

THE
TE ARAWA
MANDATE REPORT

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WAI 1150

WAITANGI TRIBUNAL REPORT 2004



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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The Honourable Parekura Horomia
Minister of Māori Affairs



The Waitangi Tribunal
110 Featherston Street
WELLINGTON

and

The Honourable Margaret Wilson
Minister in Charge of Treaty of Waitangi Negotiations
Parliament Buildings
WELLINGTON

9 August 2004

Te Minita Māori

Tena korua e nga rangatira e noho mai na i te tunga tiketike e whakatutuki nei i nga wawata o te iwi Maori. Kati tena tatou i runga i te ahuatanga o nga mate huhua puta noa i te motu mai Muriwhenua ki Murihiku whakawhiti atu ki Rekohu/Wharekauri. No reira nga mate haere atu ra, haere atu ra, oti atu.

Ko tenei purongo e tukuna ake nei ki a korua i oti i runga i nga tono o etahi iwi, hapu ranei o Te Arawa me o ratou whanaunga, ara ko Waitaha. Ko tona kaupapa e pa ana ki nga mahi kei waenga i a ratou me te mahi a te Karauna kia whakamutu atu nga keremi tiriti o Te Arawa. Koiane nga kohikohinga korero me nga whakaaro a Te Roopu Whakamana i te Tiriti o Waitangi.

Enclosed is The Te Arawa Mandate Report, prepared following a hearing held in Rotorua over four days on 21, 22, 23, and 25 June 2004. The claims were brought by:

- Pihopa Kingi, Pirihira Fenwick, and Malcolm Short, for the Te Arawa taumata;
- David Whata-Wickliffe, of Ngati Tamakari;
- Te Ariki Morehu, of Ngati Makino;
- Stephen Hohepa and Te Kapua Watene, of Ngati Tuteniu;
- Isobella Hohipera Fox, of Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi;
- David Potter and Andre Paterson, of Ngati Rangitihi; and
- Tame McCausland, of Waitaha.

In a nutshell, the claimants approached the issues differently but essentially these were claims about the decision of the Crown to recognise the mandate of Nga Kaihautu o Te Arawa Executive Council at the end of March 2004. Some were concerned with the overall 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 overall settlement policy, especially its preference for settling with 'large natural groupings' of claimants.

The Tribunal's focus during the inquiry was on the process adopted by the Crown to recognise the mandate of the executive council. In summary, we have found, inter-alia, that an active role in monitoring and scrutinising is required by the Crown to ensure that its actions in arriving at the recognition of a mandate remain consistent with the Treaty of Waitangi. In the circumstances of these claims, issues surrounding representivity and accountability have clearly not been fully and thoroughly resolved. In our view, the Crown failed to adequately identify these issues either during the implementation of the mandate plan or when assessing the quality of the council's mandate. Furthermore, we have pointed to the fact that Te Arawa have not had an opportunity adequately to discuss the composition of the council and its rules, particularly with respect to lines of accountability. That support may well be there, but it has not been formally tested. Before recognising the mandate of the executive council, the Crown failed to identify this problem.

While we identify these and other flaws in terms of process, we have asked ourselves whether they are so fundamental that they amount to actions or omissions inconsistent with the Treaty of Waitangi resulting in prejudice? In our view, the answer at this stage must be 'No'.

We welcome the fact that the Crown has indicated it is open to putting matters to right to the extent that it will review the new information raised during the hearing and decide whether any action is required. It is also very mindful of the need for 'mandate maintenance'. Moreover, it had previously requested a deferral of the Tribunal hearing so it could review the process by which the executive council's mandate was achieved itself.

We believe that the Crown is now in a much better position to undertake that review because of both our hearing and our report. If it now acts along the lines that we suggest, we consider that it ultimately will not have been in breach of the Treaty.

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 executive 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 suggest that a hui of kaihautu members be called for the purposes of this 'reconfirmation'. That seems the most sensible way of moving forward. The Crown and the executive council should, after consulting with the Te Arawa taumata, take joint responsibility for planning the hui.

We believe that this hui should be properly notified, with no fewer 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 Te Arawa taumata and the Te

Pukenga kaumatua. We also believe that there should be independent observers present to record the outcomes.

We believe that many of the concerns of those representatives of Ngati Rangiwewehi, Ngati Rangiteaorere, Ngati Whaoa, Ngati Tuteniu, and Ngati Tamakari who appeared before us will be dealt with by this process.

We also consider that the hui should not take place until Ngati Rangitahi have held one more hui at which they, finally and in the fairest of circumstances, either elect kaihautu representatives or choose to stand apart.

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.

With respect to Waitaha, we suggest that the Crown should perhaps have anticipated that Waitaha would choose to stand apart from the Te Arawa negotiations and have come up with a contingency plan accordingly. Depending on the decision of the Tauranga 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 the Office of Treaty Settlements' current level of resourcing.

If it has not already not done so, the Crown should now require the executive council's deed of mandate to be amended to expressly exclude the claims of Waitaha and Ngati Makino.

We give 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. 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. How can that be good for the honour of the Crown or for the enduring settlement of Te Arawa claims?

Finally, we provide some suggested guidelines of best practice, which, depending on the circumstances of particular claimant communities, could be utilised when the Crown and Maori are contemplating how to develop a Treaty-compliant process for recognising mandates to negotiate settlements.



Na Judge Caren Wickliffe
Presiding Officer

ABBREVIATIONS

app	appendix
ATL	Alexander Turnbull Library
c	circa
CA	Court of Appeal
ch	chapter
CFRT	Crown Forestry Rental Trust
CNI	central North Island
CNIISP	central North Island iwi settlement plan
comp	compiler
DNZB	<i>The Dictionary of New Zealand Biography</i> (5 vols, Wellington: Department of Internal Affairs, 1990–2000)
doc	document
DOSLI	Department of Survey and Land Information
ed	edition, editor
FOMA	Federation of Maori Authorities
ha	hectare
IA	Internal Affairs file
ltd	limited
MICOTOWN	Minister in Charge of Treaty of Waitangi Negotiations
MS	manuscript
n	note
NZLR	<i>New Zealand Law Reports</i>
NZMC	New Zealand Maori Council
p, pp	page, pages
para	paragraph
PC	Privy Council
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
VIP	volcanic interior plateau
vol	volume

‘Wai’ is a prefix used with Waitangi Tribunal claim numbers

Unless otherwise stated, footnote references to claims, papers, transcripts, and documents are to the record of inquiry, which is reproduced in appendix 1.

CHAPTER 1

THE BACKGROUND TO THE URGENT INQUIRY

1.1 INTRODUCTION

At the end of March 2004, the Minister in Charge of Treaty Negotiations and the Minister of Maori Affairs agreed to recognise a deed of mandate submitted by the executive council of Nga Kaihautu o Te Arawa (the executive council). That deed was filed by the executive council for the purpose of entering into negotiations with the Crown for the settlement of all Te Arawa historical claims. The Crown has indicated that it soon expects to sign terms of negotiation with the executive council.

This report deals with urgent claims lodged in response to the Crown's recognition of the executive council's mandate to negotiate such a settlement on behalf of Te Arawa iwi and hapu.

The claims were brought by: Pihopa Kingi, Pirihiira Fenwick and Malcolm Short, for the Te Arawa taumata; David Whata-Wickliffe, of Ngati Tamakari; Te Ariki Morehu, of Ngati Makino; Stephen Hohepa and Te Kapua Watene, of Ngati Tuteniu; Isobella Hohipera Fox, of Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi; David Potter and Andre Paterson, of Ngati Rangitihi; and Tame McCausland, of Waitaha.

We will discuss the claims further in chapter 2. In the present chapter, we describe the events that led to their filing. We do so in some detail to lay a firm foundation and to provide a point of reference for the ensuing summaries of the cases for and against the Crown and our decision in this matter. However, some material is repeated in subsequent chapters for the sake of adequate context at those points.

1.2 EVENTS LEADING TO THE URGENT INQUIRY

1.2.1 Early background

During the State sector reforms of the mid to late 1980s, the Government decided to transfer its forestry assets into State-owned enterprises. The assets included the Crown forests, the land under the forests, and the cutting rights to the trees. Some of those assets were the subject of claims under the Treaty of Waitangi Act 1975. This led the New Zealand Maori Council (NZMC) and the Federation of Maori Authorities (FOMA) to institute legal proceedings in an

attempt to protect any Maori interests in the assets pending settlement of those Treaty claims.¹ Concern was expressed that the transfer of the assets into State-owned enterprises would prejudice Maori claims to them.

On 20 July 1989, the Crown, on the one hand, and NZMC and FOMA, on the other, signed a written agreement (the ‘compromise agreement’).² Under that agreement, the Crown was able to sell the existing tree crop and other forestry assets, but the land under the trees could be alienated only by way of lease. However, the period of that lease was to be sufficiently long for the lessee’s investment to be commercially viable and the consideration was to include an annual rental for the land. The parties also agreed that they would jointly use their ‘best endeavours’ to enable the Waitangi Tribunal to identify and process all claims relating to forestry land and to make recommendations within the shortest reasonable period. A further clause stated that:

The provisions of this agreement are to be reflected and embodied where appropriate in draft legislation and in any event in a trust deed and consent order, the terms of each of which are to be agreed by the parties, in accordance with this agreement.

Legislation for this purpose was enacted as the Crown Forest Assets Act 1989, which provided for the establishment, by trust deed, of a forestry rental trust.³

1.2.2 The 1990s

On 10 April 1990, a trust deed was executed by NZMC, FOMA, and Ministers. The deed recited the compromise agreement and section 34 of the Crown Forest Assets Act, and established the Crown Forestry Rental Trust (CFRT). The purpose of the trust was to:

- (a) receive the Rental Proceeds from Licences; and
- (b) make the interest, earned from investment of those Rental Proceeds, available to assist Maori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve, or could involve, Licensed Land.

In 1996, the Crown was seeking to sell the State-owned Forestry Corporation of New Zealand, which owned and harvested the central North Island (CNI) forests. A consortium comprising Te Arawa and Mataatua (Te Ama) interests, representing many Maori who claimed interests in the forestry assets, sought to be involved in the sales process. Various other Maori interests, including Te Runanga o Te Ikawhenua Incorporation, also participated, although standing apart from Te Ama.⁴ In this context, the possible use of forestry assets in any future

1. See *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142

2. *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157, 163 (PC)

3. Crown Forest Assets Act 1989, s34

4. Wai 791 ROI, paper 2.47, p2

Treaty claims settlements became a subject of interest and appears to have generated discussion between Maori interests and the Minister of Finance. In the course of these discussions, the time being taken to reach such settlements was brought up. On 5 September 1996, the Minister of Finance gave written confirmation to the chairperson of NZMC of the Crown's continuing obligations arising out of the 1989 agreement:

The Government is fully committed to using its best endeavours, jointly with Maori, to enable the Waitangi Tribunal to identify and process all claims relating to Forestry lands and to make recommendations within the shortest reasonable period.⁵

And further:

As you know, the Crown is committed to meeting its obligations under or arising out of the 1989 agreement and the Crown Forest Assets Act 1989.⁶

Against this background, it appears that the CFRT and certain CNI Maori began to strategise about how the settlement of claims could be expedited.⁷

1.2.3 The establishment of the VIP project

The volcanic interior plateau (VIP) project was set up in 1999 under the leadership of a small group of prominent people from CNI iwi; namely, Bishop Manuhua Bennett, Tumu Te Heuheu, and Rangiuiira Briggs. It was the stated desire of the project organisers to 'assist claimants within the CNI area to achieve a timely and efficient settlement of their claims'.⁸ As part of that project, the leaders (or taumata⁹) filed a claim with the Waitangi Tribunal which contained what the Tribunal's deputy chairperson described as 'an extensive articulation of the various land alienation themes present in the [CNI] region'.¹⁰ On 8 September 1999, the Tribunal issued a direction registering the claim as Wai 791.

However, at the same time as the claim was lodged, a memorandum was filed by claimant counsel indicating an intention to seek urgency for the claim and proposing a process that varied from the Tribunal's usual procedure at that time. The proposal had already been mooted in earlier correspondence to the Tribunal¹¹ and involved, instead of lengthy (or even any) hearings, a programme of judicial conferences, at four-monthly intervals, at which

5. Cited in Wai 791 ROI, paper 2.47, p3

6. Cited in Wai 791 ROI, paper 2.47, p3

7. Document A11(a), pp141–143

8. Ibid, p141; *Treaty Claims within the Volcanic Interior Plateau: What You Need to Know – VIP Project Information*, brochure, [2001]

9. Other than this instance, wherever the word 'taumata' is used alone in this report, it should be taken to mean the Te Arawa taumata. In cases where there might be confusion, we have used the qualifiers 'VIP' and 'Te Arawa' (or 'northern district'), to distinguish between the two bodies.

10. Wai 791 ROI, paper 2.47, p3, para 1.3

11. Wai 791 ROI, paper 2.5

1.2.4

evidence and submissions would be progressively exchanged and responded to by claimants and the Crown.¹² After two judicial conferences to explore the proposal, the Tribunal's deputy chairperson called a third judicial conference in Rotorua, in November 2000, to discuss the question of priority, rather than urgency, for the Wai 791 claim. In September 2001, he and Joanne Morris issued a direction according higher priority in the Tribunal's forward programme to all CNI claims, including Wai 791.¹³

1.2.4 The impetus towards direct negotiation

(1) *Events in 2000*

In the meantime, in early 2000, there had been discussion between the Wai 791 claimants and Crown officials about the possibility of the claims being researched and progressed without any further involvement by the Tribunal. In March, representatives of the VIP project put such a proposal to the Minister in Charge of Treaty of Waitangi Negotiations (MICOTOWN). She replied by letter on 15 May 2000 to the effect that the Tribunal had now agreed to hear the claimants' application for urgency and that she considered that a response to the proposals 'would be better made within the Crown's submissions at the Tribunal conference'.¹⁴

(2) *Events in 2001*

On 25 June 2001, a letter was apparently sent to Ministers of the Crown by Richard Te Heuheu as convenor of a 'leadership group working party'. It is not clear, from the documents submitted in evidence, exactly who was involved in this leadership group, but it would appear that it included representatives of Ngati Awa and Tuwharetoa ki Kawerau and of other iwi with interests in the CNI and Bay of Plenty forests.¹⁵ The letter apparently proposed a 'concept' involving 'the transfer of Central North Island forests, along with the accumulated rentals, to the Leadership Group, which would hold them on trust pending a determination by the Tribunal of appropriate allocation'.¹⁶ The letter did not receive an immediate response.¹⁷

Meanwhile, on a separate track, NZMC and FOMA were preparing to launch High Court proceedings against the Crown. Those proceedings were finally initiated in September, with NZMC and FOMA alleging that the Crown lacked good faith and had breached the Crown–Maori agreement of July 1989 in failing to use its best endeavours, jointly with Maori, to resolve claims affecting Crown forests.¹⁸ In response to the litigation, MICOTOWN, together with the director of the Office of Treaty Settlements (OTS), met with the parties and 'conveyed

12. Wai 791 ROI, paper 2.47, p 4

13. Wai 791 ROI, paper 2.47

14. Ibid, p 4; claim 1.1.1, paras 14–17; doc A11(a), pp 121–123 129–130

15. Document A114, para 28; doc A114(a), p 11

16. Document A114, para 28

17. Document A114(a), p 11

18. Claim 1.1.1, para 22; doc A114, para 26.3

the Crown's policy preference that it wanted to negotiate comprehensive settlements [rather than just settlements of forest claims] with large natural groupings'. They also stressed the need for mandated representation for each iwi.¹⁹

Sometime after that, in a letter apparently sent in late October or early November, Mr Te Heuheu wrote again to Ministers, following up on the earlier letter of 25 June.²⁰ In this second letter, the leadership group appears to have also expressed concern about not being consulted in relation to the NZMC and FOMA action, and about 'rumours of a consultative group'. A joint reply from the Deputy Prime Minister and the Ministers of Finance, Maori Affairs, and Treaty of Waitangi Negotiations to Mr Te Heuheu noted that 'Aspects of the concept proposal . . . cause some difficulty from the Crown's perspective', and went on:

In view of the above, we wonder if the existing direct negotiation process might provide an acceptable mechanism for the early return of the Crown forest lands. This process provides for claimants to join together in large natural groups, and seek a mandate for negotiating the settlement of all their claims.

The Ministers ended by stating:

We should be happy to meet with you, if you wish, to discuss any matter in this letter. We have also asked officials from the Office of Treaty Settlements to be available to meet with you to give you a briefing on the Treaty settlement process, and what options might be available within that process to facilitate achievement of the Leadership group's objectives.²¹

(3) *Events in 2002*

In 2002, a number of informal discussions were held between MICOTOWN, Tumu Te Heuheu, and others to investigate the possibility of progressing CNI claims through direct negotiations. Rawiri Te Whare, a key witness in our present inquiry, was apparently asked by Mr Te Heuheu to attend the discussions,²² presumably in his role as kaiwhakahaere kaupapa or project manager of the VIP project.²³ According to Mr Te Whare, the meetings were small and did not involve Government officials. He said they covered 'such things as how a collective approach might occur, which iwi would be involved and what type of process would be engaged [in] to bring a properly representative delegation together of these iwi to engage in discussion, still with the central focus on the 7 CNI forests'.²⁴

19. Document A114, para 27

20. The letter itself has not been presented in evidence and the Ministers' response (doc A114(a), pp11–13) is undated. However, a rather indistinct 'Received' stamp fixes the Ministers' response at (probably early) November 2001, and the letter refers to a 'recent' letter from the leadership group.

21. Document A114, para 28; doc A114(a), pp11–13

22. Document A109, para 19

23. In the *Information Report, 2001–2002* of the VIP project, Mr Te Whare's role was given as kawhakahaere kaupapa, with particular responsibility for the central, or Kaingaroa, region: doc A11(a), pp372, 375.

24. Document A114, para 31; doc A109, paras 19–21; paper 3.3.7, para 5.8; doc A11(a), p339; <http://www.beehive.govt.nz/PrintDocument.cfm?DocumentID=15709>

As a result of these meetings, Mr Te Whare was asked by Mr Te Heuheu to ‘begin the process of communicating with the five CNI Iwi; namely: Tuwharetoa, Te Arawa, Tuhoe, Ngati Manawa and Ngati Whare’, using the personnel resources of the VIP management team of which Mr Te Whare was himself a member. According to Mr Te Whare, this culminated in two hui in November – one in Rotorua and one in Taupo – which ‘assessed the discussions to date and planned to respond to an invitation from MICOTOWN for a widely representative delegation to attend a special meeting at Parliament’.²⁵

The ‘special meeting’ was held on 6 December 2002 at Parliament and some 40 to 50 CNI Maori attended. After welcoming ‘representatives of two great waka – Te Arawa and Mataatua’, the Minister went on to indicate a desire to ‘enter into a constructive dialogue and to identify what common ground there is between us on how to progress the Central North Island claims’. She then identified four particular issues that would need addressing before any move towards formal negotiation could take place. Those issues were: which claimant groups would be involved; which claims would be covered; how the claimant community – iwi and hapu – would be represented and who would represent them; and what role, if any, the Waitangi Tribunal would play. The Minister then announced that David Caygill had been engaged to facilitate discussions on behalf of the Crown. She said that she envisaged ‘dialogue proper getting underway in the New Year’. Earlier in the speech, she had already stressed that it was ‘very important that the dialogue is an inclusive one, open to any groups with claims in the area who wish to participate or observe’.²⁶

Following the meeting at Parliament, the Crown and CNI Maori each set up a working group to progress matters jointly, with the Crown working group being chaired by Mr Caygill and its Maori counterpart by Tumu Te Heuheu.²⁷

1.2.5 The pre-mandating phase

During early 2003, Tumu Te Heuheu, apparently in his capacity as chair of the CNI Maori working group, called for a series of hui.²⁸ With assistance from CFRT, around 23 hui were organised by the VIP project, which sought to ‘advise others of possible discussion with the Crown about settling claims to 7 Central North Island forestry assets’. Some 16 of the hui were on Te Arawa marae, including one in the coastal Bay of Plenty area. These Te Arawa hui culminated with one for ‘Te Arawa Iwi’ as a whole, on 5 March 2003 at Tamatekapua. The remaining seven hui were for Ngati Tuwharetoa. Rawiri Te Whare was one of the facilitators, and the

25. Document A109, paras 22–24

26. K Blanchard, ‘Treaty Negotiations a Step Closer’, *Daily Post*, 17 December 2002; claim 1.1.1, paras 34–35, 37; doc A11(a), p339; <http://www.beehive.govt.nz/PrintDocument.cfm?DocumentID=15709>

27. Document A114, paras 35–36; doc A109, para 26

28. Document A109(a), p 45; doc A109, paras 26–29

items set down for discussion at the hui mirrored the issues identified in the Minister's speech of 6 December 2002.²⁹

From the minutes that have been made available to the Tribunal, the average attendance at the Te Arawa meetings (not including the final meeting at Tamatekapua) appears to have been around 25 to 30 people. Presentations were variously given by Rawiri Te Whare and Donna Hall (VIP project solicitor and strategic adviser), and at each hui there appears to have been time for questions and discussion. At one hui, in response to a question about whether any resolutions were to be put, Mr Te Whare responded in the affirmative and explained:

This is what the resolutions are premised on – before the Crown can engage with any group you have to have a claim otherwise they have no basis upon which to discuss with you[.] [F]irstly the process asks if the claimants will support the process of participating in the discussions, secondly we seek the support of the hapu to participate in the discussions and thirdly we have to elect a representative or representatives.³⁰

From the minutes of the hui at Tunohopu Marae, Ohinemutu, it is clear that Mr Te Whare had come with three recommended resolutions already prepared, presumably along the lines indicated above.³¹ Certainly, the recorded resolutions from a number of hui (including all the earlier ones) follow the pattern he had outlined:

- ▶ the first resolution sought the specific support of those with registered 'Wai' claims;
- ▶ the second sought support from the whole meeting as a hui-a-hapu/iwi;
- ▶ finally, after an election process, a third resolution nominated specific people to be representatives for the hapu or iwi concerned 'to participate in the Central North Island Iwi formal discussions with the Crown, at every stage and every level, in respect of settlement of the seven Central North Island Forests Lands and Assets'.³²

Minutes from two hui in the series record slightly different resolutions as having been passed, but still relating to whether or not to enter into formal discussions with the Crown.³³ At another hui (at Apumoana Marae), those present felt that attendance was not sufficient for any resolutions to be passed.³⁴ At the latter hui, and at three others, those present indicated a wish to take the issues back to their people for further discussion before making any decisions.³⁵

29. Document A11(a), pp345–347, 348, 376–377, 380; *Central North Island Treaty Discussions Continue*, Government press release, 10 April 2003 (<http://www.scoop.co.nz/mason/stories/PA0304/soo225.htm>); oral evidence of Rawiri Te Whare; doc A109(a), pp18–45

30. Document A109(a), p43

31. Ibid, p46

32. Ibid, pp2–3, 5–6, 8–10, 14–15, 17–18, 22–27, 48–50

33. Ibid, pp29–33, 37–39

34. Ibid, pp19–20

35. Ibid, pp34–36, 45–46, 51–52

At one of the series of hui, in response to a question about whether consensus was being sought before going back to the Crown, or simply a majority, Mr Te Whare had replied by saying that a 75 per cent majority was sought.³⁶ On the basis of the various minutes, it would appear that such a majority was attained in all but the four cases where those present wanted time for further discussion.

As a result of all the hui, the following were elected by their iwi/hapu and would later come to be referred to as 'the interim representatives': Rawiri Te Whare (Ngati Tahu, Ngati Whaoa); Te Poroa Malcolm, Ruka; Hughes, Toby Curtis (Ngati Tarawhai, Ngati Rongomai); Joe Edward, Wallace; Haumaha, Materoa Peni (Ngati Tura, Ngati Te Ngakau); Pihopa Kingi (Ngati Pukaki, Ngati Tuara, Ngati Waoku); Pirihira Fenwick (Ngati Rangiteaorere); Te Rereamanu Wihapi, Takatu Ahomiro (Ngati Moko, Ngati Kuri, Ngati Tuheke, Ngati Marukukere); Sam Hahunga, Te Ururoa Flavell, Mita Mohi (Ngati Rangiwewehi); Neville Nepia, Awhimate Awhimate, Te Ariki Morehu (Ngati Makino);³⁷ Eruini George (Ngati Tuara, Ngati Kea); Tamati John Waaka, Jarmie Piripi, Bonita Morehu (Tuhourangi).³⁸

This Te Arawa series of hui culminated in a hui-a-iwi at Tamatekapua on 5 March 2003. Two sets of minutes from this meeting have been provided to the Tribunal. They do not record attendance numbers but instead make reference to a separate attendance schedule or list. Both sets of minutes make it clear that the meeting was chaired by Bishop Vercoe and that there were a number of items on the agenda including an update on the 'CNI Proposal'. With the agreement of those present, the latter item was advanced to earlier on the programme than had originally been intended. Thus, after a presentation from Ms Hall on the VIP project and its progress, the meeting moved straight to a report by Rawiri Te Whare on the series of hui that had been held over the preceding 2½ weeks. One of the sets of minutes notes that the hui agreed to 'receive & accept' his report. Following the report by Mr Te Whare, those present voted on two motions:

- 'That this hui of all the hapu of Te Arawa move forward and support entering into formal discussions with the Crown for the early return of the Central North Island Forests Lands and Assets'; and
- 'That this hui of all the hapu of Te Arawa support and uphold the present VIP Taumata and proposed legal entity, that is, VIP Taumata Incorporated Society.'

Both set of minutes record that these resolutions were carried.³⁹

In her 6 December 2002 speech at Parliament, MICOTOWN had indicated that she hoped to be in a position to report back to Cabinet by March 2003 'with a strategy for moving forward,

36. Document A109(a), p 46

37. In addition to the election of these three representatives for Ngati Makino, the meeting voted that 'Ngati Pikiao, Ngati Makino and Ngati Tamakiri support the Bishop Whakahuihui Vercoe's role as leader for them': doc A109(a), pp 33, 39.

38. The hui was for Tuhourangi and Ngati Wahiao, but the resolution, as recorded, mentions only Tuhourangi: doc A109(a), p 50.

39. Document A11(a), pp 381–382; doc A109(a), pp 54–55

if that is what the claimants want and we can agree how to do it'.⁴⁰ The generally positive response of the Te Arawa hui held between 16 February and 5 March 2003 enabled the Minister to report to Cabinet later in March 'on the good progress and the desire to continue'. Cabinet both gave its support to dialogue being continued and reinforced the Government's commitment to settling claims in the CNI.⁴¹ It was therefore arranged for the Minister to meet again with CNI Maori on 23 April 2003.

1.2.6 The meeting of 23 April 2003

The meeting of 23 April 2003 was held in Taupo and hosted by Tumu Te Heuheu.⁴² As with the 6 December 2002 meeting at Parliament, some 40 to 50 CNI Maori appear to have attended.⁴³ During the hui, MICOTOWN acknowledged the 'enormous amount of work' done to date and said that it was now 'time to start the negotiation process'. However, she made it clear that the Crown was not willing to negotiate each claim separately. She also made it clear that it was the Crown's wish that any settlement should be comprehensive and not limited to forest-related claims, although she acknowledged that forest land would 'certainly be a central element of any settlement'. On the subject of mandating, she said:

it will be up to iwi members to decide who will carry the process forward into negotiations.

For those of you who have gauged the aspirations of your iwi – and who want to move to the negotiating table – the time is near when we can consider your mandating process. This is the pivotal point, where your people must decide who will carry the process forward for the iwi into negotiations.

There are many different pathways to a mandate and it is for you to determine the appropriate path. For the government's part, we must be certain the negotiators carry the widespread support of their iwi.⁴⁴

The Minister then concluded by outlining what she saw as the next steps, saying:

I am therefore pleased to advise I believe we are ready to move to a new phase of formal pre negotiations. If you are also willing, the government is committed to entering this phase immediately.

Pre-negotiations is the phase where we would explore all of the issues before us so you can make an informed decision as to whether we can proceed to negotiations proper. The

40. Document A11(a), p339; <http://www.beehive.govt.nz/PrintDocument.cfm?DocumentID=1570921>

41. *Central North Island Treaty Discussions Continue*, Government press release, 10 April 2003 (<http://www.scoop.co.nz/mason/stories/PA0304/soo225.htm>); doc A11(a), p384

42. Document A11(a), p384

43. Document A114, exhibit D, pp15–21

44. Margaret Wilson, *Speech Notes: Meeting with Central North Island Claimants*, 23 April 2003 (<http://www.beehive.govt.nz/PrintDocument.cfm?DocumentID=16565>), p2

pre-negotiation phase will include the detailed groundwork needed before iwi members mandate their negotiators.

I believe we could move through pre-negotiations fairly rapidly if we build on the momentum generated to date. By early June, I hope each Central North Island iwi will be in a position to give a clear indication as to whether they will be progressing to formal negotiations.⁴⁵

According to an OTS file note on the meeting, various 'CNI iwi representatives' also made comments during the course of the day. One of them was Rawiri Te Whare, who commented that discussion to date had been around the seven CNI forests but that CNI claims also included non-forest claims. He apparently emphasised the need for unity but noted that 'large iwi groups must not subsume the interests of small iwi groups'. The same OTS file note referred to a number of additional comments made by the Minister after her speech, including mention of 'a CNI collective approach' as being the best means of avoiding court action over overlapping claims. She again stressed the need for a collective approach in relation to comprehensive settlements, but commented that if some wanted to stand outside they would not lose anything except time. As regards those with claims before the Tribunal, the file note records that she acknowledged the importance accorded to the Tribunal process by some claimants and said that, rather than having to choose between the Tribunal or direct negotiations, she wanted to see if it was possible for both processes to move forward together.⁴⁶

1.2.7 Developing a mandate plan

On 8 May 2003, Bishop Vercoe, as chair of the VIP project's northern taumata, held a meeting at the VIP Peace Street office in Rotorua for the 'Northern Taumata and Constitution Members'. The second half of the meeting was also open to the Te Arawa hapu representatives and the kaupapa was to discuss 'CNI pre-negotiations with the Crown'.⁴⁷

Meanwhile, the VIP project staff were drawing up a 'central North Island iwi settlement plan' (CNIISP).⁴⁸ That plan, as submitted in evidence to the Tribunal, included a bullet point presentation called 'Te Ara Tika' outlining overall objectives; CFRT funding criteria; 'Volcanic Interior Plateau Contract Assumptions'; contract management; 'VIP Deliverables'; structure diagrams for the VIP project as a whole and for each regional team; and a 'Milestone Pathway' to settlement showing projected key activities for each quarter from April–June 2003 to January–March 2005.⁴⁹ A further document, drawn up by Rawiri Te Whare and dated 19 May 2003, stated that 'The single entity that will facilitate and support the CNIISP is the Volcanic

45. Wilson, pp 2–3

46. Document A114, exhibit E, pp 22–24

47. Document A11(a), p 388

48. Document A109, para 39

49. Document A11(a), pp 389–399

Interior Plateau Project'. However, it went on to state that VIP would remain in existence only 'for the period needed to facilitate and support the process of formal negotiations' until ratification of a settlement offer. It then set out three columns showing parallel strands of activity being carried out by VIP, 'CFRT/Crown', and the Waitangi Tribunal for the period up to October 2003. This was followed by a section headed 'Process to Achieve Mandate for Te Arawa', which consisted of a schedule of mandating hui and a page and a half of notes about the organisation and advertising of these hui. Some 23 hui were proposed in all, including nine in various urban centres around New Zealand and one in Sydney. Under 'Recording of Mandating Hui', Mr Te Whare noted: 'These hui will be recorded by two recorders and the minutes will reflect mandating criteria set down by Office Of Treaty Settlement'. With regard to resolutions, it was noted that a set procedure would be followed, although no details were given. Also noted was the intention that 'Brochures/newsletter will be available at these hui and will be an ongoing regular activity'.⁵⁰

On 20 May, as indicated in a subsequent OTS report to MICOTOWN, OTS officials met with 'a group of representatives of the CNI iwi' to begin pre-negotiation discussions. The report identified a list of six issues to be covered during these discussions, including the need for comprehensive settlements, the relationship between the negotiations process and the Tribunal process, and 'the need to engage with officials to develop sound mandating strategies'. The report also noted:

Officials explained that while the Crown is keen to engage with a collective group of CNI iwi, each iwi will need to develop and undertake a mandating process to select mandated negotiators for that iwi. Following the mandating process, it will be for the mandated negotiators for each iwi to decide the extent to which they would like to negotiate alongside other CNI iwi in a collective.⁵¹

A separate file note on the same meeting recorded that Mr Te Whare had indicated to OTS during the meeting that he was working on a '2½ month mandating process, starting at the end of June'.⁵²

Two days later, on 22 May 2003, Rawiri Te Whare convened a hui at the VIP office in Peace Street, Rotorua. He presented an outline of the proposed mandating process for CNI (the Te Ara Tika plan) to the Te Arawa interim representatives that had been elected during the February–March hui.⁵³ There was evidently some opposition to the plan, but the degree of that opposition has been a matter of contention between the parties in the present inquiry.⁵⁴ At the meeting, Mr Te Whare apparently also outlined 'an itinerary of mandating hui'.⁵⁵

50. Ibid, pp 400–404

51. Document A114, exhibit F, pp 25–26

52. Document A11(a), p 405

53. Document A6, app 2; doc A109, para 43; doc A114, exhibit L, p 48; paper 3.1.1, app 21, 22 May entry

54. Claim 1.1.1, para 51; doc A109, para 43

55. Document A11(a), p 415

On 27 May 2003, OTS staff held another meeting, this time with 15 CNI 'interim iwi representatives'. The attendance sheet was headed 'CNI Dialogue: First Pre-negotiation Meeting', and listed among those present were Rawiri Te Whare, Te Ururoa Flavell, Te Ariki Morehu, Annette Sykes, and Donna Hall. Of these, we note that Mr Te Whare, Mr Flavell, and Mr Morehu had been elected at the hui in February and March to represent their respective iwi or hapu. On the attendance sheet for the meeting, they indicated that they were representing Te Arawa VIP management, Te Arawa taumata, and Ngati Makino/Nga Rauru o Nga Potiki, respectively. Other representatives present gave similarly generic descriptions ('CNI Tuwharetoa', 'Ngati Haka/Patuheuheu/Tuhoe', and so on).⁵⁶

At the meeting, officials stressed that the Crown wanted to settle all CNI claims but recognised that the forests would be central to that. Andrew Hampton, the director of OTS (and chief witness for the Crown in the present inquiry), indicated that MICOTOWN wanted to move to the mandate strategy stage by June. He emphasised the importance of a robust mandating process to ensure that the Crown would be dealing with people who are 'fully accountable to, and have the full support of, the claimant community which hold[s] the grievance', and he noted that it was for claimant groups to run their own mandating process. However, he said that the Crown would take a strong interest in the durability and thoroughness of the mandating procedure and that there would be a review process. He noted that the Crown did not expect there to be 100 per cent support for the mandated group but that everyone should at least have the opportunity to be involved.⁵⁷

The following day, 28 May 2003, Ross Philipson, the CNI project leader at OTS, wrote to Ms Hall and mentioned his awareness of a mandate strategy that had been 'scoped out' by Rawiri Te Whare. He indicated his expectation that Mr Te Whare would 'engage with Tony Sole and the Claims Development Team in the near future on these matters'. The same letter also queried a reference, apparently made by Ms Hall, to Bishop Vercoe being the 'mandated voice' of Te Arawa as a result of the Tamatekapua hui held in 'late March'. Mr Philipson did not (as he might have done) query the date, and he acknowledged the mana of Bishop Vercoe, but he said that, as he recalled, 'the agenda for that round of Te Arawa hui did not indicate that a mandate was to be decided'.⁵⁸

On 29 May 2003, Mr Philipson sent a letter to all 'Interim representatives of CNI claimant groups' noting that, at the meeting with OTS two days earlier, claimant representatives had 'expressed a strong desire for the Crown to be more specific about its expectations for the mandate process, and in particular, the standards for that process'. He indicated that 'each claimant group' would need to develop its own mandating strategy 'along the lines of the guidelines set out in *Healing the Past, Building the Future*'. He then suggested that each group should discuss their draft mandate strategy with the OTS claims development team, 'to ensure

56. Document A114, exhibit G, pp 27–36, exhibit H, pp 37–38

57. Ibid, exhibit G, pp 27–36

58. Document A11(a), p 410

that the outcome of the mandating process will be robust and durable and will enable negotiations to begin', and he indicated that the team would be available to discuss any issues that arose during the mandating process. He then stated that the manager of the team, Tony Sole, was available to 'talk with interim representatives about the development of a mandate strategy for their claimant group' and gave Mr Sole's contact number. Mr Philipson ended the letter by noting that there would be another meeting on 10 June 2003, and he reiterated the invitation to claimant groups to discuss their mandate strategy with Mr Sole in the intervening period.⁵⁹

On 3 June 2003, an OTS report to MICOTOWN noted that 'Mr Te Whare has indicated that he is prepared to engage with officials to scope out a comprehensive mandating strategy for Te Arawa, but Ms Hall seems to consider that some key representatives have already been elected'. The report went on to comment: 'Te Arawa has numerous claims and factions within the confederation and officials consider that any mandating will need to be carefully planned, especially ensuring that all Wai claimants and representative hapu/iwi organisations are aware of the process.'⁶⁰

In a memorandum apparently sent out the next day (4 June 2003) through the VIP project office in Rotorua, Rawiri Te Whare advised the northern region taumata, the northern region management team, and the 'Te Arawa Delegates' that a 'working committee' was consulting with OTS officials on 'the framework for mandate'. Mr Te Whare indicated that he wished to meet with the recipients of the memorandum to 'determine the appropriateness' of the itinerary of mandating hui that he had presented at the Peace Street meeting of 22 May. He did not suggest a date for the proposed discussion but stressed that advertising of the hui would need to occur very soon. He went on to say that the hui should aim to elect iwi/hapu representatives who 'might number 20–30 over all' and to secure agreement that 'these elected representatives elect the proposed 5–7 or 6–8 negotiators for Te Arawa'. According to the memorandum, 'a copy of the CNIISP' was enclosed for the benefit of anyone who might not yet have seen it.⁶¹

(1) *The 9 June draft mandate plan*

By 9 June 2003, Rawiri Te Whare, as 'CEO VIP Project', had completed a draft document entitled *Central North Island Iwi Settlement Plan: Te Arawa Mandating Programme*.⁶² A subsequent letter from Tony Sole to Mr Te Whare indicates that it had been drawn up following discussion between Mr Sole and Mr Te Whare during the week of 2 to 6 June.⁶³ Like the earlier document of 19 May, it included a schedule of mandating hui, although the number and location of those hui varied slightly from the earlier version. The introduction to the

59. Ibid, pp 413–414

60. Document A114, exhibit J, p 41

61. Document A11(a), pp 415–416

62. Ibid, pp 417–424

63. Ibid, pp 428–430

1.2.7(1)

document stated: 'For the purpose of planning an itinerary of mandating hui throughout the rohe of Te Arawa, the following groups are proposed as the main Iwi groups of Te Arawa as they exist today', and there followed a list of 14 kinship groups. The document then went on to list six aims for the proposed series of hui:

- ▶ agreement to enter into direct negotiations with the Crown;
- ▶ agreement to seek comprehensive settlement through direct negotiations with the 7 CNI Forest lands being a central element;
- ▶ the election of 2 (for smaller iwi) and 3–4 (for larger iwi) Iwi representatives who will be responsible for monitoring and reporting on the negotiation process back to their respective iwi and hapu of Te Arawa and also to Te Pukenga Kaumatua O Te Arawa; (could end up with 28–36 elected iwi representatives)
- ▶ agreement that the elected Iwi representatives, however many, appoint the official Te Arawa Negotiators from within themselves; (5–8)
- ▶ agreement that the Iwi representatives may have the discretion for specialised purposes to coopt from time to time and on a when and as required basis, specialised expertise to assist with negotiations;
- ▶ agreement that the official Te Arawa negotiators must report and be accountable back to the Iwi representatives.⁶⁴

Following these stated aims, the document gave a skeletal indication of the responsibilities and accountabilities that would accrue to the elected representatives.

On 10 June 2003, in Taupo, a further meeting was held between OTS officials and 'CNI iwi representatives', and on this occasion at least nine people from Te Arawa attended. An OTS file note records that, during the meeting, Rawiri Te Whare referred to the recent OTS letter to interim iwi representatives and said that claimants had been discussing the points raised and wished to focus particularly on mandate strategy issues. Tony Sole, for OTS, said that he had met with Mr Te Whare about a mandate strategy for Te Arawa, and he went on to say that he was working with each group to design 'a process for each iwi group that fits that particular group, and which has cognizance of the tikanga of the group'. However, still according to the file note, he stressed that nothing formal had been discussed so far. Mr Te Whare referred to the presentation that he had given on 22 May and said that he had done further work on the mandate plan since then. Anaru Rangiheuea then indicated that Tuhourangi would like to look at the plan and apparently commented that there had been hui but little opportunity to talk. The director of OTS, Andrew Hampton, observed:

everyone here has a mandate of some sort. We are not saying that you should put that aside. All we are saying is, before confirming who is in negotiations, please talk to us. Otherwise,

64. Document A11(a), pp 418–419

you will be challenged on your mandate by others, and the Crown would be able to say here is how we tried to manage it.⁶⁵

The following day, Rawiri Te Whare wrote to the 'vIP Northern Region Taumata and Alternates, vIP Northern Region Management, Interim Te Arawa Representatives, Te Arawa Trust Board Representatives, Te Kotahitanga O Te Arawa Representatives, [and] Pukenga Kaumatua O Te Arawa' advising them that a hui was being called for 17 June 2003 at Te Ao Marama, Ohinemutu, to consider the draft mandating programme. The letter was headed 'Central North Island Iwi Settlement Plan', with a sub-heading to indicate that it was 'facilitated by vIP Project'. Mr Te Whare noted that the draft programme had been 'worked through with officials of OTS in terms of their criteria' and indicated to the recipients of the letter that it was now time 'to work it through amongst ourselves'. He noted that OTS officials had also been invited to attend the meeting.⁶⁶

Also on 11 June 2003, Mr Te Whare faxed his draft mandating plan to Tony Sole at OTS and Mr Sole responded on 13 June with detailed comments. As key issues, he noted the 14 kinship groups listed in the plan and acknowledged that it was for Te Arawa iwi and hapu to 'mutually decide' how many iwi/hapu would be identified to participate in any process to choose negotiators for Te Arawa. He said that OTS did not have any expectation, for example, that the list would be the same as that drawn up by Te Ohu Kai Moana for fisheries allocation purposes. As a second key issue, he stated that, in OTS' view, 'the most robust means of mandating a Te Arawa negotiating body is a "flaxroots" or "from the ground up" process'. He then included a rudimentary structure diagram showing a number of iwi/hapu interacting with a 'Te Arawa Taumata (or Forum) of elected iwi/hapu representatives (28–36)' and that body in turn interacting with a group of Te Arawa negotiators. Towards the end of the letter, he stated: 'It will be very important at all of these proposed hui to emphasise that all Wai claims within Te Arawa will be at the table and to assure claimants that their interests will not be subsumed by the negotiators.'⁶⁷ Mr Sole's closing comment, that OTS would be pleased to 'comment on the refined proposal after 17 June', conveys the impression that he expected the plan to be amended before or after consultation with those invited to the forthcoming hui.

The day before the proposed hui at Te Ao Marama, however, the vIP project held a meeting at the Suncourt Motel in Taupo. Present at the meeting were most members of the vIP taumata: Tumu Te Heuheu, Nepia Williams, Rangiuira Briggs, Anaru Te Amo, Pihopa Kingi and Anne Clarke, and also Graham France, one of the two CFRT members. Bishop Vercoe and Pirihiara Fenwick were not present, but Malcolm Short and Te Ururoa Flavell appear to have attended in their stead. Also present were three vIP staff: Rawiri Te Whare, Stephen Asher,

65. Document A114, exhibit L, p 47

66. Document A109(b); doc A11(a), pp 426, 427

67. Document A11(a), pp 428–429

1.2.7(2)

and Dickson Chapman. In addition, Paranapa Otimi, from Ngati Tuwharetoa, attended as an observer.⁶⁸

One of the items on the agenda was a report from Mr Te Whare as CEO of the VIP project.⁶⁹ The report was brief and described progress to date towards direct negotiation across the whole CNI region. Towards the end, it observed that the next step in getting to the starting line for negotiations was for each of the five CNI iwi to achieve mandate, and it then stated: ‘This report uses the proposed Te Arawa mandating programme to outline mandating requirements’.⁷⁰ Accompanying the report was an updated version of the *Central North Island Iwi Settlement Plan: Te Arawa Mandating Programme*. The final page of that document was headed ‘CFRT Funding Criteria’ and outlined what funding might be made available for the mandating programme, and for what period.⁷¹

The minutes record that the report was ‘tabled and discussed’ and note that it ‘set out . . . arrangements being implemented for the mandate programme including the draft Te Arawa Mandate programme’. However, it appears likely that the discussion focused, in particular, on funding for the mandate programme because there is reference, in the minutes, to an item on funding then being moved up the agenda⁷² – presumably in response to the reference to CFRT funding on the last page of the mandating plan. Another document filed in evidence seems likely to relate to this agenda item, being entitled ‘VIP Response to CFRT Funding Proposal’. It includes background information, comments, a list of five recommendations, and an attached budget.⁷³ The second of two resolutions that were then passed was that the CEO’s ‘funding report and budget recommendations’ be ‘received and approved’. The first of the two resolutions passed was that the CEO’s report (to which the draft Te Arawa mandating plan was appended) be ‘received and noted’.⁷⁴

(2) The 16 June draft mandate plan

The mandate plan tabled at the Suncourt Motel meeting on 16 June 2003 bore that same day’s date and, as with the earlier 9 June document, had been prepared by Mr Te Whare as CEO of the VIP project. Also like the earlier document, it opened with a list of 14 kinship groups, put forward as being the main present-day iwi groups of Te Arawa. Again as before, it then went on to list six aims for the proposed series of mandating hui, but this time with some modification in the wording of three of them – apparently in response to suggestions made in Mr Sole’s letter. It was now specified, for example, that one of the aims was to achieve agreement ‘to seek

68. Document A132

69. Ibid

70. Document A133

71. Ibid

72. Document A132, para 7

73. Document A137, exhibit M53

74. Document A132

comprehensive settlement of *all historical claims of Te Arawa* through direct negotiations' (emphasis added). More significantly, perhaps, the third aim was now to seek:

agreement that the elected Iwi representatives, however many, appoint the official Te Arawa Negotiators from within themselves (5–8) *and that these negotiators carry the full mandate to negotiate with the Crown. (Proposed name for the group – Kaiwhakarite O Te Arawa.* [Emphasis added.]

Lastly, the sixth aim now specified the need for the kaiwhakarite to report back to the iwi representatives 'on a regular basis'.⁷⁵

Following the bullet-pointed list of aims, there was the same skeletal indication of elected representatives' responsibilities and accountabilities that had featured in the earlier document. Also unchanged was the section on recording procedures for the hui, and likewise the proposed list of dates and venues. The agenda in the sample advertisement, however, had received some attention, reflecting the modified wording in the six aims listed for the hui, and proposed publication dates had been added. Also added was a structure diagram. Like Mr Sole's diagram, it showed lines of interaction between iwi/hapu and a body of iwi representatives, and between those representatives and a group of Te Arawa negotiators. However, the iwi representatives were now shown as 'Nga Kaihautu O Te Arawa' and the negotiators were called 'Nga Kaiwhakarite O Te Arawa'. Further, the VIP project's taumata and staff had been added on the left of the diagram, with lines of interaction between them and all three of the levels shown in the centre (iwi/hapu; kaihautu; kaiwhakarite). Likewise, on the right, the Pukenga Kaumatua o Te Arawa had been added, with a line of interaction linking it to the kaihautu. Below this diagram, some explanatory text had also been inserted:

The iwi/hapu of Te Arawa elect the iwi representatives and the same are accountable back to the iwi/hapu who are the claimant communities; to Te Pukenga Kaumatua O Te Arawa who determine the tikanga and kawa; to VIP Taumata who through its management facilitates and supports the negotiation process.

The iwi representatives are responsible for:—

- i) electing the official Te Arawa negotiators and determining the process by which this is achieved;
- ii) determining principles and protocols on how they work to support the negotiators;
- iii) determining principles, protocols and disciplines on how they work with each other and conduct their business of monitoring and reporting back to iwi/hapu.
- iv) working to the milestone goals and their corresponding work streams as they are set out in the Central North Island Iwi Settlement Plan.⁷⁶

75. Document A133

76. Ibid, p10

(3) *The 17 June draft mandate plan*

On 17 June 2003, the day after the VIP meeting at the Suncourt Motel, Rawiri Te Whare completed a further revision of his Te Arawa mandate plan. This time, the cover described him as ‘northern region manager’ as well as ‘CEO VIP project’. A perhaps more significant change from the version of the previous day was that the list of ‘main Iwi groups of Te Arawa’ had now been reduced from 14 to 13 by combining Ngati Tarawhai and Ngati Rongomai.⁷⁷

Another noticeable modification since the previous day was in the structure diagram. Whereas the 16 June version had shown the VIP taumata and management interacting with iwi/hapu, kaihautu and kaiwhakarite, the new version now showed VIP taumata and management interaction only with the kaihautu. The text below the structure diagram had also been changed, reordering the content somewhat and creating a rather longer list of ‘principles, policies, protocols and disciplines’ that the kaihautu would need to establish:

The Iwi/hapu of Te Arawa elect the Iwi Representatives – Kaihautu O Te Arawa.

The Kaihautu O Te Arawa [sic] elect the official Te Arawa Negotiators – Kaiwhakarite O Te Arawa and determine the process by which this is achieved.

The Kaiwhakarite O Te Arawa are responsible to report back to the Kaihautu O Te Arawa on a regular basis

The Kaihautu O Te Arawa need to establish principles, policies, protocols and disciplines on how they work to support the Kaiwhakarite O Te Arawa in determining negotiation strategies.

The Kaihautu O Te Arawa need to establish principles, policies, protocols and disciplines on how they work with each other.

The Kaihautu O Te Arawa need to establish principles, policies, protocols and disciplines on how they monitor the negotiation process, make the appropriate recommendations and report back to Iwi/hapu as the claimant communities;

Te Pukenga Kaumatua who are the guardians of tikanga and kawa of Te Arawa, and the VIP Project who is responsible for facilitating, supporting and resourcing the negotiation process.

The Kaihautu O Te Arawa need to establish principles, policies and protocols on how they work with the VIP Project to achieve the CNIISP and its associated milestones and workstreams.⁷⁸

Given the date of this further revision to the mandate plan, it seems reasonable to assume that it was done specifically for distribution at the hui being held that day at Te Ao Marama.

77. Document A11(a), pp 438–440, 445

78. Ibid, p 441

(4) *The hui at Te Ao Marama*

Te Ao Marama is the house that stands next to St Faith's church at Ohinemutu. It is owned by the Anglican Church but is in close proximity to the Tamatekapua meeting house. As noted earlier, those invited to the meeting held there on 17 June included the VIP northern region kaumata, the VIP northern region management, Te Arawa Trust Board representatives, Te Kotahitanga o Te Arawa representatives, and Te Pukenga Kaumatua o Te Arawa, in addition to the interim Te Arawa representatives that had been elected during the February and March hui.

No minutes or attendance list from this hui have been supplied to the Tribunal, other than a brief page of handwritten notes of unknown provenance.⁷⁹ However, from other documents submitted in evidence, it appears clear that Mr Te Whare's Te Arawa mandating plan was presented to the meeting but was not accepted by a majority of those present. It is also clear that some people at the meeting called for further discussion of the issue.⁸⁰ There is, however, dispute about who was entitled to vote on the plan's acceptance, and we return to consider this meeting in chapter 5.

1.2.8 The repercussions of the 17 June hui

Following the meeting at Te Ao Marama, Mr Te Whare was apparently approached by some of the interim representatives asking that mandating hui nevertheless proceed for their respective iwi/hapu.⁸¹ Mr Te Whare therefore wrote a general letter, on 20 June 2003, to all the interim representatives asking that they each sign a form if they agreed with their particular mandating hui going ahead. The form read:

We the Iwi/Hapu representatives of _____ and in consultation with kaumata named below, do hereby agree that a mandating hui as prescribed in the Te Arawa Mandating Programme dated 17th June 2003 should proceed as far as our particular Iwi/Hapu groups are concerned. We give the facilitators of the programme led by Rawiri Te Whare our approval to advertise and hold this hui at their earliest convenience.⁸²

Meanwhile, an alternative mandate plan adopting 'some of the plan considered by [OTS] with Rawiri Te Whare', was apparently being 'circulated amongst the various legal teams' in Te Arawa by Ms Hall. In a letter to OTS on 19 June 2003, she proposed forwarding a copy of the

79. Ibid, p 446

80. For example: doc A11(a), pp 435, 448–450; doc A11, para 33; doc A28, paras 6–8; doc A43, para 12; doc A109, paras 46–47; doc A114, paras 55–56, exhibit N, pp 51–57

81. Document A109, para 48

82. Document A109(b); doc A11(a), pp 435–436

document to Tony Sole for comment. She also indicated that a further hui, chaired by Bishop Vercoe, was to be held at Tamatekapua on Saturday 28 June 2003.⁸³

On 20 June 2003, Ross Philipson of OTS reported again to MICOTOWN. He noted that working at a collective CNI level had helped to build momentum and support for moving towards negotiations but it had also led to one or two problems: 'Some [claimants] mistakenly thought that we were only talking to the VIP Taumata, or that the collective is unduly dominated by Ngati Tuwharetoa, whereas we have attempted to be inclusive'.⁸⁴

In addition to such general comments, Mr Philipson reported in some detail on progress with respect to a mandate strategy for Te Arawa. He noted that the vote had gone against Rawiri Te Whare's proposal at the recent meeting but indicated that OTS staff were 'looking closely at the representative status of the attendees at that meeting'. He also reported that an alternative mandating strategy was being proposed by Ms Hall and Bishop Vercoe but said that it did not appear to be 'consistent with the Crown's mandating policies'. He then discussed concerns around Mr Te Whare's role as a facilitator, and the likely degree of support for his mandating proposal in the wider Te Arawa community. Particular mention was made of 'key people from Ngati Rangitahi' not yet having participated in the process and a comment was made about 'the informal nature of the CNI collective and the pre-negotiation discussions, where there is no formal definition around who the collective should be communicating with'. Mr Philipson also reported that: 'OTS is working to provide an opportunity for the different factions to come together prior to Te Arawa undertaking its mandating process. The position is delicate, and a positive outcome cannot be assured'.⁸⁵ In addition, the report made mention of Ngati Makino, noting that the Crown had entered into negotiations with them in 1998 'but negotiations lapsed while the Crown considered the difficulties of distinguishing Ngati Makino and its claims from Ngati Pikiao'.⁸⁶ A separate report on the issue was promised but has not appeared in evidence.

On 21 June 2003, an advertisement appeared in a number of newspapers, including the *Bay of Plenty Times*, the (Rotorua) *Daily Post*, and the *Dominion Post*, notifying 'Te Arawa Iwi' of a series of hui to begin on 12 July 2003⁸⁷ – although at this stage, according to Mr Te Whare, hui were advertised only for those iwi/hapu whose interim representatives had approached him and asked for the mandating process to proceed.⁸⁸ The newspaper advertisement listed hui for Ngati Tuara/Ngati Kea, Tuhourangi/Ngati Wahiao, Ngati Te Roro o Te Rangi, Ngati Tarawhai/Ngati Rongomai, Ngati Pikiao, Ngati Tahu/Ngati Whaoa, Tapuika, Te Arawa ki Whakatane, and Waitaha. The kaupapa of the hui was advertised as being to:

83. Document A11(a), p 434

84. Document A114, exhibit N, p 53

85. Ibid, pp 55–56

86. Ibid, p 56

87. Document A130, sch 5

88. Document A109, paras 48–51

- ▶ Secure mandate to enter into direct negotiations with the Crown;
- ▶ Secure mandate to seek a comprehensive settlement of all historical claims of Te Arawa Iwi;
- ▶ Secure mandate of elected Iwi representatives (Kaihautu O Te Arawa) to monitor the negotiations process, make the appropriate recommendations and be accountable back to the Iwi/Hapu of Te Arawa and to Te Pukenga Kaumatua O Te Arawa;
- ▶ Secure mandate that the Kaihautu O Te Arawa elect from within themselves the official Te Arawa Negotiators (Kaiwhakarite O Te Arawa) of between 6–8 persons, who will carry a full mandate to negotiate on behalf of Te Arawa.⁸⁹

The advertisements did not give any indication of who was calling the hui, but this was corrected in later versions of the notice. On 24 June 2003, for example, the advertisement now gave to understand that the hui were called by ‘na nga Kaumatua nei: Patariki Hiini. Manny Kameta, Wi Keepa Te Rangipuawhe Maika, Anaru Rangiheuea, Bill Galvin, Riki Reweti, Pinda Pirika, Te Po Hawaiki Wirangi Jones, Eru George, Tutewehiwehi Kingi, Kaiawhiti Tahana, Hirini Katene, Roka Kingi, Arthur Moke, Te Poroa Malcolm’. From 25 June 2003 onwards, the name of Henry Pryor was also added to that list.⁹⁰

Meanwhile, on 23 June 2003, Ms Hall had sent a further letter to OTS, indicating concern with the way the Te Ao Marama hui had gone and stating that there would be further discussion about a mandating plan at the hui called for 28 June at Tamatekapua. She indicated that a planning hui would be held prior to that event, on 25 June, to which Rawiri Te Whare was to be invited. She also requested input into the event from OTS.⁹¹ It is not clear, from the evidence submitted, whether the planning meeting was held and, if so, whether Mr Te Whare attended.

We are not aware of the full advertising schedule for the Tamatekapua hui set for 28 June, but an advertisement which ran on 24 June 2003 in the *Daily Post* carried the name of Bishop Vercoe and listed five main agenda items:

1. Te Arawa Waitangi Tribunal claims involving freshwater issues, (this topic includes claims about what used to swim in the freshwater), geothermal, tourism and land claims, and claims to the 7 CNI forests;
2. A proposal to enter into direct negotiations with the Crown to achieve settlement of all Te Arawa’s claims;
3. A process to achieve mandate and representation for Nga Hapu o Te Arawa and for Te Arawa claimants in the negotiations;
4. An update of the Hui held at Tamatekapu Meeting House on March 5, 2003 and May 30, 2003;

89. Document A130, sch 5

90. Document A11(a), p 451; doc A130, sch 5

91. Document A11(a), pp 448–450

5. Strategies for improving the working relationship between Te Arawa Maori Trust Board and Te Kotahitanga o Te Arawa, Nga Hapu o Te Arawa and claimants.⁹²

1.2.9 Circular letters from OTS

(1) *The letter of 26 June 2003*

On 26 June 2003, Ross Philipson of OTS sent out a letter to ‘all those members of Te Arawa who have an interest in the mandating process within Te Arawa to elect representatives in relation to proposed negotiations’. It stated that, in OTS’ view, Mr Te Whare’s mandating proposal was ‘robust and inclusive’ and that it was ‘now up to Te Arawa representatives and kaumatua to decide how to proceed’. Mr Philipson stressed the Crown’s expectation that mandating and negotiations would be based ‘on kinship groups (hapu and iwi) rather than Wai numbers’ and that having a registered claim therefore did not, in OTS’ opinion, give that claimant ‘an automatic right to be part of any representative body’. With reference to the advertisement of Saturday 21 June that had appeared without any names attached, Mr Philipson advised that Mr Te Whare had informed OTS that he held ‘written endorsement from the leaders of the iwi/hapu named in the advertisement to proceed on their behalf’.⁹³

The letter also commented on the advertisement for the forthcoming hui at Tamatekapua, noting with respect to agenda item 5 that the trust board was recognised by the Crown as ‘holding a mandate to represent Te Arawa for lakes negotiations’ and that Te Kotahitanga was ‘recognised by Te Ohu Kai Moana as representative of Te Arawa for fisheries matters’. Mr Philipson then went on to state a view that, in light of the status of those two organisations, it was ‘incumbent upon the Crown to give serious consideration to their views, if any, on the mandating strategy for Te Arawa as part of the CNI dialogue’.⁹⁴

Commenting on the earlier hui that had been held in February and March 2003, Mr Philipson noted that these had been held at short notice and pointed out that the advertised agenda included an item merely ‘to discuss’ who would represent iwi and hapu that wanted to be included in discussions with the Crown. He stated that the Crown could therefore give ‘no formal recognition to any persons who were elected as iwi or hapu representatives at those hui’, although he noted that ‘any number of these persons may eventually be elected in the formal Te Arawa mandate process’. With respect specifically to the hui of 5 March 2003, Mr Philipson stated that the Crown could recognise ‘no outcomes of that hui’ because the agenda had changed from that advertised and OTS had received correspondence challenging and objecting to that change of agenda.⁹⁵

The letter ended by encouraging all parties ‘to engage with one another in order to ensure

92. Document A11(a), p 451

93. Ibid, pp 452–453

94. Ibid, p 453

95. Ibid, p 453; doc A114, para 63

that a “bottom up” mandating process can eventuate’, and by emphasising that there could only be one mandating process for Te Arawa.⁹⁶ We take the latter comment to have been made in light of Ms Hall’s advice to OTS, noted above, that an alternative mandating strategy was under active discussion by at least some parties in Te Arawa.

(2) *The letter of 27 June 2003*

The following day, Mr Philipson wrote to all CNI ‘Wai claimants’. His stated aim was to update them on progress in discussions with the Crown and to outline how they could become involved in the mandating process that was to take place. He said that OTS had discussed mandating with each iwi with the goal of ensuring that ‘each mandate strategy follows an inclusive process appropriate for each iwi’. He encouraged the Wai claimants’ participation in their iwi’s mandating process and suggested that they contact their legal counsel or iwi. He also explained that, were formal negotiations to eventuate, those negotiations would cover all the historical claims of the claimants’ iwi, ‘including all Wai claims that have been lodged on behalf of any member’ of that iwi. He stressed that ‘This does not mean that every Wai number has a place at the negotiating table as of right’, and then went on to say: ‘But we expect that when each iwi enters into formal negotiations with the Crown, it will have good processes and structures in place that will enable the interests of individual hapu and whanau to be properly addressed.’⁹⁷

1.2.10 The 28 June 2003 hui at Tamatekapua

The hui held at Tamatekapua on 28 June 2003 was chaired by Pihopa Kingi and was attended by around 60 people. According to the minutes, it opened with VIP project business before moving to ‘an update of Te Arawa claims’, given by Ms Hall, and a presentation from Annette Sykes that included ‘Hapu/Iwi development of their mandate and representation process’. Three ‘infrastructure models’ were then presented for consideration, showing various ways that iwi/hapu could interact with elected representatives and other bodies such as the VIP regional taumata.⁹⁸

Again according to the minutes, a number of resolutions were passed, including a resolution that ‘this hui of all the Hapu and claimants of Te Arawa move forward and support entering into discussion with the Crown for the Central North Island lands on which the forests are grown’. Those present also passed a resolution that ‘re-confirmed support of the Te Arawa Taumata’ (namely Bishop Vercoe, Pihopa Kingi, and Pirihiira Fenwick), in response to the Crown’s stated non-recognition of the outcome of earlier meetings.⁹⁹

96. Document A11(a), p 454

97. Ibid, pp 457–458

98. Ibid, pp 459–468

99. Claim 1.1.1, para 70; doc A3, para 47; doc A11(a), pp 459–468

On 30 June 2003, Ms Hall wrote to OTS to advise it of the outcome of the 28 June hui and also to state that every effort would be made for Te Arawa to come up with ‘one mandating process’. She indicated agreement with a ‘hapu approach’ but raised a number of specific questions in relation to hapu mandating hui. She observed that hapu status was said to be uncertain and asked how many representatives were to be elected by each hapu. Other queries related to provision of information, the method of voting, eligibility for voting, and scrutineering. She requested a prompt response ‘so that Te Arawa can understand the rules before the advertised Hui begin’.¹⁰⁰

1.2.11 OTS expectations of the mandating process

Ross Philipson responded to Ms Hall’s letter on 1 July 2003, with comments under each of the specific points she had raised. With regard to the ‘uncertainty of hapu status’ he stated: ‘We anticipate that Te Arawa kaumatua will determine who the constituent hapu/iwi are for representative purposes. We appreciate that the number of hapu/iwi could be as low as ten, or considerably greater than that.’¹⁰¹ As regards the information that should be provided to attendees at the hui, he said that in OTS’ view the important messages to convey were, first, that the Crown anticipated a comprehensive settlement of all historical claims of Te Arawa and, secondly, that ‘multiple negotiations with individual Te Arawa kinship groups is not an option’.¹⁰²

On the subject of voting rights, he observed that eligibility was ‘normally based on whakapapa’, and specified that each hui should have a register of attendees recording name, hapu/iwi affiliation, and signature. He stated that OTS was ‘not primarily concerned with the adequacy or existence of hapu rolls’, but did anticipate that voting would be restricted to ‘those attendees who affiliate to the hapu or iwi who are holding the hui’. With regard to multiple iwi/hapu affiliation, he said it was for Te Arawa to decide whether people could vote at any hui where they had a whakapapa connection or whether they should be restricted to choosing only one hapu/iwi. As regards a minimum age for voting, he stated that ‘The Crown would be concerned if persons younger than 18 were allowed to vote’.¹⁰³

With respect to the number of representatives per kinship group, he stated that it was a matter for the groups themselves to determine. However, he noted that the number of people then elected to the smaller body that would be formed (which he referred to as the ‘hapu forum’ or ‘kaihautu’) was clearly ‘a matter for negotiation between all the groups’. He commented that there may be a case for certain groups such as Ngati Whakaue and Ngati Pikiao

100. Claim 1.1.1, paras 70, 72; doc A11(a), pp 469–470

101. Document A11(a), p 471

102. Ibid, p 472

103. Ibid, pp 471–473

to have ‘extra weight’ on the ‘hapu forum’ because of their large populations, although he again stressed that this was ‘a matter to be decided by Te Arawa representatives’.¹⁰⁴

1.2.12 The mandating hui

The advertised series of mandating hui opened as scheduled on 12 July 2003. Progressing on from the nine originally advertised, further hui were held throughout August and into September until a total of some 24 hui had been held in all.¹⁰⁵ Like the amended advertisements for the July hui, advertisements for the later hui all bore the names of kaumatua who, according to Mr Te Whare, had endorsed the holding of formal mandating hui for their respective iwi/hapu.¹⁰⁶ However, the documents presented in evidence do not give a clear rationale for why some hapu had mandating hui and others did not. We will return to this point below.

No independent observer from Te Puni Kokiri (TPK) was present at any of the hui,¹⁰⁷ and minutes are often sketchy. However, it appears that for each hui Mr Te Whare produced a handout comprising an agenda, a ‘presentation overview’, and a structure diagram.¹⁰⁸ We note that some of the content of the handout changed after 16 September, following a hui at Owata Marae (of which more below).¹⁰⁹

The agenda for all hui, both before and after 16 September, provided for a presentation, discussion, and the putting of resolutions. The presentation was presumably the one outlined in the presentation overview included in the handout, which noted key facets of progress so far towards entering direct negotiations and then ended with the headings ‘Pre-negotiation Phase’, ‘Deed of Mandate’, and ‘Plan for Negotiation Progress’.¹¹⁰

The agenda also listed four ‘mandating principles’. These were based on the kaupapa for the hui as advertised in the press but tailored so as to be specific for the iwi/hapu concerned. For example, the agenda for the hui of 15 July 2003 listed the second principle as being to ‘Secure mandate to seek a comprehensive settlement of all of Ngati Pikiao’s historical claims’. Likewise, the third was to ‘Secure mandate of Ngati Pikiao’s elected representatives to be involved in the negotiations process’.¹¹¹ One of the remaining two principles was common to all hui; namely, to secure a mandate to enter direct negotiation with the Crown. The fourth principle, however, was modified after 16 September. For mandating hui prior to that date, it read:

104. Ibid, p472

105. Document A130, sch 5; doc A1, para 26

106. Document A130, sch 5; doc A109, paras 54–55

107. Document A1, paras 15, 27

108. Document A142, paras 4–5

109. Ibid, para 6

110. See, for example, doc A142, app B, p3

111. Ibid, app B, p2

Secure mandate that the total number of elected representatives of iwi/hapu of Te Arawa, ('Kaihautu O Te Arawa'), elect from within themselves, between 5–8 negotiators ('Kaiwhakarite O Te Arawa'), who will carry a full mandate on behalf of Te Arawa Iwi/hapu to negotiate with the Crown a comprehensive settlement of all their historical claims.¹¹²

We note that, for the pre-16 September hui, the structure diagram that accompanied the agenda did not reflect the wording of the fourth principle just cited. Instead, it showed Nga Kaihautu o Te Arawa, a body of about 30 people, being elected by iwi/hapu and claimants, and then a smaller 'komiti' of about 14 people being drawn from the kaihautu. The Kaiwhakarite o Te Arawa were then shown as being drawn, in turn, from the komiti (not from the kaihautu).¹¹³ This was also a departure from the structure diagram put out in the 17 June draft mandating plan.¹¹⁴ A further change from the 17 June draft was that, while the VIP project and the Pukenga kaumatua still featured on the new diagram, there were now no lines of interaction shown between those bodies and any of the other elements of the diagram.

Following the 16 September hui, the fourth mandating principle was amended to read:

Secure mandate that the total number of elected representatives of iwi/hapu of Te Arawa, ('Kaihautu O Te Arawa'), elect an Executive Council from within themselves.

.

And that 5–8 negotiators ('Kaiwhakarite O Te Arawa'), who will conduct the negotiations be appointed by the Executive Council. (refer to structure)¹¹⁵

The new structure diagram to which the principle referred was rather more elaborate than previous versions. It now showed a number of iwi and hapu together forming 'Nga Uri O Te Arawa', whose role was indicated as being 'To mandate and to ratify'. Below this came Nga Kaihautu, the mandated iwi/hapu representatives, whose role was described as 'To protect and preserve claimant interests'. Interposed between these two, and with links to both, was the Pukenga kaumatua ('To support and to give advice'). Below the kaihautu came the 'Mandated Executive Council', whose role would be 'To lead and to Govern'. They in turn were shown as linking to two other groups. First, to the side was a box marked 'Negotiators'. Above the line linking the negotiators and the kaihautu was written 'To conduct negotiations'. Secondly, below the executive council came a box marked 'Operations', the role of the latter being shown as 'To Coordinate and manage the various work streams'.

Attendance at the various hui was mixed. From the attendance lists and the minutes, numbers appear to have averaged about 30 to 35 per hui (not including the hui in urban centres such as Auckland, Wellington, and Christchurch, where attendance was much lower). This is slightly higher than the earlier round of hui in February and March, at which the interim

112. See, for example, doc A142, app B, p 2

113. See, for example, doc A142, app B, p 4

114. Document A11(a), p 441

115. See, for example, doc A142, app O, p 2

representatives had been elected and at which, as we have indicated, the average attendance was around 25 to 30. It should be noted, however, that the average attendance figure for the formal mandating hui was raised by the significantly higher turnouts at the hui for Ngati Tahu and Ngati Whaoa, where over 100 people attended, and the hui for Tuhourangi and Ngati Wahiao, which attracted around 50 to 60 people.

At the earlier hui, at least, it appears that a series of five ready-prepared resolutions were put to those present:

1. That [name of iwi/hapu] agrees to enter into direct negotiations with the Crown, to seek a comprehensive settlement of all their historical claims.
2. That [name of iwi/hapu] elects [names of those elected] to be their official representatives in the negotiation process.
3. That [name of iwi/hapu] agrees that the total number of elected representatives of iwi/hapu of Te Arawa, ('Kaihautu O Te Arawa'), elect from within themselves, between 5–8 negotiators ('Kaiwhakarite O Te Arawa'), who will carry a full mandate on behalf of Te Arawa Iwi/hapu to negotiate with the Crown a comprehensive settlement of all their historical claims.
4. The [name of iwi/hapu] agrees that the Kaihautu O Te Arawa establish an agreed terms of reference with the appropriate protocols and disciplines by which both they and the 5–8 Kaiwhakarite O Te Arawa are to carry out their functions and responsibilities.
5. That [name of iwi/hapu] agrees that the Kaihautu O Te Arawa have the discretionary powers to engage specialised expertise on an as and when required basis, when it is deemed necessary that such expertise will assist the negotiation process.¹¹⁶

It is not at all clear, from the minutes, that all five resolutions were put to every hui. Nevertheless, it is evident that at most (but not all) hui, a clear majority of those present were in favour of entering into direct negotiations with the Crown.

A summary of the outcomes of various hui, in tabular form, can be found at appendix 11 of this report. From that table, it can be seen that the minutes of 20 hui have been located among the documents presented in evidence to this Tribunal. Of those, only 18 were appended to the deed of mandate.¹¹⁷ However, OTS' assessment report states that 'over 24 hui were held during the mandate process'.¹¹⁸ We have no information on what happened at the remaining hui.¹¹⁹

116. Document A130, sch 8; doc A143

117. We are assuming, here, that the deed of mandate filed in evidence (doc A130) was a complete copy of the original.

118. Document A1, para 26

119. We know from other documents filed that Tapuika's first hui, for example, was held on 19 July 2003: see advertisement, *Bay of Plenty Times*, 26 July 2003 (doc A130, sch 5). Likewise, a second hui was held for Ngati Rangitahi on 10 August 2003: see paper 3.3.9, para 17.1. However, we have seen no minutes for these meetings. We note, though, that the hui originally mooted for centres such as Taupo, Tokoroa, and Whakatane, and overseas in Sydney, do not seem to have eventuated: see doc A11(a), pp 401–402.

Nevertheless, it is abundantly obvious that the original intention to have an elected body of about 30 people, as shown on the structure diagram in the handout for the pre-16 September hui, was quickly overtaken by events. Five kaihautu representatives were elected at the very first meeting, and numbers tended to increase at succeeding hui. The eventual number of representatives on the kaihautu was to be 98.¹²⁰

Also evident from the minutes is that additional kinship groups, beyond those listed in the original plan of 17 June 2003, were accorded mandating hui as events unfolded. At the hui for Ngati Uenukukopako, for example, Blanche Kiriona asked: 'Where does Ngati Tuteniu fit in?' Mr Te Whare's response was: 'If Ngati Tuteniu wants us to have a hui with them, then you just need to let us know so that we can advertise 21 days prior to having the hui.'¹²¹

A mandating hui was held for Ngati Tuteniu on 22 September 2003, despite a protest lodged with OTS by the taumata on 1 September.¹²² In the event, two other groups not listed in the 17 June plan also held mandating hui and elected representatives. They were Ngati Te Roro o Te Rangi and Ngati Te Ngakau/Ngati Tura/Ngararanui.¹²³

1.2.13 The hui at Owata Marae, 16 September 2003

According to Mr Te Whare, the date of 16 September for the first formal meeting of kaihautu representatives had been dictated by the decision to submit a deed of mandate to the Crown on 25 October 2003 on behalf of Te Arawa iwi and hapu.¹²⁴ Questioned by the Tribunal as to the basis for choosing the 25 October date, Mr Te Whare explained that, counting back from the next parliamentary election (the target date for settlement), the deed would need to be ratified by early 2004 if the target were to be met. That would necessitate the deed being submitted to OTS by late October and, to meet such a deadline, the kaihautu members would first need to convene to 'consider possible negotiation structures and other associated issues'. A meeting was therefore called for 16 September 2003 at Owata Marae, Hinemoa Point.¹²⁵

With respect to the chosen date, Ms Hall had indicated to OTS on 4 August that she and two members of the Te Arawa taumata were unavailable to attend any hui between the dates of 6 and 22 September.¹²⁶ Tony Sole had responded that OTS had 'absolutely no authority to influence marae, hapu or iwi choosing when a particular hui might take place' and 'no authority over the actions of Mr Te Whare'. He suggested that Ms Hall discuss the timing of any hui

120. Document A130, sch 2

121. Document A114(a), p106

122. The protest noted, among other things, that Ngati Tuteniu has 'close connections to Ngati Rangiteaorere and Ngati Uenuku Kopako' and that it has no marae of its own at present: doc A11(a), pp 492–293. A later letter stated that Ngati Rangiteaorere had not been consulted about Ngati Tuteniu's separate status: doc A11(a), p524.

123. Document A11(a), p 439; cf doc A130, sch 2

124. Document A109, para 56

125. Ibid, paras 56, 58

126. Document A11(a), pp 482, 483, 485–486

with ‘the appropriate members of Te Arawa’.¹²⁷ It is not clear from the documents submitted in evidence whether such discussion ensued.

On 2 September 2003, Mr Te Whare sent out advance notice of the hui to those representatives who had already been elected, stressing it was important that they attend. The notice stated that the meeting was to ‘officially establish Nga Kaihautu O Te Arawa and its executive body’.¹²⁸ This letter was followed up, on 8 September, by another notice carrying more detailed information as to the purpose and conduct of the meeting:

Purpose of the Meeting: The sole purpose of this meeting is for each group within the Kaihautu to elect one person from their group onto the Executive Council.

Attendance at the Meeting: Only officially mandated representatives can attend the meeting.

Voting at the Meeting: Only officially mandated representatives can vote.¹²⁹

This second notice indicated that no proxy votes would be allowed at the hui but that those unable to attend in person could vote by completing the form attached to the notice and returning it on or before 16 September 2003. It also stated that, once the executive council had been elected, its first tasks would be to:

- (a) develop reporting and accountability procedures and processes for the Executive Council and the Kaihautu and report back to the Kaihautu on them;
- (b) file the Deed of Mandate with the Crown.

A third communication, sent out on 9 September 2003, proposed some guidelines to assist the kaihautu members in choosing appropriate people for the executive council. It suggested that factors to consider might include whether the person:

- ▶ Has some knowledge of the Treaty Of Waitangi Claims sector and the Treaty itself
- ▶ Has knowledge of and has been on or associated with your group’s claimant interests
- ▶ Has standing within and commitment to his/her iwi/hapu community
- ▶ Has the ability to manage high level information and the articulation of that information both verbally and in writing
- ▶ Is able to commit and be available to provide governance and leadership to the negotiation process for the duration of negotiations (approx 24 mths)
- ▶ Has some knowledge of dealing with Crown officials.¹³⁰

On the day of 16 September, Mr Te Whare, as ‘CNI iwi mandating facilitator’, wrote to Tony Sole at OTS informing him that the mandated iwi/hapu representatives would be meeting at

127. Ibid, p484

128. Document A109(b), exhibit D

129. Ibid, exhibit E

130. Ibid, exhibit F

Owhata Marae that evening to put in place the kaihautu's executive body. With reference to the choice of venue, he commented that he lived nearby and that the marae committee had offered it for the meeting, although it was not his own principal marae. With respect to the kaupapa of the meeting, he listed the number of members that would be elected from each iwi/hapu, giving an initial body of 13 members, but with the possibility of Ngati Makino, Tapuika, Ngati Tura/Ngati Te Ngakau/Ngararanui, and Ngati Rangiwewehi each having a seat at a later date. Waitaha was not mentioned. The 'Whakaue configuration' was shown as having three seats – two for Ngati Whakaue and one for Ngati Te Roro o Te Rangi. The 'Pikiao configuration' was shown as having two seats – one for Ngati Pikiao and one for Ngati Tarawhai/Ngati Rongomai (with a possible extra seat for Ngati Makino, 'if they choose to join'). The remainder had one seat each, with a note beside the seat allocated to Ngati Rangiteaorere saying '(will include Ngati Tuteniu)'.¹³¹ Mr Te Whare indicated that, once the body was established, it would be responsible for drawing up draft terms of reference, a draft deed of mandate, the appointment of negotiators, and a plan for draft terms of negotiation.¹³²

When the iwi/hapu representatives arrived at the meeting that evening, they were given a rundown on the establishment and membership of the kaihautu and an explanation of the proposed mandating structure.¹³³ The structure diagram used was the same as that subsequently included in the revised handout for the remaining mandating hui.¹³⁴ Mr Te Whare then advised that, while most iwi/hapu would be entitled to elect one member to the executive council, Tuhourangi could appoint two members, 'Ngati Whakaue (Iwi)/Te Roro O Te Rangi (Hapu)' could have '2 + 1 members respectively', given its overall population, and the 'Pikiao/Tarawhai-Rongomai/Makino configuration' could likewise appoint '1 + 1 + 1 members respectively'.

Voting at the 16 September meeting was restricted to those already elected to the kaihautu. Nevertheless, it would appear that iwi/hapu that had not yet held their mandating hui also had (non-voting) representatives present at the meeting – despite the notice of 8 September which indicated that 'only officially mandated representatives can attend the meeting'.¹³⁵ For those iwi/hapu, Mr Te Whare indicated that a similar voting process to elect council members would be facilitated once their mandating hui had taken place. Each iwi/hapu group would have one seat on the executive council, he said, although 'Tuteniu will be included with Ngati Rangiteaorere where only 1 seat is provided'.¹³⁶ Mr Te Whare also noted that Tapuika and

131. In the event, Tuteniu were to have a seat of their own on the council, and the Ngati Tura/Ngati Te Ngakau/Ngararanui grouping was to acquire a second seat – one for Ngati Tura and Ngati Te Ngakau, and a separate one for Ngararanui. We return to this matter later in the chapter.

132. Document A114, exhibit U, pp80–81

133. Document A109, para 59

134. Document A109(b), exhibit F

135. Paper 3.3.7, para 8.6; doc A109, para 60; doc A109(b), exhibit E

136. Document A109(b), exhibit F, handout, p3

Waitaha were ‘undecided’ about participating and Ngati Makino had chosen to ‘remain outside this process’.¹³⁷

The minutes of the meeting record that there was:

lengthy discussion over structural and process concerns; ensuring individual claimant interests would be protected; who was dictating the terms – OTS or [claimants]; how many negotiators will be appointed and how [to] ensure that they will negotiate in accordance with claimant expectations; reporting back and accountability concerns etc.¹³⁸

A motion on whether to accept the structure of the kaihautu and its executive body was then put and carried, although David Whata-Wickliffe spoke against the motion, saying that Ngati Tamakari ‘had one of the biggest claims’ and should therefore have two members on the executive council. When that assurance was not forthcoming, Ngati Tamakari withdrew from the meeting.¹³⁹

The meeting then moved on to the election of executive council members, with Mr Te Whare explaining that the council would be the mandated body ‘to govern and lead in the direct negotiation process to settlement with the Crown’. He went on to state that the negotiators would be appointed by this body but would not be confined to it. Eleven executive council members were then elected.¹⁴⁰

On 1 October 2003, an executive council meeting was held at the VIP project’s office in Peace Street, Rotorua. Around nine council members attended and, together with two who sent email votes, elected Mr Te Whare as the council’s chairperson.¹⁴¹ At the meeting it was also agreed that a first draft of the executive council’s rules would be circulated to all members by 13 October 2003.¹⁴²

1.2.14 The petition of 1 October 2003

On the same day as the executive council meeting, Ms Hall forwarded to OTS copies of a petition to MICOTOWN protesting that the 16 September meeting had been held before all iwi/hapu had elected their kaihautu members. The petition asked the Minister to direct OTS staff to:

meet with all Te Arawa CNI mandated Hapu representatives to explain the Crown’s position with regards to a structure called the Nga Kaihautu o Te Arawa and to fully explain the

137. Ibid, exhibit G, p2

138. Ibid

139. Ibid, p3

140. Ibid, pp3–4

141. Document A11(a), pp 523, 526–527

142. Document A104, para 14

implications of the Crown's comprehensive approach to settlement of all Te Arawa's Treaty of Waitangi claims.¹⁴³

Also on 1 October 2003, Bishop Vercoe, as Te Arawa taumata chairman, wrote to Mita Ririnui and Stevie Chadwick, as members of Parliament for Waiariki and Rotorua respectively, to ask for their assistance with presenting the petition to MICOTOWN 'in an appropriate manner'. Bishop Vercoe stated that the taumata was satisfied that 11 of the 14 iwi/hapu hui convened over the preceding three months had reached 'an acceptable standard of good conduct and legitimacy'. However, they 'challenged outright' the hui of 16 September, which was the subject of the petition.¹⁴⁴

Ms Hall's analysis of the support for the petition was that:

- ▶ eight hapu supported it 'either unanimously or by a majority';
- ▶ Ngati Makino also supported it unanimously;
- ▶ Ngati Pikiao was 'expected to support by a majority';
- ▶ Ngati Whakaue was evenly divided;
- ▶ Ngati Uenukukopako was 'neutral'; and
- ▶ 'Ngati Tahu/Ngati Whaoa [was] the only Hapu wholly opposed'.

Ms Hall noted that Ngati Rangitihi and Tapuika were not included because they were 'still deciding on whether to join CNI'.¹⁴⁵

The Minister responded to the petition on 15 October 2003 in a letter to Bishop Vercoe. With respect to the request for OTS staff to meet with hapu representatives, she said that she had been advised that officials had been invited to attend a meeting of the executive council 'to answer questions and discuss the mandating and negotiation processes'. Regarding the structure of the kaihautu, she observed that, 'Provided that the proposed structure is transparent, representative and accountable it is not for the Crown to comment upon the internal configurations of Te Arawa'. She then went on to state that it was only after a deed of mandate had been submitted and assessed that decisions would be made concerning recognition of a Te Arawa mandate to enter negotiations for the settlement of Treaty claims. She ended by pointing out that, once such a deed had been submitted, there would be an opportunity for claimants to raise any concerns about the mandating process during the public notification period.¹⁴⁶

On 16 October 2003, Bishop Vercoe and Pihopa Kingi wrote again to the Minister. They drew attention to specific aspects of the 16 September hui which they claimed were problematic: namely, that 14 iwi/hapu had been allowed to appoint representatives rather than the 13 originally advertised; that the hui had been called when it was known that key leaders would

143. Document A11(a), pp 520–522; doc A145

144. Document A114, exhibit BB, pp 92–93

145. Document A11(a), pp 520–522; doc A145

146. Document A11(a), pp 528–529

be absent; and that there had been no prior discussion as to what was an appropriate structure and only one option had been put forward. In relation to the last point, they said: 'That is not Te Arawa's custom. Te Arawa's custom is that the take (proposal) must lie on the ground before the meeting is called. Here the meeting was caught by surprise.'¹⁴⁷ They ended by informing the Minister that the Te Arawa taumata were calling a further meeting of hapu representatives for 27 October 2003, at Tamatekapua, stating that if OTS staff continued to talk to the executive council it would be seen as 'interfering with Te Arawa's own process'.

An 'update on Te Arawa mandating' was recorded in an OTS file note of 14 October 2003. It noted a number of developments, including the submission of the petition to the Minister. It also noted that a draft deed of mandate was being compiled but that it was unlikely to be ready for submission by 25 October as originally planned. Further, after noting that the period for mandating hui had been extended but that all mandating hui had now been completed, it went on to record that 'Some issues have arisen, and they are being worked through'.¹⁴⁸

1.2.15 Development of the executive council rules

As noted earlier, draft rules were drawn up and circulated following the executive council's meeting of 1 October 2003. On 17 October, the executive council met again to discuss the draft. As a result of those discussions, amendments were requested and a further meeting held on 7 November 2003. Additional points were raised at that meeting, necessitating consultation with the council's legal advisers. Further rounds of amendment and discussion took place throughout the month of November.¹⁴⁹

1.2.16 The hui of 27 October 2003 at Tamatekapua

Meanwhile, Bishop Vercoe, on behalf of the Te Arawa taumata, had called a meeting of hapu representatives for 27 October 2003 at Tamatekapua.¹⁵⁰ According to Mr Te Whare, the newspaper advertisement for the meeting specifically listed 'all the Nga Kaihautu members'.¹⁵¹ In the event, Bishop Vercoe was unable to chair the meeting owing to ill health, so that role was taken by Ken Hingston.¹⁵² However, according to minutes taken, it was made clear at the beginning of the meeting that it was the taumata who had called the meeting. Also according to those minutes, discussion initially revolved around support for the taumata as against support for the kaihautu. Exchanges appear to have been heated at times, but after lunch an

147. Ibid, pp 530–531

148. Ibid, p 533

149. Document A104, paras 15–20

150. Document A11(a), pp 525, 531

151. Document A109, para 63

152. Document A16, para 33

attempt was made to find a way forward. At this point, discussion turned more to the relative roles of the taumata, the kaihautu, and the executive council. Mention was also made of Te Pukenga Kaumatua o Te Arawa.¹⁵³ Discussion again appears to have become heated and, according to Mr Te Whare, Mr Hingston vacated the chair and Pihopa Kingi took over – after which Mr Kingi ‘sought resolutions from the floor to the effect that the Taumata should join with the Executive Council’.¹⁵⁴ Mr Hingston, in his subsequent report on the meeting, was of the opinion that there were ‘irreconcilable differences between the Taumata as a separate entity and Nga Kaihautu, the working group’. His estimate was that the taumata had insufficient support to ‘hold itself out to be the representative organization for Te Arawa in the negotiations with Government’. However, he reported that:

- (5) After considerable discussion, a motion by Whetu Whata (Ngati Pikiao) that a recommendation be made to add the three members of Te Taumata to the Executive of Nga Kaihautu was carried unanimously.
- (6) The effect of this motion effectively allows for unity and more importantly, spells out that there is only one body representing Te Arawa and any internal problems will not be aggravated by people playing one organization against the other. Problems that arise must now be dealt with internally.
- (7) As chairman I consider that the result was as much as could have been achieved. I recommend acceptance by Nga Kaihautu.¹⁵⁵

1.2.17 Further meetings of the executive council

As noted above, the executive council, once elected on 1 October 2003, had begun to meet at fairly regular intervals to discuss the rules that would govern their operation. They met on 7 November, held a teleconference on 10 November, and met again on 14 and 28 November. At the latter meeting, they resolved to amend the rules further, so as to ‘better reflect the commitment and obligations of the executive council members to the groups that had appointed them, and also the wider Te Arawa interests’. It was anticipated that the rules would be finalised at the next council meeting scheduled for 10 December 2003. In the event, they were not finalised at that meeting, since it was decided that there needed to be yet more discussion about ‘operating on a collective basis while also protecting the autonomy of each group’.¹⁵⁶ The rules submitted to the Tribunal in evidence were dated 12 March 2004.¹⁵⁷

Again as noted earlier, some iwi/hapu did not hold their mandating hui until late September, so still did not have executive council members in place at the time that the council first started meeting. It is not clear, from the documents we have available, at what point the

153. Document A8, exhibit PS2

154. Document A109, para 63

155. Document A8, exhibit PS2

156. Document A104, paras 16–18

157. Document A104(a)

members for Ngati Tura/Ngati Te Ngakau, Ngararanui, and Ngati Tuteniu began attending council meetings. Materoa Peni, the member for Ngati Tura/Ngati Te Ngakau, stated that he was nominated for council membership on 3 November 2003 and was ‘subsequently elected unanimously by the other Nga Kaihautu members representing Ngati Te Ngakau/Ngati Tura’. He stated that he had attended ‘a number’ of executive council meetings since that time.¹⁵⁸ Mita Pirikia said he was elected as an ‘interim Executive Council representative’ for Ngati Tuteniu, and likewise said he had attended a number of council meetings, but gave no information about the date of his election nor when he had started attending meetings.¹⁵⁹

In the case of Ngararanui’s member, Wallace Haumaha said that he had sought separate representation for Ngararanui on the council after it had become evident that the kaihautu members for Ngati Tura/Ngati Te Ngakau, on the one hand, and Ngararanui, on the other, were having difficulty working together. He stated that:

The response I received was that the Executive Council would prefer for Ngararanui to determine that issue for themselves. I then reiterated to the Executive Council at a meeting held before the council, that Ngararanui would require separate representation and requested the Executive Council to consider this request. I understand that the Executive Council met to discuss this issue and resolved, collectively as representatives of Te Arawa Iwi/hapu, that Ngararanui be represented separately on the Executive Council.¹⁶⁰

Mr Haumaha did not say when he first began formally attending council meetings as the member for Ngararanui.

1.2.18 The deed of mandate

Also under discussion during the November meetings, we presume, was a draft deed of mandate. In any event, on 1 December 2003 the executive council formally submitted a deed of mandate to ORS for consideration by the Crown.¹⁶¹ The deed comprised:

- ▶ a definition of the claimant group (noting that the executive council did ‘not yet’ have the right to represent Ngati Makino, Waitaha, and Tapuika);
- ▶ a list of ‘marae associated with Nga Uri o Te Arawa’;
- ▶ an indication of the area of land covered by the deed;
- ▶ a list of claims to be negotiated, including those of Waitaha, Tapuika, Ngati Makino, Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi, and others (but specifically noting the exclusion of particular Ngati Rangiteaorere and Ngati Whakaue claims already settled in 1993–94 and also the Te Arawa lakes claims);

¹⁵⁸. Document A50, paras 9–11

¹⁵⁹. Document A131, paras 9–11

¹⁶⁰. Document A96, para 10

¹⁶¹. Document A1, para 20

- a section on the executive council (noting that the rules by which the body would operate were ‘currently being developed’);
- a section on ‘How the mandate was obtained’; and
- an agreement to provide details of the deed to other parties, if requested.

Appended were copies of supporting material, such as copies of advertisements, minutes of mandating hui, and lists of attendees.¹⁶²

Communication then ensued between OTS and Rawiri Te Whare concerning the text of a newspaper advertisement that would give public notification of the receipt of the deed. Sarah Jardine of OTS explained that the notice needed to include the names of ‘all Te Arawa iwi/hapu, including those who are not currently represented by the Executive Council’ (emphasis in original). It would then, she said, go on to explain which were currently represented by the council and which were not. With reference to marae, she noted that the list in the deed of mandate did not include Waitaha, Tapuika, or Ngati Makino marae, and she asked that Mr Te Whare supply a list of marae associated with those groups.¹⁶³ The following day, further communication from OTS indicated that the Te Arawa Trust Board had supplied additional hapu names and that OTS staff had identified yet others from an ‘examination of Wai claims’. They again requested that Mr Te Whare inform them of ‘any Ngati Makino, Tapuika and Waitaha marae that should be added to the list’.¹⁶⁴

Following these exchanges, the notice was finalised and, beginning in the second week of December 2003, OTS and the council jointly advertised the executive council’s deed of mandate in both national and regional (Bay of Plenty) newspapers. The advertisement invited ‘submissions, views or inquiries about the Deed of Mandate and the proposed negotiations’ and indicated that any submissions would be considered by the Crown and by the executive council. The closing date for submissions was given as 30 January 2004.¹⁶⁵

1.2.19 Assessment of the deed

An assessment of the deed was carried out by OTS staff and, independently, by TPK staff.¹⁶⁶

As part of the OTS assessment, some 52 submissions were considered in addition to the material in the deed and its supporting documents. Thirteen of those submissions opposed recognition of the deed,¹⁶⁷ and 39 were ‘form letters in support of the Executive Council’s mandate’. Key issues raised in the opposing submissions were apparently that:

- the council did not have a mandate to represent registered claims put in by certain groups;

162. Document A130

163. Document A11(a), p550

164. Ibid, p554

165. Document A1, para 20; *Dominion Post*, 13 December 2003

166. Document A1; doc A11(a), pp695–696

167. See, for example, doc A44(a)

- ▶ some people had been excluded from the mandating process or had subsequently withdrawn support;
- ▶ the Crown had not given adequate consideration to Te Arawa's existing tribal arrangements, policy, and structures; and
- ▶ OTS had not acted even-handedly.¹⁶⁸

These opposing submissions notwithstanding, OTS expressed itself satisfied overall that the executive council's mandating process was 'open and robust' and that the council had the 'broad support of the Te Arawa people'. Nevertheless, the report also noted that, given the size of Te Arawa, 'mandate maintenance and open and regular communication within the claimant community will be particularly important to achieve a durable settlement'.¹⁶⁹ OTS completed the report on 30 March 2004.

The assessment report from TPK mentioned only the deed of mandate and did not refer to the submissions. It expressed concern about:

- ▶ mandating hui minutes that were incomplete or inaccurate (or both);
- ▶ ambiguity over where mandate sits; and
- ▶ limited accountability to the claimant community.

It also noted the October petition and an urgency application made in February 2004 to the Waitangi Tribunal. Overall, however, it concurred with the assessment that had been made by OTS. The report was transmitted to the Minister of Maori Affairs, copied to MICOTOWN, on 31 March 2004.¹⁷⁰

1.2.20 Recognition of the deed

On 30 March 2004, MICOTOWN signed the assessment report from OTS, indicating agreement with the proposal to recognise the mandate of the executive council. The following day, the Minister of Maori Affairs also signed and indicated his agreement.¹⁷¹ On 1 April 2004, both Ministers wrote to Eru George, as the current chairperson of Nga Kaihautu o Te Arawa Executive Council, informing him of the Crown's recognition of the council's deed of mandate.¹⁷² On 2 April 2004, the Crown put out a press statement announcing that recognition.¹⁷³

The claims that are the subject of this report arise out of this decision by the Crown to recognise the deed. They focus on issues relating to both the Crown's assessment of the Te Arawa mandating process and its negotiation policy as applied in the Rotorua district.

168. Document A1, para 21

169. Ibid, paras 3, 4

170. Document A11(a), pp 695–696

171. Document A1

172. Document A1; doc A11(a), pp 697–698

173. Document A11(a), p 699

1.3 SUMMARY

The key points made in this chapter are as follows:

- ▶ In the late 1980s, the Crown and Maori began to express a desire to settle claims relating to forestry lands as quickly as possible.
- ▶ In 1999, the VIP project was set up to try to expedite this aim in so far as it related to forestry land in CNI.
- ▶ On 6 December 2002, MICOTOWN gave a key speech indicating the Crown's willingness to enter into a dialogue with CNI Maori about progressing CNI claims.
- ▶ In February and March 2003, a series of 'pre-mandating' hui were held for Te Arawa and 'interim representatives' were elected.
- ▶ Rawiri Te Whare, as part of the VIP management team, developed a mandating plan for Te Arawa.
- ▶ The majority of attendees at a hui on 17 June 2003 rejected the plan, but the voting criteria had not been made clear and the result was contested.
- ▶ A series of mandating hui went ahead, mostly between July and September 2003, and resulted in the election of 98 kaihautu members.
- ▶ At a meeting on 16 September 2003, kaihautu members met to elect representatives from among their number to sit on the executive council.
- ▶ The executive council submitted a deed of mandate to the Crown on 1 December 2003.
- ▶ On 1 April 2004, MICOTOWN and the Minister of Maori Affairs wrote to inform the council that its mandate had been recognised by the Crown.
- ▶ The claims that are the subject of this report arise out of the Crown's decision to recognise the deed.

CHAPTER 2

THE APPLICATION FOR URGENCY, THE SCOPE AND CONDUCT OF THE INQUIRY, AND THE PARTIES INVOLVED

2.1 THE INQUIRY

2.1.1 Application and decision on urgency

On 5 February, 24 February, and 19 March 2004, the CNI Tribunal covering the Rotorua, Taupo, and Kaingaroa inquiry districts received the following applications from the Te Arawa taumata:

- ▶ A memorandum of counsel requesting urgency on issues relating to the Te Arawa mandating process.¹ The claim was brought because of a decision by the Crown to receive the mandate of the executive council to negotiate the settlement of the Rotorua claims. The taumata argued there is a real doubt as to whether the executive council carries the mandate for many, if not most, of the Te Arawa hapu or hapu clusters that it purports to represent.
- ▶ An application for urgency in relation to the Taniwha and Hamurana Springs.
- ▶ An application for joinder of both applications.

Judge Caren Wickliffe referred the applications to Chief Judge Joseph Williams for consideration, on the basis that they were applications that fell to his determination as chairperson of the Waitangi Tribunal.²

A judicial conference was convened on 14 April 2004 to hear oral argument in respect of the applications and a decision was subsequently issued.³ In his decision dated 4 May 2004, the chairperson noted that both the Crown and the executive council accepted that at some point the Te Arawa taumata ought to be entitled to have its complaint about the quality of the executive council's mandate heard. The critical issue was not, therefore, whether the claim should be heard, but when.

The chairperson also thought it important:

- ▶ that the Crown's recognition of the executive council's mandate was itself conditional and that there was unfinished business to be completed before the Crown's acceptance of that mandate; and

1. Wai 950 RO1, paper 2.1185

2. Paper 2.3.3

3. Papers 2.3.4, 2.3.6

2.1.2

- that there had been a suggestion from one Te Arawa hui that there be a coming together of the competing leaders for the sake of Te Arawa and their claims.

The chairperson made the suggestion that the parties engage in facilitated discussions with independent facilitators.⁴ After considering submissions from all parties, and reflecting on the views therein expressed, particularly that of the executive council, which made it clear that it did not feel able to engage in discussions with the taumata, the chairperson concluded that there was insufficient common ground between the parties to justify the expenditure of time and effort on facilitated discussion.⁵ While he regretted that the matter could not be progressed in that manner, he believed it important that serious and considered challenges to the mandate should be heard as early as possible so that the Crown could be aware of any problems concerning it before it was too late. He therefore granted urgency, and a reconstituted CNI Tribunal was appointed to hear the claims of the taumata and others seeking to join.⁶

2.1.2 Inquiry planning

A number of memoranda and directions were issued by the presiding officer (Judge Wickliffe) dealing with the pre-hearing and hearing timetables.⁷ The timetable was developed with the consent of all parties.

The hearing was set down for 21, 22, 23, and 25 June 2004 at Rotorua. It was agreed by all counsel that cross-examination would be allowed only where there had been a memorandum filed in advance of the hearing signalling the name of the witness to be examined and the documents that would be put to the witnesses. This was an attempt to control and monitor the time needed for hearing the evidence.

2.1.3 Application for deferral of hearing

On 11 June 2004, Crown counsel filed a memorandum seeking a deferral of the hearing to allow the Crown to undertake its own review of the process by which the executive council achieved its mandate. On 14 June 2004, Judge Wickliffe responded by seeking an answer to the following two questions:

- What is the process that the Crown proposes to adopt to review the mandating process that it has conducted thus far in respect of Te Arawa?
- Who, outside of Nga Kaihautu o Te Arawa Executive Council, will the Crown approach to assist it with the review?⁸

4. Paper 2.3.6

5. Paper 2.3.10

6. Ibid

7. Papers 2.3.11–2.3.15

8. Paper 2.3.18

Judge Wickliffe also invited responses from claimant counsel after they had an opportunity to consider the answers provided by the Crown.

Following receipt of all submissions, Judge Wickliffe issued a further memorandum of directions dated 17 June 2004 containing her decision on deferral. She noted that the Crown had responded to the two questions posed with the following explanations:

- ▶ The review proposal should be seen ‘in the context of monitoring the maintenance of the mandate’ and that it was ‘the current health of the mandate that would be the subject of the review’. The Crown proposed to conduct an internal and external process. The internal process would have been to consider the documents filed in the proceedings and during the mandating process to assess issues identified. The external process would have involved discussions with individuals and groups raising concerns and discussing those concerns with the executive council to allow them to respond. Once that was completed, the Crown would have been amenable to facilitated discussions to address any outstanding issues. At the end of the process, MICOTOWN would have been asked for a decision as to the durability of the mandate and then the Crown Law Office would advise the Tribunal and parties accordingly.
- ▶ The Crown would approach the following groups to assist with its review:
 - the Wai 1150 claimants;
 - Ngati Rangiwewehi, Ngati Rangiteaorere, Ngati Tahu/Ngati Whaoa, Ngati Wahiao, Ngati Whakaue, and Ngati Pikiao; and
 - any other deponent who may be able to assist the Crown with its consideration.

All claimants opposed the deferral of the hearing and they indicated that they were ready to proceed. The individual basis of their opposition is recorded in Judge Wickliffe’s memorandum of 17 June 2004.⁹

Judge Wickliffe then determined that the hearing would proceed in accordance with the timetable agreed to by the parties. Regarding deferral, she explained that a decision to defer:

should be based on some certainty that the issues squarely before this Tribunal are or will be addressed. That requires some certainty that the interests of all Te Arawa claimants involved in these proceedings, or at least the great bulk of them, will be carefully factored into any review process proposed. That certainty can not be ascertained from the material filed to date by the Crown.

Weighed against that uncertainty, is the fact that if these claims are well founded, any timely findings and recommendations of the Tribunal will greatly assist all parties. This could only facilitate more co-operation and co-ordination, as the Crown and Te Arawa strive together to reach important milestones in the negotiation process (eg terms of negotiation and an agreement in principle). The ultimate result could only be a more enduring

9. Ibid

2.1.4

and comprehensive settlement of all Te Arawa claims. Proceeding with the hearing certainly could not unsettle what has been to date a herculean effort to begin that negotiation process.¹⁰

Judge Wickliffe considered that, while the factual issues raised by the Te Arawa taumata and the other claimants might require more evidence preparation and cross-examination – particularly by the executive council and the Crown – that was not a task so overwhelming that it warranted a deferral of the hearing.

2.1.4 Scope of the inquiry

After directing claimants to file statements of claims and further particularise issues additional to, or different from, those outlined in the statement of claim filed by the Te Arawa taumata, Judge Wickliffe determined that all the claims, with the exception of the claim filed on behalf of Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi, would be heard during the urgency hearing.¹¹ This was despite the Crown's protestations that it was unlikely to be in a position to respond fully to any new accusations and challenges that had 'recently come to light due to insufficient time to consider all the issues and to seek the Minister's direction'.¹² Judge Wickliffe wrote on this issue that the non-taumata claimants would probably have been granted urgency and that it seemed equally clear that an:

urgent inquiry into the Te Arawa mandating process can not proceed without having regard to the impact of that process on all the tribes of the Te Arawa confederacy. It would be wasteful of the Tribunal resources to require that all these claims be dealt with separately.¹³

2.1.5 The Tribunal hearing

The hearing was held over the period 21, 22, 23, and 25 June 2004 in Rotorua. To ensure that all the evidence was heard and that all counsel were given the opportunity to cross-examine witnesses of other parties, written affidavits or signed briefs were taken as read, some additional material was added orally, and the Tribunal held long sitting days beginning between 8.30am and 9am and finishing between 7pm and 8pm. On the last night, the sitting went to 10.30pm to ensure that all the evidence of the parties was heard. What was not foreseen during the inquiry planning was the number of witnesses that would be called and, in relation to at least two witnesses, the length of time they would be needed for cross-examination.

10. Paper 2.3.18

11. Ibid

12. Paper 3.1.92

13. Paper 2.3.18

Delay was exacerbated during the course of the hearing when leave was sought at different times by the executive council and by the Crown to introduce new evidence. Leave was granted on the basis that the probative value of that evidence outweighed any detriment or disadvantage suffered by the claimants. To deal with the claimants' concern and opposition to the introduction of that material, leave was granted for their counsel to file further evidence in reply following the hearing, with additional time also granted to file submissions in reply. The additional evidence and submissions were filed by 9 July 2004.

It is important to note that Crown counsel, Mr Soper, was due to present legal submissions for the Crown on the third day of the hearing but he waived that right until he heard the evidence for the executive council. As it happened, neither he nor Mr Stone for the council was able to address the Tribunal orally. Instead, they filed their written submissions which have been fully considered by this Tribunal. We thank counsel for their cooperation in this regard whilst noting the concern subsequently expressed by the Crown.¹⁴

2.2 THE CLAIMANTS

Five statements of claim were filed in the context of the present inquiry: Wai 1150, Wai 1173, Wai 1174, Wai 1175, and Wai 1180.

2.2.1 Wai 1150

The Wai 1150 claim was filed by Pihopa Kingi, Pirihiira Fenwick, and Malcolm Short for the Te Arawa taumata. It is closely linked to the earlier Wai 791 claim, filed on 20 August 1999 by the Right Reverend Manuhuia Bennett, Tumu Te Heuheu, and Rangiuira Briggs.

Wai 791 is often referred to as the VIP claim and was brought on behalf of a significant number of claimants throughout the whole CNI area. It aimed to serve as an 'umbrella claim' for a large number of other claims from all three CNI districts in the Waitangi Tribunal process: Rotorua, Taupo, and Kaingaroa (known under the VIP project as the north, south, and central districts).

As we outlined in chapter 1, the VIP project was formally set up in 1999 and initially had a taumata, or leadership, made up of the three people who became the named claimants in the Wai 791 claim.¹⁵ Of this group, Bishop Bennett was the representative for the northern region, Tumu Te Heuheu represented the southern region, and Rangiuira Briggs represented the central region. Two CFRT appointees were also added to the taumata. At the time of his death, in December 2001, Bishop Bennett was the chairperson.

14. See, further, paper 2.3.21

15. Document A11(a), pp141, 163–164

In early 2002, the VIP taumata was expanded to nine members (not including the CFRT appointees), being three for each region.¹⁶ The members for the northern district were Bishop Whakahuihui Vercoe, Sir Howard Morrison, and Pirihiira Fenwick.¹⁷ This group effectively constituted a Rotorua district, or Te Arawa, taumata within the larger VIP taumata. Tumu Te Heuheu took over as chairperson of the main VIP taumata, while, within that, Bishop Vercoe became the chairperson of the Te Arawa taumata.¹⁸ From the VIP annual report for 2001–02, it appears that Sir Howard Morrison's place was subsequently taken by Pihopa Kingi.¹⁹

When the Wai 1150 claim was filed, in April 2004, Bishop Vercoe was convalescing from an illness. The claim was therefore lodged in the name of Malcolm Short as an alternate for Bishop Vercoe, along with Pihopa Kingi and Pirihiira Fenwick. In terms of the role they play, the named claimants in Wai 1150 may thus be said to be the successors to the original Te Arawa representative on the VIP taumata of the Wai 791 claim.

Overall, the Wai 1150 statement of claim highlights issues of both policy and process with regards to mandating, citing seven main points of grievance.

The claimants state that the Crown did not respect the rangatiratanga principle of the Treaty of Waitangi, which they describe as 'the right of the Maori tribes to have their own institutions, processes and policies respected by the Crown'.

In relation to this, they claim that the Crown assisted and supported a person (namely, Rawiri Te Whare) to institute mandate strategies for Te Arawa 'without gaining an appropriate tribal consent first, and without prior inquiry of other bodies which might have an authority in this regard'. They state that this is also contrary to the rangatiratanga principle of the Treaty.

Thirdly, they say that the council's deed of mandate 'purports to convey to Kaihautu Executive the right to negotiate a settlement of individual property claims, when no authority was given by the individuals affected', and they claim that the Crown's recognition of the deed is therefore contrary to article 3 of the Treaty.

Their next three points of grievance relate to what they allege to be breaches by the Crown of its duty to act in good faith:

- ▶ they state that the Crown has recognised the executive council despite its structure never being mandated by Te Arawa iwi/hapu;
- ▶ they claim lack of procedural fairness, on a number of points, in the implementation of the mandating process; and
- ▶ they claim that the Crown 'failed to act fairly and evenly' and that it did not ensure procedural fairness in the assessment and recognition of the deed of mandate.

Lastly, they allege compromise of their right to claim, stating that the Crown proceeded

16. Document A11(a), p373

17. Wai 791 ROI, doc A100, p3

18. Document A11(a), p373; claim 1.1.1, para 1.6

19. Document A11(a), p373

to recognise the mandate claimed by the executive council when the question of whether it should do so was before the Waitangi Tribunal. They state that the effect of this was to prejudice rights of hearing and determination provided for by the Treaty of Waitangi Act 1975.

2.2.2 Wai 1173

The named claimant in Wai 1173 is David Whata-Wickliffe, who states that the claim is brought on behalf of eight named kinship groups ‘insofar as it relates to their Waitangi Tribunal claims (Wai 164, 193, 194, 195, 196, 197, 198, 199, 295, 929, 296, 564, 1032) all of which are represented by the Ngati Tamakari Claims Committee’.

Mr Whata-Wickliffe adopts the seven points of grievance expressed by the Te Arawa taumata in Wai 1150. While the statement of claim is not particularised further than this, later submissions have made it clear that Mr Whata-Wickliffe has an issue over the way the disposition of hapu seats on the executive council was decided. In particular, he queries why some small hapu have been allocated a seat and other hapu such as Ngati Tamakari have not.²⁰

2.2.3 Wai 1174

Wai 1174 was filed by Ms Sykes, acting for the following claimants:

- ▶ Te Ariki Morehu, of Ngati Makino (Wai 275);
- ▶ Stephen Hohepa and Te Kapua Watene, of Ngati Tuteniu (Wai 980); and
- ▶ Isobella Fox, of Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi (Wai 21(a)).

As such, the claim represents the interests of three distinct groups of claimants.

(1) *Ngati Makino*

In 1994 and 1995, Ngati Makino (Wai 275) were party to the eastern Bay of Plenty inquiry. In the report that followed that inquiry, the eastern Bay of Plenty Tribunal wrote:

Through historical associations, Tuwharetoa, Ngati Awa, and Te Arawa all saw Ngati Makino as part of them. Clearly, there are whakapapa links to each, but in the course of the hearings it became clear that they saw their main link as being with Te Arawa. They place significance on a line of descent from Hei and his son Waitaha-a-Hei of the Arawa canoe.²¹

(2) *Ngati Tuteniu (Wai 980)*

Material presented in evidence by the Te Arawa taumata states that Ngati Tuteniu have close links to Ngati Rangiteaorere and Ngati Uenukukopako.²² This accords with Rangi Easthope’s

20. See, for example, doc A43; paper 3.3.16

21. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p22

22. Document A11(a), pp 492, 524

2.2.3(3)

statement during the hearing, under cross-examination by Ms Sykes, that the ancestor Tuteniu was a grandson of Rangiteaorere, and that Ngati Tuteniu and Ngati Rangiteaorere have a close relationship.²³

(3) Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi

Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi (Wai 21(a)) are part of the Ngati Tuwharetoa ki Kawerau grouping that signed a deed of settlement with the Crown in June 2003, although the issues in Wai 21(a) have been specifically excluded from that settlement and in evidence this claimant group stressed their independence from Tuwharetoa ki Kawerau.²⁴ According to evidence presented during the eastern Bay of Plenty inquiry, the Tuwharetoa ki Kawerau people are descended from Tuwharetoa-i-te-aupouri, who was born at Otamarakau. Today, Ngati Tuwharetoa are more associated with the Taupo area, but some Tuwharetoa hapu remained in the Kawerau area. Ngai Tamarangi are among them.²⁵

(4) The issues of claim

The issues of claim in Wai 1174 are not particularised to each of the above groups but are rather of a generic nature and relate to the way in which the Crown's mandating and negotiation policies have been applied within the Te Arawa region. The claimants allege that the Crown has 'actively attempted to displace the rangatiratanga of Te Arawa and its constituent hapu and iwi'. They state that this has occurred at two levels: in the development of the Crown's settlement policy relative to Te Arawa; and in the implementation of that policy. In particular, they question the development and application of the Crown's 'large, natural groupings' policy in the context of Te Arawa.

In the course of the inquiry, however, it became apparent that the groups involved in this claim had rather different concerns. The Wai 21(a) claimants, for example, were anxious that their claim, having been listed in the executive council's deed of mandate, would be included in the proposed Te Arawa negotiations. However, in their closing submissions, counsel for Wai 21(a) recorded that their clients' issue of grievance had 'largely been resolved by way of undertakings received from the Crown during the hearing process'.²⁶

Ngati Makino, for their part, expressed a particular grievance in that the Crown had already recognised a deed of mandate from Ngati Makino and had agreed to terms of negotiation, yet their claim had been included in the executive council's deed of mandate and the Crown was seeking to persuade them to join with the kaihautu for the purposes of negotiation and settlement.²⁷

23. Rangi Easthope, oral evidence

24. Document A40, para 3; doc A41, para 3. In respect of the exclusion from the settlement, see <http://nzoi.terabyte.co.nz/ots/DocumentLibrary/2003settlementsupdate.pdf>; MICOTOWN to Tomairangi Fox, 13 March 2002 (Wai 21/o).

25. Waitangi Tribunal, *The Ngati Awa Raupatu Report*, pp19–21

26. Paper 3.3.15, para 1.2

27. Ibid, paras 3.5–3.10, 3.26–3.27, 4.2

2.2.4 Wai 1175

The named claimants in Wai 1175 are David Potter and Andre Paterson. The claimant group includes a cluster of nine other claims, of which Wai 996 is the lead claim, and ‘those members of the iwi who are members of the Te Rangatiratanga o Ngati Rangitihi Inc’. The latter body was set up in 2003 and has a committee that is representative of ‘most of the major Rangitihi trusts’.²⁸

Wai 996 was filed in March 2002 and was, at that time, one of only two claims filed specifically on behalf of Ngati Rangitihi, the other claim being Wai 524 (see below). Since then, other Ngati Rangitihi claims have been filed and all except Wai 524 are part of the Wai 996 cluster. There is a difference of opinion between the claimants in the Wai 996 cluster, on the one hand, and the Wai 524 claimants, on the other, as to who (or what modern legal entity) best represents the interests of the traditional kinship group known as Ngati Rangitihi.

Apart from general claims about the Crown failing to respect tino rangatiratanga and to act in good faith towards Ngati Rangitihi, it is the Wai 1175 claimants’ particular contention that the Crown’s mandating process has been ‘damaging to the social relationships within Ngati Rangitihi’. They also claim that the Crown’s process has been ‘undermining of the political and cultural relationships of the people’ and has caused ‘division and discontent and aggravated intra hapu and whanau tensions and disputes’. The statement of claim particularises a number of ways in which they say this has come about. For example, they say that certain hui were not properly advertised or did not confer a proper mandate (or both), and that the Crown had insufficient grounds to believe that a proper mandate had been achieved on behalf of Ngati Rangitihi. They further cite dissatisfaction over the way in which the Crown addressed their submission on the executive council’s deed of mandate and object to the concept and conduct of a ‘reconfirmation hui’ held in May 2004.

The core of the Wai 1175 claim thus relates more to the application of the Crown’s mandate policy than to the policy itself.

2.2.5 Wai 1180

The Wai 1180 statement of claim was filed by Tame McCausland on behalf of Waitaha (Wai 664). Waitaha are a coastal Bay of Plenty people, and the Wai 664 claim has already been partly heard in the Tauranga moana inquiry. The Tribunal’s report on that inquiry is due out shortly. In the CNI inquiry, there is at least one other claim (Wai 702) that states a specific link to Waitaha, but the claimants in that claim have not sought to participate in the present urgent inquiry.

The kinship group of Waitaha is descended from Hei, who arrived on the Te Arawa waka along with Tamatekapua, Tia, Ngatoroirangi, and a number of others. Printed genealogies

28. Document A44(a), para 19

and texts show Hei and Tia as brothers, being sons of Tuamatua (also written Atuamatua). The tupuna Waitaha was a son of Hei, while Tapuika was a son of Tia.²⁹

The Wai 1180 statement of claim alleges that the Crown failed to respect the tino rangatiratanga of Waitaha, and failed to act honourably, reasonably, and with the utmost good faith, when it attempted to pressure the Waitaha people into joining Nga Kaihautu o Te Arawa against their will. The claimant states that, although Waitaha are of the Te Arawa waka, they are not part of the confederation of Te Arawa or of the Te Arawa Trust Board, and they have a raupatu claim that is wholly unrelated to the claims of the rest of Te Arawa. Further, the claimant seeks recommendations from the Tribunal that the Crown should ‘ensure that it develops policies to protect the interests of claimant groups whose interests are marginal to larger iwi groupings’.

2.3 THE RESPONDENTS

2.3.1 The Crown

Crown policy with respect to the Treaty claims settlement process is set by Cabinet on the advice of the Cabinet Policy Committee and, in particular, the Minister in Charge of Treaty of Waitangi Negotiations. The process leading up to that is described in the Tribunal’s *Pakakohi and Tangahoe Settlement Claims Report*:

The Minister, in turn, is advised by the Office of Treaty Settlements (OTS). That office obtains input to its policy advice, and to its development of processes to implement Crown policy, from other Crown agencies (most notably Te Puni Kokiri (TPK) – the Ministry of Maori Development) as well as from Maori communities.³⁰

OTS has laid out the Crown’s policy and practices with regard to settling Treaty claims in its book *Ka Tika a Muri, Ka Tika a Mua – Healing the Past, Building a Future*.³¹

The claims in the present inquiry centred on:

- ▶ aspects of the Crown’s overall policy with regard to the mandating process;
- ▶ aspects of the practical application of that policy; and
- ▶ aspects of the Crown’s overall settlement policy.

At the hearing, the Crown was represented by the Crown Law Office and the main Crown witness was the director of the Office of Treaty Settlements.

29. Document A113A, paras 3–5

30. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p2

31. 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])

2.3.2 The executive council of Nga Kaihautu o Te Arawa

The executive council of Nga Kaihautu o Te Arawa does not have a Treaty claim registered with the Tribunal and has not been a full party to any Tribunal hearing, although it does send representatives to CNI judicial conferences as observers. Rather, the council states that its role is as ‘a vehicle through which Te Arawa are to collectively negotiate for the settlement of historical Treaty claims’.³² This highlights a difference between the claims process, which by law requires that claims be lodged by named individuals, and the settlement process, which requires that negotiation and settlement be carried out with iwi and hapu.

According to the council, the issues raised in the urgent inquiry ‘relate squarely to the mandate of the Executive Council’ and not to the Crown’s policy and process. As such, they say, the issues are not ones that lend themselves to a Tribunal inquiry. Rather, they are political issues internal to Te Arawa and should be dealt with internally.³³

2.4 OTHER PARTIES

2.4.1 Ngati Rangitihi (Wai 524)

The Ngati Rangitihi (Wai 524) claimants were not directly party to the inquiry but counsel sought leave to represent their interests in relation to certain claims brought against the Crown by the Ngati Rangitihi (Wai 1175) claimants.

Wai 524 was filed in 1995 by Leith Comer, Nirai Raureti, William Savage, Marion Amai, Duke Kepa, and Anapeka Tuna. They stated that it was brought on behalf of themselves ‘and the Ngati Rangitihi people in general’. Kaumatua Henry Pryor was subsequently named as a spokesperson for the claim and, in the public notification of the council’s deed of mandate, was listed as the Ngati Rangitihi representative on the council.³⁴

The main interest of the Wai 524 claimants in the present inquiry was in relation to assertions by the Wai 1175 claimants that:

- ▶ no mandate had been conferred by Ngati Rangitihi for anyone to represent them on the council; and
- ▶ the council has no mandate to represent Ngati Rangitihi in negotiations with the Crown.

The Wai 524 claimants stated that this was ‘a matter of mana’ for themselves and the iwi at large, and sought to be heard publicly on parts of the Wai 1175 case. They stressed, however, that responding to the case was ‘the sole province and responsibility of the Crown’.³⁵

32. Paper 3.3.7, para 1.6

33. Ibid, paras 1.1, 1.5

34. E Barrett-Whitehead et al, ‘Final Report on the Current State of Claimant Mandate and Representation in the Rotorua Inquiry District’, report commissioned by Waitangi Tribunal, October 2002 (Wai 950 RO1, doc A3), p 48; doc A11(a), p 559

35. Paper 3.3.9, para 5

2.4.2

2.4.2 The Tuhourangi cluster (Wai 7, 204, 233, 363)

The Tuhourangi cluster of claims is made up of Wai 7, Wai 204, Wai 233, and Wai 363. Of the claims listed for potential inclusion in the CNI inquiry, these are the main claims relating specifically to Tuhourangi, although the kinship group is also closely linked with Ngati Wahiao, who have additional claims.

There are two principal named claimants in the cluster: Te Rangipuawhe Maika (Wai 7, Wai 363) and Anaru Rangiheuea (Wai 204, Wai 233). In the public notification of the council's deed of mandate, Mr Maika and Mr Rangiheuea are listed as the representatives for Tuhourangi on the council, and each filed affidavits for the urgent hearing in support of the council.³⁶

2.4.3 Ngati Taeotu, Ngati Hurungaterangi me Ngati te Kahu o Ngati Whakaue (Wai 533)

Ngati Whakaue is one of the two largest of the Te Arawa iwi and is made up of a number of hapu including Ngati Taeotu, Ngati Hurungaterangi, and Ngati Te Kahu. Among the claims listed for potential inclusion in the CNI inquiry are around nine that relate specifically to Ngati Whakaue or its hapu. Wai 533 is one of them.

Wai 533 was lodged in 1995 by 'Te Au Nikora, Hokimatemai Kahukiwa and Tobias Hona (Ben Hona, power of attorney)'.³⁷ The statement of claim specified that the named claimants were 'mandated representatives of the Ngati Hurungaterangi, Ngati Taeotu and Ngati Kahu'. Ben Hona is currently one of the kaihautu representatives for Ngati Whakaue but is not on the executive council.

At first, the Wai 533 claimants did not indicate a wish to be involved in the urgent inquiry, but they sought late leave to be included in order to answer matters that had been raised in affidavits filed by supporters of the Te Arawa taumata. In particular, they were concerned about matters that had been raised in relation to Ngati Whakaue and the extent of any mandate alleged to have been given to the taumata by its constituent hapu.³⁸

2.4.4 Ngati Whaoa (Wai 837) and Rika whanau (Wai 681)

The claimants in Wai 837 and Wai 681 did not file a separate claim in the context of the urgent inquiry but did file submissions. Their particular concern was with the conduct of the mandating hui that included Ngati Whaoa and what they saw as a resulting lack of representation in the proposed negotiations with the Crown. They also expressed concern about the facilitation of the mandating process.

36. Document A11(a), p 559; docs A63, A107, A138

37. Claim by Te Au Nikora and others concerning Whakarewarewa Valley and Whakarewarewa State Forest, 26 July 1995 (Wai 533 R01, claim 1.1)

38. Papers 3.1.100, 3.3.8; docs A112, A113

2.4.5 Tapuika (Wai 615)

Tapuika were not party to this inquiry, although reference was made to them on a number of occasions. In many respects, their situation would appear similar to that of Waitaha, but they did not file a claim in the context of the urgency and did not seek to make a submission.

2.5 SUMMARY

The key points made in this chapter are as follows:

- ▶ On 5 February 2004, the Tribunal received a memorandum of counsel requesting urgency on issues relating to the Te Arawa mandating process.
- ▶ The chairperson of the Tribunal granted urgency on 4 May 2004, following a judicial conference to hear oral argument, and the matter was referred to the CNI Tribunal.
- ▶ On 11 June 2004, the Crown sought a deferral of the hearing, which was declined.
- ▶ The hearing was held on 21, 22, 23, and 25 June 2004.
- ▶ The claims in the inquiry were brought by: Pihopa Kingi, Pirihiira Fenwick, and Malcolm Short, for the Te Arawa taumata; David Whata-Wickliffe, of Ngati Tamakari; Te Ariki Morehu, of Ngati Makino; Stephen Hohepa and Te Kapua Watene, of Ngati Tuteniu; Isobella Hohipera Fox, of Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi; David Potter and Andre Paterson, of Ngati Rangitihi; and Tame McCausland, of Waitaha.

CHAPTER 3

THE ARGUMENTS OF THE CLAIMANTS

3.1 INTRODUCTION

The claimants can be grouped into several categories. As is clear from our introduction in the previous chapter, all opposed the Crown's recognition of the executive council's deed of mandate, but they did not share the same focus in doing so. Some were concerned with the overall process, others with the consequences of the process for specific kin or claimant groups, and others still had a primary concern with the Crown's overall settlements policy, and especially its preference for settling with 'large natural groups' of claimants. In this chapter, we run through the arguments of each of the claimant groups in turn, following the order in which they appeared before us, but attempting not to repeat identical or similar submissions made by more than one group.

3.2 TE ARAWA TAUMATA (THE WAI 1150 CLAIMANTS)

The Te Arawa taumata was perhaps the primary claimant group in the inquiry, since it opposed the entire mandating process rather than focusing on specific aspects relating to a particular kin group. We consider that its concerns fell under approximately five heads, which we describe as follows:

- ▶ the Crown's partiality and its non-recognition of the taumata's own mandate;
- ▶ Te Arawa's ongoing support for the taumata and their rejection of Rawiri Te Whare's plan;
- ▶ problems with the conduct and recording of mandating hui;
- ▶ opposition to the council structure; and
- ▶ the Crown's failure to investigate concerns about the process actively.

We now relate its arguments in more detail on each of these matters.

3.2.1 The Crown's partiality and its non-recognition of the taumata's own mandate

The claimants argued that the Crown had not recognised the mandate that it (the taumata) saw itself as already holding at the start of 2003. Indeed, counsel contended that the Crown

had viewed Te Arawa as some kind of mandate ‘terra nullius’ situation despite years of taumata involvement (through the VIP project) in leading the progression of Te Arawa claims both through the Tribunal process and towards direct negotiation.¹ Counsel said it was contended not so much that the taumata stood ‘above other bodies in the region, or [had] authority over Claimants or Hapu or Iwi’ but rather that the Crown should have recognised that it was the taumata which had, ‘by the time the Crown finally decided to engage in meaningful settlement discussions with Te Arawa, been playing this role for at least four years’.² Counsel further argued that the Tribunal itself had previously recognised VIP’s ‘popular support’, referring to the directions of the deputy chairperson and Joanne Morris of 5 September 2001, which referred to the ‘critical mass achieved by the Wai 791 claimants in the VIP project’.³ In ignoring this pre-existing mandate, counsel argued, the Crown had failed to respect Te Arawa’s mana.

In support of this argument, counsel cited the Tribunal’s *Taranaki Report: Kaupapa Tuatahi*, which had found that Maori communities should be able to choose their own leadership rather than have the Crown effectively make that decision for them. The Tribunal wrote:

The problem is not that the Government’s answers were wrong but that the Government presumed to decide the questions at all, for it is the right of peoples to determine themselves such domestic matters as their own membership, leadership, and land entitlements. Remarkably, it was presumed that the Government could determine matters of Maori custom and polity better than Maori and that it should have the exclusive right to rule on what Maori custom meant.⁴

Counsel concluded that the Crown had been well aware of the ‘clarity of leadership within Te Arawa’ and had, therefore, been duty-bound ‘to abide by *Taranaki* Principles when dealing with Te Arawa, and it failed to do so’.⁵ Instead, the Crown had become ‘Te Arawa’s Kingmakers’.⁶

Counsel also rejected the suggestion that VIP or its offshoot, the Te Arawa taumata, had only ever had claimant – as opposed to iwi/hapu – support. For example, counsel argued that certain claims had been made with full iwi/hapu backing and that the Wai numbers were in effect synonymous with the particular kin group. Counsel cited Ngati Rangiwewehi as an example of this, and noted Mr Te Whare’s own previous submission of support for the VIP collective on behalf of Ngati Tahu/Ngati Whaoa.⁷

1. Paper 3.3.19, p12

2. Paper 3.3.1, p17

3. Ibid, p19 (in reference to doc A11(a), p263)

4. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p5; paper 3.3.1, p8

5. Paper 3.3.19, p10

6. Paper 3.3.1, p3

7. Paper 3.3.19, p13 (in reference to doc A11(a), pp334–337)

Counsel said that the date at which the Crown first ‘sidelined’ the taumata was when it met alone with Tumu Te Heuheu and Rawiri Te Whare in 2002. At that point, said counsel, the taumata’s support was ‘undisputed’,⁸ but MICOTOWN then ‘selected’ Mr Te Heuheu to progress mandate issues, and the latter took Mr Te Whare along ‘as his assistant’.⁹ From then, said counsel, it was Mr Te Whare, and not the taumata, that the Crown met with, groomed, and adopted as their facilitator. They did so while he was employed by the taumata, and ‘without the knowledge of the Te Arawa Taumata’.¹⁰ Counsel argued that this was in breach of proper rules of management accountability to governance, since Mr Te Whare was an employee of the whole taumata (and specifically designated northern region coordinator) and was not answerable to the chair alone.¹¹ Furthermore, said counsel, it was a breach of Te Arawa tikanga for Mr Te Whare to be placed in this facilitative position by someone from another tribe (Ngati Tuwharetoa).

Counsel added that the Crown’s alleged partiality continued during the mandating process in that it actively supported and bolstered the status of Mr Te Whare, even though he was acting without the taumata’s sanction. Counsel said that, despite the Crown’s constant insistence that it is inappropriate for it to interfere in internal tribal business, ‘the reality is that OTS did interfere and did favour one side in the electoral process’. This favouritism manifested itself not so much in active intervention, according to counsel, but in OTS ‘closing its eyes’ to the flaws each time it received a complaint about the mandating process.¹² Furthermore, said counsel, the Crown’s statement that the person proposing the mandate had no greater status than anyone else is ‘extraordinary’ when ‘the experience in Te Arawa shows that the person whom the Crown chose to be its facilitator (Mr Te Whare) became the chairman of the group claiming the mandate’.¹³

3.2.2 Support for the taumata and rejection of Rawiri Te Whare’s plan

The claimants contended that hui of Te Arawa both expressed support for the taumata facilitating the mandating process and rejected Rawiri Te Whare’s plan. Despite this, said counsel, Mr Te Whare carried on regardless and did so with OTS approval.

The first hui in question is that of 5 March 2003 held at Tamatekapua. As noted in chapter 1, this was a Te Arawa-wide meeting that followed on from the preceding month’s hui at which interim representatives had been selected. Following Mr Te Whare’s own presentation on the night, two resolutions were passed: first, that Te Arawa enter direct negotiations and, secondly, that ‘this hui of all the hapu of Te Arawa support and uphold the present VIP Taumata

8. Paper 3.3.1, p 21

9. Paper 3.3.19, p 11

10. Paper 3.3.1, p 17

11. Martin Taylor, cross-examination of Rawiri Te Whare, 25 June 2004

12. Paper 3.3.19, p 8

13. Ibid, p 10

and proposed legal entity'.¹⁴ Both the Crown and the council argued that this effective rejection of Mr Te Whare's role and endorsement of the taumata's facilitation of the process were invalid, since the advertised agenda had been departed from. However, counsel contended that the expression of support for the VIP taumata fell comfortably within item 3 on the advertised agenda; namely, 'Who will represent Iwi and Hapu who wish to be included in discussions?'¹⁵

Then, on 22 May 2003, Mr Te Whare presented his 'Te Ara Tika' plan to a hui of Te Arawa interim representatives. According to Pihopa Kingi, the plan was not approved and the hui reiterated the support expressed on 5 March for the taumata to lead management of the claims.¹⁶ Te Ururoa Flavell added that the hui decided to put the plan to a meeting of Te Arawa whanui.¹⁷ In the meantime, the mandate plan was put to the VIP taumata at a meeting in Taupo on 16 June. Contrary to Mr Te Whare's opinion, counsel maintained that that hui had in no way approved of the plan. The minutes record that Mr Te Whare's update, with the plan attached, was merely 'received and noted'.¹⁸ Taumata witness Malcolm Short was adamant that there had never been any intention to vote on or approve what was only a 'report on progress'.¹⁹

On 11 June, Mr Te Whare sent out a notice for a hui to be held at Te Ao Marama on 17 June to consider the draft mandating plan. Counsel described the notice period as quite insufficient. As we have noted, those invited to the hui were limited to interim representatives, taumata members, and representatives of the Te Arawa Maori Trust Board, Te Pukenga Kaumatua o Te Arawa, and Te Kotahitanga o Te Arawa. Besides the short notice, 17 June was already set down for a Tribunal judicial conference in Taupo, which taumata members and their counsel were committed to attending. According to Pihopa Kingi, Mr Te Whare's timing seemed intended 'to exclude the Taumata from full participation'. Nevertheless, on 17 June, a motion that Mr Te Whare's plan be adopted was 'lost by a large majority'. Instead, the meeting resolved to refer the matter to a further meeting, to be held on 28 June, at which all Te Arawa claimants would be invited to participate.²⁰

Despite what counsel referred to as this 'huge rejection',²¹ Mr Te Whare decided to proceed to implement his plan, supposedly on the basis of being approached after the hui by individual interim representatives who told him to go ahead, and because nine of the 13 interim representatives present at the hui had voted in his favour. Counsel submitted that 'to proceed on the basis of individual authorities to hold hui is unheard of in Te Arawa. It places the

14. Document A11(a), p382

15. Paper 3.3.1, p20; paper 3.3.19, p14; see notice of meeting at doc A11(a), p380

16. Document A3, para 21

17. Document A5, p7

18. Document A137, exhibit 1

19. Ibid, pp2-3

20. Document A3, para 32

21. Paper 3.3.19, p15

individual before the collective. It allows the tail to wag the dog.’²² Counsel queried just which interim representatives had approached Mr Te Whare afterwards. He named three persons, but counsel contended that only one of them was an interim representative. In the circumstances, counsel submitted, this rather undermined Mr Te Whare’s assertion that only the votes of interim representatives were relevant at the hui.²³

3.2.3 Problems with the conduct and recording of mandating hui

According to the taumata, the problems with the mandating process – such as discrepancies over minutes of hui, the adequacy of notice about and explanation of the council, and so on – mean that the Crown’s requirement for an open and robust process was not met. Counsel rejected the suggestion of Mr Stone for the council that only a limited number of the hui were challenged in any way. To illustrate this, counsel summarised the 19 mandating hui as follows:

Hui	Reaction
Ngati Kea/Ngati Tuara	No challenge
Tuhourangi/Ngati Wahiao	Challenge, no final authority given, minutes incorrect
Ngati Te Roro o Te Rangi	No challenge but no correct minutes seen
Ngati Tarawhai/Ngati Rongomai	No challenge
Ngati Pikiao	No challenge
Ngati Rangitahi	Clearly a large challenge from Kensington Swan
Ngati Tahu/Ngati Whaoa	Treatment of Ngati Whaoa and counting of children in vote challenged
Ngati Rangiteaorere	Challenged to extent that no final authority given
Waitaha	Rejected kaihautu
Tapuika	Rejected kaihautu
Ngati Whakaue	Challenged to extent that no final authority given
Ngati Tuteniu	Swinging 9–10 balance as to whether kaihautu and executive accepted; independent status of hui challenged – previously regarded as part of other hapu/iwi
Ngati Rangiwehehi	Timing challenged and no final authority given
Ngati Uenukukopako	No challenge
Ngararanui/Ngati Te Ngakau/Ngati Tura	Challenged to extent that no hui held on separation of Ngararanui representation
Auckland rohe	No challenge
Hamilton rohe	No challenge
Wellington rohe	No challenge
Christchurch rohe	No challenge

Results of mandating hui. Source: paper 3.3.19, pp26–27.

In other words, there was outright rejection of the executive council at two of the mandating hui, and serious challenges arising out of a number of others.

22. Ibid, p17

23. Ibid, p18

A number of the challenges arose in response to the minutes of the hui that were provided to the Crown as part of the deed of mandate. These minutes followed a standard format that barely differed from hui to hui. For example, every set of minutes stated ‘The presentation overview outline addressed the four mandating principles as advertised’ and ‘In depth discussion and questions were answered by Presenter (Rawiri Te Whare)’. However, counsel pointed out that this was certainly inaccurate in the case of the Ngati Tuteniu hui, as Mr Te Whare had not been present at that meeting. With respect to the Ngati Rangiwehewhi minutes, Te Ururoa Flavell disputed that Mr Te Whare had led any ‘in-depth discussion’.

Each set of minutes also recorded the (almost identical) resolutions put and voted on at the hui. The resolutions, which we have already traversed in chapter 1, included that the iwi/hapu:

- ▶ would agree to enter direct negotiations for a ‘comprehensive settlement of all their historical claims’;
- ▶ would elect representatives (of unspecified number) to the kaihautu ‘to represent them in the negotiations process’; and
- ▶ would agree that all the kaihautu representatives would choose between five and eight ‘kaiwhakarite’ to negotiate a comprehensive settlement of all Te Arawa historical claims.

Counsel observed that the Ngati Rangiwehewhi minutes were totally inaccurate, because the resolutions recorded as being put at that hui referred not to Ngati Rangiwehewhi but to Ngati Tuteniu. Furthermore, Mr Flavell said that the 11 people elected at the hui were to negotiate a settlement of Ngati Rangiwehewhi’s claims themselves, not just to be part of the kaihautu.²⁴ With respect to the Ngati Wahiao hui, Mihikore Heretaunga argued that, contrary to the minutes, there had been no agreement about the five to eight negotiators, and that instead the hui had decided to debate the matter further at a subsequent hui.²⁵

With respect to the Ngati Tahu–Ngati Whaoa hui, Mike Rika alleged some irregularities. For example, the vote taken on the night as to whether Ngati Whaoa should have separate representation from Ngati Tahu (in which only members of Ngati Whaoa were eligible to vote) was invalid, because many who were not Ngati Whaoa (as well as a number of children playing outside) were counted in the tally. He argued that such a vote should have taken place at Ngati Whaoa’s own marae at Mataarae rather than on a Ngati Tahu marae.²⁶ Mr Rika further alleged that the list of attendees was incomplete, which was something Rangi Easthope also claimed about the Ngati Tuteniu hui.²⁷

Altogether, counsel for the taumata said that the minutes ‘can only be described as a sham-ble, which should have put the Crown on alert to the need for independent verification’. In any event, counsel argued, the minutes do reveal that Ngati Whakaue, Ngati Rangiteaorere, and Ngati Rangiwehewhi did not approve of the resolution that kaihautu representatives

24. Document A6, p6

25. Document A7, p1

26. Document A9, p5

27. Document A26, p5

would select five to eight negotiators to settle all the Te Arawa claims. Counsel added that the weight of evidence was that Ngati Wahiao also did not pass this resolution at its mandating hui. Therefore, counsel concluded, there was no authority from the mandating process for individuals representing these hapu – which comprise ‘a major part of Te Arawa’ – to be included in the council.²⁸

3.2.4 Opposition to the council structure

The claimants also expressed concerns that the council structure itself was not in accord with Te Arawa tikanga. Nor, they said, had there been any proper notification about it in the hui advertisements, let alone adequate explanation of it at the hui themselves. Overall, said counsel, the council had been founded on ‘too little consideration, too little information, and too little consultation from Hapu and claimants of Te Arawa’.²⁹

Counsel made the point that, in the public notices for the mandating hui, there was no mention of the executive council.³⁰ Those notices referred solely to several meeting objectives (or ‘mandating principles’) to be discussed at the hui. These were essentially the same as the resolutions voted on that we referred to above (that is, to secure a mandate to enter into direct negotiations for the comprehensive settlement of all Te Arawa historical claims, to elect representatives to the kaihautu, and to gain agreement to the selection of five to eight ‘kaiwhakarite’ or negotiators).³¹ Counsel conceded that a handout which included a diagram depicting a ‘komiti’ of 14 members between the kaihautu and the negotiators may have been distributed at the mandating hui but contended that this ‘komiti’ had not been explained or even specifically discussed at the hui.³² Counsel adduced further affidavits from several witnesses who argued that the handout had been quite insufficient for the conferment of any endorsement of the proposed council.³³ More to the point, said counsel, ‘the komiti did not feature in the mandating resolutions where the Claimants gave their mandate to their Hapu representatives’.³⁴

Counsel rejected the suggestion that the council structure had been approved at the 16 September 2003 hui. That hui lacked validity, counsel said, because of inadequate notice and because of its timing – it was held when both counsel and Pihopa Kingi were overseas. Furthermore, no vote ever took place – either on 16 September itself or during the mandating hui – as to whether there should even be an executive council. As counsel pointed out, the

28. Paper 3.3.19, pp 20–21

29. Ibid, p 8

30. Ibid, p 23

31. See the examples in document A130.

32. The handout was the ‘presentation overview’ referred to in the hui minutes, which was submitted in evidence by Rawiri Te Whare during our proceedings: see doc A142.

33. Documents B3, B6, B7

34. Paper 3.3.19, p 23

notice of 8 September presumed a prior acceptance by stating that ‘The sole purpose of this meeting is for each group within the Kaihautu to elect one person from their group onto the Executive Council’.³⁵ No alternatives were put up at the meeting for debate, said counsel, meaning that ‘the Executive council structure was simply imposed by Mr Te Whare’. Counsel also said that the 16 September hui came at a time when some groups, such as Ngati Rangiwewehi, had still not formally mandated representatives and were thus unable to participate officially.³⁶ Ngati Whakauae were in the same position, said counsel, but Mr Te Whare later relied upon a ‘personal communication’ to confirm that they now approved of the council structure.³⁷

Counsel stressed that the hui was quickly followed by a petition signed by 48 of the 98 kaihautu representatives, who sought further information and a rerun of the hui. This, said counsel, completely undermined the theoretically unanimous support of the kaihautu on 16 September.³⁸ One such participant who rescinded their support was taumata witness Pirihiara Fenwick. Mrs Fenwick admitted under cross-examination by Crown counsel that she had voted in favour of the council on the day, but she explained that she really had no authority to do so, since Ngati Rangiteaorere had not properly mandated her at that point. In her evidence, Mrs Fenwick described the 16 September hui as an ‘ambush’ and as having been ‘rigged to one outcome’ by Rawiri Te Whare ‘and his personal team of supporters’.³⁹

With respect to the council’s rules, counsel argued that they were not the subject of any consultation within Te Arawa but had rather been formulated by the council itself. Moreover, counsel submitted, the rules were inadequate in any event, providing ‘very little in the way of responsibility from the Executive Council’ to the kaihautu. For example, there is a requirement for no more than a reporting meeting once a month and no requirement for consultation. Counsel suggested that the kaihautu members in whose names the rules exist but who have had no say in them, ‘risk their good names, reputation and credibility by that nominal association’.⁴⁰

Counsel was particularly critical of the proportionality of iwi/hapu representatives on the council. From an advertised intention for one person to be elected per iwi/hapu (which accorded with Mr Te Whare referring to 14 ‘komiti’ members in his presentation overview handout), the total number of council members expanded, as did the number representing certain groups. According to Te Ururoa Flavell, Mr Te Whare explained at the 16 September hui that he personally had decided to give some groups more seats on the council on the basis

35. Document A11(a), p 500

36. Paper 3.3.1, p 45

37. Martin Taylor, cross-examination of Rawiri Te Whare, 25 June 2004

38. Paper 3.3.19, pp 23–24

39. Document A29, p 2

40. Paper 3.3.19, pp 25–26

of population statistics.⁴¹ Counsel submitted that Mr Flavell's account was un rebutted, and that the 'arbitrary nature of the representation on the Executive Council is a fundamental reason to remove mandate'.⁴² The Crown's acceptance of the council's advice that matters of representation were resolved according to tikanga, said counsel, was 'extraordinary'.⁴³

Specifically, the claimants made reference both during cross-examination and in submissions to a number of allegedly incongruous and disproportionate cases, which we summarise as follows:

- ▶ The varying treatment of Ngati Whaoa, Ngati Tamakari, and Ngati Tuteniu must be considered. While Ngati Whaoa were compelled to join up with Ngati Tahu, and Ngati Tamakari were denied representation separate from Ngati Pikiao, Ngati Tuteniu's seat arose only because Mr Te Whare decided to offer them a mandating hui, without consulting either themselves or their close Ngati Rangiteaorere relations.⁴⁴ According to tau-mata witness Rangi Easthope, this was because Mr Te Whare wanted to use his 'personal friendship' with some of the hapu to 'manipulate a position of control of Ngati Tuteniu' and 'place one of his loyal allies into a voting position' on the council.⁴⁵
- ▶ Ngararanui gained a seat only as the result of personal conflict within the wider grouping, including Ngati Te Ngakau and Ngati Tura: 'A personal conflict is not the type of matter that should result in an additional vote at the governance table'.⁴⁶
- ▶ With only two seats, Ngati Whakaue are under-represented given the size of their population. If one counts the seats for Ngararanui and Ngati Te Ngakau–Ngati Tura, they have four, but these are disproportionately split with two just for the Ngongotaha area and two for the rest of Ngati Whakaue put together.⁴⁷ If groups like Ngararanui can achieve separate representation, then so should larger groups within Ngati Whakaue such as Ngati Pukaki and Ngati Tunohopu. The separate status for the smaller groups should have been approved by the whole of Ngati Whakaue first.
- ▶ Ngati Pikiao are equally under-represented given their size, especially since they have only one seat. That Ngati Tuara–Ngati Kea also have one is disproportionate.

In sum, said counsel, 'If some parties are favoured with the grace of gaining a seat at the table, there should be a process for all parties to have that same favouring'.⁴⁸ Furthermore, counsel felt that the 'ad hoc' nature of the decision-making over council representation meant that the Crown 'should have insisted on more stringent measures of mandate assessment'.⁴⁹

41. Document A5, p9

42. Paper 3.3.1, pp 45–46

43. Paper 3.3.19, p 27

44. Paper 3.3.1, p 46

45. Document A26, p5

46. Paper 3.3.1, p 46

47. Ibid, p 47

48. Paper 3.3.19, p 28

49. Ibid

3.2.5 The Crown's failure to investigate actively

Counsel for the taumata argued that the Crown failed to fulfil its Treaty obligation to carry out an active investigation of the strength of the council's mandate and the concerns of the submitters opposed to it. Overall, said counsel, the Crown's assessment of the council's purported mandate was 'woefully inadequate' and, to this extent, followed on from the Crown's failure to inquire adequately into the extent of the taumata's mandate in the first place.⁵⁰ Counsel described the Crown's obligation in assessing a mandate as an 'active duty of informed assessment'. It was quite insufficient, said counsel, for the Crown merely to:

- ▶ read submissions and pass them to the council for comment;
- ▶ refuse to enter into dialogue with the submitters to discuss their concerns;
- ▶ assume that individuals filing submissions spoke only for themselves and not (in the case of Mr Flavell and Ngati Rangiwewehi, for example) for entire iwi;
- ▶ draw inferences from events prior to the submissions in preference to the actual concerns expressed in the submissions themselves; and
- ▶ assume that a lack of submissions from most petitioners meant that they were satisfied at the time submissions were called for.⁵¹

Furthermore, said counsel, Mr Hampton's justification for this passivity that the Crown should not 'foist' itself upon iwi was quite misplaced. Counsel submitted that 'An active review is required, not to impose on Iwi, but to ensure that the protection of an open and robust mandating process is afforded to all members of an iwi in practice, not just in words on a page'.⁵² Counsel noted Mr Hampton's further comment that the Crown could not be held responsible for matters that were not raised in the submissions process and were only now being raised during the hearing by arguing that the Crown would have known of all these concerns if it had undertaken an 'appropriately serious assessment' of the submissions.⁵³

Overall, said counsel, the Crown and the council were quite wrong to dismiss opposition to the council's deed of mandate as emanating from a small minority within Te Arawa only. Counsel pointed to the number of signatures on the September 2003 petition and the number of affidavits filed in support of the taumata's claim as evidence of an 'extremely large and real' dispute over the mandate.⁵⁴ The Crown's proposed remedy of the dispute – namely, requiring that places be reserved on the council for groups such as Ngati Rangiwewehi that had refused to come on board – was, said counsel, quite inadequate. Instead, the Crown should rescind recognition of the council's mandate and return the parties 'to the position which they would have been in, but for the Crown's failure'.⁵⁵ In response to questions from the Tribunal, counsel submitted that what would be required would now be a series of three mandating hui per

50. Paper 3.3.19, p4

51. Ibid, pp29, 35

52. Ibid, p30

53. Ibid, p31

54. Ibid, p33

55. Ibid, pp32, 36

iwi/hapu spread over three months run by the taumata, under the scrutiny of an independent auditor appointed by the Tribunal.

3.3 NGATI RANGITIHI CLAIMANTS (WAI 996)

For the sake of convenience, we will refer here to that group of Ngati Rangitihi claimants who filed a claim in these proceedings (Wai 1175) as ‘Wai 996’. The necessity for this shorthand is because, as they themselves acknowledged, the claimants do not speak for all Ngati Rangitihi. Counsel was quick to recognise this. Indeed, it was central to the Wai 996 claim to do so, because it is something that the claimants wished to contrast with the situation of Wai 524, the rival Ngati Rangitihi claim. As counsel put it, ‘the Wai 524 claimants, in effect, through their involvement in the Kaihautu process, in fact *do* claim to represent [the] Wai 996 claims cluster and the incorporated society and are, almost incredibly, recognised by the Crown as having the authority to do so’ (emphasis in original).⁵⁶

The claimants’ arguments revolved around several issues. For a start, counsel made some effort to argue that his clients represented a large proportion, if not the bulk, of Ngati Rangitihi people. They had established an incorporated society, for example, with a current membership of 1700 persons.⁵⁷ Moreover, counsel argued, Wai 996 had been active in furthering and protecting Ngati Rangitihi’s interests, which counsel portrayed as being in sharp distinction to those associated with Wai 524. As examples, counsel said that Wai 996:

- ▶ had protected Ngati Rangitihi’s interests in the Tuwharetoa ki Kawerau settlement;
- ▶ had participated in the foreshore and seabed inquiry;
- ▶ had established a website; and
- ▶ were now participating in the Urewera inquiry.

By contrast, the Wai 524 claimants, counsel said, had failed to act in respect of the Tuwharetoa ki Kawerau settlement (which was in itself the catalyst for the filing of the Wai 996 claim) and been struck out of the Urewera inquiry for taking no steps.⁵⁸ Counsel stressed the irony that those who had been ‘making all the efforts on Ngati Rangitihi’s behalf in the Tribunal’ had been ‘completely sidelined and ignored by those responsible for putting together the Kaihautu’. Counsel explained that Wai 996’s wish was very simple: ‘to remain within the Waitangi Tribunal process and to enjoy the full benefits of the research currently being commissioned. What gives anyone else the right to impose a different strategy on them?’⁵⁹

56. Paper 3.3.4, p5

57. While counsel’s submissions stated that there were 1500 members of the society, counsel added verbally that the current figure was 1700. In this context, counsel also submitted that Ngati Rangitihi were a group equal to or larger in size than a number of other groups with which the Crown was prepared to negotiate on their own in other districts: paper 3.3.4, p6.

58. Paper 3.3.4, p4

59. Ibid, p5

Counsel also rejected the submission of counsel for Wai 524 that the Wai 996 claimants needed to demonstrate a mandate from the whole of Ngati Rangitihi before bringing their claim (see ch4). The jurisdictional requirement was only for a claim to allege that Crown action was prejudicial and a breach of the Treaty, counsel stressed.⁶⁰

In his cross-examination of Henry Pryor, Wai 524 claimant and council representative for Ngati Rangitihi, counsel questioned just how Mr Pryor could represent other Ngati Rangitihi claimants given his lack of accommodation or dialogue with them.⁶¹ Mr Pryor said that Wai 996 could pursue their claim however they wished, revealing that he did not realise that the council would have the sole mandate to settle all Te Arawa claims whether a group like Wai 996 liked it or not. For counsel, this situation highlighted the ‘acute’ problems with the ‘badly designed and seriously flawed’ negotiating structure, given the ‘virtually non-existent’ lines of accountability from the council back to the iwi. As counsel put it, Wai 996 do not want to be represented by Mr Pryor, ‘while he for his part has made no effort to consult with them or set up a claimant committee which is in any way representative’.⁶²

Counsel submitted that the Crown’s own negotiations guidelines (as set out in its publication *Ka Tika a Muri*) had not been met. There, the Crown states that representatives of groups negotiating settlements should be ‘fairly representative of all the interests that must be taken into account’. Counsel contended that Mr Pryor in no sense fitted this description. Secondly, the OTS guide states that a deed of mandate should ‘endorse a structure by which the mandated representatives are accountable to the wider group’,⁶³ but counsel argued that the deed appeared to have ‘a very marked *lack* of accountability’ (emphasis in original).⁶⁴

Counsel argued that a large part of the problem was that the negotiating structure – which he described in an oral comment as a ‘centralised negotiating structure’ being imposed on a ‘decentralised social structure’ – had been endorsed by the Crown well before research had revealed what the key issues in the claims would be. As counsel put it, the Crown cannot ‘properly assess a mandating structure without some understanding of the *issues* that are in dispute. Mandate, negotiating structure, and the range of issues in dispute are in our submission *linked*.’ (Emphasis in original.)⁶⁵ Counsel argued that it would be better all round if a Tribunal inquiry were to take place first before settlement negotiations commenced. Counsel drew a contrast with the Tribunal’s recently published *Mohaka ki Ahuriri Report*, in which, he

60. Paper 3.3.13, p14

61. It should be added that counsel also disputed the adequacy and legitimacy of the process that saw Mr Pryor elected and rejected the Crown’s position that the flawed Ngati Rangitihi mandate of the council could simply be obtained through a ‘reconfirmation hui’: paper 3.3.4, pp16–17, 20.

62. Paper 3.3.13, pp3–4

63. 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]), p49

64. Paper 3.3.13, p4

65. Ibid, p5

said, the Tribunal had carefully considered, on the basis of full information on the historical issues, the groups with which the Crown should negotiate a settlement. For example, counsel pointed to the way in which the Tribunal had suggested in that report that a ‘large natural group’ of claimants could form around those who shared a particular historical issue (the Mohaka–Waikare raupatu). If this same analysis were applied to the Te Arawa claims, said counsel, it would certainly have important implications for just what kind of negotiating structure would work.⁶⁶

Related to this, counsel argued that the Tribunal should be mindful of ‘preserving the integrity of its own process’ by endorsing what counsel described as a quite unexpected departure by the Crown of proceeding to settlement negotiations before the completion of the research.⁶⁷ Counsel reminded us of the Tribunal’s directions of 25 March 2003, in which Judge Wickliffe had written that the Tribunal:

seeks to add value to the achievement of comprehensive and durable settlements by ensuring that Treaty grievances are thoroughly researched, by conducting fair and transparent public inquiries into all claims before it, and by completing authoritative reports on whether the claims are well-founded.

Counsel submitted that it was implicit in the Tribunal’s words that the Tribunal believed that settlements require ‘proper research’ and that ‘its own process is the most fair and transparent means of ensuring that negotiations and settlement are carried out in a fair and accountable way’. Counsel said that the Wai 996 claimants agreed strongly with these propositions, and had had ‘every expectation that their claims would be heard by the Tribunal *as part of a process of eventual settlement*’ (emphasis in original).⁶⁸ Counsel said that Wai 996 had reacted with ‘dismay and astonishment’ to the plan revealed by council member Paul Tapsell for the council to hold its own ‘hearings’.⁶⁹

Counsel also made some submissions on the overall Treaty settlements process, noting the frequency of claimant resort to the Tribunal in the context of the Crown’s negotiation and settlement policies. This, said counsel, was because the courts had found that Treaty settlements were not justiciable and that claimants therefore had no recourse to judicial scrutiny of the Crown’s actions. Counsel argued that there was now an ‘urgent need for legislative intervention in the Treaty claims settlement area’:

What is needed is a Treaty Claims Settlement Act which lays down authoritatively general criteria after full parliamentary debate and which has been subject to input from all sectors, including all sections of Maori opinion, through the parliamentary select committee

66. Ibid, pp5–10. Counsel suggested that a proper analysis would conclude that ‘the most meaningful units’ for most people of Te Arawa are its constituent iwi, and that there was ‘no one centre or ‘voice’ for Te Arawa as such’: p7.

67. Ibid, p11

68. Ibid, p12

69. Ibid, p13

process. Such a statute could lay down authoritatively the relationship between the Tribunal regional inquiry process and Crown settlement negotiations, could define the relevant criteria relating to cultural and commercial redress, and could define the relevant entities with whom the Crown should normally negotiate and identify situations where departures from the general rule might apply.⁷⁰

Counsel suggested that there was some precedent for such an approach to be found in the statute books of various states of the United States.⁷¹

Finally, counsel sought several recommendations from the Tribunal, including that:

- ▶ any deed of mandate recognition be delayed until the conclusion of stage 1 of the Tribunal's inquiry process;
- ▶ no Ngati Rangitihi claimants be forced to abandon the Tribunal process against their will;
- ▶ the Crown recognise that Ngati Rangitihi is an iwi in its own right; and
- ▶ the Crown further recognise that the Ngati Rangitihi mandate has not been given to the council to represent any of its claims.⁷²

3.4 WAITAHA (WAI 664)

We will refer to the Waitaha claimants as 'Wai 664' for the sake of consistency with our treatment of other claimant groups in this inquiry, and not because we doubt that the Wai 664 claimants clearly represent the kin group known as Waitaha. Indeed, we are unaware of any challenge to their status in that regard.

Counsel for Wai 664 argued that, just as Waitaha had historically been marginalised and overlooked, so had they again been demeaned and belittled by the Crown's settlement policy. She explained that Waitaha were a border people whose territory was split between the Tauranga and Rotorua districts. In contrast to their Rotorua kin, they had fought against loyalist Te Arawa during the wars of the 1860s, been branded 'rebels', and suffered the confiscation of their lands in the Tauranga raupatu.⁷³ Now, in the Crown's arrangements for the settlement of the Te Arawa claims, they had not been consulted about the mandating process and it had simply been assumed that they would willingly join with the rest of Te Arawa in the settlement of their claims. But, said counsel, 'Waitaha are unwavering in their determination to achieve their own settlement, to restore their own mana'.⁷⁴

70. Paper 3.3.13, p17

71. Ibid, pp17-19

72. Paper 3.3.13, p20. In regard to recognising Ngati Rangitihi as an iwi in its own right, Wai 996 witness David Potter stated his view that the Crown should negotiate with each iwi of Te Arawa separately: doc A44, p14.

73. Paper 3.3.5, p2

74. Ibid, p4

More specifically, counsel was highly critical of the way Waitaha had been overlooked by Rawiri Te Whare during the mandating process. For a start, Waitaha did not elect any interim representatives, and thus the decision of the other representatives to proceed to a negotiated settlement of all Te Arawa claims was not one in which Waitaha had any say. Then, when Mr Te Whare called a Waitaha mandating hui on 20 July 2003, he did so not with the consent of Waitaha but with the approval of Tapuika kaumatua Pateriki Hiini (and on the apparent suggestion of Rereamanu Wihapi, also of Tapuika). In cross-examination, Mr Te Whare admitted that he knew of Wai 664 claimant Tame McCausland's status as a leader of Waitaha but conceded that he had never rung him. Counsel argued that Waitaha's mana had simply been usurped. She said that, while these matters were not necessarily relevant to Waitaha's claim against the Crown, 'the almost complete lack of consultation with Waitaha proper in the mandating process is a vivid illustration of why Waitaha are so opposed to joining Nga Kaihautu: they are always overlooked'.⁷⁵

Focusing on the Crown, counsel submitted that it had made a 'unilateral' decision that it would be in Waitaha's best interests for them to join the Te Arawa-wide settlement negotiations. The Crown had thence directed all its energies to 'persuading Waitaha to join Nga Kaihautu', rather than exploring other and more appropriate ways of settling Waitaha's claims.⁷⁶ Despite Waitaha's clear rejection of joining the council-led negotiations, the Crown had attempted to 'coerce' Waitaha into participating and had 'failed to respect their tino rangatiratanga by lecturing Waitaha on what is best for Waitaha'.⁷⁷

In evidence, Mr McCausland explained that a deputation of Crown officials visited him and other Waitaha representatives in Te Puke on 5 December 2003 to persuade them to join the kaihautu (notwithstanding Waitaha's repeated rejection of this at mandating hui). Despite his lengthy ('two hours') explanation of why this did not suit Waitaha, Mr McCausland soon received a letter dated 10 December 2003 from Ross Philipson of ORS which stated the Crown's view that Waitaha would benefit from participation in a Te Arawa-wide settlement and that Waitaha's concerns could still be resolved through discussion with the executive council. Mr McCausland said this letter showed that the Crown was 'not really interested in our point of view'. Into 2004, Waitaha suggested that the Crown conduct 'multi-lateral' negotiations, which would include a settlement with Waitaha and Ngati Makino. In rejecting this in a letter of 5 March 2004, the Minister expressed her conviction that 'the best interests of Waitaha and the Crown would be served through Waitaha participating in a Te Arawa-wide settlement'. Finally, Mr McCausland noted that the ORS mandate assessment paper submitted to Ministers in late March 2004 continued in the same vein, stating that officials would 'continue to encourage' Waitaha to join the negotiations. He said that 'The Crown wanted to tell us what was best for us, but what they really meant was what was best for the Crown'.⁷⁸

75. Paper 3.3.14, p3

76. Ibid, p12

77. Paper 3.3.5, p4

78. Document A113A, paras 42–55, apps D, I, J

Counsel made a number of submissions about the Crown's 'large natural groups' settlement policy. The policy, she said in opening, was now one of settling at a regional level with a 'conglomeration of tribal interests'. Counsel termed this 'mega-settlements'. She contrasted the policy as it applied to Te Arawa to the situation in Taranaki, where the Crown had been prepared to negotiate with iwi separately.⁷⁹ In closing, counsel stepped back slightly from her submission about a wholesale policy shift, after the evidence of Mr Hampton for the Crown, but she maintained that 'the Crown's emphasis has shifted towards the "large" at the expense of the "natural"'. She noted Mr Hampton's explanation that a significant factor for the Crown in choosing whether to enter negotiations with a particular group was whether such a decision would increase or decrease the number of settlements in future. This, she said, showed that the Crown viewed the size of a claimant community as an overriding imperative.⁸⁰ To this end, she maintained that the Crown's settlement policy simply did not have an 'adequate response' for a group like Waitaha, which is relatively small yet distinct in terms of history, claims, and whakapapa. Counsel said that Crown settlement policy ought, in fairness, to accord such groups equal priority with larger groupings – especially when they had suffered particularly serious Treaty breaches that had contributed to their marginalisation.⁸¹

Counsel was able to draw some parallels between the situation of Waitaha and that of Ngati Hineuru, whose claims had just been reported on by the Waitangi Tribunal in its *Mohaka ki Ahuriri Report*. In that report, the Tribunal found that Ngati Hineuru were a border group who had kinship links to all their larger neighbours but who existed to some extent 'in a sphere of their own'. Moreover, their grievances (through war and raupatu) were probably worse than those of their neighbours and were 'relatively distinct'. Altogether, the Tribunal considered that there appeared to be grounds for Ngati Hineuru to 'receive separate consideration'.⁸² Counsel submitted that Ngati Hineuru were in 'an analogous position to Waitaha'. She expressed support for what she described as the Mohaka ki Ahuriri Tribunal's 'finesse' in applying the 'large natural groups' policy, particularly on the basis of its 'detailed consideration of the particular circumstances of the claimant groups, including their historical experiences and grievances'.⁸³

Counsel maintained that the Crown's settlement policy was partly driven by 'political expediency'.⁸⁴ Ngati Manawa and Ngati Whare were being separately negotiated from the rest of Te Arawa, she said, not because of the size of their population or the gravity of their grievances but because of their proximity to key CNI forests. She submitted that, as a matter of principle, the priority afforded Ngati Manawa and Ngati Whare should have been equally extended to Waitaha and Ngati Makino.⁸⁵ In summarising what Waitaha want, counsel said

79. Paper 3.3.5, p11

80. Paper 3.3.14, p4

81. Paper 3.3.5, p5; paper 3.3.14, p11

82. Waitangi Tribunal, *Mohaka ki Ahuriri Report* (Wellington: Legislation Direct, 2004), p700

83. Paper 3.3.14, pp4–5

84. Ibid, p9

85. Ibid, p13

that ‘in terms of outcome they seek a separate Waitaha settlement, but in terms of process they are open to any process that delivers on the desired outcome’. To this extent, she said that Waitaha would be happy to negotiate alongside their fellow descendants of Hei, Ngati Makino.⁸⁶ For Mr McCausland: ‘Inclusion within a Te Arawa settlement would continue our marginalisation as a people . . . The most important thing to achieve through this claim is the restoration of our mana. Our claim is not about money; it is about our identity as a people.’⁸⁷

3.5 NGATI MAKINO (WAI 275)

Counsel for Wai 275 made a number of similar submissions to counsel for Waitaha and the taumata.⁸⁸ With specific regard to Ngati Makino, she argued that, despite having recognised the Ngati Makino deed of mandate in 1997, the Crown had:

- ▶ kept Ngati Makino waiting since that time;
- ▶ recognised the executive council’s mandate to represent Ngati Makino interests and ignored Ngati Makino objections to this;
- ▶ pressured Ngati Makino to join the executive council; and
- ▶ ignored an alternative negotiations strategy proposed by Ngati Makino.

Counsel explained that the Crown had recognised Ngati Makino’s deed of mandate in 1997, at a time when the Crown was actively negotiating the settlement of other raupatu claims in the eastern Bay of Plenty. Furthermore, said counsel, as late as OTS’ quarterly report of 31 March 2002, the Crown had referred to Ngati Makino as essentially being in negotiation by noting that they had a recognised mandate and agreed terms of negotiation.⁸⁹ Despite this, said counsel, on 2 April 2004 MICOTOWN announced that Ngati Makino had ‘not yet joined the [Te Arawa] negotiations’. She submitted that the Crown was well aware at this time of both Ngati Makino’s longstanding preparedness to negotiate a settlement with the Crown and its categorical rejection of joining the executive council’s negotiations. Furthermore, counsel did not accept that the inclusion of the Wai 275 claim in the deed of mandate was an error. She argued that it had been included through the ‘deceit and chicanery’ of the executive council and the Crown, who, despite their constant assurances that Ngati Makino were entitled to remain outside the kaihautu, in fact had ‘insidious intentions’ to settle Wai 275.⁹⁰

Counsel explained that representatives of Ngati Makino and Waitaha had presented a ‘multilateral’ negotiations strategy to the Crown as a means of allowing ‘the many identities within Te Arawa to be promoted without fear of subsumation’.⁹¹ The Crown, however, had

86. Ibid, p15

87. Document A113A, paras 37–38

88. As with Waitaha and Wai 664, we are unaware of any challenge to the right of the Wai 275 claimants to speak for Ngati Makino as a whole.

89. Paper 3.3.6, p14

90. Paper 3.3.15, para 3.16

91. Paper 3.3.6, p10

rejected this proposal. Counsel submitted that, in explaining the Crown's stance, Mr Hampton 'merely seemed to rely on the position that such an approach was not *his preference*' (emphasis in original). She criticised Mr Hampton as 'paternalistic' for his remark that the Crown knew what kind of negotiations worked best.⁹² Furthermore, counsel echoed counsel for Wai 664 in submitting that the Crown had actively attempted to 'coerce' Ngati Makino to join the kaihautu and 'to force Ngati Makino into a negotiation settlement framework that Ngati Makino wants no part of'. The Crown, she said, had rejected Ngati Makino's preferred settlement strategies with 'disdain and contempt'.⁹³

Over the years, counsel explained, the Crown had refused to progress the Ngati Makino settlement because of their close links to their relations in Ngati Pikiao, who were not ready to proceed. This, she submitted, was in marked contradiction to the Crown's position elsewhere. For example, she quoted from the Tribunal's *Ngati Maniapoto/Ngati Tama Settlement Cross-Claims Report*, which recorded the Crown as arguing that it was 'unfair to claimants who were ready to negotiate a settlement with the Crown to make them wait until all overlapping claimants were in a position to negotiate'.⁹⁴ Counsel added that, in a letter to Ngati Makino of early March 2004, MICOTOWN stated that there was a strong likelihood that the close relationship of Ngati Pikiao to Ngati Makino meant that settling with Ngati Pikiao would effectively mean the settling of some Ngati Makino claims without their participation. As counsel put it:

Ngati Makino have been forced to wait since 1997 to progress their claims so that Ngati Pikiao would be present and not be prejudiced. Now it seems that Ngati Pikiao will be able to progress their claims without the participation of, and to the detriment of Ngati Makino, solely because they have agreed to the Crown's preferred settlement structure.⁹⁵

Ngati Makino witness Neville Nepia said that his people felt like the Crown was essentially forcing them 'into bed with those whom we wished to remain at arms length'. He described the Crown's actions as 'utterly disappointing and completely abysmal'.⁹⁶

In sum, said counsel, the Crown has committed 'a plethora of breaches' of the Treaty, including the 'unilateral . . . rejection of previously agreed terms of negotiation' and the 'unilateral curtailing of, and . . . blatant disregard for prior negotiations'. Counsel sought a recommendation from the Tribunal that the Crown 'treat with Ngati Makino in accordance with Crown policy and their agreed Deed of Mandate'.⁹⁷

92. Paper 3.3.15, para 3.18

93. Paper 3.3.6, p16

94. Waitangi Tribunal, *The Ngati Maniapoto/Ngati Tama Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2001), p12

95. Paper 3.3.6, p18

96. Document A38, p3

97. Paper 3.3.15, paras 2.10, 4.2

3.6 NGATI TUTENIU (WAI 980)

Counsel for Wai 980 submitted that the issue of Ngati Tuteniu's participation within the kaihautu illustrated 'the inherent lack of stability within the Nga Kaihautu structure'. First, she said, Ngati Tuteniu sought separate representation within the kaihautu and this was granted. Then, the Ngati Tuteniu trust met and elected to withdraw from the kaihautu. Finally, a more recent meeting of the trust in fact resolved to reaffirm support for it. As counsel put it: 'This behaviour is illustrative of an iwi in a state of flux. Such uncertainty is an inevitable component of tribal politics. Such uncertainty is not something upon which a stable mandate may be founded.'⁹⁸

Counsel contended that the Crown was well aware of this instability but had nevertheless proceeded to recognise the authority of the kaihautu. Counsel thus sought a recommendation from the Tribunal that the Crown should now 'require a proper and full Treaty compliant mandating process to be adopted and implemented'.⁹⁹

3.7 NGATI TUWHARETOA TE ATUA RERETAHI NGAI TAMARANGI (WAI 21(a))

Counsel for Wai 21(a) explained that her clients' claim was a contemporary one involving environmental damage resulting from the operations of the Tasman Pulp and Paper Company and that it had been specifically excluded from the Ngati Tuwharetoa ki Kawerau settlement with the Crown. Her clients wished to take their claim 'to its finality through the Waitangi Tribunal process' and took little comfort from the Crown's suggestion that it would not be affected by the forthcoming negotiations with Te Arawa.¹⁰⁰ During the hearing, Mr Hampton gave a categorical assurance that Wai 21(a) would not be affected, and in reply, counsel agreed that her clients' concerns had thus 'largely been resolved'.¹⁰¹

3.8 NGATI TAMAKARI (WAI 1173)

Counsel contended that her client, David Whata-Wickliffe, represented the Ngati Tamakari hapu and that his mandate to do so had not been challenged during the Tribunal's urgent inquiry. She maintained that, although Mr Whata-Wickliffe and his brother Fred Whata had been elected as kaihautu representatives for Ngati Pikiao, the minutes of the mandating hui did not reveal that they had made the point that they were distinct representatives of

98. Ibid, para 3.32

99. Ibid, paras 3.33, 4.2

100. Paper 3.3.6, pp19–20

101. Paper 3.3.15, para 1.2

Ngati Tamakari. Counsel argued that Ngati Pikiao had recognised Ngati Tamakari's right to separate status at the February 2003 hui which elected interim representatives. In view of all this, she explained, Mr Whata-Wickliffe had been quite surprised to learn, in September 2003, that the Ngati Pikiao representatives were expected to select just one of their number as a member of the executive council. He objected to this, believing both that it was inappropriate and that it had never been discussed or agreed upon by Ngati Tamakari.¹⁰²

Counsel largely adopted the submissions of the taumata on the mandating process as a whole, adding that it was incumbent upon the Crown at the very least to investigate whether Ngati Tamakari's claims were 'substantial and distinct enough in themselves to stand outside the Pikiao representation on the Kaihautu framework'.¹⁰³ Counsel sought recommendations from the Tribunal that the Crown 'cease negotiations under the current mandate' and that it 'ensure Ngati Tamakari's interests are properly recognised and catered for in any future mandated negotiations'.¹⁰⁴

3.9 SUMMARY

The key points made in this chapter are as follows:

- ▶ The Te Arawa taumata argued that it had been wrongly sidelined by the Crown during the mandating process.
- ▶ The taumata and other claimants argued that the mandating process had been flawed, particularly in regard to the lack of notice about or explanation of the executive council structure.
- ▶ The taumata submitted that the Crown had failed to investigate actively the concerns raised about the mandating process.
- ▶ The Wai 996 claimants argued that Ngati Rangitihi had not in fact agreed to join the kaihautu.
- ▶ The Wai 664 and Wai 275 claimants argued that the Crown had unfairly pressured Waitaha and Ngati Makino to join the kaihautu and that both these groups were disadvantaged by the Crown's overall Treaty settlement policies.

102. Paper 3.3.2, pp2–5; paper 3.3.16, p2

103. Paper 3.3.2, p8

104. Paper 3.3.16, p10

CHAPTER 4

THE ARGUMENTS OF THE RESPONDENTS

4.1 INTRODUCTION

Unsurprisingly, the Crown was not the only respondent in this inquiry. The jurisdictional requirement of the Treaty of Waitangi Act 1975 of course necessitates that claims be made against the Crown, but in reality the claimants' concerns were equally directed towards the executive council. We clarify our jurisdiction to hear and report on the claims in the following chapter, since both the Crown and the council submitted that that jurisdiction was very limited and needed to be exercised with particular care. Here, though, we relate the respective arguments of the Crown and the council, which, although similar, were not without some important distinctions.

4.2 THE CROWN

Crown counsel made both opening and closing submissions, but the latter incorporated and built on the former (as Crown counsel had signaled in opening¹) and is the subject of our focus here. We do not here recount every aspect of the Crown's mandate recognition and assessment policies, as described by counsel, because we examine these in detail in our following chapter.

In its submissions, the Crown addressed some general matters before responding to the allegations of the specific groups in the inquiry. In setting out the Crown's arguments, we have followed this structure. In sum, however, Crown counsel made the following main points:

- ▶ The Crown's responsibility with regard to the mandating process is limited to ensuring that the final mandate meets minimum guidelines. The Crown is indifferent to which group ultimately receives the mandate.
- ▶ The Crown fulfilled this responsibility in assessing whether or not the executive council's mandate should be recognised. Those groups that wished to stand outside the mandate – namely Waitaha, Ngati Makino, and Tapuika – were excluded. Conditions were placed on the Crown's recognition of the executive council's mandate in order to address certain unresolved concerns of Te Arawa iwi and hapu.

1. Paper 3.3.3, p2

4.2.1

- ▶ The present claims against the Crown are distractions from a fundamental issue of division within Te Arawa. There is an ‘air of artificiality’ in bringing what are essentially internal Te Arawa disputes to the Tribunal in the guise of claims against the Crown.
- ▶ The Crown’s settlement policy has not been departed from in the case of Te Arawa. The Crown’s actions have been consistent with other districts. In any case, the Crown’s decision on the groups it accords priority to and negotiates settlements with is a political one, and is further constrained by the capacity of OTS to take on new negotiations.

We now describe the Crown’s submissions in more detail.

4.2.1 The Tribunal’s role and relevant Treaty principles

Crown counsel stressed what he described as the limits of the Crown’s role in the mandating process. The Crown, he said, is indifferent to which group finally received the mandate to negotiate. It is interested only in assessing whether or not the mandating process adopted meets its minimum guidelines. The Tribunal’s role in the inquiry was, therefore, to ensure that the mandating recognition process had been thorough and fair, not to review the mandate decision itself. Counsel compared the Tribunal’s role in this inquiry to that of a ‘reviewing Court’, referring to the following extract from the Tribunal’s *Pakakohi and Tangahoe Settlement Claims Report*:

It follows from the foregoing that we are clear as to what the Tribunal’s role is *not* in the context of claims of this nature. It is not the role of this Tribunal in investigating claims of this nature to substitute its own view of matters, for that arrived at by the Crown and the working party. There can be no room for second-guessing matters in decisions as delicate and fundamentally political as those relating to the recognition of mandate for the purpose of Treaty settlements. [Emphasis in original.]²

Indeed, counsel submitted that the Crown’s decision to accept or reject a deed of mandate is ‘purely political’.³

Counsel noted that issues were raised in new evidence filed for the Wai 1150 inquiry that had not been brought to the attention of the Crown at the time that it made its mandate decision. He submitted that any evidence that was not known to the Crown at the time of the mandate decision could not be considered by the Tribunal in reviewing that decision. He added that the Crown would consider this new evidence as a matter of course, regardless of the outcome of the Tribunal hearing.⁴

2. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p56

3. Paper 3.3.10, pp8–9

4. Ibid, p7

Counsel asserted that there was ‘some artificiality’ to the claims brought against the Crown in this inquiry. He submitted that at the heart of the matter were disputes within Te Arawa over who should have facilitated the mandating process and which group should have received the mandate. In support of this statement, he referred to the ‘directly conflicting and irreconcilable’ evidence which had been filed regarding these disputes. Such issues, he argued, were internal matters of concern to Te Arawa only. The Crown had no responsibility in this area. Counsel added that ‘the claims disclose no discernible complaint about the election of the kaihautu members, that is, the individuals selected as representatives of the various hapu/iwi’, and that it was only when ‘the matter crystallised into the selection of a mandated body, and the awareness of those who were elected, that real concern appears to have arisen’.⁵

Counsel emphasised that the Crown’s role in assessing and recognising mandates is a difficult one, requiring it to find a balance between ‘ensuring transparency, accountability and representation . . . and the need for mandate to be developed and recognised in accordance with the relevant tikanga’.⁶ He stated that, in many cases, ‘no perfect solution’ to mandating recognition exists, and that a compromise between parties is required. He explained that the Crown does not consider it necessary to gain the consent of every individual within a claimant group before accepting a mandate. The Crown did, however, have a Treaty obligation to act in good faith in its dealings with groups during the mandating process. Counsel particularised the Crown’s specific responsibilities in this area as:

- ▶ Assessing the proposed mandate to ensure it meets the Crown’s minimum guidelines;
- ▶ Being informed of the support for the proposed mandate;
- ▶ Being informed of any opposition to the proposed mandate; and
- ▶ Taking the matters of which it has been informed into account in reaching decisions about the mandate.⁷

Counsel submitted that, in its decision to recognise the executive council’s mandate, the Crown had met these requirements. The Crown’s decision to recognise the mandate was based on its finding that there was broad support for the mandate from within Te Arawa, and that those groups who wished to stand outside the mandate (Waitaha, Ngati Makino, and Tapuika) were able to do so. Furthermore, the Crown placed conditions on its recognition of the mandate (which we discuss at section 4.2.3(2) and (3)), to ensure that certain issues (regarding Ngati Rangiteaorere, Ngati Rangiwehewehi, and Ngati Rangitihi) were addressed by the council. Therefore, counsel implied, the Crown had not breached Treaty principles in recognising the council’s mandate.⁸

5. Ibid, p9

6. Ibid, p10

7. Ibid, p11

8. Ibid, pp11–12

4.2.2 Crown policy

Counsel said that the Crown's policy on groups obtaining a mandate to enter into settlement negotiations had several key aspects. In sum, he said (noting that the affidavit of Mr Hampton had gone into these matters in more detail), the Crown preferred comprehensive settlements with 'large natural groupings of tribal interests'. Furthermore, he explained, priority was accorded 'to claimant groups that reduce, rather than increase, the potential number of future settlements by joining together for negotiations'. With regard to the mandating process itself, counsel stressed that the Crown did not confer a mandate and that such a decision was for a claimant group to make itself. Instead, the Crown's role was limited to ensuring that the process gone through to obtain the mandate was 'robust and transparent'. This in part was confirmed by calling for and assessing submissions on the advertised deed of mandate. Any recognition of a mandate, he explained, was 'conditional on the representatives retaining their mandate throughout negotiations'.⁹

In specific response to the submissions of the claimants on the Crown's policy, Mr Hampton made a number of additional verbal comments to what was contained in his written affidavit. He said that there had been some confusion about the shift in the language of *Ka Tika a Muri* from the 1999 edition, which had stated that the Crown's preference was to settle with 'iwi', to the 2002 version, which referred to 'large natural groups'. He said that the intention had been not to introduce and require 'mega settlements' but rather to allow for necessary flexibility. For example, he said that the stipulation about settling with 'iwi' placed some onus on the Crown to say whether a claimant group was an iwi or not, which the Crown did not want or need to do. Furthermore, the Crown continued to negotiate with groups smaller than 'iwi' – such as Ngati Whatua ki Orakei – so the policy can actually be used to negotiate with groups of iwi or groups *within* iwi, depending on what claimant communities want. In sum, he said, the 'large natural groups' policy was 'an attempt to balance . . . matters of tikanga and whakapapa with practicality and efficiency'.¹⁰

Mr Hampton explained that ORS had the capacity to make about three 'large natural group' settlements a year and that the 'best case scenario' was the requirement for at least another 50 settlements nationwide. Within 15 years, therefore, the Crown would be 'well through the process'. If, however, the number of settlements doubled, he said, it would obviously take much longer than that. He added that, while they were 'useful', the Tribunal's comments in its *Mohaka ki Ahuriri Report* about the Crown's 'large natural groups' policy could not be taken too far, because the Crown was 'never asked to provide any evidence in that hearing on what its policy drivers were'. The answer, he said, was to ensure that the distinctive interests of the groups party to a settlement were properly recognised, and this, he argued, was what the Crown was doing in its negotiations with Te Arawa.¹¹

9. Paper 3.3.10, pp12–13

10. Transcript 4.1.1, p4

11. Ibid, pp5–6

4.2.3 Responses to specific claimant groups

(1) *The Te Arawa taumata*

Crown counsel considered that the Te Arawa taumata's claim had two main elements: first, that the Crown had failed to treat with the taumata and had preferred to deal with Mr Te Whare; and, secondly, that the Crown's mandate assessment was incorrect.

Counsel began by responding to the claimants' assertions that the taumata had some kind of 'Te Arawa mandate', based on 'popular support', to facilitate the progress of mandate plans for Te Arawa. Counsel argued that the taumata had not provided explicit evidence of the basis of this popular support. He stated that the taumata had not received the endorsement of any hui before that of the 5 March 2003 hui held at Tamatekapua. In any case, the Crown did not acknowledge any outcome from that hui, since its agenda had been changed without sufficient prior notification.¹²

Next, counsel challenged the claimants' attempts to infer widespread hapu/iwi support for the taumata on the ground that support for the VIP taumata's role in the Tribunal process necessarily reflected support for the taumata to facilitate the Te Arawa mandating process. He argued that it was important to distinguish between, on the one hand, support for the VIP taumata among Te Arawa registered claimants within a Tribunal context in September 2001, and, on the other, the level of support among Te Arawa iwi/hapu for the taumata to facilitate the mandating process in 2004. Counsel acknowledged the mana of each of the individuals on the taumata and their role in early mandating and settlement discussions, but he rejected the assertion that the taumata had any exclusive role in facilitating the mandating process for Te Arawa.¹³

Counsel rejected the claimants' assertions that, because the VIP taumata had identified the importance of a robust mandating process in its dealings with the Tribunal, it had in effect signaled to the Crown its intention to assume the role of facilitating the process. He argued that the VIP taumata's observation that a robust process was important was 'nothing more than a truism' and that it did not in itself secure any exclusive role for the VIP taumata or the Te Arawa taumata in the mandating process.¹⁴ Counsel argued that the very fact that mandating hui were held and that kaihautu members were elected demonstrated that the iwi and hapu of Te Arawa did not believe that the taumata had an exclusive role in facilitating the mandating process. In fact, the iwi and hapu of Te Arawa had demonstrated a willingness to follow Mr Te Whare's mandating plan.¹⁵

Counsel rejected the notion that the Crown had exhibited favouritism in its consideration of Mr Te Whare's mandate plan. He argued that the Crown was in no position to dismiss the plan since there was no 'previously acknowledged authority or mandate' and that, if anything,

12. Paper 3, 3.10, p18

13. Ibid, pp18–19

14. Ibid, p19

15. Ibid, pp19–20

4.2.3(1)

the Crown would have ‘taken sides’ had it dismissed Mr Te Whare’s strategy. Counsel said that the claimants’ allegations in this matter relied heavily on the letter of 26 June 2003 from Mr Philipson to the Te Arawa claimants, which said that ‘the Crown has always viewed Mr Te Whare as having a facilitative role’. He stressed that the sentences which followed this statement gave the proper context for Mr Philipson’s comment:

This does not imply that the Crown recognises his representative status as being different or more elevated than for any other members of Te Arawa with whom we have been talking. In that light the Crown is indifferent to whom wider Te Arawa finally accord the mandates to represent them. Our primary concern is that any process is open and robust.

Nor, said counsel, could anything be drawn from OTS’ meetings with Mr Te Whare, which were both routine and necessary in order to ensure that the proposed mandate strategy was consistent with the Crown’s minimum guidelines. In short, said counsel, the claimants’ allegation that the Crown had wrongly neglected to treat with the taumata must fail.¹⁶

Counsel then turned to the taumata’s allegations concerning the Crown’s assessment of, and its decision to recognise, the executive council’s mandate. First, counsel summarised the events leading up to the mandate recognition decision, beginning with the public notification of the receipt of the deed of mandate (which called for submissions), and traversing the issues which officials took into account in making their recommendation to Ministers that the mandate be recognised. Counsel also responded to some of the key allegations made by the submitters. He said that, while the executive council had not been referred to in resolutions passed at mandating hui, it was approved by kaihautu members, and, in any case, the ‘internal structure of Te Arawa was a matter for Te Arawa, not the Crown’. He added that it was incorrect that council members held ‘total power’ in respect of their iwi/hapu because provision existed for them to be removed from office. With respect to the issue of whether certain groups had a right to be separately represented on the kaihautu (such as Ngati Whaoa and Ngati Tuteniu), counsel contended that ‘this was a matter for Te Arawa’, and the council had advised that ‘these matters had been resolved in accordance with the relevant tikanga’. Nevertheless, officials were of the view that the 14 iwi/hapu on the council ‘represented the core of Te Arawa’.¹⁷

Counsel said that the taumata placed much reliance on the 1 October 2003 petition signed by a large number of kaihautu members. This petition, he argued, did little more than raise a concern about the position of those who had not held their mandating hui before the 16 September hui. He also contended that a number of petitioners subsequently withdrew their support for the petition. These and other factors influenced the weight that the Crown placed upon it, he said. He rejected any notion that the Crown’s assessment was ‘blinded by a desire to progress settlements’, citing – for example – the conditions stipulated with respect to Ngati

16. Paper 3.3.10, pp 20–22

17. Ibid, pp 22–25

Rangitahi, Ngati Rangiwewehi, and Ngati Rangiteaorere (see below). In conclusion, counsel submitted that the Ministers' decision to recognise the executive council's mandate was made on the basis of fully considered advice from officials in OTS and TPK.¹⁸

Counsel did not note the separate advice tendered by TPK on the deed of mandate, but Mr Hampton did comment upon it. Mr Hampton acknowledged that TPK brought 'four issues' (which he did not name) to the Ministers' attention, but he said that these were 'considered by OTS officials who concluded that they did not justify refusing to recognise the mandate'. Mr Hampton felt that TPK's concerns were, in any event, largely addressed by additional material provided by the executive council during the assessment process, such as omitted minutes and the council's trust deed. In any case, he said, TPK's overall recommendation to Ministers was that the council's mandate be recognised.¹⁹ We discuss the TPK report in our concluding chapter.

(2) *Ngati Rangiwewehi and Ngati Rangiteaorere*

While, as Crown counsel noted, no separate claims were filed by members of Ngati Rangiwewehi or Ngati Rangiteaorere, counsel dealt with them under their own subheading in the context of the conditions that the Crown had placed upon its recognition of the executive council's deed of mandate.

Counsel noted that a submission on the deed of mandate had been filed by Te Ururoa Flavell complaining that Ngati Rangiwewehi had been excluded from the mandating process until late in the piece, and had thus been unable to influence the development of that process. Counsel said, however, that Mr Flavell and members of Ngati Rangiwewehi were present at the 16 September hui, and that subsequently Ngati Rangiwewehi agreed to elect representatives to the kaihautu and sought to appoint Mr Flavell to the executive council.²⁰ Officials considered, he said, that the available information showed support for the executive council and the negotiations process. Therefore, a condition placed on the recognition of the deed of mandate was that the council assist Ngati Rangiwewehi in making its appointment.²¹ Under cross-examination, Mr Hampton added that, if Ngati Rangiwewehi had now decided 'not to be part of this process via the same processes they decided to be part of it, the Crown will need to consider that'.²²

With respect to Ngati Rangiteaorere, counsel said that their situation was similar to that of Ngati Rangiwewehi in that they had also not yet successfully appointed a member to the executive council. However, he submitted that no members of Ngati Rangiteaorere had raised any concerns about the executive council's mandate in the submissions process, although

18. Ibid, pp 26–27

19. Document A114, para 141

20. This appointment could not be confirmed because 'appropriate process' had not been followed, according to Mr Hampton: see doc A114, para 159.

21. Paper 3.3.10, p 28

22. Transcript 4.1.1, p120

4.2.3(3)

some concerns had been raised in correspondence about the status of Ngati Tuteniu. Further concerns about the mandating process were new and had not been made known to the Crown at the time the deed of mandate was assessed, said counsel. In the circumstances, he said, the Crown was justified in concluding that Ngati Rangiteaorere supported the kaihautu and the executive council. Recognition of the deed of mandate was thus made subject to the council assisting Ngati Rangiteaorere to make its appointment.²³

(3) Ngati Rangitihi

Counsel said that the concerns of the Wai 996 claimants were narrow and appeared to come down to:

1. Whether there should have been more than one hui for Ngati Rangitihi;
2. Whether the condition was correctly described as requiring 'reconfirmation'.

Counsel argued that the first of these matters was primarily the concern of Te Arawa and Ngati Rangitihi rather than the Crown. Indeed, at their 16 July 2003 hui, Ngati Rangitihi chose to take the option available to it of deferring its decision on the mandate until it held a second hui to consider the elements of the mandate proposal. On the second point, counsel submitted that the condition placed on the executive council's mandate explicitly recognised the possibility that Ngati Rangitihi might, at a future hui, decline to give its mandate.²⁴ Counsel understood that the 'reconfirmation' hui had been held on 17 June 2004 and said that the Crown was waiting to be formally advised of its result.²⁵

(4) Ngati Makino and Waitaha

Counsel began by noting that the executive council did not claim a mandate to represent Ngati Makino and Waitaha and that the Crown had explicitly noted this in its recognition of the mandate. Counsel agreed that the Crown had 'encouraged' these groups to join a Te Arawa-wide settlement but denied that the Crown had sought to 'compel' them or threaten them with 'punitive delays'. Instead, the Crown was simply trying to 'inform these groups of the impact of their decisions so that they could make informed decisions as to whether or not they should mandate the Executive Council'. Counsel suggested that the Ngati Makino and Waitaha claims were effectively that the Crown 'should accord priority to negotiations with any group that presents itself for negotiations irrespective of their sizes, their distinctiveness or whether they have a Tribunal report'.²⁶

As we noted above, Mr Hampton rejected the suggestion of counsel for Wai 664 and Wai

23. Paper 3.3.10, pp 28–29

24. Mr Hampton explained that this condition was placed because the minutes of the second Ngati Rangitihi hui, on 10 August 2003, did not sufficiently demonstrate Ngati Rangitihi support for joining the kaihautu: see doc A114, paras 171–177.

25. Paper 3.3.10, p 30

26. Ibid, pp 31–32

275 that the Crown had shifted to a policy of ‘mega settlements’. Mr Hampton also made some other specific responses to the claims of Ngati Makino and Waitaha. As did counsel, he denied that these groups had been unduly pressured to join the executive council or had effectively been punished by being told that they would have to wait many years for a settlement for not having come on board. He stressed that this was ‘no punitive delay’ but just ‘the reality of how long it would take anyway’ were it not for the opportunity that currently existed to have a quicker settlement through participation with the rest of Te Arawa. No group was being sent to the ‘back of the queue’, he said, because there ‘isn’t a queue for them to go to the back of’. All there was was a prioritisation of progressing claims in the CNI.²⁷

With respect to the suggestion of counsel for Wai 275 that the Crown should consider ‘multi party’ negotiations, Mr Hampton said his experience was that they were ‘the most inefficient and unfruitful negotiations I have been involved in because of the simple number of parties’. He said that the Crown had attempted something like this in northern Taranaki with Ngati Tama, Ngati Mutunga, and Te Atiawa and that it had been unsuccessful and tension-ridden. The Crown’s experience, he said, was that such negotiations were ‘as time consuming’ as entirely separate sets of negotiations. He drew a distinction with the treatment currently being afforded Ngati Manawa and Ngati Whare, stating that those two groups were being dealt with together only on the basis that they work together and that there be a single negotiation. In sum, he said, ‘the Crown has more negotiation experience than . . . any of the iwi parties’ and ‘knows what works and what hasn’t worked’. The Tribunal had almost always found that the Crown’s settlement policies and practices were Treaty-compliant when called upon to inquire, he said.²⁸

In sum, said counsel, the Crown did not consider it appropriate for the ‘fundamental parts of the Crown’s negotiation and settlement policy’ to be questioned in the context of this urgent inquiry. Counsel cited the comments of the Tribunal in its *Ngati Awa Settlement Cross-Claims Report* that the Tribunal’s focus was not on whether it liked the Crown’s policy or not but on the Treaty and whether the Crown had ‘fallen foul’ of it. Moreover, said counsel, the Tribunal in its *Pakakohi and Tangahoe Settlement Claims* and *Mohaka ki Ahuriri* reports had expressed support for the policy of settling with ‘large natural groups’. There was simply not sufficient evidence in this inquiry, said counsel, for the Tribunal to ‘make decisions on who constitutes a large natural grouping for the purpose of settlement negotiations with the Crown’. Furthermore, according priority to one group or another was a ‘high level political decision’, and the Crown simply did not have the resources to negotiate ‘all settlements at once’. However, said counsel, the Crown’s policy of seeking to ‘deliver the benefits of settlement to as large a group of Maori as early as possible’ was in line with the Crown’s obligations under the Treaty.²⁹

27. Transcript 4.1.1, p7

28. Ibid, pp 8–10

29. Paper 3.3.10, pp 35–37

4.2.3(5)

Finally, counsel said that if the Tribunal upheld the claims of Ngati Makino and Waitaha it would have ‘serious precedential effects’, such as requiring the Crown to ‘enter into negotiations with any group that presented itself to the Crown’.³⁰

(5) Ngati Tamakari

Counsel submitted that the substance of Ngati Tamakari’s claim was that they had been denied direct representation on the executive council. Counsel explained that the executive council had advised the Crown that Ngati Tamariki were ‘an old re-emerging hapu’. Counsel said that Mr Whata-Wickliffe’s claim to separate representation for Ngati Tamakari at the 16 September 2003 hui had not been supported. Ultimately, said counsel, ‘Decisions regarding which . . . hapu should have representative seats on the Executive Council is a complex issue of tikanga and is not for the Crown.’ Moreover, Mr Whata-Wickliffe remained a kaihautu member, and thus the decision to recognise the council’s mandate as encompassing Ngati Tamakari ‘cannot be described as being in breach of the Treaty’.³¹

(6) Ngati Tuteniu

With regard to the claim that Ngati Tuteniu had decided to withdraw from the kaihautu, counsel drew a distinction between the decision of the Ngati Tuteniu trust to withdraw its Wai 980 claim from the mandate of the executive council and ‘the Ngati Tuteniu hapu’ electing to do so. The latter had not occurred, said counsel. Furthermore, he said, a more recent meeting of the Tuteniu trust had decided to reaffirm support for the council.³²

4.3 THE EXECUTIVE COUNCIL OF NGA KAIHAUTU O TE ARAWA

The executive council of Nga Kaihautu o Te Arawa made the following main points:

- ▶ The Tribunal has limited jurisdiction to inquire into the claims because they relate principally to the executive council’s mandate, which is an internal matter for Te Arawa.
- ▶ The Crown’s decisions with regard to mandate and negotiation ‘form part of a complex process of political judgment’ and, as such, are not justiciable.
- ▶ Any investigation by the Tribunal would need to be limited to matters of error in process, the misapplication of tikanga Maori, or apparent irrationality on the part of the Crown.

We now describe the executive council’s submissions in more detail, but without (so far as it is possible) repeating material already covered in the earlier part of this chapter.

30. Paper 3.3.10, pp 37–38

31. Ibid, pp 38–39

32. Ibid, pp 39–40

4.3.1 Tribunal's role and Treaty principles

Counsel for the executive council, Mr Stone, submitted that the issues raised by the claimants in this inquiry were 'clearly directed at the Executive Council' and that very little of the evidence submitted was in fact leveled against the Crown. Rather, he said, the bulk of the claimants' evidence relates to 'actions, or to the establishment of the Executive Council'. In his submission, the claim issues 'relate squarely to the mandate of the Executive Council' and, as such, are an internal matter for Te Arawa.³³

In this context, counsel referred to a passage from the *Pakakohi and Tangahoe Settlement Claims Report*, which commented that:

Although the claims are technically aimed at the Crown, they mask what is essentially an internal dispute between closely related kin groups as to which organisation at which level speaks for them. The Tribunal was not established to deal with these categories of disputes.³⁴

With regard to justiciability, counsel noted that it is well-established in law that 'decisions regarding high level political and policy issues' cannot be reviewed by any court. Like Mr Soper, Mr Stone submitted that the nature of the Crown's decision-making in relation to mandate and negotiation is purely political. While acknowledging that the Tribunal's jurisdiction 'potentially extends beyond a review of the exercise of a statutory power of decision by the Ministers involved', he urged that the Tribunal exercise extreme caution in intervening in what is a political process.³⁵

Again drawing on the *Pakakohi and Tangahoe* report, it was Mr Stone's further submission that, if the Tribunal is nevertheless of the opinion that there is a case for the Crown to answer, then the mandate of the executive council should be subjected to the Tribunal's close scrutiny only if the claimants can prove that:

- ▶ there had been an error in the process undertaken by the Crown;
- ▶ the Crown had misapplied tikanga Maori; or
- ▶ the Crown had acted irrationally.³⁶

Counsel also reminded us that, in considering any case against the Crown, our focus should be solely on whether the Crown's acts or omissions were compliant with the principles of the Treaty of Waitangi, and he stressed that those principles were developed to govern the relationship between Maori and the Crown, not Maori and Maori.³⁷ It was his submission that: 'The issue that the Tribunal is faced with in this Urgent Inquiry concerns the relationship between the iwi/hapu of Te Arawa and between the members of the iwi/hapu of Te Arawa.' The issue, he said, is not one between Te Arawa and the Crown.³⁸

33. Paper 3.3.7, paras 1.1, 1.2, 2.1, 2.5

34. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report*, p55

35. Paper 3.3.7, paras 4.13–4.14

36. Ibid, paras 1.2, 4.15

37. Paper 3.3.20, paras 2.1, 9.4

38. Ibid, paras 9.4, 10.2

However, in the event of us finding that there were acts or omissions of the Crown that did not comply with the principles of the Treaty, counsel further drew to our attention the stipulation in section 6(1) of the Treaty of Waitangi Act 1975.³⁹ That subsection states that there must also be prejudice, or likely prejudice, to the claimants as a result of the Crown's acts or omissions. Counsel submitted that there was no such prejudice and, indeed, he stated his opinion that it is the iwi and hapu that support the executive council that will be prejudicially affected if the Tribunal decides to intervene in matters that are internal to Te Arawa.⁴⁰

Enlarging on his submission that there was no existing or potential prejudice to the Te Arawa taumata or other claimants, Mr Stone pointed out that they had participated in the mandating process and were entitled to continue doing so. If some executive council members disagreed with the council's rules, those rules could be changed, he said, as long as the other members were in agreement with the changes. Further, he observed that the direct negotiations were still in their infancy and that recognition of the executive council's mandate was but the start of the settlement process. Any proposed settlement, he noted, would need to be put to the people and approved by them.⁴¹

Having thus argued against any but the most narrow limits for a Tribunal inquiry, counsel went on to challenge the claims put forward by the various claimants.

4.3.2 The period leading to formal mandating

In counsel's submission, the process leading up to the mandating of the executive council (for the purposes of direct settlement negotiations with the Crown) was not rushed, as the taumata alleged. Rather, it commenced as early as 2001. At that time, counsel argued, the VIP taumata was already operating as a vehicle through which claimants before the Tribunal could consider the issues associated with entering into direct negotiations with the Crown.⁴²

However, counsel contended that none of the evidence put before the Tribunal supported the view that the members of the VIP taumata were authorised to facilitate any process of mandating for settlement purposes. Indeed, he went further and suggested that there was evidence that Te Arawa iwi/hapu did not want the VIP taumata to be involved in any such process. In support of the first contention, he took up points made by Rawiri Te Whare to the effect that the primary focus of the VIP taumata was to progress claims made in the Tribunal on behalf of specific claimants and that its role was limited to certain Tribunal matters. It was, according to both counsel and Mr Te Whare, a body that acted for certain claimants before the Tribunal and was never mandated by, or representative of, CNI iwi/hapu. Further, counsel

39. Paper 3.3.7, para 4.8

40. Ibid, paras 4.9, 4.10

41. Ibid, paras 4.9, 4.11

42. Ibid, paras 5.3–5.4; paper 3.3.20, paras 3.1–3.3

noted that the northern region members within the VIP taumata were appointed, not elected.⁴³

In counsel's submission, it was the Crown that approached CNI claimants, in late 2001 and early 2002, about the possibility of entering into direct negotiations for the settlement of historical Treaty claims. This led to informal discussions during 2002 between MICOTOWN and CNI representatives. In cross-examination, Mr Te Whare mentioned the Minister's approach to Tumu Te Heuheu and underlined that it had been made to Mr Te Heuheu in his capacity as a tribal leader. Counsel contended that the Te Arawa taumata should have been aware of these discussions and pointed out that some taumata members had even participated at various times. Mr Te Whare also countered taumata allegations of secrecy around some of the discussions, saying that the Minister had specifically asked for some of the meetings to be kept small.⁴⁴

As noted earlier in this report, on 6 December 2002 a meeting was held at Parliament between MICOTOWN and a group of prominent CNI Maori. Mr Te Whare, in his affidavit, described the group as 'a widely representative delegation from CNI Iwi'.⁴⁵ Following that meeting, two working parties were set up, one for the Crown and one for the CNI iwi, and Mr Te Whare noted that the latter was chaired by Tumu Te Heuheu.⁴⁶ The CNI iwi working party, said Mr Stone, considered that the decision about whether or not to enter into direct negotiations with the Crown was one that should be made by iwi/hapu. He emphasised that the working party's opinion was that the decision should not be made 'solely by the claimants before the Tribunal within the CNI district represented through the VIP Taumata' and nor could it be made by the membership of the VIP taumata.⁴⁷

In Mr Stone's submission, it was around this time (early 2003) that members from the northern region of the VIP taumata began to separate off and describe themselves as the Te Arawa taumata. He contended that this step was to be expected and that 'It was perhaps a logical conclusion that those VIP Taumata representatives for the Northern Region would seek to represent the iwi/hapu within that region for direct negotiation purposes'. However, he rejected any inference that the taumata ever acquired a mandate to negotiate and stated that there was no evidence before the Tribunal to show that the taumata had even assumed its purported facilitative role, 'except through reference to what the Te Arawa Taumata considers as key resolutions passed at the 5 March 2003 hui'.⁴⁸ We take this to be a reference to the resolutions, first, to support an entry into formal discussions with the Crown and, secondly,

43. Paper 3.3.7, paras 5.5–5.6; paper 3.3.20, para 3.4; doc A109, paras 7–11

44. Paper 3.3.7, paras 5.7–5.8; paper 3.3.20, paras 3.5–3.6

45. Document A109, para 25

46. Ibid, para 26

47. Paper 3.3.7, paras 5.9–5.11; paper 3.3.20, para 3.8

48. Paper 3.3.20, para 3.10

to ‘support and uphold the present VIP Taumata and proposed legal entity, that is, VIP Taumata Incorporated Society’.⁴⁹

Regarding the hui of February and March 2003, Mr Stone contended that they were iwi/hapu hui, and not solely claimant hui.⁵⁰ The hui were, he said, specifically to gauge whether Te Arawa iwi and hapu wanted to enter into direct negotiations with the Crown.⁵¹ Further, the interim representatives elected as a result of those hui included members of the Te Arawa taumata. While the hui were not, in counsel’s submission, mandating hui as such, he nevertheless contended that the people thus elected were representative in a way that the taumata was not.⁵²

With regard to the hui of 5 March 2003 in particular, both Mr Stone and Mr Te Whare denied that it had any validity in terms of conferring any mandate on the Te Arawa taumata to progress settlement negotiations or to have any facilitative role towards that end. Mr Te Whare stated that it had been advertised as a reporting hui and that the taumata ‘sought to impose a different agenda for the meeting on the day’. In any event, as both he and Mr Stone pointed out, the resolution passed referred only to the VIP taumata and not to the Te Arawa, or northern region, taumata.⁵³

Responding to the taumata’s allegations of ‘private meetings’ in the period following the February–March hui between Mr Te Whare and others on the one hand and between Mr Te Whare and OTS on the other,⁵⁴ counsel stated that these were meetings between the Crown and the interim representatives.⁵⁵ Both he and Mr Te Whare also stated that taumata members were present at some of the meetings.⁵⁶

With regard to the development of a mandating plan for Te Arawa, counsel stated that a draft CNI settlement plan – Te Ara Tika – was drawn up by the VIP management team (which included Mr Te Whare himself), largely because it was the VIP project that had the capacity to do it. As part of the settlement plan, a draft mandating plan for Te Arawa was also prepared. The management team was directed to draw up the plans by the VIP taumata, which, counsel noted, included the members of the Te Arawa taumata.⁵⁷ Both Mr Stone and Mr Te Whare further contended that the taumata had had ample opportunity to comment on the resulting draft mandate plan and that members had indeed given their approval to it.⁵⁸ Likewise, they asserted that it had received the approval of the majority of Te Arawa interim representatives present at the 17 June 2003 hui, who, according to the original intention of the meeting, were

49. Document A11(a), pp 381–382; doc A109(a), pp 54–55

50. Paper 3.3.20, para 3.12

51. Paper 3.3.7, paras 5.14–5.15

52. Paper 3.3.20, paras 3.11–3.13

53. Paper 3.3.7, paras 5.17–5.22, paper 3.3.20, paras 3.14–3.22; doc A109, paras 32–35

54. Claim 1.1.1, paras 43–45

55. Paper 3.3.7, para 5.25; paper 3.3.20, para 3.24

56. Paper 3.3.7, para 5.25; paper 3.3.20, para 3.24; doc A109, para 40

57. Paper 3.3.7, paras 5.25, 5.27; paper 3.3.20, para 3.25

58. Paper 3.3.7, paras 5.25–5.26; paper 3.3.20, paras 3.25–3.28

the only people who should have voted. This endorsement was, they said, reinforced by direct approaches to Mr Te Whare after the meeting.⁵⁹

4.3.3 The formal mandating hui, July to September 2003

Counsel noted that the Te Arawa taumata had accepted that the majority of the mandating hui had reached an acceptable standard of good conduct and legitimacy and that no issues had been raised by any party in respect of most of them.⁶⁰

With respect to the minutes, Mr Stone's contention was that it had never been intended to record all the discussion – only the resolutions passed and the number of votes cast. He acknowledged that there were 'typographical errors' but stated that these did not alter the outcome of the hui, and he further observed that few complaints about the minutes had been raised during the formal submission process. Countering a related complaint about inaccurate attendance registers, counsel submitted that it was always difficult to ensure that all those present at a hui recorded their names on the attendance list. However, he stressed that there had been specific encouragement, at every hui, for people to sign the register.⁶¹

4.3.4 The 16 September hui and formation of the executive council

Regarding the allegations about the 16 September hui, and the manner in which the executive council structure was adopted, counsel observed that most of the claimant evidence had been provided by individual kaihautu members who appeared dissatisfied with the outcome. He suggested that they were, in most cases, 'a minority of the Kaihautu members appointed for the relevant Te Arawa iwi/hapu'.⁶²

Assertions that people were unaware of any proposal to select an executive body for the kaihautu were, in Mr Stone's submission, unfounded. Both he and Mr Te Whare pointed to three communications that had been sent out to kaihautu members prior to the hui, two of which included explanatory material. Further, they contended that there was additional explanation at the hui, and also discussion, before the vote for executive council members took place. Opinion, they say, was overwhelmingly in favour of the proposed structure.⁶³ Mr Te Whare also pointed out that Te Arawa taumata members participated in the election of executive council representatives for their respective iwi/hapu.⁶⁴

With regard to those iwi/hapu who had not yet held their mandating hui at the time of the 16 September hui, and who thus did not yet have kaihautu members, counsel submitted

59. Paper 3.3.7, paras 5.27–5.31; paper 3.3.20, paras 3.29, 3.31–3.36; doc A109, paras 45–49

60. Paper 3.3.20, paras 4.2, 4.4

61. Ibid, paras 4.5–4.14

62. Paper 3.3.7, para 8.1; paper 3.3.20, para 5.1

63. Paper 3.3.7, paras 8.2–8.5, 8.8–8.9; paper 3.3.20, paras 5.2–5.6, 5.10–5.11; doc A109, paras 58–59

64. Document A109, para 62

that they nevertheless all had representatives present at the meeting. Further, of those groups, only the kaihautu members for Ngati Rangiwewehi, he said, had since expressed disagreement with the structure. However, he then went on to observe that Ngati Rangiwewehi had elected those kaihautu members in the knowledge that an executive council was already in existence.⁶⁵ He also observed that the majority of groups who did not have kaihautu members at the time of the 16 September hui had since indicated agreement with the structure and were actively participating in the executive council. Counsel contended that it was not possible to delay the 16 September hui until all kaihautu members had been appointed because ‘a timeframe had been set’. If there was any remedy to be provided, he said, it was within the agreed structure.⁶⁶

Countering allegations made against Mr Te Whare with regard to the allocation of seats on the executive council, Mr Stone contended that, had the composition of the council done ‘violence to settled tribal structures’, it would have been roundly rejected – which it was not. In counsel’s submission, the number of positions available on the council for each of the iwi/hapu was approved unanimously at the 16 September hui. He did, however, note Mr Rangihuea’s oral evidence as to the difficulty of achieving fair representation and said that, if concerns were held by individuals within Te Arawa, then those people should use the internal processes of Te Arawa to resolve them.⁶⁷

4.3.5 The executive council’s rules

With regard to the rules for the operation of the executive council, Mr Stone stressed that they had been developed over a period of months and had been the subject of much discussion within the council, as witnessed by the affidavit of Eruini George.⁶⁸ He further emphasised the concern expressed by council members that the collectivity necessary to the negotiation process should not undermine individual iwi/hapu autonomy. While noting that the copy of the rules submitted in evidence did not include the schedules, he confirmed that they did include provision for kaihautu members to appoint and remove their respective council representatives and likewise provided for new kaihautu members to be elected (a copy of the schedules was in due course provided to us). He stated that they also included reporting requirements and a provision for individual iwi/hapu to have a say on items of redress that related specifically to them. Lastly, he observed that there was provision for the rules to be amended.⁶⁹

65. Paper 3.3.7, para 8.6; paper 3.3.20, para 5.8

66. Paper 3.3.7, para 8.7; paper 3.3.20, paras 5.9, 5.12

67. Paper 3.3.20, paras 6.1–6.5

68. Document A104

69. Paper 3.3.20, paras 7.2–7.4

4.3.6 Iwi/Hapu-Specific Issues

Mr Stone then turned to address points made by specific claimants.

(1) *Ngati Rangiwewehi*

Responding to the concerns of Ngati Rangiwewehi, counsel argued that the matter was one that was internal to Te Arawa. He said that, since there appeared to be good faith on the part of Ngati Rangiwewehi and the executive council to resolve the issues raised, discussions should be allowed to run their course.⁷⁰

(2) *Ngati Rangiteaorere*

With respect to Ngati Rangiteaorere, counsel noted that they already had kaihautu members and it only remained for them to elect a council member. This was, he said, already provided for in the deed of mandate.⁷¹

(3) *Ngati Wahiao*

In regards to Ngati Wahiao, counsel noted that, as with Ngati Rangiteaorere, it only remained for them to appoint their member to the executive council.⁷²

(4) *Ngati Tamakari*

Counsel submitted that the claims of Ngati Tamakari were an internal matter to be resolved between Ngati Pikiao and Ngati Tamakari. He argued that, in practical terms, giving each hapu separate representation on the council would remove the purpose of having the council, which is to be a small executive group to ‘manage the day to day aspects of the settlement negotiations process’.⁷³

(5) *Ngati Rangitihi*

In response to the claims of the Wai 996 cluster, Mr Stone observed that a second opportunity had been provided for Ngati Rangitihi to express an opinion on whether or not to support the executive council and the result had been an overwhelming vote in favour. He indicated that it was now for the Crown to determine whether it was satisfied that the conditions for reconfirmation of support had been fulfilled.⁷⁴

Mr Stone further observed that, although the Wai 996 claim had been filed on behalf of all Ngati Rangitihi, the named claimant had acknowledged under cross-examination that no hui-a-iwi had been held to confirm his mandate to bring the claim in the name of Ngati

70. Ibid, para 8.2

71. Ibid, para 8.3

72. Ibid, para 8.4

73. Ibid, paras 8.5–8.8

74. Ibid, para 8.9

4.3.6(6)

Rangitihi. Likewise, he said, representations that had been made about the incorporated society that had been formed having 1500 to 1700 members were without value unless it could be shown that they all supported the claimant's position. It was Mr Stone's assertion that, to the contrary, Ngati Rangitihi had indicated their support for entering into direct negotiations with the Crown, through the executive council.⁷⁵

(6) Waitaha

Responding to the Waitaha claimants, Mr Stone stressed that the executive council does not represent Waitaha, although he reiterated that a place is available should they wish to join. Acknowledging that a mandating hui had been held for Waitaha, he nevertheless asserted that no prejudice had been suffered by them as a result of the hui and that the intention had merely been to be inclusive and to give everyone the opportunity to be informed. Had a hui not been held, he said, criticism could have been levelled at Mr Te Whare, as the facilitator, for failing to notify or inform Waitaha. He stressed that 'no usurpation of mana was intended' and that the position of Waitaha to remain separate was and is respected.⁷⁶

(7) Ngati Makino

Again, Mr Stone stressed that the executive council does not represent Ngati Makino although, as with Waitaha, if Ngati Makino wish to join there is provision for them to do so. Mr Stone observed that Ngati Makino had indicated for some time that they did not wish to form part of the kaihautu and that, for that reason, no mandating hui had been called for them. In response to the claimants' concerns about Wai 275 being included in the deed of mandate, he pointed to the Crown's stated difficulty in distinguishing between the claims of Ngati Makino and those of Ngati Pikiao and said that it was reasonable to include the claim on the basis that some of the grievances in it may be 'indistinguishable from Ngati Pikiao claims'. He stressed, however, that the deed clearly stated that it did not cover the claims of Ngati Makino. Further, he contended that, 'to the extent that there are any issues with the wording used in the Deed', there is no prejudice to Ngati Makino because it is clear that the mandate for the executive council does not include claims of Ngati Makino.⁷⁷

(8) Ngati Tuteniu

In the submission of Mr Stone, the evidence regarding Ngati Tuteniu appeared in conflict, but he noted that a further hui was to be held within Ngati Tuteniu to appoint an executive council member.⁷⁸

75. Paper 3.3.20, paras 8.11–8.12

76. Ibid, paras 8.13–8.15

77. Ibid, paras 8.16–8.20

78. Ibid, para 8.21

4.3.7 Conclusion

Summarising his closing submissions, counsel asserted that the Crown did not take sides when it approved the deed of mandate and in fact had repeatedly indicated that it had no interest in who, or what body, facilitated the mandating process for Te Arawa, as long as the process was open and robust. Likewise, he maintained that (as was appropriate) the Crown had not involved itself in matters of tikanga. Indeed, in counsel's submission, the level of support for the Te Arawa mandating process indicated that tikanga was and is being observed. He further contended that the Crown had already taken all relevant information into account when making its decision to approve the executive council's mandate and that there was no case to be made for the Crown having acted irrationally when it decided to approve the executive council's mandate.⁷⁹

In sum, in counsel's submission, the claimants had failed to prove that the Crown had erred in its process, had misapplied tikanga Maori, or had acted irrationally.

4.4 NGATI RANGITIHI (WAI 524)

As we noted in chapter 2, the Wai 524 claimants filed a submission in opposition to the allegations of the Wai 996 claimants. They maintained that Ngati Rangitihi had indeed conferred a mandate on Henry Pryor and Morris Raureti as kaihautu representatives.

Counsel said that this was 'a matter of mana' for his clients. While he acknowledged that responding to the claims before the Tribunal was 'the sole province and responsibility of the Crown', he nevertheless made several criticisms of the Wai 996 claimants' case. He contended, for example, that the claimants had no right to refer to themselves as 'Ngati Rangitihi te iwi', and that their expressed focus on Crown actions was 'ultimately artificial', since at the heart of the matters was a 'dispute as to who, for the purposes of settlement negotiations with the crown, holds the mana of Ngati Rangitihi'. He submitted further that the Tribunal could address the concerns about the mandating process raised by the Wai 996 claimants only if their right to speak for Ngati Rangitihi was decided by the Maori Land Court.⁸⁰

4.5 SUMMARY

The key points made in this chapter are as follows:

- Both the Crown and the executive council submitted that our jurisdiction in reporting on the claims was limited and needed to be exercised carefully.

79. Ibid, para 1.1

80. Paper 3.3.9, paras 4–5, 9–10, 19

- ▶ The Crown argued that its role in a mandating process is restricted to ensuring an open and robust process takes place that meets its minimum guidelines. It maintained that it is indifferent to which group ultimately receives a mandate.
- ▶ Both the Crown and the executive council submitted that the Te Arawa mandating process had indeed been open, fair, and robust.
- ▶ The Crown denied that its overall settlement policy, and particularly its preference for settling with 'large natural groupings' of claimants, was in breach of the principles of the Treaty.

CHAPTER 5

ANALYSIS AND FINDINGS

5.1 INTRODUCTION

In this chapter, we briefly discuss jurisdictional issues before analysing key events and documents in the process leading to the Crown's recognition of the executive council's mandate. We do not respond to every specific allegation made by the claimants but rather make our findings on the key matters and suggest a course of action. Finally, we also suggest some possible guidelines to the Crown for dealing with mandating issues in the settlement of Treaty claims.

5.2 JURISDICTIONAL ISSUES AND TREATY PRINCIPLES

Under section 6 of the Treaty of Waitangi Act 1975, any Maori may file a claim that he or she has been, or is likely to be, prejudicially affected by any policy or practice adopted by, or on behalf of, the Crown that is inconsistent with the principles of the Treaty of Waitangi. In other words, the hurdle to cross for claims to be eligible for registration is relatively straightforward. An explanation of the procedure whereby the claims were accepted and how they were heard has already been provided in chapter 2.

Obviously, however, the claims 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.¹ 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.²

1. See, for example, Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p 56

2. Ibid, p 55

In a nutshell, the claimants approached the issues differently, but essentially these were claims about the decision of the Crown to recognise the mandate of the executive council. As noted previously in chapter 3, some claims were concerned with the overall process leading to the recognition of the mandate, others with the consequences of the process for specific kin or claimant groups, and still others with the Crown's overall settlement policy, especially its preference for settling with 'large natural groups' of claimants.

The claimants alleged that they have been, or will be, prejudicially affected by these actions or policies, which they claim to be inconsistent with one or more of the following principles of the Treaty of Waitangi:

- ▶ the principle of reciprocity, whereby the cession to the Crown of kawanatanga was in exchange for the Crown's recognition of rangatiratanga;
- ▶ the duty of active protection, whereby the Crown is obliged to protect Maori rights under the Treaty in an active rather than a passive manner;
- ▶ the principle of partnership, which carries an obligation on the Crown to act towards its Treaty partner in the utmost good faith;
- ▶ the principle of equity, whereby the Crown is to apply the protection of citizenship equally to Maori and to non-Maori, and to safeguard Maori access to the courts to have their legal rights determined; and
- ▶ the principle of equal treatment, whereby the Crown is obliged to act fairly and impartially towards Maori by not allowing one iwi an unfair advantage over another.

In assessing the claims, we accept that these principles are relevant to our consideration. The jurisprudence on them has been traversed so often in other reports that it is unnecessary to recount it here. Rather, it is more important to proceed directly to analyse the issues based on the facts as we understand them and to determine whether the above principles have in any way been breached.

5.3 ANALYSIS OF KEY EVENTS AND DOCUMENTS

Having briefly touched on our jurisdiction and the relevant Treaty principles, we now analyse the key events and documents in the mandating process and the Crown's recognition of the executive council's mandate in order to establish whether any of the claims are well founded.

5.3.1 The mandating plan

The Crown's essential requirement for mandates to be accepted is that the process undergone to achieve them was open, fair, and robust. Consequently, we turn first to the mandate plan proposed for the Rotorua district. This plan or programme was part of the broader 'central North Island iwi settlement plan' (or CNIISP, which we discussed in chapter 1). The CNIISP set

out broad objectives and milestones for settling the CNI claims within two years (and was known as ‘Te Ara Tika: The Direct Path’). While it is unclear whether or not the ‘Te Ara Tika’ plan as a whole was accepted by Te Arawa, Mr Te Whare’s Te Arawa mandating component was certainly implemented. The Crown thus had a duty at the outset to ensure that his process was open, fair, and robust.

In the mandating plan,³ which had been finalised after some detailed input from OTS,⁴ Mr Te Whare listed 13 groups which he said were ‘proposed as the main Iwi groups of Te Arawa as they exist today’. They were as follows: Ngati Whakaue, Tuhourangi/Ngati Wahiao, Ngati Rangiteaorere, Ngati Makino, Ngati Tarawhai/Ngati Rongomai, Waitaha, Ngati Tahu/Ngati Whaoa, Ngati Tuara/Ngati Kea, Ngati Uenukukopako, Ngati Rangiwehewhi, Ngati Pikiao, Tapuika, and Ngati Rangitahi.

We are not sure as to how Mr Te Whare devised this list, as that was not explained either in the plan itself or in his evidence. The 13 groups differed somewhat from the iwi and hapu singled out by the VIP project for hui at which interim representatives were elected in February and March 2003 (Waitaha and Ngati Rangitahi, for example, had not elected interim representatives).⁵ Mr Te Whare’s list also differed from the groups represented on both the Te Arawa Maori Trust Board and Te Kotahitanga o Te Arawa. However, we note that his list was a proposal only, which was appropriate. As such, we would have expected it to be subject to robust debate from those representing a broad spectrum of Te Arawa. We return to this point below.

In the plan, Mr Te Whare proposed that mandating hui be held for each of the listed iwi/hapu at which a range of matters would be agreed upon. We listed these matters in chapter 1 but reiterate here that they included:

- ▶ entering into direct negotiations with the Crown and seeking a ‘comprehensive settlement of all historical claims’;
- ▶ electing ‘2 (for smaller iwi) and 3–4 (for larger iwi) Iwi representatives’ to a body of up to 28 to 36 persons to be called the kaihautu, which would monitor and report on the negotiations process; and
- ▶ the kaihautu representatives electing five to eight ‘official Te Arawa negotiators [or kaiwhakarite] from within themselves’, who would ‘carry the full mandate to negotiate with the Crown on behalf of Te Arawa’.⁶

The plan included a diagram of how this structure would operate. It also included a list of all the proposed hui (including those to be held outside the Te Arawa rohe), a scheme of how and

3. The final version of this draft plan that was presented to the hui at Te Ao Marama on 17 June 2003 is at document A11(a), pp 438–445.

4. See Tony Sole to Rawiri Te Whare, 13 June 2003 (doc A11(a), pp 428–430).

5. In the February–March 2003 hui, Ngati Tura/Ngati Te Ngakau, Ngati Tumatawera (with three other hapu), and Ngati Te Roro o Te Rangi had their own hui, while Ngati Pikiao and Ngati Makino met jointly. Both Ngati Whakaue and Ngati Pikiao/Ngati Makino had two hui (at different marae). There was no hui in February or March for Ngati Rangitahi or Waitaha: see doc A109(a); doc A11(a), p 376.

6. Document A11(a), p 440.

when the hui would be notified, and some details about how the hui would be conducted (including the recording of both decisions and names of those in attendance).⁷

As a plan for how to navigate Te Arawa through the complex and fraught process of mandating a body to represent them in their negotiations with the Crown, we are inclined to agree with counsel for the taumata that the plan lacked consideration of some potentially important mandating issues. As counsel put it:

There is no ‘in-depth’ discussion of the principles that truly count. Important matters such as which Hapu shall participate at what levels, the amount of representation to be provided for each group within the mandated structure, questions as to what type of structure is appropriate, rectangular and broad based or pyramid? What steps if any should be taken to ensure that Ngati Makino, Tapuika and Waitaha are not left exposed?⁸

In our view, the plan was a starting point, and a hui or series of hui could have helped refine it into a sophisticated mandating strategy. As we say, debate on key issues such as representation and accountability was needed at this point.

As we have noted in chapter 1, a hui on 17 June 2003 was then called to debate the plan. Those people invited to the hui probably did represent the ‘broad spectrum’ of Te Arawa whose endorsement of the plan should have been necessary. Besides the interim representatives elected earlier in the year, they also included the taumata, representatives of the Te Arawa Maori Trust Board, Te Kotahitanga, and Te Pukenga Kaumatua o Te Arawa.

However, those invited came not knowing that, unless they were interim representatives, they would not be authorised to vote on the plan. Mr Te Whare’s notice to them of 11 June 2003 (which we believe was short and likely to inconvenience those who had already planned to attend the Tribunal’s judicial conference on that day in Taupo) did not state that voting was to be so restricted. All invitees may have legitimately expected that they were included in Mr Te Whare’s statement that the mandate plan needed to be worked through ‘amongst ourselves’.⁹ Indeed, Bishop Vercoe insisted on the day that all present be entitled to vote. The attempt to restrict voting created unnecessary tension, and in the end we are left with the impression that the hui focused narrowly on accepting or rejecting Mr Te Whare’s plan because it was his plan, rather than on debating its contents.

We accept that the matters described above were not actions of the Crown. However, the rejection of the plan at the 17 June hui should have obliged the Crown to proceed at this point only with caution. For example, the Crown should have required a further hui to be held to discuss the plan’s content properly. In that way, some of the tension and confusion around the composition of the kaihautu and about what body was to be mandated might have been avoided.

7. Document A11(a), pp 441–445

8. Paper 3.3.19, p11

9. Document A11(a), p 426

In addition, the Crown must have, or should have, known from due inquiry that some of the ‘main Iwi groups of Te Arawa’ listed in Mr Te Whare’s plan did not have interim representatives. Moreover, had the Crown reviewed matters adequately, it would have known that some of the interim representatives were from groups that Mr Te Whare had not included in his list.

Care was needed to review accurately the outcome of this hui before supporting the continuation of the mandating process. After all, the Crown soon put people on notice that the interim representatives elected during the early part of 2003 did not hold any recognised status. Mr Philipson of OTS wrote to Te Arawa claimants on 26 June 2003 advising, with respect to the February and March hui, that, ‘Given that the notice for these hui was short, and the hui were to “discuss” issues, the Crown gives no formal recognition to any persons who were elected as iwi or hapu representatives at those hui.’¹⁰

We consider the Crown’s failure to recognise that there had been insufficiently robust debate within Te Arawa over the groups to be covered in the mandating plan to have been regrettable. Instead, the process was allowed to evolve organically with little active monitoring by the Crown. This omission or flaw sowed the seed for future discontent.

5.3.2 The mandating hui and creation of the executive council

Mr Te Whare then decided, upon the personal communication to him from certain interim representatives and others,¹¹ that he should proceed to hold the mandating hui. In the light of what we have just said, this action seems precipitate. We accept, however, that this undue haste would have been mitigated if the individual mandating hui had then given Mr Te Whare and his plan a resounding endorsement. To that extent, we need to examine the conduct of the July to September 2003 mandating hui and their outcomes.¹²

According to Mr Te Whare, the hui were notified with the consent of kaumatua and interim representatives. Clearly, this requirement was not met in the case of Waitaha, but we accept that it seems to have been carried out in other cases. We agree, though, with counsel for the taumata that the public notices for the hui made no mention of an executive council. This is presumably because there was no suggestion in Mr Te Whare’s plan that such an intermediate level of representation would exist between the kaihautu representatives and the negotiators. Indeed, there was no vote at the hui on an executive council but only votes on entering comprehensive negotiations, electing kaihautu representatives, and agreeing to the kaihautu members in turn electing negotiators – as had been envisaged in Mr Te Whare’s plan. Nevertheless, at the hui Mr Te Whare distributed a handout which showed in a diagram a ‘komiti’ of

10. Ibid, p453

11. These included Anaru Rangihuea, who Mr Te Whare said (under cross-examination from counsel for Wai 275) was a kaumatua of such standing that his view could not be ignored.

12. The hui were principally conducted in July and August, but several were held in the latter part of September after the 16 September hui of all mandated representatives. These were for groups which had chosen or been allowed to join the mandating process late.

14 members sitting between the kaihautu of 30 members and a negotiating group of seven members.

We do not know the extent to which the ‘komiti’ was explained and debated at the hui, but we presume that attendees were left with some idea of the proposal. Under cross-examination from counsel for the taumata, Mr Hampton stated that the potential for the creation of a group smaller than the kaihautu had been implicit in the resolution put at the hui about the kaihautu representatives electing five to eight negotiators from within themselves. That implication is not so apparent to us, and Mr Hampton may have been confusing the ‘komiti’ and the ‘kaiwhakarite’. In any event, we would agree with Mr Hampton that an intermediate body may well be necessary in a group the size of Te Arawa, but only on the basis of our knowledge that the membership of the kaihautu essentially tripled from what was then contemplated. There was no such rationale for creating an intermediate group at the time. Moreover, the creation of the council was certainly a departure from Mr Te Whare’s plan put to the interim representatives and others on 17 June 2003.

The plan was also departed from in two other important respects at the mandating hui. First, and as we have just indicated, instead of there being between two and four kaihautu representatives elected per iwi/hapu, it seems that each hui was free to elect as many representatives as it desired. We are not sure as to the basis for this decision, but it saw the election of seven representatives for Tuhourangi/Ngati Wahiao, five for Ngati Tarawhai/Ngati Rongomai, 10 for Ngati Pikiao,¹³ 11 for Ngati Tuteniu, and so on. We agree with counsel for the taumata’s comment that there appears to have been an ‘unregulated process of groups putting as many representatives on the Kaihautu as they wished’.¹⁴ Ideally, this sort of matter, as we have identified in our discussion on the 17 June 2003 hui above, should have been resolved through Te Arawa-wide discussion before the mandating hui commenced.

Secondly, the number of participating iwi/hapu changed from the proposal in Mr Te Whare’s plan in that Ngati Te Ngakau/Ngati Tura/Ngararanui and Ngati Tuteniu were added to the original list. This came about after individuals from both these groups made belated requests for mandating hui, which Mr Te Whare agreed to.¹⁵ Still further changes were made when the seats on the executive council were apportioned, which we discuss below. Ngati Te Roro o Te Rangi were also an addition to the list in the mandating plan, although they had elected an interim representative in March 2003. We are unaware of why they were not listed in the mandating plan or the circumstances in which they nevertheless elected kaihautu representatives. With respect to the other groups, we note the concerns raised by claimant counsel that the very question of Ngati Tuteniu’s separate representation should probably first have been considered by hui of Ngati Tuteniu and Ngati Rangiteaorere. Counsel for the taumata

13. The deed of mandate shows the election of 10 kaihautu representatives for Ngati Pikiao, but Mr Hampton’s mandate assessment refers to 11 Ngati Pikiao representatives: see doc A130; doc A11(a), p 674.

14. Paper 3.1.19, p 24

15. Document A109, para 55

made a similar point about the propriety of a hui of all of Ngati Whakaue deciding first the issue of separate representation for Ngati Te Ngakau/Ngati Tura/Ngararanui. From our perspective, we think such decisions were again the kinds of questions that should have been resolved at the outset at Te Arawa-wide hui. Alternatively, a strategy for how such matters could be resolved should have found its way into the mandating plan.

The next significant step was that Mr Te Whare called a hui at Owata Marae on 16 September 2003 for the confirmed mandated representatives from the July to August mandating hui. His first notice for this hui, of 2 September, said that its purpose would be ‘to officially establish Nga Kaihautu O Te Arawa and its executive body’. His second notice, of 8 September 2003, stated that ‘The sole purpose of this meeting is for each group within the Kaihautu to elect one person from their group onto the Executive Council.’¹⁶ We agree with counsel for the taumata that support for the notion of an executive council was assumed at this point and was never explicitly put to a vote itself.

On 9 September, Mr Te Whare sent out the agenda and some notes on the procedure to be followed at the 16 September hui. This document is interesting in that it departed from the advertised notion that each group would elect one council representative and instead detailed an altered allocation of seats. In it, Mr Te Whare stated that ‘Ngati Whakaue (Iwi)/Te Roro o Te Rangi (Hapu) given its overall population may appoint 2 + 1 members respectively = (03) onto the Executive Council’. He also stated that the same reasoning applied to the ‘Pikiao/Tarawhai–Rongomai/Makino configuration’, which was also to share a total of three seats (‘1 + 1 + 1’), although Mr Te Whare then noted that ‘Ngati Makino is standing alone’. He next stated that ‘Tuhourangi may appoint 2 members’, but no grounds for this decision were provided. Mr Te Whare concluded by noting that one seat each was to be provided for those groups which had not yet elected kaihautu representatives (Ngati Te Ngakau/Ngati Tura/Ngararanui, Ngati Rangiwewehi, Tapuika, and Ngati Tuteniu), although he then commented that ‘Tuteniu will be included with Ngati Rangiteaorere where only 1 seat is provided’. There was no mention of Waitaha.¹⁷

Consistent with our earlier comments, we are bound to say that these issues should have been debated by Te Arawa in advance rather than stated as final decisions (and not proposals) in a circular a week before such an important meeting. Even if Mr Te Whare was correct in his decisions on seat allocation, we believe that such a decision needed to be made by a wide and representative gathering. Be that as it may, the minutes of the 16 September meeting appended to Mr Te Whare’s evidence indicate that the mandated representatives subsequently endorsed ‘the structure of Nga Kaihautu O Te Arawa and its executive body’.¹⁸

We note that, with respect to the complaints about the 16 September hui’s timing, Mr Te Whare disputed the necessity to hold proceedings up while counsel for the taumata and

16. Document A109(b), exhibits D, E

17. Ibid, exhibit F

18. Ibid, exhibit G

Pihopa Kingi were overseas. Mr Te Whare explained under cross-examination that, under the two-year timeframe agreed with OTS to enable settlement to occur before the 2005 election, a deadline had been set of presenting the deed of mandate to OTS by 25 October 2003. We believe that there was no harm in such a political imperative driving matters so long as due process prevailed rather than haste. We consider that haste did prevail on several occasions.

In the aftermath of the hui, however, protests were lodged by the taumata. Counsel wrote to OTS on 22 September alleging ‘deliberate timing of Hui to secure unfair advantage’; ‘failure to provide relevant information and provision of misleading information’; ‘inadequate opportunity for informed debate’; ‘dishonest manipulation of process’; and ‘duty upon OTS to ensure that an open, honest and transparent mandate process’ was followed.¹⁹

On 1 October, counsel submitted a petition supported by roughly half the kaihautu representatives asking the Crown to meet with Te Arawa and explain its comprehensive approach to negotiations and requesting that a further hui be held after 30 September so that Ngati Rangiwewehi and Ngati Te Ngakau/Ngati Tura/Ngararanui could ‘participate in any debate about the adoption or otherwise of Nga Kaihautu o Te Arawa’.²⁰ Also on 1 October 2003, Bishop Vercoe wrote to his local members of Parliament on behalf of the taumata challenging ‘outright’ the 16 September hui and seeking the members’ support for the petition.²¹

Bishop Vercoe advised at the same time, however, that, ‘of the 14 Te Arawa Hapu Hui convened over the last 3 months, we are satisfied that 11 of these reach an acceptable standard of good conduct and legitimacy’. This is an overall theme we detect from the evidence: that most of Te Arawa, and even the taumata members themselves, were generally happy about the mandating of iwi and hapu representatives, but that a good number became uneasy about the next step in the process, which created the executive council.

That is not to say that there were not some problems with the mandating hui, but most of these seem to have been exacerbated by the poor quality of the ‘cut and paste’ minutes submitted as part of the deed of mandate (see below), which had of course not been seen by Bishop Vercoe when he made his comment. We also accept the point made by the claimants that not all mandating hui completed the business of passing all their resolutions, and it was perhaps inappropriate for Mr Te Whare to rely on personal communication (such as that from members of Ngati Whakaue) that subsequent discussions had resolved matters. Again, haste should not have been determinative of process.²²

19. Document A11(a), p505

20. Document A145

21. Document A114, exhibit BB

22. We add that, while many of the mandating hui were reasonably well attended, some turnouts were disappointing and others were particularly poor. For example, we believe that the Ngati Pikiao and Ngati Rangiwewehi hui were poorly attended (23 and 15 people respectively), while attendances at the hui in the main centres outside of Te Arawa’s rohe were very sparse. The Te Arawa population in the Auckland metropolitan area is, according to the 2001 census, as high as 4323. This figure includes 2088 people in the category ‘Te Arawa/Taupo (Rotorua/Taupo) region not further defined’ (which is probably half Te Arawa and half Ngati Tuwharetoa). Even allowing for this, the Auckland hui

What did the Crown do about the concerns raised by the taumata? It noted them but decided nevertheless to receive the executive council's deed of mandate, partly on the basis that the mandate hui appeared to have been endorsed by some of Te Arawa's most influential leaders. We consider, however that, having been advised that there had been procedural deficiencies, ORS should have first reviewed the outcome of the 16 September 2003 hui. If such a review had been conducted, the Crown would have identified, as we have, that there had been insufficiently robust debate within Te Arawa on, and limited notice of, the actual composition of the executive council and its accountability back to its constituent iwi and hapu.

This underscores the point that the process was allowed to evolve organically, with limited transparency and little active monitoring by the Crown.

5.3.3 The deed of mandate

The next matter for us to consider is the deed of mandate itself, which was submitted to the Crown on 1 December 2003.²³ There are a number of comments to make about it. First, we note that the executive council's rules were described as 'currently being developed' and were to be provided 'as soon as they are finalised and agreed by the Te Arawa Executive Council'. Despite this, and somewhat confusingly, it was stated that 'this Deed sets out the Rules that are relevant to assessing this Deed' and 'the Rules that relate to how the Te Arawa Executive Council will make decisions are set out in Schedule 3 of this Deed'. We do not intend to dwell here on these apparently provisional rules, since a copy of the final rules – the deed of trust – was submitted in evidence and we consider that below.²⁴ But it is important to note that the rules attached to the deed of mandate did not include any provisions relating to such matters as accountability to, or consultation with, the kaihautu. Instead, the deed gave only an indication of the content of the rules. For example, the deed stated that 'The reporting and accountability of the Te Arawa Executive Council to its beneficiaries . . . will be extensive and multi-layered and will be set out in the Rules'. Specifically, the deed signalled that this would include a monthly report on 'progress regarding the settlement negotiations', meetings with Te Arawa members to report on progress every four months, 'annual reports', 'regular newsletters', and the like.

Leaving the rules aside for the time being, the deed revealed that, under the final structure of the executive council, it was to have 20 members, which included three unallocated seats for Ngati Makino, Waitaha, and Tapuika, which the council did 'not yet have the right to represent'. The remaining 17 seats were shared amongst the other Te Arawa iwi/hapu largely along

attendance of only seven people was particularly low, despite newspaper advertising. Similar things could be said of the turnout of seven in Hamilton (out of a possible total population of 1056), six in Wellington (1631), and 14 in Christchurch (858). It perhaps shows that newspaper advertising is not the most effective method of contacting Maori about such hui.

23. Document A130

24. Document A104(a)

the lines outlined by Mr Te Whare in his briefing of 9 September, albeit with a couple of notable exceptions. First, a seat was made for Ngati Tuteniu despite Mr Te Whare's previous indication that they would share a seat with Ngati Rangiteaorere. Secondly, Ngararanui had a seat of their own distinct from Ngati Te Ngakau/Ngati Tura. Counsel for the taumata alleged that this had arisen only because of a 'personal conflict', with members of Ngararanui, on the one hand, and Ngati Te Ngakau and Ngati Tura, on the other, not being able to work together.²⁵

We were told by executive council chairman Eruini George that the council, rather than Mr Te Whare, made the final decisions about Ngati Tuteniu and Ngararanui (although he confirmed the Ngararanui decision was taken so as to 'avoid further tension').²⁶ Nevertheless, we still consider that such decisions should have been made by a broad number of representatives of Te Arawa (or, failing that, Ngati Whakaue, in the case of Ngararanui) as a whole.

As mentioned, the deed noted that the council had no mandate to represent Ngati Makino, Waitaha, and Tapuika. Despite this, the deed stated that 'A consequence of a successful negotiation will result in the settlement of all Te Arawa based Wai claims currently before the Tribunal'. These would include, according to the deed, Ngati Makino's claim Wai 275 and Waitaha's claim Wai 664.

Mr Te Whare admitted in cross-examination that this had been an error, one which he could not explain but for which he took responsibility. (As we noted in chapter 4, however, his counsel said that it had been reasonable to include Ngati Makino's claim since it was difficult to distinguish their interests from Ngati Pikiao's.) The deed also included the notices advertising the mandating hui, including the notice for the Waitaha hui placed under the apparent authority of Pateriki Hiini. As indicated above, we accept the submission of counsel for Wai 664 that Waitaha had not in fact sanctioned the advertising of this hui. We return to the claims of Wai 664 and Wai 275 below, but it suffices here to say that the deed was deficient in its treatment of these two groups.

Finally, with respect to the deed of mandate, we return to the issue of the 'cut and paste' minutes. The submission of such basic (and, in cases, erroneous) accounts of the hui was unsatisfactory and has subsequently served to foster disquiet about the mandating hui that would not have been there but for better minutes. We are surprised that such poor records of these vitally important meetings could be considered an adequate component of a deed of mandate. They do not appear to us to have been evidence of robust process.

5.3.4 The executive council's rules

We now return to the rules. These are entitled 'Deed of Trust Relating to the Te Arawa Executive Council' and are dated 12 March 2004 (a trust was established, meaning that council members are effectively trustees). They were appended by Mr George to his evidence minus

25. Paper 3.3.1, p 46

26. Document A104, paras 24–26

the schedules, which were provided separately. For a start, we should say that Nga Uri o Te Arawa (which is how the council's beneficiaries are referred to in the deed of mandate) have not been formally consulted about the rules. In other words, they were devised by the executive council members themselves (obviously with legal advice) and have not been the subject of wider debate amongst Te Arawa except to the extent that council members have discussed them informally with kaihautu representatives or beyond.

The rules set out the purposes of the council. These include negotiating a settlement with the Crown as well as 'consulting with the Beneficiaries from time to time on matters relevant to the Settlement Negotiations'.²⁷ Clause 8 sets out in detail the duties of the council members, which must be 'consistent with tikanga' and 'take into account the interests of the Beneficiaries', although clause 4.6 notes that the members have, subject to clause 8, 'absolute discretion' in carrying out their functions.²⁸ Notably, the duties include (at cl8.3) not acting 'in a manner that unfairly prejudices or unfairly discriminates against any particular Beneficiaries'.²⁹

The rules also contain a section on the replacement of members who have 'ceased to act', as well as provision for the election or removal of council members by a majority of kaihautu members for each iwi/hapu.³⁰ The second schedule to the deed of trust also sets out the rules for the election or removal of kaihautu members themselves. Of particular interest to us are the sections of the rules that prescribe reporting to the kaihautu and to beneficiaries. For the former, the council is required to produce a monthly report on progress. For the latter, the council is required (as was indicated in the deed of mandate) to produce annual reports, hold three meetings a year to 'update' beneficiaries on progress, make its annual accounts available, produce regular newsletters, and assist kaihautu members themselves to update the beneficiaries.³¹

The first schedule to the deed of trust sets out the procedure for the passing of resolutions at executive council meetings. According to this, 'ordinary' resolutions can be passed by a majority of council members present, but 'special' resolutions require 75 per cent support to be passed. Mr Baird asked some specific questions of Mr Te Whare about these rules, nominating as an example the case of Ngati Rangiwewehi, whose claims very specifically relate to two springs, and querying whether they could simply be outvoted by the rest of the executive council. Mr Te Whare replied that such issues were still being worked through.

We note in this regard that clause 8.8 of the schedule states that, subject to clause 8.3 of the trust deed, which we have quoted from above:

27. Document A104(a), p7

28. Ibid, pp8–9, 10

29. Ibid, p11

30. Ibid, pp10, 13. Clause 6.4 refers to the ability of kaihautu members 'to elect or remove an Executive Council Representative for [their] Te Arawa Ropu', excepting the election of the council members listed in schedule 4 (who are those members of the council 'on Rules Date'): pp10, 33–35.

31. Document A104(a), pp16–17

no resolution that relates to an item of redress offered by the Crown in the context of the Settlement Negotiations that specifically affects or relates to a Te Arawa Ropu [iwi/hapu] is effective unless a majority of the Executive Council Representatives for that particular Te Arawa Ropu vote in favour of that resolution.

That would seem to give individual iwi/hapu some comfort that they have some control over such decisions, except that the reference is specifically to items of redress offered by the Crown rather than those not offered. It is not clear how the council will deal with a situation where the specific redress sought by a particular iwi/hapu is not offered in settlement by the Crown. We presume that it will be subject to a majority or 75 per cent vote which will bind the iwi/hapu in question, albeit with the rest of the council being obliged to consider the matter in light of clause 8.3 of the trust deed.

Overall, the rules are thorough and should help the executive council considerably in carrying out its work in a transparent and professional manner. However, as we have noted, the rules have not been subject to debate amongst representatives of Te Arawa whanui, and it would solidify their acceptance if this were to occur. Questions that might be considered in such a debate include whether it is sufficient for the kaihautu members and beneficiaries to be updated with progress reports, or whether firmer lines of accountability are required. For example, should iwi/hapu direct kaihautu members, who would in turn direct their executive council representatives, or would this be too unwieldy? Or is it sufficient that provision exists for iwi/hapu members to remove kaihautu members and kaihautu members in turn to remove their members of the council? Furthermore, what rights should an iwi/hapu have to hold up the settlement until a specific claim issue is resolved? Alternatively, should a 50 or 75 per cent majority of the council be able to determine such settlement issues with finality? Should there be any right of withdrawal for an iwi/hapu from the process or should joining the council require a group to be bound by the collective approach and outcome?

We can presume only that some amendment to the rules is still possible, since Mr Te Whare seemed to indicate, under the questioning from Mr Baird referred to above, that they remained under review.

5.3.5 The Crown's assessment of the deed of mandate

Having now given detailed consideration to aspects of the mandating process that are of concern to us, and having identified some of its flaws, we must now focus our attention on the next question before us; namely, whether the Crown's own process leading to the recognition of the executive council's mandate was deficient.

At the outset, we adopted the views of Judge Carrie Wainwright in making her decision on an unrelated application to the Tribunal in February 2002:

It seems to me that the Crown, in attempting to secure a settlement, is sometimes caught between what one might colloquially call a rock and a hard place. On the one hand the Crown needs to be in a position to confirm, in the interests of good government and honouring the Treaty obligation to act in good faith, that claimants have been procedurally fair in managing their own settlement processes. . . . Balanced against this imperative is the need on the other hand for the Crown to avoid offending the claimant community, often in the person of the settlement negotiation body, by being overly patriarchal, and by ‘interfering’ being seen as impinging on the claimant’s tribal authority. This is indeed a difficult and narrow path to tread.³²

We also feel sympathy for the difficulty of the Crown’s position. To this extent, we support the statement by Crown counsel that:

The Crown does not seek to impose any mandate structure or particular mandate body on a claimant group. Rather, the Crown simply requires that the mandate be obtained in accordance with certain minimum guidelines so that the Crown can take comfort as to the soundness of the mandate.³³

(1) Crown policy and guidelines

What, then, are the ‘minimum guidelines’ that the Crown emphasises when it assesses a deed of mandate? They are to be found in OTS’ negotiations guide *Ka Tika a Muri*, which we have referred to previously. In the guide, OTS states that its mandate review procedures verify, inter alia, that:

- ▶ the representatives are properly mandated to negotiate an offer for the settlement of the claimant group’s historical Treaty claims
- ▶ the mandated representatives have a process in place to ensure they are accountable.³⁴

The guide goes on to state that the deed of mandate must:

endorse a structure by which the mandated representatives are accountable to the wider claimant group . . . [and] provide for the mandated representatives to report back to the claimant group on progress and specify consultation procedures on particular issues.³⁵

32. Judge Wainwright, memorandum concerning application for urgency, 21 February 2002 (Wai 889 ROI, paper 2.67) (as quoted in paper 3.3.10, p10)

33. Paper 3.3.10, p11

34. 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]), p 46

35. Ibid, p 49

5.3.5(2)

In reviewing the deed of mandate, the Crown must determine whether it:

- ▶ clearly defines the claimant group and the claims to be settled
- ▶ shows that the wider claimant group members have been consulted and that they support the representatives seeking the mandate to pursue negotiations with the Crown
- ▶ provides authorisation for the representatives to negotiate a comprehensive settlement of all the claimant group's historical claims
- ▶ shows that representatives are accountable to the wider claimant group
- ▶ acknowledges any opposition to the mandate and describes the extent of that opposition, and
- ▶ identifies overlapping claims.³⁶

The guide then provides what OTS calls its 'mandate checklist' of 'essential items' for inclusion in the deed of mandate. This includes:

- ▶ a definition of the claimant group;
- ▶ a statement that the group intends to seek a comprehensive settlement of all its historical claims;
- ▶ the names of the mandated representatives and the process by which they will make decisions;
- ▶ a description of how the mandate was obtained, with supporting evidence including hui advertisements, minutes, and signed lists of attendees, and an explanation of whether any Crown (TPK) or independent observers attended the hui; and
- ▶ a statement outlining the accountabilities of the mandated representatives, including the requirements for reporting back to the claimant group, 'the ability of the claimant group to have input into key decisions', the ability of members of the claimant group to remove the mandate from their representatives, and so on.³⁷

(2) OTS' comments on the draft mandating plan

We have had regard to these 'minimum guidelines' while assessing the Crown's decisions. First, we consider OTS' review of Mr Te Whare's mandating plan at the start of the mandating process. This analysis was principally undertaken by Tony Sole of OTS' claims development team. In a letter to Mr Te Whare of 13 June 2003, Mr Sole said that, with respect to the 14 Te Arawa kin groups named in the plan, 'it is up to the constituent iwi/hapu of Te Arawa to mutually decide how many iwi/hapu will be identified to participate in any mandating process to choose negotiators for Te Arawa'.³⁸ We understand by this statement that Mr Sole

36. Office of Treaty Settlements, *Ka Tika a Muri*, p 49

37. *Ibid*, p 50

38. Document A11(a), p 428. Mr Sole was correct in referring to 14 iwi/hapu, because he was commenting on a draft dated 9 June 2003 which listed Ngati Tarawhai and Ngati Rongomai separately. In the plan dated 17 June, which we have relied upon as the one presented at the 17 June meeting, these two kin groups are listed together as one: see doc A11(a), pp 418, 439.

was saying that this was a matter for Te Arawa to decide, rather than the Crown. But the comment is interesting because it touches on our own concern that the overall decision on the participating iwi/hapu needed to be made or endorsed by Te Arawa collectively, at the start of the process, and not changed abruptly by Mr Te Whare or the executive council.

Mr Sole considered the status or mandate of what he referred to as the ‘taumata’ but which became known in due course as the kaihautu (bearing in mind that, at this stage, there was no suggestion of an intermediate group between the kaihautu and the negotiators). He wrote that ‘protocols would need to be agreed on how the taumata would operate; this would include a description of how representatives are elected to the taumata; how they report back to their iwi/hapu; how they conduct their own meetings; how negotiators are appointed; and so on’.³⁹ Mr Sole did not specify when such protocols would need to be agreed, but the implication seems to be that it would be during the mandating process.

Mr Sole then said he concurred with the proposal to have a series of hui at which each iwi/hapu would elect representatives to the ‘Taumata’ (which would be a ‘large plenary group of perhaps 28–36 iwi/hapu representatives’). He said that OTS understood that ‘the “Taumata” would have the responsibility of appointing the Te Arawa negotiators who would be accountable to the taumata who – in turn – would be accountable back to their various iwi/hapu. This is very sound in our view.’

Mr Sole then gave some advice on hui advertising and endorsed the planned process for recording the decisions taken at the hui. Finally, he offered Mr Te Whare the further advice that the process not be rushed. He said that the Crown did ‘not relish a situation where all parties are “squeezed” by a tight timeline, with the potential to destabilise the whole process’, and that it was ‘important, in our view, to reduce the opportunity for accusations to be laid that this process is being “forced through” without proper input from leaders and kaumatua’.⁴⁰

On 26 June 2003, Mr Philipson of OTS wrote to all Te Arawa, enclosing Mr Sole’s letter and stating that, ‘In short, we consider that Mr Te Whare’s proposal was robust and inclusive.’⁴¹ We agree that it would have been had there been adaptation to include some of the matters raised by Mr Sole, namely:

- ▶ Te Arawa ‘mutually’ deciding on the iwi/hapu groups to participate in the mandating process;
- ▶ a plan for how to gain agreement on the ‘protocols’ for the operation of the kaihautu (and its eventual offshoot, the executive council); and
- ▶ a timeline that could in no sense be described as rushed.

As we note above, the Crown’s omission or flaw was in not requiring further debate within Te Arawa on the plan. OTS knew, or ought to have known, that the hui of 17 June 2003 had

39. Document A11(a), p 429

40. Ibid, p 430

41. Ibid, p 452

5.3.5(3)

rejected the plan without addressing its substantive content, so debate on the issues raised by Mr Sole had not taken place.

Secondly, the Crown then failed actively to monitor the plan's implementation during the mandating process to ensure that issues of accountability and representivity were being adequately addressed.

(3) *The Crown's assessment of the deed of mandate including review of submissions*

Upon receipt of the deed of mandate, the Crown placed advertisements calling for submissions on it. As we have noted previously, 39 were filed in favour and 13 against. After considering these submissions, Mr Hampton submitted OTS' assessment (with input from TPK) of the executive council's mandate to MICOTOWN and the Minister of Maori Affairs in a paper dated 30 March 2004 (officials' detailed comments on the submissions were attached as an appendix). Mr Hampton recommended that the Ministers agree to recognise the council's mandate, which they duly did on 30 and 31 March 2004 respectively.⁴²

In the advice provided to Ministers, there are matters upon which we agree and matters that we consider could have been presented with a different emphasis.

In sum, Mr Hampton wrote that officials were 'satisfied that the Executive Council's mandating process was open and robust and that it has demonstrated, through an inclusive process, that it has the broad support of the Te Arawa people'. However, Mr Hampton noted that the sheer size of Te Arawa meant that 'ongoing mandate maintenance and open and regular communication with the claimant community' would be necessary to achieve a durable settlement. He also explained the officials' view that there was not clear evidence that Ngati Rangitihi had mandated the executive council and that a 'reconfirmation hui' would be required. He further noted that Ngati Makino, Waitaha, and Tapuika had refused to join or mandate the council, and he stated that the council's mandate did not extend to the settlement of their claims.⁴³

In detailing the mandating process, Mr Hampton said that the 'Kaihautu structure' was approved at a hui of kaihautu representatives on 16 September 2003. At that hui, representatives were also elected to the executive council. According to Mr Hampton, 'Subsequently, the Executive Council agreed, in accordance with tikanga, to requests from Ngati Tuteniu and Ngararanui that they be represented separately on the Kaihautu and the Executive Council'.⁴⁴ Moreover, Mr Hampton explained that the executive council had advised that the groups represented on the council (bearing in mind seats were reserved for Ngati Makino, Waitaha, and Tapuika) reflected the 'contemporary political configuration of Te Arawa'. He added that

42. This paper and its appendices are at document A11(a), pp670–694.

43. Document A11(a), pp671, 679

44. Ibid, p673

officials were ‘comfortable’ that the groupings included the main iwi/hapu of Te Arawa as well as ‘selected subgroups’.⁴⁵

In our view, compliance with tikanga depends on the method of the ‘selection’. If Mr Hampton had been able to demonstrate significant buy-in at hui from representatives of a wide spectrum of Te Arawa to the composition of groups represented on the executive council, as well as the broad approval of affected kin groups’ representatives when new ‘subgroups’ were added, he would have been on firmer ground in suggesting that decisions were made ‘in accordance with tikanga’. The same, of course, applies to the proportionality of representation on the council amongst the respective iwi/hapu.

Mr Hampton then outlined the submissions made on the deed of mandate. He noted that, of the 52, 39 were ‘form letters in support of the Executive Council’s mandate’. The 13 opposed, he said, were from ‘individuals and groups of individuals of several Te Arawa iwi/hapu’. We presume that Mr Hampton’s emphasis on ‘individuals’ might equally have been applied to the 39 who completed the ‘form letters’ (the representative status of those persons is not explained to Ministers), but it is unclear. Mr Hampton said that the opposing submissions were mainly from individuals of Ngati Rangitahi, Ngati Tamakari, Ngati Rangiwehewi, Ngati Tuteniu, Ngati Tahu, and Ngati Whaoa who disputed the executive council’s mandate to represent their claims, and one from the taumata, which complained that it had been wrongly sidelined during the mandating process. Mr Hampton did not mention several of the submissions in the body of his paper, including those made by counsel for Wai 664 concerning Waitaha and counsel for Wai 275 concerning Ngati Makino.⁴⁶ However, comment on all the opposing submissions was included in an appendix, as noted above.

In sum, Mr Hampton considered that ‘the submissions received in opposition to the Executive Council’s mandate represent a relatively small proportion of the Te Arawa people’. With respect to the concerns of members of Ngati Tamakari, Ngati Tahu, Ngati Whaoa, Ngati Tuteniu, and Ngati Rangiwehewi, he said that the mandating processes for these groups had been ‘sufficiently open and inclusive’. He also noted that officials had met with the executive council to ‘discuss the issues raised in the submissions and how they can be addressed’.⁴⁷ He then ran through a limited number of the ‘minimum guidelines’ outlined above and stated that OTS and TPK officials believed that the deed of mandate had met these assessment criteria. He did, however, note what he saw as some imperfections and matters requiring further attention. These were as follows:

- TPK observers had not attended any of the mandating hui since they had not been invited, which was ‘unfortunate’, although the hui minutes appeared to ‘accurately record the key resolutions made at each hui’.

45. Ibid, p 674

46. Ibid, pp 674–675

47. Ibid, pp 675, 677

5.3.5(3)

- ▶ Ngati Rangitahi's hui left room for doubt whether a mandate had been given to the executive council and a 'reconfirmation hui' would be necessary.
- ▶ At other hui, there was 'some ambiguity relating to the resolutions passed pertaining to the internal structure of the Kaihautu and Executive Council', but 'these resolutions were not key to entering into negotiations with the Crown'.
- ▶ A number of submissions indicated that 'the structure of the proposed mandated body may not have been clearly communicated during the mandating process', but the executive council was now going to 'clarify matters'.

Overall, he said, the deed of mandate demonstrated that the executive council would be 'appropriately accountable to the claimant community', with the council's rules being a good example of this.⁴⁸ Finally, Mr Hampton said that it would be 'preferable' for Ngati Makino, Waitaha, and Tapuika to join the council and that officials would 'continue to encourage' their participation.⁴⁹

We agree with OTS that there appears to be a good measure of support from within Te Arawa for the kaihautu and the executive council. The assessment does identify issues and problems associated with the main claimant groups that appeared before us and there are suggestions about how they may be addressed.

Where we disagree with OTS is in the emphasis it placed on matters relating to accountability and representivity. Mr Hampton said that OTS had been advised that representation was resolved in accordance with tikanga, but the Crown took no interest in actively ascertaining this. Furthermore, where Mr Hampton said that the council was 'appropriately accountable', he was basing that on the officials' view of appropriate accountability rather than Te Arawa's. There was never a large gathering of Te Arawa representatives (such as the kaihautu) to debate the rules and, in particular, what might constitute 'appropriate accountability'. The executive council may well have consulted with individuals, but it certainly did not take instruction on the rules from the kaihautu as a whole. As we mentioned in chapter 1, one of the resolutions put at some at least of the mandating hui was that the iwi/hapu agreed that 'the Kaihautu O Te Arawa establish an agreed terms of reference with the appropriate protocols and disciplines by which both they and the 5-8 Kaiwhakarite O Te Arawa are to carry out their functions and responsibilities'. In other words, and although the executive council had not been proposed at that point, the resolution put was that the kaihautu representatives would determine these matters. At the very least, the smaller executive body should have sought formal approval of the rules from the kaihautu, or it should at least have sought the kaihautu's approval to set the rules itself.

These matters were not brought to the attention of Ministers, despite OTS being aware of the fact that the original mandating proposals had been modified.

48. Document A11(a), pp 676-677

49. Ibid, pp 678

5.4 CONCLUSION AND FINDINGS

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. It seemed to us this was a matter acknowledged by the Crown in its recognition that it had been 'unfortunate' that independent TPK observers had not attended the mandating hui.

To that extent, we believe that it is understandable that the claims were brought. Claimant concern has been exacerbated by the lack of active monitoring of the process by the Crown, both when the mandating plan was first proposed to Te Arawa and then during its implementation. We think that the following quotation from the Tribunal's *Ngati Awa Settlement Cross-Claims Report* is particularly apposite:

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.⁵⁰

Issues surrounding representivity and accountability have clearly not been fully and thoroughly resolved, and claimant disaffection in the main seems to us to be about these matters. We have pointed to the fact that Te Arawa has not had an opportunity adequately to discuss the composition of the council and its rules, particularly with respect to lines of accountability. That support may well be there, but it has not been formally tested.

This view is consistent with the advice of TPK. While agreeing with the recommendations in Mr Hampton's mandate assessment paper, John Tamahori of TPK (on behalf of the chief executive) brought some additional concerns to the attention of Ministers. This memorandum was dated 31 March 2004, and thus could not have been seen by MICOTOWN when she accepted Mr Hampton's recommendations the day before. It is a concern to us that this advice may not have been available at the time the decision to recognise the council's mandate was taken.

Mr Tamahori observed that there was 'ambiguity over where the mandate sits', pointing out that Te Arawa iwi/hapu had mandated representatives to sit on the kaihautu rather than the council. It was with the kaihautu that the mandate technically sat, he said, rather than with the kaihautu's delegates on the council. (Despite this, of course, the Crown recognised the

50. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), p88

mandate of the council, not the kaihautu.) He then commented on what he described as the ‘limited accountability’ of the executive council to the claimant community, since the beneficiaries of the trust have neither voting rights at the AGM ‘nor any mechanism to directly hold the Trustees to account’. Mr Tamahori noted that the beneficiaries’ ability to influence matters seemed to be limited to ‘Indirect accountability mechanisms’, such as the removal of representatives and the application of trust law.⁵¹

But are these flaws so fundamental that they amount to a breach of the Treaty of Waitangi? The answer at this stage must be no. The Crown wants to negotiate and settle the Te Arawa claims. The claimants want to negotiate and settle their claims. Both parties have the same intention and the claimants have approached the mandating process with enthusiasm. That there have been mistakes cannot be denied. One could get bogged down in the detail of poor notices, flawed meeting procedure, sloppy minute-taking, and so on, and insist that the process start again to ensure that all the Crown’s minimum guidelines are rigidly complied with from the outset. But would that change the result? We do not necessarily believe so. For all its flaws, we consider that the majority of Te Arawa want to continue the process already embarked upon. We believe, therefore, that matters should be taken back only as far as is absolutely necessary. In our opinion, the errors are not beyond rectification. No one denies that there remain outstanding issues, but we believe that they can still be addressed before the terms of negotiation are signed.

As Mr Hampton explained in response to a question from Judge Wickliffe, the Crown is open to putting matters to right to the extent that it will review the new information raised during the hearing and decide whether any action is required. It is also very mindful of the need for ‘mandate maintenance’. Moreover, it had previously requested deferral of the Tribunal hearing so that it could review the process by which the executive council’s mandate was achieved (see ch2). We believe that the Crown is now in a much better position to undertake that review because of both our hearing and this report. If it now acts along the lines that we suggest (see below), we consider that ultimately it will not have been in breach of the Treaty.

It follows that we find that some aspects of the claims are well founded, but we do not uphold them *per se* because we believe that matters are not yet concluded. Therefore, 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 an entrenched division between the claimants (and their not insignificant number of supporters) and the executive council that will take many years to overcome. How can that be good for the honour of the Crown or for the enduring settlement of Te Arawa claims?

We believe that, had our hearing been deferred (as was sought by the Crown), this would

51. Document A11(a), pp 695–696

have increased the likelihood of dissent from the claimants. By hearing the evidence, we have been able to ascertain what further work needs to be done to ensure that the claimants and the Crown do act towards each other reasonably and with the utmost good faith. Getting the first stage of the process right will lay the basis for future cooperation. If the measures we suggest are undertaken, we believe that it will be a 'win-win' situation for all of Te Arawa.

5.5 SUGGESTED COURSE OF ACTION

What, therefore, is our suggestion? 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. If these issues are not addressed, the suspicion on the part of some that the council exercises a 'top-down' authority in the guise of a 'bottom-up' mandate will be vindicated.

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 that 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 a settlement amongst a significant number of Te Arawa. A return to the beginning would run the risk of destabilising matters further.

So, our suggestion is that a hui of kaihautu members be called to 'reconfirm' acceptance. That seems the most sensible way of moving forward. 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. The executive council, on the other hand, needs to recognise this hui as an opportunity to solidify the gains that have been made to date. Both the Crown and the council should also consult with the taumata, in recognition of the mana of its leaders.

We recognise, too, that such a hui will require careful planning. For example, thought will 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? 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. 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.

After that, 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 (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.

We believe that 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.

We also consider that the 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. We return to their situation below.

5.6 SPECIFIC COMMENTS ON THE CLAIMANT GROUPS

5.6.1 Te Arawa taumata

The taumata's leaders are highly respected and influential people. We acknowledge that it was partly the effort of the VIP northern or Te Arawa taumata which paved the way for the mandating process. We should also mention our appreciation of Pihopa Kingi's closing remarks at the hearing of these claims to the effect that the taumata would accept the Tribunal's decision and that Te Arawa would rally together.

In our view, the leaders of the taumata will have much to offer Te Arawa by assisting the executive council to find the right balance in terms of representivity and accountability. They will be part of the process we now propose through being consulted by the Crown and the council and because of their membership of the kaihautu.

We agree with the taumata that facilitation has important implications for the internal stability of an iwi or hapu. That is because the process for achieving mandate should have as little impact as possible on the internal relationships within a community of claimants. We can only agree with the words of the Tribunal constituted to hear the Ngati Awa settlement cross-claims when it said 'The Crown must also be careful not to exacerbate the situations where there are fragile relationships within tribes.'⁵² In the Te Arawa case, there have been some facilitation errors, such as those involving Waitaha, but, given the complexity of the tribal landscape within the wider Rotorua district, the odd mistake was bound to happen. These problems can be rectified and, for Waitaha, we have suggested what approach is needed below.

So, with respect to facilitation, we believe that there is a basic requirement for the Crown to address at the very start of the process who is the right person or group to plan and implement a mandating programme. We acknowledge that it is up to a claimant community to identify its own leadership. However, the Crown needs to assure itself that facilitators, as much as negotiators, have a good measure of acceptance amongst a claimant community, and that any proposed mandating process is open, fair, and robust.

We have not received any evidence that some objective criteria for assessing the standing of Mr Te Whare were applied before the mandating process began. We believe that further advice on facilitation issues should have been sought by OTS from key hapu or iwi institutions and other government agencies. We are saying not that Mr Te Whare was an inappropriate choice but that more transparency was needed in the process that led to his appointment.

52. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report*, p88

At this point, we note that on 20 June 2003 Mr Philipson of OTS briefed MICOTOWN and said that officials had concluded that Mr Te Whare's plan was 'consistent with our policies'. Mr Philipson added that, while 'many people from Te Arawa' saw Mr Te Whare as a natural person to undertake the mandating process for Te Arawa, officials had 'recently heard concerns that [he] has not communicated well with interested Te Arawa people during the pre-negotiations process'. This, said Mr Philipson, may in part have been caused by 'the lack of formal definition of who the [CNI] collective should be communicating with'. Mr Philipson said that OTS was working on bringing the opposing factions together before the mandating process began, adding that 'The position is delicate, and a positive outcome cannot be assured.'⁵³ We wonder whether Mr Philipson realised how very prophetic these words would turn out to be.

But, in mitigation, and as explained in chapter 1, Mr Te Whare was employed by the VIP taumata. He was a senior manager charged with the responsibility for implementing decisions made by that taumata regarding its desire to negotiate and settle the CNI forestry claims which broadened to the settlement of as many CNI claims as possible. To that extent, he was well known to the Crown, and, at least until 16 June 2003, he discharged his functions in line with the instructions of the VIP project governance. He is also a leader in his own right and is one of the principal speakers for Ngati Tahu.

Aspects of Mr Te Whare's mandate plan could be said to have been endorsed by implication by those who voted at the 16 September 2003 hui and, subsequent to that meeting, by those who have participated fully on the kaihautu and the council. We believe that these supporters represent the majority of Te Arawa hapu and iwi. To that extent, Mr Te Whare meets the requirement that the facilitator has a good measure of acceptance amongst the claimant community. We suggest, however, that he has matched this criterion by accident rather than design and that the Crown should, in any future case, take a far more active and careful role in obtaining advice on the acceptability of key facilitators.

Weighing all the above in the balance, and with respect to the taumata's key complaint that it was sidelined and replaced as the facilitator of this process, we have no specific recommendation to make. This is because for much of the mandating process the taumata seemed to be content with how matters were unfolding. We are conscious of Bishop Vercoe's comment of 1 October 2003 that 11 of the 14 mandating hui were perfectly acceptable, and this partly convinced us that the real flaws in the process lay not in the individual mandating hui but in the step from the creation of the kaihautu to the birth of the executive council. The actions of individual taumata leaders were supportive of the process facilitated by Mr Te Whare. Whether he was their employee or not seems something of a red herring. What is important now is improving the result so that their real concerns regarding representivity and accountability are addressed. As we noted above, as members of the kaihautu, all the taumata leaders will be eligible to participate in our proposed reconfirmation process.

53. Document A114(a), pp55–56

5.6.2 Ngati Makino

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.

5.6.3 Waitaha

With respect to Waitaha, we do not believe that the Crown has in fact altered its 'large natural groups' settlement policy to their disadvantage.⁵⁴ 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 Tauranga 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 orts' current level of resourcing.

Finally, we understand why the claimants believe that the mana of Waitaha (as well as that of Ngati Makino) was usurped during the mandating process by the inclusion of their claims in the deed of mandate against their will and, in Waitaha's case, by the advertising of mandating hui for them without their consent. While these were not Crown actions, the Crown replicated some of the misinformation, and moreover it has found it difficult to take 'no' for an answer from Waitaha in particular. If the Crown has not been 'coercive' in pursuing Waitaha, as claimant counsel alleged, it has certainly been relentless.

If it has not already not done so, the Crown should now require the deed of mandate to be amended to expressly exclude the claims of Waitaha and Ngati Makino.

5.6.4 Ngati Rangiwehehi

As for Ngati Rangiwehehi, we think that their concerns may be alleviated somewhat by the voting that we propose be undertaken on the executive council's rules. As we have indicated,

54. In principle, the same considerations apply to Tapuika, although of course they did not participate in our inquiry and we received no submissions from them.

5.6.5

we think that it must be made very clear how a group like Ngati Rangiwewehi will be affected if specific natural resource claims become sticking points in the negotiations while the rest of Te Arawa wish to move forward to a settlement. At present, the rules do not make it clear whether redress that is not offered can give an affected iwi/hapu the right to block a resolution, but it appears that no such right exists.

5.6.5 Ngati Rangitihi

With regard to Ngati Rangitihi, we need to state at the outset that we do not agree with counsel for Wai 524's submissions concerning the Tribunal's jurisdiction to hear the concerns of the Wai 996 claimants. Furthermore, we are aware that a 'reconfirmation hui' was held on 17 June 2004 but that its outcome is once again disputed. As noted above, we recommend that one more mandating hui take place for Ngati Rangitihi after thorough advertising, at an acceptable venue, and with a neutral chair and independent observers and record takers. At this hui, we envisage that Ngati Rangitihi will finally decide whether to elect kaihautu representatives or stand apart from the negotiations process. That the outcome remains uncertain is reflected in Mr Hampton's comments in his mandate assessment in March of this year that it was indeed 'possible' that Ngati Rangitihi may not elect to join the kaihautu at the pending reconfirmation hui, and that this would have some impact upon the scope of the proposed negotiations.⁵⁵ We must await the outcome of the hui. As for counsel for Wai 996's concern that all claimants may be required to withdraw from the Tribunal process under terms of negotiation agreed between the Crown and the executive council, we do not wish to comment at this stage, since such a requirement has not yet become a reality.

5.6.6 Ngati Tuteniu, Ngati Tamakari, and Ngati Whaoa

Finally, with respect to Wai 980 (regarding Ngati Tuteniu), Wai 1173 (regarding Ngati Tamakari), and Wai 681 and Wai 837 (regarding Ngati Whaoa), we do not need to comment on these claims because the concerns of the particular claimants will be decided not by us but by the kaihautu at the hui we have recommended. We consider that the concerns of these groups truly are within the domain of Te Arawa to decide.

5.7 SUMMARY

The key points made in this chapter are as follows:

- There were flaws in the mandating process for Te Arawa and the Crown should now take steps to put matters to right.

55. Document A11(a), p 676

- ▶ The Crown has not yet breached the Treaty of Waitangi because there remains an opportunity for review and reconfirmation. If the Crown does not make an adequate response to our suggested course of action, however, we believe that it will be in breach of the Treaty.
- ▶ We suggest that the kaihautu be given the opportunity to thoroughly debate and resolve issues of accountability and representivity in regard to the executive council. Other possible issues for resolution include rules for treatment of claims specific to individual iwi/hapu.
- ▶ We believe that there should be a further mandating hui for Ngati Rangitihi, that the Crown should at last honour its undertaking to enter separate settlement negotiations with Ngati Makino, and that Waitaha should be invited to join those negotiations if Ngati Makino agree.

POSTSCRIPT

Dealing with issues surrounding the negotiation and settlement of claims is not a novel exercise for this Tribunal. What has been unusual about this inquiry has been the layering of internal tribal politics. This Tribunal heard evidence attempting to progress hapu/iwi disputes, which are matters beyond our jurisdiction, or even our desire, to inquire into. Much of this evidence demonstrated that Maori people have to assume more responsibility for practising the politics of inclusion rather than exclusion, of adopting or adhering to good governance and management practices, and of embracing more rigorous and transparent decision-making processes.

Much of this evidence of internal disputation and poor governance and management also created a smokescreen behind which several major flaws relating to representivity and accountability were obscured. It was only following a careful review of the events as they unfolded within Te Arawa that any smoke disappeared. There may not always be time for such careful analysis to take place. In our view, if standards of best practice are not developed, then, as negotiations proceed at pace, the greater is the likelihood of mistakes being made by both parties to the Treaty of Waitangi.

It is also likely that the Tribunal will be asked, from time to time, to exercise its jurisdiction to assess the adequacy or otherwise of the Crown's process for recognising the mandate of tribal leaders charged with the negotiation and settlement of their people's claims. Mistakes will be made unless some basic standards are developed.

With that in mind, and although too late to address the specific claims before this Tribunal concerning Te Arawa, the following Treaty-compliant standards of best practice should be considered by the Crown and Maori for adoption to progress the negotiation and settlement of claims. These are merely suggestions, since their utility may be limited in the context of a specific claimant community.

1. SHORT TERM: SUGGESTED BEST PRACTICE CRITERIA

1.1 Possible process requirements for scrutinising a mandate plan

A robust process for scrutinising a mandate plan could include inquiring into whether:

1. The credentials of those purporting to facilitate the mandating process were identified.
2. Independent advice was obtained from other Crown agencies (particularly TPK) and Maori organisations as to the suitability of any facilitators to conduct the mandating process.

3. A list was drawn up of those Waitangi Tribunal claimants potentially affected by the negotiations.
4. An adequate hapu/iwi or confederation profile was produced. (The plan should have provided some general information about the groups involved, including the population of different hapu and iwi to be consulted during the mandating process.)
5. A rationale was established for explaining why a particular hapu/iwi or marae community has to be consulted.
6. An appropriate number of hui was held, given the size of the group. (The selection of venues for hui and meetings should have taken into account issues such as claimant communities, tikanga, and the ancestral connections of those to be consulted.)
7. The key claimants, hapu/iwi leaders, marae committee members, and Maori reservation trustees to be directly consulted were identified.
8. A schedule of hui for particular hapu/iwi and or confederation of iwi was prepared.
9. Draft public advertisements notifying the date, venue, and agenda of hui were disseminated to all relevant media.
10. A procedure was established for adoption at hui. (The procedure should have included minute taking, the transparent selection of chairpersons and scribes, and the recording of resolutions, votes in favour, abstentions, and dissent.)
11. An outline of the presentations to be given at each hui was prepared. (The presentations should have included information on the structure used to arrive at selected hapu/iwi representatives and negotiators.)
12. Provision was made for an independent scrutineer of the process, either TPK or a consultant commissioned by TPK, which scrutineer should have attended all scheduled hui.

1.2 Possible process requirements for scrutinising a deed of mandate filed with OTS

A possible robust process for scrutinising a deed of mandate, once filed with OTS, could include inquiring into whether:

1. An appropriate number of hui was held, given the size of the group. (The selection of venues for hui and meetings should have taken into account issues such as claimant communities, tikanga, and the ancestral connections of those to be consulted.)
2. A report was prepared on the views of key claimants, hapu/iwi leaders, marae committee members, and Maori reservation trustees.
3. Advertisements notifying the date, venue, and agenda of hui were published.
4. A report was prepared on the procedure adopted at hui, including minute-taking, the transparent selection of chairpersons and scribes, and the recording of resolutions, votes in favour, abstentions, and dissent.

5. A report was prepared on the presentations given at each hui, including the structure used to arrive at selected hapu/iwi representatives and negotiators.
6. A report was prepared assessing whether the negotiating structure was properly designed to ensure accountability from the negotiating body back to the constituents.
7. A record was kept of the outcomes of hui.
8. An independent report from the scrutineer of the process was prepared.
9. A final report from the facilitator was prepared assessing the success of the mandate plan and identifying any problems. (This report should also identify any additional meetings or hui held over and above those identified in the mandate plan and their purpose.)
10. A list was drawn up of those Waitangi Tribunal claimants affected by any draft deed of mandate.

1.3 Possible process requirements for ensuring acceptability of deed of mandate

A robust process for ensuring that the deed of mandate is acceptable to the hapu/iwi or confederation of iwi could include requirements for:

1. Public advertisements notifying that the deed of mandate has been received and inviting public submission or comment.
2. The circulation of the deed of mandate to all Tribunal claimants affected by it.
3. The circulation of the deed of mandate to hapu/iwi leaders, marae committee members, Maori reservation trustees, and major hapu/iwi organisations, with a letter explaining the impacts and inviting submission or comment.
4. A careful assessment of the nature of the submissions or comments received, including an assessment of whether the submitters represent significant hapu or iwi groups or clusters.
5. OTS, TPK, and independent scrutineer meetings with submitters where the latter clearly object to aspects of the deed of mandate.
6. An OTS, TPK, and independent scrutineer meeting with facilitators to ascertain responses to submissions and comments.
7. A written response based on facilitator feedback sent to submitters inviting their comments.
8. An OTS and TPK review of all objections and results of meetings and correspondence with submitters and facilitators. (This review to take place with the assistance of the independent scrutineer.)
9. Instructions to facilitators to rectify any issues and or problems clearly identified.
10. A report from the facilitator on the rectification of any issues or any failures to rectify.

1.4 Possible requirements for a robust process for reporting to Ministers on deed of mandate

A robust process for reporting to the Ministers of the Crown on the deed of mandate could include requirements for:

1. An outline showing compliance with the above standards.
2. An assessment of the strengths and weaknesses of the deed of mandate.
3. Notice of any risks associated with proceeding to recognise the mandate.
4. Notice and enclosure of the final report of the independent scrutineer assessing the deed of mandate.
5. An explanation of any divergence in opinion from that of the independent scrutineer.
6. Recommendations as to whether or not the deed of mandate should be recognised.
7. A meeting between Ministers, officials, facilitators, submitters, and hapu/iwi representatives or negotiators.
8. The final decision to be made by Ministers of the Crown.

2. LONG TERM: POSSIBLE LEGISLATION

The submission from counsel for Wai 996 regarding the need for legislative intervention and the development of policy on a Treaty claims settlement Act has, in our view, much to commend it. It would inject some objectivity into a negotiation and settlement process that some may perceive to be in danger of becoming subsumed by political rather than Treaty-compliant priorities.

Dated at Wellington this 9th day of August 20 04



CL Wickliffe, presiding officer



J Baird, member



GH Herbert, member



APPENDIX I

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 HEARING

The hearing was held on 21, 22, 23, and 25 June 2004 in Rotorua.

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 Whanarere, 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

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

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

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

2.1 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

2.2 AMENDING STATEMENTS OF CLAIM

There were no papers concerning the amending of statements of claim

2.3 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

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
- 2.3.17** Presiding officer, memorandum in response 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

3. SUBMISSIONS AND MEMORANDA OF PARTIES

3.1 PRE-HEARING STAGE (INCLUDES ALL JUDICIAL CONFERENCES)

- 3.1.1 Te Arawa taumata, submissions in response 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 executive council of Nga Kaihautu o Te Arawa, 4 January 2004

- 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 Rangitihi 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
- 3.1.15** Counsel for executive council of 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 response 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 response 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 response 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 response to paper 3.1.27, 31 March 2004

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

- 3.1.31 Crown counsel, submissions concerning recognition of mandate of executive council of Nga Kaihututu 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 response to paper 3.1.32, 6 April 2004
- 3.1.35** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in response to paper 3.1.32, 6 April 2004
- 3.1.36** Wai 726 claimant counsel, submissions in response to paper 2.3.2, 6 April 2004
- 3.1.37** Wai 1175 claimant counsel, submissions in response to paper 3.1.33, 6 April 2004
- 3.1.38** Wai 1034 claimant counsel, submissions in response to paper 3.1.33, 6 April 2004
- 3.1.39** Wai 1150 claimant counsel, submissions in response 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 response 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 319, Wai 154, Wai 275, Wai 918, Wai 980, and Wai 21(a), submissions concerning applications for interim relief and urgency, 14 April 2004
- 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 Rangiwehewhi, 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 response to paper 2.3.5, 29 April 2004

- 3.1.51** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in response to paper 3.1.50, 4 May 2004

- 3.1.52** Counsel for Ngati Tamakari, submissions in response to paper 2.3.6, 4 May 2004

- 3.1.53** Counsel for CFRT, submissions in response to paper 2.3.5, 7 May 2004

- 3.1.54** Wai 1150 claimant counsel, submissions in response to paper 2.3.6, 12 May 2004

- 3.1.55** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in response to paper 2.3.6, 12 May 2004

- 3.1.56** Crown counsel, submissions in response to paper 2.3.6, 12 May 2004

- 3.1.57** Wai 1175 claimant counsel, submissions in response to paper 2.3.6, 12 May 2004

- 3.1.58** Wai 1150 claimant counsel, submissions in response 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 response to paper 2.3.6, 13 May 2004

- 3.1.61** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in response to paper 2.3.7, 18 May 2004

- 3.1.62** Crown counsel, submissions in response to paper 2.3.7, 18 May 2004

- 3.1.63** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in response to paper 2.3.8, 20 May 2004

- 3.1.64** Wai 1175 claimant counsel, submissions in response to paper 2.3.8, 20 May 2004
- 3.1.65** Wai 1175 claimant counsel, submissions in response to paper 3.1.64, 21 May 2004
- 3.1.66** Wai 1150 claimant counsel, submissions in response to paper 2.3.10, 26 May 2004
- 3.1.67** Wai 837 claimant, submissions in response to paper 2.3.11, 28 May 2004
- 3.1.68** Counsel for Ngati Tamariki, submissions in response 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 response to paper 2.3.11, 28 May 2004
- 3.1.70** Wai 524 claimant counsel, submissions in response to paper 2.3.11, 28 May 2004
- 3.1.71** Counsel for Wai 316 and Wai 410, submissions in response to paper 2.3.11, 28 May 2004
- 3.1.72** Wai 1175 claimant counsel, submissions in response to paper 2.3.11, 28 May 2004
- 3.1.73** Wai 726 claimant counsel, submissions in response to paper 2.3.11, 28 May 2004
- 3.1.74** Counsel for Tuhourangi, submissions in response to paper 2.3.11, 28 May 2004
- 3.1.75** Crown counsel, submissions in response 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 response to paper 2.3.11, 28 May 2004
- 3.1.78** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in response to paper 2.3.11, 28 May 2004
- 3.1.79** Counsel for CFRT, submissions in response 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 response to paper 2.3.11, 4 June 2004
- 3.1.86** Counsel for Nga Kaihautu o Te Arawa Executive Council, submissions in response 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 response to paper 3.1.92, 12 June 2004
- 3.1.94** Wai 681 claimant, memorandum in response to paper 3.1.97, 14 June 2004
- 3.1.95** Wai 1150 claimant counsel, memorandum in response to paper 3.1.92, 14 June 2004
- 3.1.96** Wai 664 claimant counsel, memorandum in response to paper 3.1.92, 14 June 2004

- 3.1.97** Crown counsel, memorandum in response 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 response to paper 3.1.92, 15 June 2004
- 3.1.99** Wai 1175 claimant counsel, memorandum in response 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** Counsel for Te Arawa taumata claimants, memorandum in response to paper 3.1.92, 14 June 2004
- 3.1.103** Counsel for Ngati Tamariki, memorandum in response to papers 3.1.92 and 3.1.97, 15 June 2004
- 3.1.104** Wai 726 claimant counsel, memorandum in response to paper 3.1.92, 15 June 2004
- 3.1.105** Wai 681 claimant, memorandum in response to paper 3.1.92, 15 June 2004
- 3.1.106** Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum in response 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
- 3.1.110** Wai 681 claimant, submissions concerning autonomy of Ngati Whaoa, 17 June 2004
- 3.1.111** Wai 681 claimant, submissions in response 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 kaihautu witnesses, 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 response to paper 3.1.113, 18 June 2004

3.1.116 Counsel for Nga Kaihautu o Te Arawa Executive Council, memorandum in response 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

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 response 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, in response in response 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

3.2 HEARING STAGE

3.2.1 Wai 837 claimant, memorandum, 21 June 2004

3.3 OPENING, CLOSING, AND 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

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 Counsel for Ngati Tamakari, 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

3.4 POST-HEARING STAGE

3.4.1 Crown counsel, memorandum concerning signing of terms of negotiation, 29 July 2004

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 JUDICIAL CONFERENCES**

There were no public notices concerning judicial conferences

5.2 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

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, 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

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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

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 Pirihira 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

A37 David Taui, 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 (Wai 996)

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

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
- A73 Wiremu Te Pohawaiki Wiringi Jones, affidavit, 14 June 2004
- A74 Rosie Te Wao, affidavit, 14 June 2004
- A75 Te Puhi Patara, affidavit, 14 June 2004
- A76 John Te Poari Newton junior, affidavit, 14 June 2004
- A77 Craig Pirika, affidavit, 14 June 2004
- A78 Minnie Vercoe, affidavit, 14 June 2004
- A79 Barnett Vercoe, affidavit, 14 June 2004
- A80 Barnett Vercoe, affidavit, 14 June 2004
- A81 Hakopa Paul, affidavit, 14 June 2004
- A82 Davey Gardiner, affidavit, 14 June 2004
- A83 Edward Kameta, affidavit, 14 June 2004

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- A84 Wayne Taylor, affidavit, 14 June 2004
- A85 Louis Phillips, affidavit, 14 June 2004
- A86 Hana Wharehinga, affidavit, 14 June 2004
- A87 Frederick Cookson, affidavit, 14 June 2004
- A88 Brian Peni, affidavit, 15 June 2004
- A89 Hariata Paikea, affidavit, 15 June 2004
- A90 Tawhiri Morehu, affidavit, 15 June 2004
- A91 Mihipeka Morehu, affidavit, 15 June 2004
- A92 Aroha Campbell, affidavit, 15 June 2004
- 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
- A102 Te Ohu Mokai Wi Kingi, affidavit, 15 June 2004
- A103 Mary Hohepa-Kiriona, affidavit, 15 June 2004

A104 Eruini George, affidavit, 15 June 2004

(a) Te Arawa Executive Council, 'Deed of Trust Relating to the Te Arawa Executive Council', 12 March 2004

A105 Te Poroa Malcolm, affidavit, 15 June 2004

A106 Robert Reweti, affidavit, 15 June 2004

(a) Declarations of support for Ngati Tahu/Ngati Whaoa representatives from participants in mandating hui, various dates

A107 Wikepa 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

(b) Documents concerning Te Arawa mandating hui, various dates

Evidence filed on behalf of Ngati Rangitihi (Wai 524)

A110 Wai 524 claimant counsel, submissions in response to claim 1.1.3, 15 June 2004

A111 Henry Pryor, affidavit, 15 June 2004

Evidence filed on behalf of Ngati Taeotu, Ngati Hurunga Te Rang and Ngati Te Kahu

A112 Wai 533 claimant counsel, submissions in response to claim 1.1.1, 16 June 2004

A113 Ben Hona, affidavit, 16 June 2004

Evidence filed on behalf of Waitaha claimants (Wai 664)

A113A Tame McCausland, affidavit, 22 June 2004

Evidence filed on behalf of Crown

A114 Andrew Hampton, affidavit, 16 June 2004

(a) Supporting documents to document A114, various dates

Claimant rebuttal evidence filed on behalf of the Te Arawa taumata claim

A115 Joe Edwards, affidavit in reply to documents A76, A64, A50, A96, A104, June 2004

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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 Pihihira 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

Claimant rebuttal evidence filed on behalf of Ngati Rangitihi (Wai 996)

A123 Keremete Kuriwaka, affidavit, 15 June 2004

A124 Andre Paterson, affidavit, 18 June 2004

A125 Patricia Rondon, affidavit, 18 June 2004

Further evidence filed on behalf of Nga Kaihautu o Te Arawa Executive Council

A126 Cedri Forrest, affidavit, 14 June 2004

A127 Eva Moke, affidavit, 15 June 2004

A128 David Galvin, affidavit, 15 June 2004

A129 Edwin McKinnon, affidavit, 15 June 2004

A130 Nga Kaihautu o Te Arawa Executive Council, *Deed of Mandate*, 2 vols (Nga Kaihautu o Te Arawa Executive Council, 21 June 2004), vol1

A131 Mita Pirika, affidavit, 20 June 2004

A132 Minutes of VIP taumata meeting, Suncourt Motel and Conference Centre, Taupo, 16 June 2003

A133 VIP taumata, 'VIP Taumata Meeting: CEO's Report', 16 June 2003

A134 Whaimutu Dewes, affidavit, undated

A135 James Schuster, affidavit, undated

A136 Leah Ratana-Clubb, affidavit, 17 June 2004

A137 Malcolm Short affidavit, 22 June 2004

A138 Anaru Rangiheuea, affidavit, 22 June 2004

A139 John Waaka, affidavit, 22 June 2004

A140 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]), pp32, 41, 42

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 Nga Kaihautu deed of mandate, undated

B TO END OF FIRST HEARING

B1 Horace Meroiti, affidavit, 2 July 2004

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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

APPENDIX II

OUTCOMES OF TE ARAWA MANDATING HUI

A table summarising the outcomes of various Te Arawa mandating hui held during the period July to September 2003 follows. The information in this table was drawn from document A2; document A114(a), pages 104 to 114; document A130, schedule 8; and document A143. It is not a complete list of all hui held – only those for which minutes have been filed in evidence are shown.

Iwi/hapu	Date of hui	Resolutions passed	Representatives elected
Ngati Kea, Ngati Tuara	12 July 2003	1. 32 for, 0 against 2. Carried, no numbers given* 3. 40 for, 0 against 4. Carried, no numbers given 5. Carried, no numbers given	Eru George, Iris Kirimaoa, Bob Young, Rahu Katene, Barnett Vercoe
Tuhourangi, Ngati Wahiao	12 July 2003	1. 47 for, 2 against 2. Carried, no numbers given† 3. 33 for, 0 against 4. Carried, no numbers given 5. Carried, no numbers given‡	Bonita Morehu, Peter Waaka, Anaru Rangihueua, Patrick Mansell, Kaa Daniels, Rangi Te Rangipuwawhe Maika, Bill Hall
Ngati Te Roro o Te Rangi	13 July 2003	1. 16 for, 1 against 3. 16 for, 1 against§ No other resolutions recorded as having been put	
Ngati Tarawhai, Ngati Rongomai	13 July 2003	1. 22 for, 0 against 2. Carried, no numbers given¶ 3. 23 for, 0 against 4. Carried, no numbers given 5. Carried, no numbers given	Ruka Hughes, Te Ohu Mokai Wi Kingi, Te Poroa Malcolm, Tai Eru, Manu Pene, Toby Curtis
Ngati Pikiao	15 July 2003	1. 22 for, 0 against 2. Carried, no numbers given¶ 3. 23 for, 0 against 4. Carried, no numbers given 5. Carried, no numbers given	Eva Moke, David Gardiner, Edwin Mcinon, Manny Kameta, David Whata, Fred Whata, Hakopa Paul, Bishop Whakahuihui Vercoe, Jim Schuster, Stormy Hohepa
Ngati Rangitahi	16 July 2003	None of the five resolutions recorded as having been put Attendees reserved the right to call a further hui	

Ngati Tahu, Ngati Whaoa	17 July 2003	Wayne Taylor, Cedric Forest, Rawiri Te Whare, Roger Pitia, Louis Phillips, Rob Reweti, Aroha Campbell, Maria Johnson	1. 67 for, 0 against 2. Carried** 3. Carried, no numbers given 4. Carried, no numbers given 5. Carried, no numbers given
Ngati Uenukukopako	13 August 2003		1. 16 for, 0 against 3. 11 for, vote against not recorded 4. 12 for, vote against not recorded 5. 12 for, vote against not recorded Attendees voted to leave resolution 2 'for a later date'
Ngati Rangiteaorere	14 August 2003	Pirihira Fenwick, Bill Kingi, Donna Hall, Herbie Hapeta Junior, Kereama Pene, Joan Te Kiri-Kanara	1. 22 for, 3 against 2. Carried, no numbers given [†] Attendees reserved the right for further discussion on resolutions 3, 4, and 5
Waitaha	16 August 2003		None of the five resolutions recorded as having been put Attendees reserved the right to defer a decision

* Resolution 2 was at first passed (27 for, 0 against) with only Eru George's name inserted. Four more nominations were subsequently made and there was then a motion that all five representatives be accepted. The minutes record that this motion was carried, but the number of votes is not shown.

† The wording in the minutes simply states 'That Tuhourangi Ngati Whaoa elects', followed by the list of nominations. It was then recorded that the nominations were closed and the motion was carried. No voting numbers are given.

‡ The minutes state 'Motion Carried', but document A143, recording voting on the individual resolutions, shows no outcome for that particular motion.

§ As recorded in the minutes, this resolution states 'That Tuhourangi Ngati Whaoa agrees' (not Ngati Te Roro o Te Rangī).

¶ The minutes follow the same pattern as those for the Tuhourangi and Ngati Whaoa hui.

|| From the minutes, a large number of Ngati Whaoa attendees appear to have withdrawn part-way through the meeting.

** In this case, the resolution passed was: 'That all nominees be accepted as the elected representatives for Ngati Tahu/Ngati Whaoa on "Nga Kaihau O Te Arawa" in the negotiation process'. The minutes do not record which of the other resolutions were put, merely stating that they were 'Presented by Rawiri Te Whare'. However, there is reference to an 'Appendix 2 Ngati Tahu/Ngati Whaoa Resolutions'. We take this to be 'Resolutions: Ngati Tahu–Ngati Whaoa' at document A114(a), exhibit dd, pages 101 to 103, which lists all five resolutions and gives the outcome for each motion, as entered in the table above.

Summary of outcomes of various Te Arawa mandating hui, July to September 2003. The numbers in the 'resolutions passed' column correspond to those of the five resolutions listed on page 27 of this report. The spellings of the names in the 'representatives elected' column are as recorded in the minutes.

Iwi/hapu	Date of hui	Resolutions passed	Representatives elected
Ngati Te Roro o Te Rangī (second hui)	17 August 2003	2. Carried*	Te Po Hawaiki Wiringi Jones, Pinder Te Amotau Pirika, Rangimahuta Easthope, David Galvin, Bryce Morrison, Maramena Udy, Ian Macintosh, Maxine Rennie
'Tapuika/Re-Run' [†]	21 August 2003	None of the five resolutions recorded as having been put Attendees reserved the right to hold a further hui	
Ngati Whakaue	27 August 2003	1. 56 for, 0 against [†] 2. Carried [§] No other resolutions are recorded as having been put	Paul Tapsell, Ben Hona, Tony Wihapi, Parehuia Hakaraia, Jack Aratema, Pihopa Kingi, John Kahukiwa, Eru Hall, Alexander Wilson, Malcolm Short, Alf McRae
Te Arawa ki Kirikiriroa	11 September 2003	1. 7 for, 0 against [§] 3. } 4. } 7 for, 0 against 5. }	
Te Arawa ki Poneke	13 September 2003	1. 3 for, 0 against, 1 abstention** 3. } 4. } 3 for, 1 against, 1 abstention** 5. }	
Te Arawa ki Otautahi	14 September 2003	1. 13 for, 0 against** 3. } 4. } 13 for, 0 against** 5. }	
Te Arawa ki Tamakimakaurau	17 September 2003	1. Carried, no numbers given** 3. } 4. } Carried, no numbers given** 5. }	

Ngati Tuteniu	22 September 2003	1. 19 for, 0 against 2. 17 for, 3 against The minutes do not record any other resolutions as having been put	Jose Meroti, Mita Pirika, Blanche Kiriona, Mihipa McGrath, Barney Meroti, Karaki Hoani, Hapeta Hapeta senior, Kapua Hohepa, Tuteniu Hohepa, Aaron Hapeta, Takawai Wirangi
Ngati Tura, Ngati Te Ngakau, Ngararanui ^{††}	22 September 2003	1. 17 for, 0 against 2. Results not recorded	Wallace Haumaha, Henry Colbert, Joe Edwards, Charles Taua, Materoa Peni, David Taui
Ngati Rangiwehewhi	30 September 2003	1. 15 for, 0 against ^{##} 2. 16 for, 0 against ^{##}	Te Ururoa Flavell, Harata Patterson, Taki Roberts, Boy Hall, Magerie Dodd, Arapene Walker, Richard Charters, Mita Mohi, William MacDonald, Karorina Walker, Sam Hahunga ^{§§}

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- * The attendees at first voted that five representatives be elected (the motion failed), and then they increased the number to eight. A motion to accept the eight nominations was carried.
- † The minutes of the 're-run' are the only ones that have been presented to the Tribunal in evidence. We have seen no minutes of any earlier hui for Tapuika.
- # This resolution is not recorded in the set of minutes attached to the deed of mandate. It comes from the alternative set of minutes at document A114(a), page 104.
- § It would appear that 11 nominations were put forward and that they were all accepted. However, there are two slightly different versions of the minutes: document A2, mandating hui 14, page 2; compare document A114(a), page 105.
- § In the resolution in this case read: 'That Te Arawa ki Kirikiriroa endorse and support the decision of Te Arawa ki te Haukainga to enter into direct negotiations with the Crown to seek a comprehensive settlement of all their historical claims.'
- || A resolution broadly covering the content of resolutions 3, 4, and 5 was put to the meeting. It stated: 'That Te Arawa ki Kirikiriroa endorse and supports [sic] the negotiations structure and process as outlined in the presentation'.
- ** The resolution followed the same pattern as that at the Te Arawa ki Kirikiriroa hui.
- †† The minutes from this hui do not appear to have been appended to the deed of mandate. The information here is as recorded in the minutes at document A114(a), pages 113 and 114.
- ## In the set of minutes attached to the deed of mandate, this resolution states: 'That Ngati Tuteniu agrees', not Ngati Rangiwehewhi. (A corrected set of minutes is to be found at document A114(a), pages 111 and 112.)
- §§ In the set of minutes attached to the deed of mandate, the names recorded are exactly the same as those for Ngati Tuteniu.

Summary of outcomes of various Te Arawa mandating hui, July to September 2003. The numbers in the 'resolutions passed' column correspond to those of the five resolutions listed on page 27 of this report. The spellings of the names in the 'representatives elected' column are as recorded in the minutes.

