made in this chapter are as follows:

- ▶ The reconfirmation process was designed by the executive council and the Crown, and accepted by those Te Arawa groups which have voted in favour of it. We are satisfied that the Crown has not breached the Treaty of Waitangi in its monitoring of the process, nor in its acceptance of the outcome. Those Te Arawa groups which have reconfirmed the mandate of the executive council have exercised their tino rangatiratanga, and they will now negotiate their claims with the Crown.
- ▶ The reconfirmation process departed from our suggestions when the council decided to defer a review of its rules and accountability until May 2005. As a result, the kaihautu has yet to determine a process for the uncoupling of groups that do not wish to remain coupled, and a formal process for withdrawal. In our view, this has left Ngati Tuteniu, Ngati Rangiteaoere, the six Ngati Pikiapo hapu who pursued claims before us, and Ngati Whaoa, in an unsettled position. We do not find their claims to be upheld, as we expect their position to be resolved successfully when proper procedures are finalised in May. These hapu need to be given the opportunity to properly and formally confirm their support or otherwise for the mandate of the executive council.
- ▶ The Wai 996 Ngati Rangitahi claimants and the Te Takere o Nga Wai claimants are responsible for registered Wai claims which have been included in the executive council's mandate. They are, therefore, affected by the Crown's policy of negotiating historical claims with mandated groups. Where the views of registered claimants conflict with the views of their hapu, or where there is little evidence of support for a claimant from their hapu, we believe that the Crown is right to give precedence to the view of the hapu provided at a duly convened and monitored hui. For that reason, we do not uphold the Wai 996 Ngati Rangitahi claim or the Te Takere o Nga Wai claims in this inquiry. Their other claim issues will be heard in the CNI inquiry, as is our statutory obligation. None the less, we consider that claimants of this type are, at the least, entitled to be consulted regarding the negotiation and settlement of their claims. We also remind the Crown that individuals and whanau may have specific, 'ancillary' claims which must be properly provided for in Treaty settlements.
- ▶ The Crown rejected our August 2004 recommendation that another mandating hui be held for Ngati Rangitahi. Given the additional information provided to the Tribunal, and the position now taken by the Wai 996 claimants in respect to holding another hui, we do not find that this failure constitutes a breach of Treaty principles.
- ▶ Moving beyond the reconfirmation process, we consider that the Crown effectively rejected our August 2004 suggestions regarding Ngati Makino, Waitaha, and Tapuika. We do not consider that the Crown's concern to limit the number of CNI (and national) settlements provided a justification for this. Quite apart from Treaty principles, ORS has accepted the necessity of at least two additional Te Arawa settlements. We find that the

Crown has breached the Treaty principles of partnership and of equal treatment in relation to Ngati Makino. Prejudice is likely to result from the long delay in negotiating with Ngati Makino, combined with the present refusal to consider concurrent negotiations with them. We therefore recommend that the Crown should now commence negotiations with Ngati Makino.

- ▶ With respect to Waitaha, we remain of the view (from our earlier report) that priority should be accorded to negotiations with them. Unless the Crown does so, it will be acting in a manner inconsistent with the Treaty of Waitangi. As above, we note that OTS has accepted that two additional Arawa settlements will be required, and we note also that Waitaha and Ngati Makino have agreed to enter joint negotiations. We think that Tapuika could be joined to those negotiations, if the Crown and claimants together thought that that would form a natural grouping. It seems to us, therefore, that priority is both practicable for the Crown, and required if it is to act consistently with the principles of the Treaty of Waitangi.
- ▶ Finally, we note the formal withdrawal of Ngati Whakaue, Ngati Wahiao, and Ngati Rangiwehi from the executive council's mandate. We are satisfied that the Crown acted consistently with the Treaty when it required that well-notified and conducted hui-a-iwi were held before it recognised the withdrawal of these groups.
- ▶ Their withdrawal, however, in combination with the non-participation of Ngati Makino, Waitaha, and Tapuika, means that just over half of Te Arawa have reconfirmed their support for the executive council's mandate. It is now the case that 48 per cent of Te Arawa have exercised their tino rangatiratanga in favour of pursuing a different path.
- ▶ First, we think that this creates a new order of problems for the Crown. There will be very significant overlaps between core Te Arawa claims, some of them inside the negotiations, some of them outside. This is particularly so for Ngati Whakaue and Ngati Pikiao, but also for other groups. These are not 'cross-claims' in the conventional sense. We are concerned that the process for managing these overlapping claims, as set out in the terms of negotiation, will put groups outside the executive council at a significant disadvantage.
- ▶ Secondly, we do not believe that to proceed with negotiations with just over half of Te Arawa, and to leave the other groups waiting (for an unspecified time) for an opportunity to negotiate and settle their claims, would be consistent with Treaty principles. This would not in effect be a comprehensive settlement of Te Arawa's historical claims, no matter how narrowly the terms of negotiation define 'Te Arawa'. Nor would it properly safeguard the overlapping core claims of other Te Arawa groups. We believe that Treaty breaches and prejudice will inevitably arise. We also consider that, given the size of the Ngati Whakaue cluster, and the willingness of at least Waitaha and Ngati Makino to negotiate jointly, that practicable solutions are available to the Crown, that will enable it to act consistently with the Treaty.

Dated at *Wellington* this *29th* day of *March* 20 *05*



CL Wickliffe, presiding officer



J Baird, member



GH Herbert, member





## APPENDIX

### RECORD OF INQUIRY

#### RECORD OF HEARINGS

##### TRIBUNAL MEMBERS

The Tribunal constituted to hear the Te Arawa mandate claims comprised Judge Caren Wickliffe (presiding), John Baird, and Gloria Herbert.

##### THE HEARINGS

The first hearing was held on 21, 22, 23, and 25 June 2004 in Rotorua, and the second hearing was held at the Tribunal's offices in Wellington on 12 January 2005.

#### RECORD OF PROCEEDINGS

##### 1. CLAIMS

###### 1.1 Statements of claim

###### 1.1.1 Wai 1150

A claim by Pihopa Kingi, Pirihira Fenwick, and Malcolm Short on behalf of Te Arawa taumata concerning the Crown's mandating process in Te Arawa, 30 April 2004

###### 1.1.2 Wai 1173

A claim by David Whata-Wickliffe on behalf of Ngati Te Takinga, Ngati Hinekura, Ngati Whana-rere, Ngati Rongomai, Ngati Te Rangiunuora, Ngati Te Rangiteaorere, Ngati Parua Ha, and Ngati Tamakari concerning the mandating structure of Nga Kaihautu o Te Arawa and the Crown's recognition of that mandate, June 2004

###### 1.1.3 Wai 1175

A claim by David Potter and Andre Patterson on behalf of Ngati Rangitihi concerning the Crown's settlement and mandating policies in the Te Arawa region, 8 June 2004

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**1.1.4 Wai 1180**

A claim by Tame McCausland on behalf of Waitaha concerning the Crown's settlement and mandating policies in the Te Arawa region, 10 June 2004

(a) Amendment to claim 1.14, 7 March 2005

**1.1.5 Wai 1174**

A claim by Te Ariki Morehu, Stephen Hohepa, Te Kapua Watene, and Isobella Fox on behalf of Ngati Makino and Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi concerning the Crown's settlement and mandating policies in the Te Arawa region, 8 June 2004

**1.1.6 Wai 664**

A claim by Thomas McCausland, Te Runui Whare, and Tukaha Ngaki on behalf of Waitaha concerning the Crown's settlement and mandating policies in the Te Arawa region, 14 February 1997

(a) Amendment to claim 1.16, 2 November 2001

(b) Amendment to claim 1.16, 1 November 2004

(c) Amendment to claim 1.16, 7 March 2005

**1.1.7 Wai 1219**

A claim by Wirihana Te Rangi, Noble Curtis, William Whakataki Emery, Dennis Curtis, and Ngawhakawairangi Hohepa on behalf of Ngati Rongomai and Nga Uri o Nga Tokotoru o Manawakotokoto concerning the Crown's settlement and mandating policies in the Te Arawa region and the recognition of Nga Kaihautu o Te Arawa, 21 December 2004

**1.1.8 Wai 1220**

A claim by Te Ariki Morehu, James Schuster, John Meroiti, Iharaira Hohepa, and Pakitai Raharuhi on behalf of Ngati Hinekura concerning the Crown's settlement and mandating policies in the Te Arawa region and the recognition of Nga Kaihautu o Te Arawa, 21 December 2004

**1.1.9 Wai 1221**

A claim by Raewyn Bennet, Te Ariki Morehu, William Emery, Kelvin Cassidy, and Dennis Curtis on behalf of Ngati Rangiuuora and Nga Uri o Nga Tokotoru o Manawakotokoto concerning the Crown's settlement and mandating policies in the Te Arawa region, 21 December 2004

**1.1.10 Wai 1222**

A claim by Hamuera Hodge, Eric Hodge, Beverley Hodge, Kiri Dewes, Susan Thompson, Eric Walters, and Tukekeru Dansey on behalf of Te Takere o Nga Wai concerning the Crown's settlement and mandating policies in the Te Arawa region, 21 December 2004

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**1.1.11 Wai 1223**

A claim by Kanohi Winiata on behalf of Te Kotahitanga o Ngati Whakaue concerning the Crown's settlement and mandating policies in the Te Arawa region, 21 December 2004

**2. PAPERS IN PROCEEDINGS: TRIBUNAL MEMORANDA, DIRECTIONS, AND DECISIONS**

**2.1 Papers registering new claims**

**2.1.1** Chairperson, memorandum concerning applications for urgency and joinder, 4 May 2004

**2.1.2** Presiding officer, memorandum registering claim 1.1.5, 10 June 2004

**2.1.3** Presiding officer, memorandum registering claim 1.1.7, 23 December 2004

**2.1.4** Presiding officer, memorandum registering claim 1.1.8, 23 December 2004

**2.1.5** Presiding officer, memorandum registering claim 1.1.9, 23 December 2004

**2.1.6** Presiding officer, memorandum registering claim 1.1.11, 23 December 2004

**2.1.7** Presiding officer, memorandum registering claim 1.1.10, 23 December 2004

**2.1.8** Presiding officer, memorandum registering claim 1.1.6, 24 March 2005

**2.2 Papers amending statements of claim**

**2.2.1** Presiding officer, memorandum registering amendment to claim 1.5, 14 July 2004

**2.2.2** Presiding officer, memorandum directing inclusion of Wai 664 and Wai 1180 on Wai 1150 and Wai 1200 record of inquiry, 24 March 2005

**2.3 Papers concerning judicial conferences and hearings**

**2.3.1** Presiding officer, memorandum concerning research, Taupo and Kaingaroa representation, direct negotiations, and other mandate issues, 5 February 2004

**2.3.2** Presiding officer, memorandum concerning research, boundaries, and mandate representation, 24 February 2004

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**2.3.3** Presiding officer, memorandum concerning applications for urgency and joinder, 7 April 2004

**2.3.4** Chairperson, memorandum concerning applications for urgency and joinder, 7 April 2004

**2.3.5** Presiding officer, memorandum concerning research, boundaries, and mandate representation, 23 April 2004

**2.3.6** Chairperson, memorandum concerning applications for urgency and joinder, 4 May 2004

**2.3.7** Chairperson, memorandum concerning applications for urgency and joinder, 17 May 2004

**2.3.8** Chairperson, memorandum concerning applications for urgency, 19 May 2004

**2.3.9** Chairperson, memorandum concerning applications for urgency, 20 May 2004

**2.3.10** Chairperson, memorandum declining to order facilitated discussion between parties and granting urgency, 24 May 2004

**2.3.11** Presiding officer, memorandum setting out timetable for inquiry and hearing, 26 May 2004

**2.3.12** Presiding officer, memorandum scheduling teleconference to discuss urgent hearing, 31 May 2004

**2.3.13** Presiding officer, memorandum revising timetable for hearing, 2 June 2004

**2.3.14** Presiding officer, memorandum concerning 24 June 2004 judicial conference, 2 June 2004

**2.3.15** Presiding officer, memorandum summarising directions issued at 4 June 2004 teleconference concerning timetable for filing of submissions, evidence, and applications for cross-examination, scope of inquiry, and venue and timetable for hearing, 8 June 2004

**2.3.16** Presiding officer, memorandum appointing kaumatua to assist CNI regional claims Tribunal, 9 June 2004



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**2.3.17** Presiding officer, memorandum in reply to 11 June 2004 memorandum of Crown, 14 June 2004

**2.3.18** Presiding officer, memorandum concerning scope of inquiry, inclusion of new claims, and deferral of urgency, 18 June 2004

**2.3.19** Presiding officer, memorandum registering claim 1.1.2, 11 June 2004

**2.3.20** Presiding officer, memorandum registering claim 1.1.3, 10 June 2004

**2.3.21** Presiding officer, memorandum concerning extensions for filing of documents, 9 July 2004

**2.3.22** Presiding officer, memorandum confirming 5 July 2004 timetable for filing of documents, 5 July 2004

**2.3.23** Wai 1174 claimant counsel, memorandum seeking leave for late filing of submissions, 7 July 2004

**2.3.24** Crown Law Office, memorandum concerning presentation of submissions, 7 July 2004

**2.3.25** Wai 1150 claimant counsel, memorandum seeking leave for late filing of submissions, 7 July 2004

**2.3.26** Crown counsel, memorandum concerning claimant counsel's late filing requests, 8 July 2004

**2.3.27** Wai 1032 claimant counsel, memorandum seeking leave for late filing of submissions, 7 July 2004

**2.3.28** Presiding officer, memorandum registering claim 1.1.4, 7 July 2004

**2.3.29** Chairperson, memorandum concerning applications for urgency and joinder, 18 June 2004

**2.3.30** Presiding officer, memorandum seeking submissions on Wai 1150 claimants' request for further Tribunal hearing, 24 September 2004

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**2.3.31** Presiding officer, memorandum seeking submissions from Crown counsel and counsel for Nga Kaihautu o Te Arawa, 28 September 2004

**2.3.32** Presiding officer, memorandum declining Wai 1150 claimants' request for further Tribunal hearing, 1 October 2004

**2.3.33** Presiding officer, memorandum requesting report from Crown counsel and counsel for Nga Kaihautu o Te Arawa, 28 October 2004

**2.3.34** Presiding officer, memorandum, 10 November 2004

**2.3.35** Presiding officer, memorandum concerning resumption of hearings, 19 November 2004

**2.3.36** Presiding officer, memorandum, 7 December 2004

**2.3.37** Presiding officer, memorandum, 17 December 2004

**2.3.38** Presiding officer, memorandum, 11 January 2005

**2.3.39** Presiding officer, memorandum concerning hearing and filing dates, 17 January 2005

**2.4 Papers concerning Waitangi Tribunal research commissions**

There were no papers concerning Waitangi Tribunal research commissions

**2.5 Papers concerning other matters**

**2.5.1** Presiding officer, memorandum concerning delay in issuing of *Te Arawa Mandate Report*, 25 February 2005

**3. PAPERS IN PROCEEDINGS: SUBMISSIONS AND MEMORANDA OF PARTIES**

**3.1 Submissions and memoranda of parties – pre-hearing stage (including judicial conferences)**

**3.1.1** Te Arawa taumata, submissions in reply to 21 November 2003 memorandum of Tribunal and 22 December 2003 memorandum of Crown, 30 January 2004

**3.1.2** Te Rangatiratanga o Ngati Rangitahi Incorporated, submissions concerning deed of mandate of Nga Kaihautu o Te Arawa, 4 January 2004

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**3.1.3** Counsel for Wai 21(a), Wai 43, Wai 154, Wai 275, Wai 316, Wai 319, Wai 358, Wai 724, Wai 725, Wai 794, Wai 795, Wai 918, Wai 937, Wai 980, Wai 1009–1013, Wai 1026, Wai 1035, Wai 1036, Wai 1037, Wai 1039, Wai 1041, and Wai 1042, submissions concerning issues raised at 10 February 2004 judicial conference, 20 February 2004

**3.1.4** Wai 1150 claimant counsel, submissions concerning issues raised at 10 February 2004 judicial conference, 20 February 2004

**3.1.5** Counsel for Wai 837, Wai 57, and Wai 288, submissions concerning issues raised at 10 February 2004 judicial conference, 23 February 2004

**3.1.6** Counsel for Wai 18, Wai 114, and Wai 500, submissions concerning issues raised at 10 February 2004 judicial conference, 23 February 2004

**3.1.7** Counsel for Ngati Rangitahi and Ngati Hikairo, submissions concerning issues raised at 10 February 2004 judicial conference, 24 February 2004

**3.1.8** Counsel for Wai 257, Wai 416, Wai 996, and Wai 1034, submissions concerning issues raised at 10 February 2004 judicial conference, 24 February 2004

**3.1.9** Wai 664 claimant counsel, submissions concerning issues raised at 10 February 2004 judicial conference, 24 February 2004

**3.1.10** Crown counsel, submissions concerning issues raised at 10 February 2004 judicial conference, 24 February 2004

**3.1.11** Wai 726 claimant counsel, submissions concerning issues raised at 10 February 2004 judicial conference, 24 February 2004

**3.1.12** Counsel for Wai 832, Wai 445, Wai 781, and Wai 786, submissions concerning issues raised at 10 February 2004 judicial conference, 24 February 2004

**3.1.13** Counsel for Ngati Raukawa Trust Board, submissions concerning issues raised at 10 February 2004 judicial conference, 24 February 2004

**3.1.14** Wai 533 claimant counsel, submissions concerning issues raised at 10 February 2004 judicial conference, 27 February 2004

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- 3.1.15** Counsel for Nga Kaihautu o Te Arawa, submissions concerning issues raised at 10 February 2004 judicial conference, 27 February 2004
- 3.1.16** Counsel for Tapuika, submissions concerning issues raised at 10 February 2004 judicial conference, 27 February 2004
- 3.1.17** Wai 1150 claimant counsel, submissions concerning issues raised at 10 February 2004 judicial conference, 27 February 2004
- 3.1.18** Counsel for Wai 316 and Wai 410, submissions concerning issues raised at 10 February 2004 judicial conference, 3 March 2004
- 3.1.19** Crown counsel, submissions in reply to paper 2.3.2, 15 March 2004
- 3.1.20** Counsel for CFRT, memorandum seeking leave to be heard, 16 March 2004
- 3.1.21** Counsel for Wai 218, 219, and Wai 791, memorandum seeking joinder of urgency applications, 19 March 2004
- 3.1.22** Counsel for Wai 218, 219, and Wai 791, submissions supporting application for joinder (paper 3.1.21), 19 March 2004
- 3.1.23** Crown counsel, submissions in reply to papers 3.1.21 and 3.1.22, 23 March 2004, 23 March 2004
- 3.1.24** Entry vacated
- 3.1.25** Wai 1150 claimant counsel, submissions concerning Crown's Te Arawa mandating policies, 25 March 2004
- 3.1.26** Counsel for Ngati Pikiao kaihautu committee, submissions concerning issues raised at 10 February 2004 judicial conference, 24 March 2004
- 3.1.27** Crown counsel, submissions in reply to paper 3.1.25, 29 March 2004
- 3.1.28** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions opposing applications for urgency and joinder, 30 March 2004
- 3.1.29** Wai 1150 claimant counsel, submissions in reply to paper 3.1.27, 31 March 2004

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**3.1.30** Wai 1150 claimant counsel, submissions concerning recognition of mandate of Nga Kaihautu o Te Arawa, 2 April 2004

**3.1.31** Crown counsel, submissions concerning recognition of mandate of Nga Kaihautu o Te Arawa, 2 April 2004

**3.1.32** Wai 1150 claimant counsel, memorandum applying for interim relief, 5 April 2004

**3.1.33** Wai 1150 claimant counsel, submissions concerning application for interim relief (paper 3.1.32), 5 April 2004

**3.1.34** Crown counsel, submissions in reply to paper 3.1.32, 6 April 2004

**3.1.35** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in reply to paper 3.1.32, 6 April 2004

**3.1.36** Wai 726 claimant counsel, submissions in reply to paper 2.3.2, 6 April 2004

**3.1.37** Wai 1175 claimant counsel, submissions in reply to paper 3.1.33, 6 April 2004

**3.1.38** Wai 1034 claimant counsel, submissions in reply to paper 3.1.33, 6 April 2004

**3.1.39** Wai 1150 claimant counsel, submissions in reply to paper 3.1.34, 7 April 2004

**3.1.40** Crown counsel, memorandum concerning availability of Crown counsel, 8 April 2004

**3.1.41** Wai 1150 claimant counsel, submissions in reply to paper 3.1.26, 13 April 2004

**3.1.42** Wai 1150 claimant counsel, submissions concerning taumata claim and application for interim relief, 13 April 2004

**3.1.43** Wai 681 claimant, submission concerning Ngati Whaoa mandate hui, 14 April 2004

**3.1.44** Wai 384 claimant counsel, submissions concerning issues raised at 14 April 2004 judicial conference, 14 April 2004

**3.1.45** Counsel for Wai 21(a), Wai 154, Wai 275, Wai 319, Wai 918, and Wai 980, submissions concerning applications for interim relief and urgency, 14 April 2004

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**3.1.46** Wai 1150 claimant counsel, submissions concerning issues raised at 14 April 2004 judicial conference, 14 April 2004

**3.1.47** Counsel for Ngati Rangiwewehi, submissions seeking urgent hearing, 14 April 2004

**3.1.48** Counsel for Ngati Tamakari, submissions concerning Te Arawa mandate for Nga Kaihautu o Te Arawa, 15 April 2004

**3.1.49** Counsel for Ngati Tamakari, submissions concerning Te Arawa mandate for Nga Kaihautu o Te Arawa, 21 April 2004

**3.1.50** Wai 1150 claimant counsel, submissions in reply to paper 2.3.5, 29 April 2004

**3.1.51** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in reply to paper 3.1.50, 4 May 2004

**3.1.52** Counsel for Ngati Tamakari, submissions in reply to paper 2.3.6, 4 May 2004

**3.1.53** Counsel for CFRT, submissions in reply to paper 2.3.5, 7 May 2004

**3.1.54** Wai 1150 claimant counsel, submissions in reply to paper 2.3.6, 12 May 2004

**3.1.55** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in reply to paper 2.3.6, 12 May 2004

**3.1.56** Crown counsel, submissions in reply to paper 2.3.6, 12 May 2004

**3.1.57** Wai 1175 claimant counsel, submissions in reply to paper 2.3.6, 12 May 2004

**3.1.58** Wai 1150 claimant counsel, submissions in reply to paper 2.3.6, 13 May 2004

**3.1.59** Wai 681 claimant, submissions concerning mandating issue and section 30 application, 13 May 2004

**3.1.60** Counsel for Ngati Tamariki, submissions in reply to paper 2.3.6, 13 May 2004

**3.1.61** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in reply to paper 2.3.7, 18 May 2004

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- 3.1.62** Crown counsel, submissions in reply to paper 2.3.7, 18 May 2004
- 3.1.63** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in reply to paper 2.3.8, 20 May 2004
- 3.1.64** Wai 1175 claimant counsel, submissions in reply to paper 2.3.8, 20 May 2004
- 3.1.65** Wai 1175 claimant counsel, submissions in reply to paper 3.1.64, 21 May 2004
- 3.1.66** Wai 1150 claimant counsel, submissions in reply to paper 2.3.10, 26 May 2004
- 3.1.67** Wai 837 claimant, submissions in reply to paper 2.3.11, 28 May 2004
- 3.1.68** Counsel for Ngati Tamariki, submissions in reply to paper 2.3.11, 28 May 2004
- 3.1.69** Counsel for Wai 21(a), Wai 275, Wai 316, Wai 319, Wai 358, Wai 724, Wai 725, Wai 794, Wai 795, Wai 937, Wai 980, Wai 1009–1013, Wai 1026, Wai 1035, Wai 1036, Wai 1037, Wai 1039, Wai 1041, and Wai 1042, submissions in reply to paper 2.3.11, 28 May 2004
- 3.1.70** Wai 524 claimant counsel, submissions in reply to paper 2.3.11, 28 May 2004
- 3.1.71** Counsel for Wai 316 and Wai 410, submissions in reply to paper 2.3.11, 28 May 2004
- 3.1.72** Wai 1175 claimant counsel, submissions in reply to paper 2.3.11, 28 May 2004
- 3.1.73** Wai 726 claimant counsel, submissions in reply to paper 2.3.11, 28 May 2004
- 3.1.74** Counsel for Tuhourangi, submissions in reply to paper 2.3.11, 28 May 2004
- 3.1.75** Crown counsel, submissions in reply to paper 2.3.11, 28 May 2004
- 3.1.76** Crown counsel, memorandum concerning contact details for teleconference, 31 May 2004
- 3.1.77** Wai 681 claimant, submissions in reply to paper 2.3.11, 28 May 2004
- 3.1.78** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in reply to paper 2.3.11, 28 May 2004

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**3.1.79** Counsel for CFRT, submissions in reply to paper 2.3.11, 28 May 2004

**3.1.80** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum concerning availability for teleconference, 31 May 2004

**3.1.81** Wai 1150 claimant counsel, memorandum concerning contact details for teleconference, 1 June 2004

**3.1.82** Counsel for Ngati Whakaue, memorandum concerning mandate of Nga Kaihautu o Te Arawa, 1 June 2004

**3.1.83** Counsel for Ngati Whakaue, memorandum amending paper 3.1.82, 3 June 2004

**3.1.84** Wai 1150 claimant counsel, memorandum concerning contact details for teleconference, 4 June 2004

**3.1.85** Wai 664 claimant counsel, submissions in reply to paper 2.3.11, 4 June 2004

**3.1.86** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in reply to paper 2.3.10, 4 June 2004

**3.1.87** Wai 664 claimant counsel, submissions concerning claimants' position and mandate issues, 8 June 2004

**3.1.88** Wai 1175 claimant counsel, memorandum concerning particulars of claim and evidence to be filed, 8 June 2004

**3.1.89** Wai 1150 claimant counsel, memorandum concerning document A11, 8 June 2004

**3.1.90** Wai 664 claimant counsel, memorandum concerning provisional status of statement of claim, 10 June 2004

**3.1.91** Wai 681 claimant, submissions supporting Wai 1150 and concerning Lake Opouri and broadcasting issues, 11 June 2004

**3.1.92** Crown counsel, memorandum requesting deferral of hearing, 11 June 2004

**3.1.93** Wai 681 claimant, memorandum in reply to paper 3.1.92, 12 June 2004



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- 3.1.94** Wai 681 claimant, memorandum in reply to paper 3.1.97, 14 June 2004
- 3.1.95** Wai 1150 claimant counsel, memorandum in reply to paper 3.1.92, 14 June 2004
- 3.1.96** Wai 664 claimant counsel, memorandum in reply to paper 3.1.92, 14 June 2004
- 3.1.97** Crown counsel, memorandum in reply to paper 2.3.17, 14 June 2004
- 3.1.98** Counsel for Ngati Makino, Ngati Tuteniu, and Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi, memorandum in reply to paper 3.1.92, 15 June 2004
- 3.1.99** Wai 1175 claimant counsel, memorandum in reply to paper 3.1.92, 15 June 2004
- 3.1.100** Wai 533 claimant counsel, memorandum concerning statement of claim and evidence filed by Wai 791 claimants, 15 June 2004
- 3.1.101** Wai 524 claimant counsel, memorandum concerning statement of response and document A111, 15 June 2004
- 3.1.102** Wai 1150 claimant counsel, memorandum in reply to paper 3.1.92, 14 June 2004
- 3.1.103** Counsel for Ngati Tamariki, memorandum in reply to papers 3.1.92 and 3.1.97, 15 June 2004
- 3.1.104** Wai 726 claimant counsel, memorandum in reply to paper 3.1.92, 15 June 2004
- 3.1.105** Wai 681 claimant, memorandum in reply to paper 3.1.92, 15 June 2004
- 3.1.106** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum in reply to papers 2.3.17 and 3.1.92 and e-mail circulated by Tribunal on 11 June 2004, 15 June 2004
- 3.1.107** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum concerning affidavits and supporting evidence to be filed, 15 June 2004
- 3.1.108** Wai 664 claimant counsel, memorandum seeking leave for late filing of document A113A, 16 June 2004
- 3.1.109** Wai 837 claimant, submissions concerning autonomy of Ngati Whaoa, procedural concerns, and document A114, 17 June 2004

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**3.1.110** Wai 681 claimant, submissions concerning autonomy of Ngati Whaoa, 17 June 2004

**3.1.111** Wai 681 claimant, submissions in reply to document A114, 16 June 2004

**3.1.112** Wai 1150 claimant counsel, memorandum seeking leave for late filing of submissions, 17 June 2004

**3.1.113** Wai 1150 claimant counsel, memorandum concerning cross-examination of witnesses for Nga Kaihautu o Te Arawa, 18 June 2004

**3.1.114** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum seeking leave to cross-examine Malcolm Short, David Whata-Wickliffe, David Potter, Pihopa Kingi, Te Ururoa Flavell, Mihikore Heretaunga, Taiwhakaneke Eru, and Mike Rika, 18 June 2004

**3.1.115** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum in reply to paper 3.1.113, 18 June 2004

**3.1.116** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum in reply to paper 3.1.114, 18 June 2004

**3.1.117** Counsel for Ngati Tamariki, memorandum seeking leave to cross-examine Andrew Hampton, Edward Kameta, Eva Moke, and Rawiri Te Whare, 18 June 2004

**3.1.118** Counsel for Wai 7, Wai 204, Wai 233, and Wai 363, memorandum seeking leave to cross-examine William Hall, Mihikore Heretaunga, and Pat Mansell, 18 June 2004

**3.1.119** Wai 524 claimant counsel, memorandum seeking leave to cross-examine David Potter, 18 June 2004

**3.1.120** Counsel for Ngati Makino, Ngati Tuteniu, and Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi, memorandum seeking leave to cross-examine Andrew Hampton, Rawiri Te Whare, Mihipa McGrath, Eva Moke, and Mita Pirika, 18 June 2004

**3.1.121** Wai 664 claimant counsel, memorandum seeking leave to cross-examine Andrew Hampton, 16 June 2004

**3.1.122** Counsel for Ngati Whakaue, memorandum concerning status of Ngati Whakaue claims Wai 268, Wai 317, and Wai 335 and Pukeroa Oruawhata Trust, 18 June 2004

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**3.1.123** Crown counsel, memorandum seeking leave to cross-examine Malcolm Short, Te Ururoa Flavell, Pihopa Kingi, and Pirihira Fenwick, 18 June 2004

**3.1.124** Counsel for Ngati Rangitihi, memorandum seeking leave to cross-examine Andrew Hampton, Henry Pryor, Eruini George, Hakopa Paul, Paul Tapsell, Eva Moke, and Rawiri Te Whare, 18 June 2004

**3.1.125** Counsel for Ngati Makino, Ngait Tuteniu, and Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi, memorandum in reply to paper 2.3.18, 21 June 2004

**3.1.126** Counsel for Ngati Makino, Ngati Tuteniu, and Ngati Tuwharetoa te Atua Reretahi Ngai Tamarangi, memorandum in reply to paper 2.3.18, 21 June 2004

**3.1.127** Counsel for Ngati Tamakari, memorandum seeking leave for late filing of submissions, 20 June 2004

**3.1.128** Wai 1150 claimant counsel, memorandum seeking leave to cross-examine Hakopa Paul, Eruini George, Te Ohu Mokai Wi Kingi, Manahi Bray, Mihipa McGrath, Martha Siggelko, Paul Tapsell, Putiputi Tonihi, Andrew Hampton, Arama Pirika, Denis Polamalu, Anaru Rangiheuea, Charles Taua, Ngarahu Katene, Barnett Vercoe, and Rawiri Te Whare, 18 June 2004

**3.1.129** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum concerning background and nature of document A141, 24 June 2004

**3.1.130** Crown counsel, memorandum, 6 October 2004

**3.1.131** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum in reply to Tribunal's 1 October 2004 memorandum (paper 2.3.32), 6 October 2004

**3.1.132** Wai 1150 claimant counsel, memorandum concerning updating memorandum following hui, 6 October 2004

**3.1.133** Wai 681 claimant, memorandum following reconfirmation hui, 6 October 2004

**3.1.134** Wai 996 claimant counsel, memorandum, 7 October 2004

**3.1.135** Counsel for Ngati Tamakari, memorandum, 12 October 2004

**3.1.136** Memorandum concerning withdrawal from Nga Kaihautu o Te Arawa, 20 October 2004

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- 3.1.137** Memorandum requesting urgency following Crown's mandate reconfirmation, 26 October 2004
- 3.1.138** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum in reply to Tribunal's 28 October 2004 memorandum (paper 2.3.33), 5 November 2004
- 3.1.139** Crown counsel, memorandum, 5 November 2004
- 3.1.140** Counsel for Ngati Whakaue cluster, memorandum in reply to Tribunal's 12 October 2004 memorandum, 5 November 2004
- 3.1.141** Counsel, memorandum in reply to Tribunal's 27 October 2004 memorandum, 16 November 2004
- 3.1.142** Counsel, memorandum concerning representation and dual process, 17 November 2004
- 3.1.143** Counsel for Ngati Whakaue cluster, memorandum, 16 November 2004
- 3.1.144** Crown counsel, memorandum, 23 November 2004
- 3.1.145** Counsel for Ngati Whakaue cluster, memorandum, 23 November 2004
- 3.1.146** Wai 1150 claimant counsel, memorandum concerning request for further hearing and directions or findings in respect to reconfirmation process, 20 September 2004
- 3.1.147** Counsel for Ngati Whakaue cluster, joint memorandum, 12 November 2004
- 3.1.148** Crown counsel, memorandum, 16 November 2004
- 3.1.149** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum concerning 17 December 2004 judicial teleconference, 16 December 2004
- 3.1.150** Wai 1150 claimant counsel, memorandum concerning 17 December 2004 judicial teleconference, 16 December 2004
- 3.1.151** Wai 1150 claimant counsel, memorandum concerning statement of mandate issues, 21 December 2004

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- 3.1.152** Wai 1150 claimant counsel, memorandum seeking leave for late filing of statement of mandate issues, 22 December 2004
- 3.1.153** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum concerning exhibit M to document C6, 6 January 2005
- 3.1.154** Counsel for Ngati Whakaue cluster, memorandum seeking leave for late filing of document C25, 7 January 2005
- 3.1.155** Counsel for Ngati Whakaue cluster, memorandum seeking leave to cross-examine Heather Baggott and Rawiri Te Whare, 7 January 2005
- 3.1.156** Counsel for Wai 275, Wai 334, Wai 1219, Wai 1220, Wai 1221, and Wai 1222, memorandum seeking leave to cross-examine Heather Baggott and Rawiri Te Whare, 7 January 2005
- 3.1.157** Wai 1173 claimant counsel, memorandum seeking leave for late filing of document C23, 7 January 2005
- 3.1.158** Wai 1150 claimant counsel, memorandum seeking leave to file reply to exhibit M to document C6, 7 January 2005
- 3.1.159** Counsel for Ngati Whakaue cluster, memorandum seeking leave to cross-examine Heather Baggott and Rawiri Te Whare, 7 January 2005
- 3.1.160** Counsel for Wai 7, Wai 204, Wai 233, Wai 363, Wai 453, and Wai 1150, memorandum advising of counsel's non-attendance at hearing, 10 January 2005
- 3.1.161** Wai 316 claimant counsel, memorandum seeking leave for late filing of document C24 and advising of counsel's possible non-attendance at hearing, 10 January 2005
- 3.1.162** Wai 1150 claimant counsel, memorandum concerning hearing timetable, 11 January 2005
- 3.1.163** Wai 1150 claimant counsel, memorandum seeking leave for late filing of opening submissions, 7 January 2005
- 3.1.164** Wai 316 claimant counsel, memorandum enclosing document C24 and advising of appearance of counsel at hearing, 11 January 2005

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**3.1.165** Counsel for Ngati Whakaue cluster, memorandum seeking leave to have two Wai 1200 memoranda placed on the record, 24 January 2005

**3.1.166** Crown counsel, memorandum rejecting allegations of misrepresentation by Crown witness, 28 January 2005

**3.2 Submissions and memoranda of parties – hearing stage**

**3.2.1** Wai 837 claimant, memorandum, 21 June 2004

**3.2.2** Wai 1150 claimant counsel, memorandum requesting further Tribunal hearing and directions concerning reconfirmation process, 10 September 2004

**3.2.3** Crown counsel, memorandum in reply to Wai 1150 claimants' request for further Tribunal hearing, 14 September 2004

**3.2.4** Wai 1150 claimant counsel, memorandum in reply to submissions of Crown counsel on need for further hearing, 15 September 2004

**3.2.5** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum in reply to Wai 1150 claimants' request for further Tribunal hearing, 20 September 2004

**3.2.6** Wai 1150 claimant counsel, memorandum requesting further Tribunal hearing and directions concerning reconfirmation process, 20 September 2004

**3.2.7** Wai 996 claimant counsel, memorandum seeking extension for filing of submissions on Wai 1150 claimants' request for further Tribunal hearing, 20 September 2004

**3.2.8** Wai 681 claimant, memorandum supporting Wai 1150 claimants' request for further Tribunal hearing, 20 September 2004

**3.2.9** Counsel for Wai 94, Wai 268, Wai 316, Wai 317, Wai 335, Wai 384, Wai 391, Wai 410, Wai 533, Wai 893, and Wai 1101, memorandum advising of withdrawal of support from Nga Kaihautu o Te Arawa, 20 September 2004

**3.2.10** Wai 1150 claimant counsel, memorandum enclosing assorted correspondence, 21 September 2004

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- 3.2.11** Wai 996 claimant counsel, memorandum concerning reconfirmation process and supporting Wai 1150 claimants' request for further Tribunal hearing, 21 September 2004
- 3.2.12** Wai 1150 claimant counsel, memorandum enclosing assorted documents, 23 September 2004
- 3.2.13** E-mail from counsel for Waitaha expressing no opinion on Wai 1150 claimants' request for further Tribunal hearing, 16 September 2004
- 3.2.14** Wai 1174 claimant counsel, memorandum supporting Wai 1150 claimants' request for further Tribunal hearing, 27 September 2004
- 3.2.15** Counsel for Wai 268, Wai 317, Wai 335, and Wai 384, memorandum seeking leave for late filing of submissions on Wai 1150 claimants' request for further Tribunal hearing and adopting submissions made by counsel for Wai 316 and Wai 410 in paper 3.2.20, 27 September 2004
- 3.2.16** Wai 1150 claimant counsel, memorandum concerning attendance at proposed reconfirmation hui and withdrawal of Ngati Wahkaue cluster from Nga Kaihautu o Te Arawa, 27 September 2004
- 3.2.17** Wai 681 and Wai 837 claimant, memorandum concerning Paeroa East block and status of Ngati Tahu and supporting Wai 1150 claimants' request for further Tribunal hearing, 27 September 2004
- 3.2.18** Wai 837 claimant, memorandum supporting Wai 1150 claimants' request for further Tribunal hearing, 27 September 2004
- 3.2.19** Wai 996 claimant counsel, memorandum outlining concerns with reconfirmation process, 27 September 2004
- 3.2.20** Counsel for Wai 316 and Wai 410, memorandum reserving right to participate in further hearing pending announcement of Crown's position on withdrawal of Ngati Wahkaue cluster from Nga Kaihautu o Te Arawa, 27 September 2004
- 3.2.21** Counsel for Wai 7, Wai 204, Wai 223, Wai 363, and Wai 453, memorandum opposing Wai 1150 claimants' request for further Tribunal hearing but seeking leave for late filing of submissions on that request, 28 September 2004

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**3.2.22** Crown counsel, memorandum expressing view that it would be premature for Tribunal to reconvene inquiry at that time, 29 September 2004

**3.2.23** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum concerning voting at reconfirmation hui and expressing view that it would be premature for Tribunal to reconvene inquiry at that time, 29 September 2004

**3.2.24** Counsel for Tapuika, memorandum concerning exclusion of Tapuika from deed of mandate and expressing no opinion on Wai 1150 claimants' request for further Tribunal hearing, 27 September 2004

**3.2.25** Te Maru o Ngati Rangiwehewhi, letter to Nga Kaihautu o Te Arawa Executive Council advising of withdrawal from kaihautu, 19 October 2004

Individual notices of Ngati Rangiwehewhi kaihautu delegates resigning from Nga Kaihautu o Te Arawa, 14, 15, 18, 20 October 2004

**3.2.26** Wai 980 claimants, memorandum affirming mandate given to Nga Kaihautu o Te Arawa and raising concerns with filing of statement of claim, 16 November 2004

(a) Counsel for Wai 316 and Wai 410, memorandum concerning mandate of Nga Kaihautu o Te Arawa, participation in further hearing, and CNI inquiry hearings, 24 November 2004

**3.2.27** Wai 1150 claimant counsel, memorandum concerning terms of negotiation signed by the Crown and Nga Kaihautu o Te Arawa Executive Council and litigation issued against the council, 30 November 2004

**3.2.28** Counsel for Wai 533, Wai 1101, and Wai 1204, memorandum enclosing two memoranda filed with the CNI Tribunal concerning withdrawal of support for Nga Kaihautu o Te Arawa, 20 January 2005

**3.2.29** Counsel for Wai 275, Wai 334, Wai 1219, Wai 1220, Wai 1221, and Wai 1222, submissions in reply to closing submissions of Crown counsel and counsel for Nga Kaihautu o Te Arawa Executive Council (papers 3.3.34, 3.3.35), 28 January 2005

**3.2.30** Wai 1223 claimant counsel, submissions in reply to closing submissions of Crown counsel and counsel for Nga Kaihautu o Te Arawa Executive Council (papers 3.3.34, 3.3.35), 28 January 2005



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**3.2.31** Crown counsel, memorandum enclosing letter from director, Office of Treaty Settlements, to Tribunal, 14 February 2005  
Letter from director, Office of Treaty Settlements, to Tribunal concerning accidental release of draft press release anticipating findings of Tribunal, 11 February 2005

**3.2.32** Counsel for Ngati Rangiteaoreore, memorandum concerning release of draft OTS press release anticipating findings of Tribunal and seeking Tribunal direction concerning same, 21 February 2005

**3.2.33** Counsel for Ngati Rangiteaoreore, memorandum concerning release of draft OTS press release anticipating findings of Tribunal, 15 February 2005

**3.2.34** Counsel for Ngati Rangiteaoreore, memorandum concerning relationship between Ngati Rangiteaoreore and Nga Kaihautu o Te Arawa Executive Council, 14 March 2005

**3.2.35** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum concerning relationship between council and Ngati Rangiteaoreore and objecting to comments in paper 3.2.34, 18 March 2005

**3.3 Opening and closing submissions and submissions in reply**

**3.3.1** Wai 1150 claimant counsel, opening submissions, 21 June 2004

**3.3.2** Wai 1173 claimant counsel, opening submissions, 21 June 2004

**3.3.3** Crown counsel, opening submissions, 21 June 2004

**3.3.4** Wai 1175 claimant counsel, opening submissions, 18 June 2004

**3.3.5** Wai 1180 claimant counsel, opening submissions, 19 June 2004

**3.3.6** Wai 1174 claimant counsel, opening submissions, 20 June 2004

**(a)** Wai 1174 claimant counsel, table detailing chronology of claim-related events, 22 June 2004

**3.3.7** Counsel for Nga Kaihautu o Te Arawa Executive Council, opening submissions, 21 June 2004

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- 3.3.8 Wai 533 claimant counsel, opening submissions, 25 June 2004
- 3.3.9 Wai 524 claimant counsel, opening submissions, 25 June 2004
- 3.3.10 Crown counsel, submissions in reply to submissions and evidence of other parties, 25 June 2004
- 3.3.11 Wai 1173 claimant counsel, opening submissions, 22 June 2004
- 3.3.12 Edward George, submissions on behalf of Ngati Tuara Ngati Kea, 30 June 2004
- 3.3.13 Wai 1175 claimant counsel, submissions in reply, 7 July 2004
- 3.3.14 Wai 1180 claimant counsel, submissions in reply, 9 July 2004
- 3.3.15 Wai 1174 claimant counsel, submissions in reply, 9 July 2004
- 3.3.16 Wai 1173 claimant counsel, closing submissions, 13 July 2004
- 3.3.17 Wai 681 claimant, closing submissions, 8 July 2004
- 3.3.18 Wai 837 claimant, closing submissions, 2 July 2004
- 3.3.19 Wai 1150 claimant counsel, submissions in reply, 8 July 2004
- 3.3.20 Crown counsel, opening submissions, 23 December 2004  
(a) Note of oral submissions, 12 January 2005
- 3.3.21 Counsel for Nga Kaihautu o Te Arawa Executive Council, opening submissions, 24 December 2004
- 3.3.22 Wai 1180 claimant counsel, opening submissions, 7 January 2005
- 3.3.23 Wai 1223 claimant counsel, opening submissions, 7 January 2005
- 3.3.24 Counsel for Wai 275, Wai 334, Wai 1219, Wai 1220, Wai 1221, and Wai 1222, opening submissions, 7 January 2005
- 3.3.25 Counsel, opening submissions, 10 January 2005

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**3.3.26** Wai 1150 claimant counsel, opening submissions, undated

(a) Chronology, 12 January 2005

**3.3.27** Wai 996 claimant counsel, opening submissions, 12 January 2005

**3.3.28** Wai 681 claimant, opening submissions, 12 January 2005

**3.3.29** Wai 1223 claimant counsel, closing submissions, 24 January 2005

**3.3.30** Wai 1150 claimant counsel, closing submissions, 24 January 2005

**3.3.31** Wai 681 claimant, closing submissions, 24 January 2005

**3.3.32** Wai 1180 claimant counsel, closing submissions, 25 January 2005

**3.3.33** Counsel for Ngati Tamakari, opening submissions, 10 January 2005

**3.3.34** Crown counsel, closing submissions, 26 January 2005

**3.3.35** Counsel for Nga Kaihautu o Te Arawa Executive Council, closing submissions, 26 January 2005

**3.3.36** Wai 1223 claimant counsel, submissions in reply to closing submissions of Crown counsel and counsel for Nga Kaihautu o Te Arawa Executive Council (papers 3.3.34, 3.3.35), 28 January 2005

**3.3.37** Counsel for Wai 275, Wai 334, Wai 1219, Wai 1220, Wai 1221, and Wai 1222, submissions in reply to closing submissions of Crown counsel and counsel for Nga Kaihautu o Te Arawa Executive Council (papers 3.3.34, 3.3.35), 28 January 2005

**3.4 Submissions and memoranda of parties – post-hearing**

**3.4.1** Crown counsel, memorandum concerning signing of terms of negotiation, 29 July 2004

**3.5 Submissions and memoranda of parties – other matters**

**3.5.1** Wai 533 and Wai 1101 claimant counsel, memorandum demanding removal of Wai 533 and Wai 1101 from Nga Kaihautu o Te Arawa Executive Council's final terms of negotiation, deed of mandate, and deed of trust, 29 December 2004

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**4. TRANSCRIPTS AND TRANSLATIONS**

**4.1 Transcripts**

**4.1.1** Transcript of portion of hearing on 23 June 2004, undated

**5. PUBLIC NOTICES**

**5.1 Notices of judicial conferences**

There were no public notices concerning judicial conferences

**5.2 Notices of hearings**

**5.2.1** Registrar, declaration that notice of hearing given, 10 June 2004

Registrar, notice of hearing, 10 June 2004

Waitangi Tribunal, list of parties sent notice of hearing, undated

**5.2.2** Registrar, notice of hearing, 7 January 2005

**6. OTHER PAPERS IN PROCEEDINGS**

**6.1 Other papers filed by parties**

**6.1.1** Letter to Minister in Charge of Treaty of Waitangi Negotiations from secretary, Te Rangatiratanga o Ngati Rangitahi Incorporated, concerning Ngati Rangitahi's opposition to being part of Nga Kaihautu o Te Arawa, 6 October 2004

**6.1.2** Letter from Minister in Charge of Treaty of Waitangi Negotiations to Te Arawa taumata advising that the reconfirmation process was considered fair and open by the Minister and the Minister of Maori Affairs, 22 October 2004

**6.1.3** Letter from Ngati Kea Ngati Tuara kaihautu members to presiding officer, CNI inquiry, concerning Wai 1150 claimant counsel and voting at reconfirmation hui, 4 November 2004

**6.1.4** *Pirihira Fenwick v Eru George* unreported, 25 November 2004, Heath J, High Court, Rotorua, CIV2004-463-847

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RECORD OF DOCUMENTS

**A DOCUMENTS RECEIVED UP TO COMPLETION OF CASEBOOK**

**A1** Office of Treaty Settlements, 'Te Arawa Mandate Assessment', report to Ministers in Charge of Treaty of Waitangi Negotiations and Maori Affairs, 30 March 2004

**A2** Nga Kaihautu o Te Arawa, minutes of CNI mandating hui, various dates

***Evidence filed on behalf of the Te Arawa taumata claim***

**A3** Pihopa Kingi, affidavit, April 2004

**A4** Pirihiira Fenwick, affidavit, April 2004

**A5** Te Ururoa Flavell, affidavit, undated

**A6** Te Ururoa Flavell, affidavit, 7 June 2004

**A7** Mihikore Heretaunga, affidavit, 7 June 2004

**A8** Peter Staite, affidavit, 7 June 2004

**A9** Mike Rika, affidavit, 7 June 2004

**A10** Warwick Rika, affidavit, 7 June 2004

**A11** Pihopa Kingi, affidavit, 8 June 2004

**(a)** Supporting documents to document A11, various dates

**A12** Maxine Rennie, affidavit, 8 June 2004

**A13** James Wilson, affidavit, 8 June 2004

**A14** Archbishop Whakahuihui Vercoe, affidavit, 8 June 2004

**A15** Fred Whata, affidavit, 8 June 2004

**A16** Malcolm Short, affidavit, 8 June 2004

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- A17 Leah Ratana-Clubb, affidavit, 8 June 2004
- A18 Bonita Morehu, affidavit, 8 June 2004
- A19 Alfie McRae, affidavit, 8 June 2004
- A20 Robert Martin, affidavit, 8 June 2004
- A21 Pat Mansell, affidavit, 8 June 2004
- A22 Iris Kirimaoa, affidavit, 8 June 2004
- A23 Maria Johnston, affidavit, 8 June 2004
- A24 Eru Hall, affidavit, 8 June 2004
- A25 Taiwhanake Eru, affidavit, 8 June 2004
- A26 Rangi Easthope, affidavit, 8 June 2004
- A27 Toby Curtis, affidavit, 8 June 2004
- A28 Trudi Bennett, affidavit, 8 June 2004
- A29 Pirihiira Fenwick, affidavit, 9 June 2004
- A30 William Hall, affidavit, June 2004
- A31 Ngarahu Katene, affidavit, June 2004
- A32 Katerina Daniels, affidavit, June 2004
- A33 Barnett Vercoe, affidavit, June 2004
- A34 Joe Edwards, affidavit, June 2004
- A35 Manu Pene, affidavit, June 2004
- A36 Ian Mackintosh, affidavit, 10 June 2004

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A37 David Tauī, affidavit, 8 June 2004

*Evidence filed on behalf of Ngati Makino*

A38 Neville Nepia, affidavit, 9 June 2004

A39 Hakopa Paul, affidavit, 10 June 2004

*Evidence filed on behalf of Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi*

A40 Colleen Skerret-White, affidavit, 8 June 2004

A41 Tomairangi Fox, affidavit, 8 June 2004

*Evidence filed on behalf of Ngati Makino*

A42 Horace Meroiti, affidavit, 9 June 2004

*Evidence filed on behalf of Ngati Tamakari*

A43 David Whata-Wickliffe, affidavit, 8 June 2004

*Evidence filed on behalf of Ngati Rangitihi*

A44 David Potter, affidavit, 8 June 2004

(a) Society Te Rangatiratanga o Ngati Rangitihi Incorporated, submissions, 4 January 2004

*Evidence filed on behalf of Nga Kaihautu o Te Arawa Executive Council*

A45 Paul Tapsell, affidavit, 14 June 2004

A46 Putiputi Tonihi, affidavit, 14 June 2004

A47 Maramena Udy, affidavit, 14 June 2004

A48 Hare Raharuhi, affidavit, 14 June 2004

A49 Stormy Hohepa, affidavit, 14 June 2004

A50 Brian Peni, affidavit, 14 June 2004

A51 Rongomaipapa Kokiri-Taikato, affidavit, 14 June 2004

A52 Manahi Bray, affidavit, 14 June 2004

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- A53 Polly Bray, affidavit, 14 June 2004
- A54 Cathrine Galvin, affidavit, 14 June 2004
- A55 Mihipa McGrath, affidavit, 14 June 2004
- A56 Hariata Kaiako, affidavit, 14 June 2004
- A57 Ken Hingston, affidavit, 14 June 2004
- A58 Katerina Galvin, affidavit, 14 June 2004
- A59 Te Ruapeka Taikato, affidavit, 14 June 2004
- A60 Arama Pirika, affidavit, 14 June 2004
- A61 Topsy Pirika, affidavit, 14 June 2004
- A62 Denis Polamalu, affidavit, 14 June 2004
- A63 Anaru Rangiheuea, affidavit, 14 June 2004
- A64 Charles Taua, affidavit, 14 June 2004
- A65 Mariana Henry, affidavit, 14 June 2004
- A66 Riria Waru, affidavit, 14 June 2004
- A67 Ngarahu Katene, affidavit, 14 June 2004
- A68 Lewis Vercoe, affidavit, 14 June 2004
- A69 Hohepa Heke, affidavit, 14 June 2004
- A70 Robert Young, affidavit, 14 June 2004
- A71 Peehiarangi Hemepo, affidavit, 14 June 2004
- A72 Martha Siggelko, affidavit, 14 June 2004



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A73 Wiremu Te Pohawaiki Wiringi Jones, affadavit, 14 June 2004

A74 Rosie Te Wao, affadavit, 14 June 2004

A75 Te Puhi Patara, affadavit, 14 June 2004

A76 John Te Poari Newton junior, affadavit, 14 June 2004

A77 Craig Pirika, affadavit, 14 June 2004

A78 Minnie Vercoe, affadavit, 14 June 2004

A79 Barnett Vercoe, affadavit, 14 June 2004

A80 Barnett Vercoe, affadavit, 14 June 2004

A81 Hakopa Paul, affadavit, 14 June 2004

A82 Davey Gardiner, affadavit, 14 June 2004

A83 Edward Kameta, affadavit, 14 June 2004

A84 Wayne Taylor, affadavit, 14 June 2004

A85 Louis Phillips, affadavit, 14 June 2004

A86 Hana Wharehinga, affadavit, 14 June 2004

A87 Frederick Cookson, affadavit, 14 June 2004

A88 Brian Peni, affadavit, 15 June 2004

A89 Hariata Paikea, affadavit, 15 June 2004

A90 Tawhiri Morehu, affadavit, 15 June 2004

A91 Mihipeka Morehu, affadavit, 15 June 2004

A92 Aroha Campbell, affadavit, 15 June 2004

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A93 Barry Woods, affidavit, 15 June 2004

A94 Henry Colbert, affidavit, 15 June 2004

A95 Kipa Hohepa, affidavit, 15 June 2004

A96 Wallace Haumaha, affidavit, 15 June 2004

A97 Henry Pryor, affidavit, 15 June 2004

A98 Ruka Hughes, affidavit, 15 June 2004

A99 Mihiterina Hohepa, affidavit, 15 June 2004

A100 Paea Hohepa, affidavit, 15 June 2004

A101 Te Hei Pirika, affidavit, 15 June 2004

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mandating hui, various dates

A107 Wikeepa Te Rangipuawhe Maika, affidavit, 15 June 2004

A108 Te Amotawa Pirika, affidavit, 15 June 2004

A109 Rawiri Te Whare, affidavit, 16 June 2004

(a) Minutes of hui, various dates

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A110 Wai 524 claimant counsel, submissions in reply to claim 1.1.3, 15 June 2004

A111 Henry Pryor, affidavit, 15 June 2004

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A112 Wai 533 claimant counsel, submissions in reply to claim 1.1.1, 16 June 2004

A113 Ben Hona, affidavit, 16 June 2004

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A113A Tame McCausland, affidavit, 22 June 2004

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A114 Andrew Hampton, affidavit, 16 June 2004

(a) Supporting documents to document A114, various dates

***Claimant rebuttal evidence filed on behalf of Te Arawa taumata claim***

A115 Joe Edwards, affidavit in reply to documents A76, A64, A50, A96, A104, June 2004

A116 Bonita Morehu, Pat Mansell, and William Hall, affidavit in reply to documents A63, A107, 17 June 2004

A117 Pirihiira Fenwick, affidavit in reply to documents A46, A47, A51, A54, A55, A56, A58, A59, A60–A62, A65, A69, A72–A75, A77, A78, A93, A95, A99, A100–A103, 17 June 2004

A118 Pirihiira Fenwick, Bill Kingi, Joan Kanara, and Hapeta Hapeta senior, affidavit in reply to document A104, 17 June 2004

A119 Pirihiira Fenwick, affidavit in reply to document A114, 18 June 2004

A120 Merepeka Raukawa-Tait, affidavit in reply to documents A97, A111, 18 June 2004

A121 Pihopa Kingi, affidavit in reply to document A109, 18 June 2004

***Claimant rebuttal evidence filed on behalf of Ngati Tamakari***

A122 David Whata-Wickliffe, affidavit, 18 June 2004

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A123 Keremete Kuriwaka, affidavit, 15 June 2004

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A126 Cedri Forrest, affidavit, 14 June 2004

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A131 Mita Pirika, affidavit, 20 June 2004

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A134 Whaimutu Dewes, affidavit, undated

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A136 Leah Ratana-Clubb, affidavit, 17 June 2004

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**A141** ‘Presentation Overview’, outline of presentation at Te Arawa mandate hui of July and August 2003, undated

**A142** Rawiri Te Whare, affidavit, 24 June 2004

**A143** ‘Resolutions: Tuhourangi/Ngati Wahiao’, record of recommended resolutions, undated

**A144** Maria Tini, affidavit in reply to document A139, 25 June 2004

**A145** Petition of iwi representatives for Te Arawa to Minister in Charge of Treaty of Waitangi Negotiations concerning deed of mandate of Nga Kaihautu o Te Arawa, undated

**B DOCUMENTS RECEIVED UP TO END OF FIRST HEARING**

**B1** Horace Meroiti, affidavit, 2 July 2004

**B2** Rangi Easthope, affidavit, 6 July 2004

**B3** Bonita Morehu, affidavit, 6 July 2004

**B4** Tame McCausland, affidavit, 7 July 2004

**B5** David Whata-Wickliffe, affidavit, 6 July 2004

**B6** Bill Kingi, affidavit, 6 July 2004

**B7** Tawhanake Eru, affidavit, 6 July 2004

**B8** Heather Baggott, affidavit, 5 November 2004

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- c1 Andre Paterson, affidavit, 21 December 2004
- c2 Heather Baggott, affidavit, 2 vols, 23 December 2004
- c3 James Schuster, affidavit, 23 December 2004
- c4 Ruka Hughes, affidavit, 23 December 2004
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- c6 Mita Pirika, affidavit, 23 December 2004
- c7 Thomas McCausland, affidavit, 24 December 2004
- c8 Colleen Skerrett-White, affidavit, 5 January 2005
- c9 Keita Emery, affidavit, 5 January 2005
- c10 William Emery, affidavit, 5 January 2005
- (a) Willian Emery, affidavit, 14 January 2005
- c11 Derek Te Ariki Morehu, affidavit, 5 January 2005
- c12 Raewyn Bennett, affidavit, 5 January 2005
- c13 Dennis Curtis, affidavit, 6 January 2005
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- c15 Eva Moke, affidavit, 6 January 2005
- c16 Hamuera Mitchell, affidavit, 6 January 2005
- c17 Barry Te Kowhai, affidavit, 6 January 2005
- c18 Andrew Te Amo, affidavit, 6 January 2005
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- c20 John Merito, affidavit, 7 January 2005
- c21 Eric Hodge, affidavit, 7 January 2005
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- c29 Toby Curtis, affidavit, 7 January 2005
- c30 Hiwinui Heke, affidavit, 7 January 2005
- c31 Pirihiara Fenwick, affidavit, 7 January 2005
- c32 Whakawai Wiringi, affidavit, 10 January 2005
- c33 Horace Meroiti, affidavit, 20 December 2004
- c34 Eruini George, affidavit, 9 December 2004
- c35 Michael Rika, affidavit, 11 January 2005
- c36 William Emery, affidavit, 14 January 2005
- c37 Pihopa Kingi, affidavit, 19 January 2005
- c38 Michael Rika, affidavit, 26 January 2005

