WAITANGI TRIBUNAL

Wai 2421

CONCERNING

the Treaty of Waitangi Act 1975

AND

an application for an urgent hearing by William James Taueki, Vivienne Therese Taueki, Sheryl Waho Stanford, Edward Karaitiana, Peggy Anne Gamble and Kay Kahumaori Pene

DECISION OF THE TRIBUNAL ON AN APPLICATION FOR URGENCY

Introduction

1. On 28 November 2013, a statement of claim and an application for an urgent hearing was filed by William James Taueki, Vivienne Therese Taueki, Sheryl Waho Stanford, Edward Karaitiana, Peggy Anne Gamble and Kay Kahumaori.[1] The claim and the application concerns the Crown's recognition of a deed of mandate submitted by the Muaūpoko Tribal Authority (MTA) on or about 24 September 2013 to negotiate and settle claims brought by these and other Muaūpoko claimants, despite their objections to the settlement and the MTA representing them.

2. This claim was registered on 9 December 2013 as Wai 2421, the Muaūpoko Tribal Authority Deed of Mandate claim.[2] The Chairperson directed the Crown and interested parties to file submissions in response to the application for urgency and an application for subpoena by 23 December 2013. The applicants were to file a reply to these submissions by 24 January 2014.[3]

3. On 12 December 2013, the Chairperson delegated the task of determining this application to Deputy Chief Judge C L Fox.[4] On 7 March 2014, the Honourable Sir Douglas Kidd, Emeritus Professor Sir Tamati Reedy and Tania Simpson were appointed to assist Deputy Chief Judge Fox in determining the application for urgency.[5]

[1] Wai 2421, #1.1.1 and #3.1.1
[2] Wai 2421, #2.1.1
[3] Wai 2421, #2.5.1
[4] Wai 2421, #2.5.2
[5] Wai 2421, #2.5.5

Background

4. The process by which the Crown recognised the MTA Mandate began when the MTA draft mandate strategy was submitted in 2009. A reviewed draft mandate strategy was not notified, and information hui not advertised in local and national newspapers until June 2012. It was notified on the MTA, Te Puni Kōkiri (TPK) and the Office of Treaty Settlements (OTS) websites. A number of Muaūpoko Waitangi Tribunal claimants, including the applicants, made submissions. Officials met with these submitters on 15 September 2012 in Pakipaki and 19 October 2012 in Levin.

5. The Crown conditionally endorsed the MTA's mandate strategy on 19 October 2012. The conditions were that (1) the MTA undertake research regarding the Muaūpoko claimant definition and consider its own research on the issue prior to beginning the mandate vote; and (2) the MTA offer a facilitated hui with Muaūpoko Waitangi Tribunal claimants to discuss the MTA proposed mandate process. The Crown considers that the first condition was satisfied on 13 November 2012, seven historic hapū were added as a result. On 19 November 2012, the same day that voting began, the MTA wrote to Muaūpoko Waitangi Tribunal claimants inviting them to attend a facilitated hui. This invitation was declined on 12 December 2012. Another invitation dated 12 December 2012 for a meeting on 13 or 27 January 2013 was also declined. On 16 December 2012, voting for the MTA mandate closed. Finally, a date for the facilitated hui was agreed and that hui was held on 14 April 2013.

6. The MTA submitted their final deed of mandate in May 2013. Notification for submissions commenced in June 2013 over a period of three weeks. Twenty submissions were received with 14 in support and six opposed. After considering the voting results, submissions and the advice of officials, the Minister of Treaty Negotiations and the Minister of Māori Affairs recognised the MTA Deed of Mandate to negotiate Muaūpoko claims on 24 September 2013.

The Claim and Application for Urgency

7. The applicants allege in their Statement of Claim[6] that the deed of mandate submitted by the MTA has been achieved by an unfair mandate process recognised by the Crown, in breach of the principles of the Treaty of Waitangi. This has prejudicially affected them they claim, including by depriving them of their rights to have their claims heard by the Waitangi Tribunal and by permitting settlement of their claims by a group that does not represent them.

8. The applicants allege, that the unfair mandate process is full of defects and was arrived at despite certain conflicts of interest; that for years there have been objections from claimants (2009-2014) to being subjected to a mandate process when at least 22 of the 28 Muaūpoko claimants wanted to go to hearing and did not want to be represented by the MTA; that the conditions of the conditional mandate strategy had not been fulfilled but the Crown accepted it anyway; that there was a premature postal ballot held before the conditions of the conditional mandate were met; that the postal ballot was manipulated for the benefit of members of the MTA leading to disadvantage and disenfranchisement of those not members of the MTA; that there was an overly broad voting process allowing people who were not Muaūpoko to vote; that the deed of

[6] Wai 2421, #1.1.1

mandate was kept a secret and not released to the Muaūpoko people before the postal ballot; that the claimants were not directly notified that a mandate was being considered but rather the only notice was by public advertising thus impacting on the ability to object; that counsel for the claimants were also not notified; that the overly broad and unilateral claimant definition of Muaūpoko was not supported by whakapapa and it was devised without consultation with the claimants thus leading to seven hapū being listed as Muaūpoko who do not identify as Muaūpoko; and that MTA have no claim before the Waitangi Tribunal but is preparing to settle claims of people who do not want to settle before a hearing.

9. They allege that these defects in the process mean that the claimed mandate by MTA is not a true mandate of the Muaūpoko claimants or the Muaūpoko community. Rather it is a process established and managed by the Crown to make it appear that a democratic process has been used to establish a mandate, rather than actually being a democratic process that established a mandate.

10. The Crown, they say, has a duty to all Māori and not just those who wish to settle the claims of others; and this Tribunal has a statutory duty to hear all claims that are not frivolous; and a duty under Article III of the Treaty of Waitangi to protect the claimants' right to be heard.

11. They allege further that the Crown has a duty to apply its own settlement policies in a fair way and that in this instance the Crown has "manipulated those policies so as to give the appearance of fairness and good faith while, in fact, denying fairness to the claimants who wish to be heard and who want to select their own vehicle for settlement following hearing."

12. They also allege that because the mandate has been accepted the claimants will not be able to obtain funding from Crown Forest Rental Trust for their research and hearings.

13. Moreover, they say that settlement with the MTA is likely to result in resources and land that rightly belongs in their hands going to the MTA; a group whom the claimants consider does not represent them.

14. The Crown's conduct, they allege, has prejudiced the claimants by permitting the settlement of their claims by a group that does not represent them and by denying them a hearing and findings before the Waitangi Tribunal upon which they could seek remedies. It is forcing them into a settlement against their wishes and it will result in them having to face the establishment of a post-settlement governance entity that does not include or represent them, with redress for settlement that belongs to the claimants.

15. In terms of relief the applicants seek an urgent hearing of this claim and recommendations from the Tribunal that the Crown set aside its recognition of the MTA mandate and the mandate strategy of the MTA. They also ask that this Tribunal hear the claims of all Muaūpoko claimants with all deliberate speed and without interference from the Crown. Finally they seek such other relief as the Tribunal considers just and proper.

16. In terms of the application for urgency[7], the applicants say that they can demonstrate that they are suffering and will continue to suffer significant and irreversible prejudice as a result of the Crown approving the MTA Deed of Mandate. The application relies essentially upon the same grounds as those listed in paragraph 8 above.

[7] Wai 2421, #3.1.1

17. Further the applicants state that they have no alternative remedy that is reasonable in the circumstances for them to exercise. They submit that they have attempted over a number of years to reach a point of understanding between themselves and the MTA and that has proven unsuccessful, and has left an application for urgency with the Waitangi Tribunal as their only remaining avenue.

18. The applicants submit that they are ready to proceed to a hearing and that no research is required before a hearing can take place.

Submissions from interested parties

19. Tama-i-uia Ruru, named claimant for the Wai 108, Muaūpoko Lands and Fisheries claim, filed a memorandum in support of the application for an urgent hearing. He submitted that the Deed of Mandate recognised by the Crown did not reflect his wishes and was achieved by an unfair process.[8]

20. Leo Watson, counsel for the Wai 1491 and Wai 1621 claimants, filed a memorandum in support of the application for an urgent hearing and sought to be heard as an interested party on the application.[9] Their claims relate to the Hokio A Māori land block with 1536 owners. His clients do not agree with the recognition by the Crown of the Deed of Mandate of the MTA, in circumstances where there remains significant concern as to the governance, accountability and integrity of the MTA; and that the MTA does not appropriately represent those of Muaūpoko descent.

21. David Stone and Chelsea Terei, counsel for the Wai 1622, 2046, 2048, 2050, 2051, 2052, 2053, 2054, 2056, 2140 and 2173 claimants, filed a memorandum in support of the application for an urgent hearing and sought to be heard as interested parties on the application.[10] It was submitted that their clients do not support the MTA entering into negotiations to settle their claims, and that they have made this clear to the MTA and OTS and have always maintained that they wish to proceed to a full hearing of their claims before the Waitangi Tribunal.

22. Mr Phillip Taueki, named claimant for Wai 2306, and Mr Charles Rudd, named claimant for 1631, both filed submissions supporting the application for an urgent hearing.[11]

23. The MTA sought to be included late as an interested party on 7 March 2014. That was because they understood that the application concerned the actions of the Crown. But after reviewing evidence and submissions filed by the applicants, the MTA decided that a response to statements they considered to be misleading or factually incorrect was necessary. In general they considered that objections to the process raised by the applicants were overstated and that the majority of Muaūpoko supported the MTA leading direct negotiations.[12]

[8] Wai 2421, #3.1.4
[9] Wai 2421, #3.1.5
[10] Wai 2421, #3.1.6
[11] Wai 2421, #3.1.18, #3.1.19 & #3.1.20)
[12] Wai 2421, #3.1.26

Crown Response

24. On 23 December 2013, the Tribunal received a response from the Crown to the application.[13] The Crown contends that the applicants have been heard and understood within the mandate process, and will continue to be taken account of. In particular they had the opportunity for input in providing submissions on the draft mandate strategy in June 2012; at a mandate hui on 8-9 December 2012; voting for or against the proposed MTA mandate between 19 November – 16 December 2012; in the facilitated hui with the MTA held in April 2013; and in submissions on the deed of mandate in June 2013. There will be opportunity for further input in further meetings facilitated or otherwise with MTA; through accountability mechanisms set out in the MTA Deed of Mandate; by voting on any proposed settlement negotiated between the Crown and MTA; and by making submissions and voting on any proposed post-settlement governance entity.

25. Counsel for the Crown gave a short summary of the Crown's position, contending that the mandating process was robust, open, fair and transparent. Counsel noted that 87% of those who voted for the mandate indicated support for the MTA to enter into negotiations. Furthermore, the Crown considers that the applicants were notified and had every opportunity to participate and that there has been no prejudice to them, as the process leading to the recognition of the MTA mandate has been fair. The Crown considers that the applicants are a small group of individual claimants who do not appear to represent a wider community. The Crown's view is that the applicants can participate in the current settlement negotiations through the MTA and they may vote on whatever draft deed of settlement is proposed. If settlement is reached they will be beneficiaries and will have input into post-settlement arrangements. Thus Crown counsel submitted that the applicants cannot demonstrate they are likely to suffer significant and irreversible prejudice.

26. Counsel reviewed the Waitangi Tribunal's grounds for urgency and its commentary from previous decisions, including its previous statement that "Treaty settlements are carried out in the world of politics and government".

27. Since 1975, the Tribunal has registered many hundreds of historical claims submitted under section 6 of the Treaty of Waitangi Act 1975, filed by individuals, their whānau, hapū or iwi. There can be multiple claims relating to the same historical matter. Crown counsel submitted that it would not be possible for the Crown to negotiate separately the settlement of each well-founded historical claim, adding that 'not only would it require vast resources and be very slow' but it would also be difficult for the Crown to meet its Treaty obligations fairly, evenly and durably. It is established Crown policy that the Crown's preference is to negotiate with large natural groupings, and to negotiate all the historical Treaty claims of that grouping at the same time in a comprehensive settlement. The benefits of the policy include reducing overlapping claims, fragmentation, and costs.

28. Counsel submitted that the policy is well established and has been supported by the Waitangi Tribunal.

29. Counsel noted that the Crown has developed principles for mandating in order to recognise the appropriate people with whom to negotiate the comprehensive settlement of the historical claims of a particular claimant group. The Crown's view is that it is for

[13] Wai 2421, #3.1.3

the members of the large natural group to decide for themselves who will represent them in settlement negotiations and to determine the manner in which those representatives are chosen. The Crown, largely through TPK and the OTS, provides advice on and monitors the mandating procedures that the claimant groups adopt to ensure that they are fair and open, and that the decision reached has solid foundations. It also scrutinises the outcome of the mandating process so as to be satisfied that it was procedurally sound and that the decision reached has the broad support of the iwi/hapū members concerned and that it is likely to endure.

30. Mandates, it was contended, are 'rarely attained and held in an uncontested environment' and the Crown accepts that there may not be unanimity within the iwi/hapū membership as to who the mandated representatives should be or how and when they should achieve settlement with the Crown. Ultimately the Crown will not continue to recognise a deed of mandate if it is not satisfied that there is adequate support for it amongst the members of the iwi and hapū. However, where there is broad support amongst a large natural grouping, a degree of dissent will not necessarily stop negotiations proceeding. In some cases, where disputes are not resolved, it may mean that a claim is extinguished as a result of a settlement without the individual claimant's or claimants' particular consent.

31. In relation to the Muaūpoko mandating process Crown counsel submitted that it had been fair and consistent with mandating policy. Further to that, the applicants had been included in the process and had received all information and notifications, and had the opportunity to make submissions and vote on the mandate.

32. Counsel contended that the applicants' central complaint is an 'objection to Muaūpoko entering into negotiations with the Crown, when their preference is to proceed through the Tribunal'. It was noted that the applicants are Muaūpoko and fit within the claimant definition covered by the MTA mandate and that this is not a case of identity or one of overlapping claims. Rather, it is a case where the applicants wish to proceed through the Tribunal first, and then establish their own body mandated to negotiate settlement.

33. Counsel submitted that Treaty settlements are political and there will inevitably be some who are dissatisfied with the process or proposals. The Tribunal, it was noted, has often observed that unanimity in settlements is rare and in such circumstances the will of the individual claimant is not determinative.

34. Counsel points to the fact that the Tribunal and the Courts have been clear that numbers matter. In this case there has been no firm evidence to show the extent of support for the applicants. Rather the voting process for the mandate demonstrates that the applicants are a minority, with the majority of those who voted wishing to proceed to direct negotiations.

35. It was further submitted that there appears to be a lack of understanding from the applicants of the distinction between the Tribunal's jurisdiction, to allow any Māori to make a claim on behalf of any person or group, and the Crown's large natural grouping policy, which looks to identify support from across a group as a whole. Where the will of the wider group conflicts with the will of registered claimants, proceeding towards the settlement of claims without the individual consent of registered claimants, is not contrary to the principles of the Treaty of Waitangi.

36. The applicants' complaint about the MTA not fulfilling the conditions upon which their mandate strategy was approved, 'misrepresents the nature of the conditions' placed on the strategy. Crown counsel submitted that the first condition was met prior to the

beginning of the mandate vote and the second was met on 14 April 2013 when the MTA held a facilitated hui with the Muaūpoko Wai claimants.

37. In response to the applicants' complaint about an 'very broad claimant definition …. that includes seven hapū that do not associate with Muaūpoko, and include all hapū without meeting with the claimants to agree on a whakapapa' Crown counsel noted that the MTA undertook further research on the Muaūpoko claimant definition and considered the independent historical research commissioned by the Crown. This subsequently led to the MTA adding tupuna who are more closely aligned with that definition. Crown counsel acknowledged that these seven historic hapū were not active and have not been for some time. However, they were included to ensure 'a well-defined and inclusive Muaūpoko claimant definition.'

38. In response to the complaint about the MTA voting procedure for those not registered with the MTA, counsel advised that a call number was provided in order to request a ballot paper which included a whakapapa form. In the Crown's view, the simplest way to vote was to register with the MTA but the process for all others could not have been made simpler. Fifty-five valid votes were cast in this way as 'special votes'.

39. In terms of the final complaint that the "MTA did not notify the claimants of the Deed of Mandate in a way that aligns with Treaty compliant practice", in response the Crown submitted that the applicants had been notified of and participated in the mandate process at several points and in fact five Waitangi Tribunal claimants provided submissions on the Deed of Mandate.

40. Crown counsel submitted that the applicants cannot demonstrate that they will suffer significant or irreversible prejudice. The threshold for urgency is high as the Tribunal grants urgency only in exceptional cases. Crown counsel submitted that the applicants cannot meet that test. They are Muaūpoko and it is for Muaūpoko as a whole to decide when and how it wishes to proceed through negotiations. The Muaūpoko people have indicated a strong desire to proceed through negotiations led by the MTA. The applicants are a small number of individuals who do not accept the authority of the mandated representatives to represent them. It was concluded that there is nothing extraordinary in that.

41. Crown counsel submitted there are alternative remedies for the applicants. They have had the opportunity to be heard in the Nga Kōrero Tuku Iho process before the Tribunal, they have had the opportunity for input into the negotiation of a settlement for Muaūpoko, and they will also have the ability to vote on whatever settlement is proposed and to vote on a post-settlement governance entity.

42. Finally, Crown counsel submitted that as settlement negotiations are now underway, were the Tribunal to grant urgency there would be significant disruption to those negotiations and prejudice to the members of Muaūpoko who wish to proceed to settlement.

Applicants' Reply

43. On 24 January 2014, the Tribunal received a memorandum of counsel for the applicants in reply to the submissions of the Crown.[14]

[14] Wai 2421, #3.1.8

44. Counsel submitted that the mandating process was not fair. First, because the Crown's generic settlement policy was not a Treaty compliant process to begin with. In reality, she contended, the policy was drafted unilaterally by the Crown with no consultation. Secondly, that policy as implemented in the Muaūpoko situation is 'replete with Crown conduct and Crown-endorsed conduct that is not fair'. Rather it was designed to produce the desired result – that being to mandate a group chosen by the Crown, despite the indication of the Muaūpoko Claimant Community (MCC) that they do not want to go into direct negotiations and they do not wish to be represented by the MTA.

45. It was also submitted that the Crown had used its policy to "construct a postal ballot system that appears to place a democratic quality onto the mandate process" when in reality the applicants were confronted with a one-sided election process.

46. Further, it was contended that the mandate strategy was approved on two conditions, which were never met. Counsel asserted that neither of those conditions were addressed until after the postal ballot process had begun. This, she argued, suggests that the whole process was nothing more than a "box-ticking exercise designed to appear responsive to claimant objections." Furthermore, the applicants had sought to address the mandate hui about why they wished to go to hearings before the Waitangi Tribunal but were denied that opportunity by the MTA. Accordingly, those who attended the hui only heard the MTA reasons for wanting to go into direct negotiations.

47. She also complained that those who were not members of the MTA were not able to participate in the postal ballot without registration with the MTA, requiring that their whakapapa be vetted by the MTA. She asserted that this resulted in the sidelining of Waitangi Tribunal claimants.

48. Counsel also submitted that the Crown had allowed the MTA to create a voter population heavily weighted towards the MTA, and along with the difficulties encountered by those non-MTA members wishing to vote, the majority result was manufactured and is 'not a reliable reflection of those who wished to vote'.

49. Also of concern to the applicants was the fact that the claimant definition for the group did not accurately describe the Muaūpoko iwi and after concerns were raised about the lack of specificity, seven hapū that nobody recognised were included unilaterally in the claimant definition. This allowed more people 'of questioned ancestry to vote, rather than fewer'.

50. Counsel submitted that under section 6 of the Treaty of Waitangi Act 1975 the applicants have a statutory right to be heard by the Tribunal. She relied upon the decision *Haronga v Waitangi Tribunal and Ors* (SC 54/2010) [19 May 2011] to assert "that hearing these claims and considering whether they are well founded must also be jurisdiction that the Tribunal cannot decline." If the claimants are to be heard, she submitted, denial of this urgency will result in the denial of the claimants' statutory right to be heard.

51. She submitted that the fact that the applicants will benefit from any settlement does not mean that they should be denied an urgent hearing. Their statutory right is to have their claims heard. What will remove that right is any settlement legislation that may be passed over their objections. Thus this application must, she opined, be granted.

52. Further, she contended that the Crown has not provided any evidence that the delay to negotiations required by an urgent hearing would prejudice those members of Muaūpoko who wish negotiations to proceed. There has been no reason given as to why this settlement must be rushed.

53. In terms of defining the claimant community, counsel submitted that the Crown is seeking to use its definition of 'a large natural grouping' to justify 'including just about everybody it can include', while it discounts the wishes of the actual claimants and the people whom they represent and who support them. The Crown, she opined, is attempting to re-define the claimant community so that 'it includes and heavily relies on those who have no participation or connection to the Treaty grievance process' but who are eager to claim redress. This is causing tribal division for the purpose of achieving a quick settlement.

54. If the claimants are ignored in a settlement process, she submitted, then the entire settlement process is irrational and divorced from the purpose it was intended for. It will not achieve reconciliation in fact. Rather in this case it will lead to more animosity and division. The Crown owes a duty to all Māori, not just to those who want to settle.

55. Counsel for the applicants further argued that the mandating process was flawed from the beginning, that the election process was unreliable in terms of the numbers in support, that the applicants have been excluded from elements of the process, that the MTA have not fulfilled the required conditions, and that the MTA is 'simply not the right body to represent Muaūpoko'.

56. The applicants are and will face significant and irreversible prejudice if this process continues as the Crown knows that the two groups are not able to work together as hostilities exist between them. It has effectively discounted the claimants and their ambitions for redress in favour of the MTA, who are struggling to find a claim.

57. With respect to alternative remedies, counsel argues that participation in the proposed negotiation process with MTA leading negotiations is not an alternative remedy in these circumstances.

58. In conclusion counsel submitted that the Crown cannot force settlement upon them and that if such a settlement is to be enduring, Treaty compliant, and meaningful, then it is hapū and not iwi which are 'the vehicles of Māori political organisation'. There is no reason, she opined, why the applicants cannot be heard before the Tribunal and after that Muaūpoko can discuss and develop a mandate.

Application for Subpoena

59. On 4 December 2013, the applicants filed an application for a subpoena of certain documents directed at the MTA.[15] The applicants sought the production of the following documents:

    a) Independent review report of MTA by Sir Wira Gardiner, as well as the project brief or commission;
    b) Correspondence between MTA and Sir Wira Gardiner concerning the report; and
    c) Any and all supporting papers and documents for the Independent review report.

60. Counsel for the applicants submitted that the documents are vital to a complete understanding of the current status and condition of the MTA as an incorporated society and as a representative for the Muaūpoko claimants and the tribe. Further the applicants submitted that the report describes and identifies the financial condition of the MTA and

[15] Wai 2421, #3.1.2

its content explains why the applicants and others have declined to support the MTA and why the Crown should not be devolving valued assets and redress to the MTA.

61. During the hearing of the application, held on 10-11 March 2014, this report was subsequently released to the Tribunal by the MTA for review of the relevant findings and recommendations.

Teleconference

62. A teleconference was held on 27 February 2014 with the parties. The purpose of the teleconference was to confirm a date for a judicial conference, discuss the application for the subpoena of documents, obtain from the Crown a timetable for the signing of an agreement in principle (AIP), and to discuss a timetable for filing of further evidence and submissions.

63. Crown counsel indicated that work towards an AIP was progressing for completion sometime during 2014 but would not be finalised before the end of March.

64. The decision concerning the subpoena of certain documents was deferred until a decision on the application for urgency was made. Parties were advised that there did not appear to be any reason for the documents to be produced in order to determine the application for urgency as it was only the Tribunal's urgency criteria that needed to be addressed.

65. However, that view changed during the hearing of the application for urgency when the document was referred to by several witnesses. As it turns out the core document at issue was one commissioned by the MTA who produced it at the judicial conference. The document was produced after the acting chief executive officer (CEO) of the MTA referred to it, leading to a request from the Tribunal for its release. Aspects of that report were irrelevant to these proceedings and were not entered onto the record.

66. In terms of the timetable, the applicants and interested parties were to file any further evidence and submissions for the judicial conference by 4 March and the Crown was to file any further evidence and submissions by 7 March.

67. After discussion with counsel, 10 and 11 March 2014 were confirmed as the dates for the judicial conference to hear from parties on the application.

Judicial Conference

68. As noted above, on 7 March 2014 the Chairperson appointed the Honourable Sir Douglas Kidd, Sir Tamati Reedy and Tania Simpson to determine this application with Deputy Chief Judge Fox.[16]

69. As also noted above, the conference to hear the application was held on 10-11 March 2014. The Waitangi Tribunal received evidence from the following people for the applicants and interested parties in support: Vivienne Taueki and Robyn Zwaan, Eugene Henare, Ngaroimata Kenrick, John Kenrick and Edward Karaitiana, Phillip

[16] Wai 2421, #2.5.5

Taueki and Charles Rudd. The Crown called Kererua Ray Savage as its primary witness and the MTA called Brenton Tukapua and Robert Warrington.

70. The Tribunal indicated at the conclusion of the conference that once the transcript from the hearing was available a timetable would be set for closing submissions (Wai 2421, # 2.5.6). Closing submissions were received on 4 April 2014 from the Crown and the MTA, and the applicants and other interested parties filed their submissions on 11 April 2014. We refer to these submissions and the evidence as we discuss the main issues that emerged at the hearing.

Baker v Waitangi Tribunal

71. On 29 May 2014, Williams J released his decision in relation to *Baker v Waitangi Tribunal* (2014) NZHC 1176. Memorandum-directions were issued on 30 May 2014 welcoming submissions from parties in relation to this decision.[17]

72. The Crown filed submissions on 4 June 2014.[18] The Crown submitted that it is ultimately for the Tribunal to determine whether the High Court's decision in *Baker* impacts upon its ability to determine the claimants' application for urgency but submit that the decision does not affect the Tribunal's ability to determine this application and that the Tribunal is able to proceed to make a decision.

73. Crown submissions did note that two directions were issued by Judge Fox prior to the Tribunal Panel being appointed and that based on the decision in *Baker* it would appear that these directions were likely *ultra vires*. The Crown submits, however, that the directions remain valid until set aside by a Court of competent authority.

74. It was submitted by the Crown that it is difficult to see how the determination of the claimants' application for urgency by a lawfully established Tribunal, having heard submissions and evidence from all parties, could reasonably be set aside and that any directions issued prior to a full Tribunal being empanelled does not affect the subsequently appointed Tribunal's ability to determine the application for urgency.

Urgency Criteria

75. The Waitangi Tribunal *Guide to Practice and Procedure* sets out the factors to be considered when determining any application for urgency:

> **2.5 Applications seeking urgent Tribunal consideration**
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> **(1) *Criteria for applications seeking urgent Tribunal consideration***
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> In deciding whether to grant urgent consideration to a claim or claims, the Tribunal must set criteria for determining the proper deployment of its resources to research, hear, and report on all the claims before it. The Tribunal will grant an urgent hearing only in exceptional cases and only once it is satisfied that adequate grounds for according priority have been made out. Such hearings will inevitably delay programmed hearings already in train, and the claims of those seeking priority must be balanced against the numerous claims involved in inquiries in hearing and in

[17] Wai 2421, #2.5.7
[18] Wai 2421, #3.1.30

preparation. Deferral of an existing hearing is often the practical effect of a Tribunal decision to grant an urgent hearing.

(a) *Applications for an urgent inquiry*

In deciding on an application for urgency, the Tribunal has regard to a number of factors. Of particular importance are whether:

- The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- The claimants are ready to proceed urgently to a hearing.

Other factors that will be considered by the Tribunal include whether:

- The claim or claims challenge an important current or pending Crown action or policy;
- An injunction has been issued by the courts on the basis that the claim or claims for which urgency has been sought have been submitted to the Tribunal; and
- Any other grounds justifying urgency have been made out.

76. Given the number of urgencies concerning the Crown's negotiation and settlement policies, there is now a well established set of principles that pervade the Tribunal's jurisprudence in assessing the criteria for urgency. We list those relevant to this application as follows:

From the Courts

- The nature and extent of prejudice described in the Tribunal's Practice Note is unrestricted in ambit and certainly not confined only to financial or tangible detriment.[19]

- Any prejudice complained of should be material in the sense of being more than minimal and it may extend to prejudice of an intangible kind; and in particular extend to matters such as potential loss of mana and mana whenua.[20]

- That it is for the Tribunal to assess what weight to give the various factors as impacting on the criterion of significant and irreversible prejudice.[21]

- In assessing significant and irreversible prejudice for an urgent resumption hearing, and where negotiations are proceeding at a pace leading to an imminent possibility of removal of the Tribunal's jurisdiction, the loss of jurisdiction is a factor that is "close to being determinative" for granting a hearing.[22]

The Tribunal has additional principles that apply and these are:

- Urgency should only be afforded where there is genuine need to receive a report and irreversible consequences may flow from any delay in processing the claim.[23]

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[19] *Attorney-General v Mair, Mathews, and the Waitangi Tribunal* [2009] NZCA 625
[20] Ibid
[21] Ibid
[22] *Haronga v Waitangi Tribunal* [2010] NZSC 98
[23] Memorandum, 5 April 1995, Wai 431, paper 2.19

- In establishing that they are likely to suffer significant and irreversible prejudice, claimants must show that it is more probable than not that they will suffer prejudice.[24]

In terms of the Negotiation Process the Tribunal has determined:

- That it is important to assess whether the alleged prejudice may be mitigated either through improvement to the mandating and negotiation process or through the benefits to be achieved in a settlement.[25]

- Open and transparent mandating processes should be adopted and a fair assessment of the mandate including numbers who are in support should be undertaken before a mandate is recognised. This should include a hapū/iwi/confederation profile.[26]

- Any flaws in the process of mandating, negotiation or settlement should be addressed by the Crown but where they are not so addressed, the Tribunal should only intervene where those flaws are so serious or of sufficient magnitude to warrant calling negotiations to a halt.[27]

- That the Tribunal should assess an applicant's support base relative to the numbers in favour of a negotiation and settlement process. It should have regard to the prejudice that may occur for those people who support that process, should the Tribunal recommend that negotiations cease or a settlement be deferred.[28]

77. In our view the criterion of suffering or likelihood of suffering significant and irreversible prejudice as a result of current or pending Crown actions or policies is not the only criterion, but it is the primary consideration when considering an application for urgency.

78. We would add that timing is an important consideration and that in less immediate circumstances such as, for example, the present application, it would be one factor among others to weigh up when considering whether the applicants are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies.

79. We are also mindful that we must consider the nature and extent of the Tribunal's resources when determining this application. These resources are, for the time being, committed to the Tribunal's long-term work programme, including the conclusion of the historical district inquiries.

80. In his memorandum-directions of 26 April 2012, the Chairperson of the Tribunal advised that urgency and remedies applications were, by their nature, to be given priority for Tribunal resources. The consequence of this is that any diversion of Tribunal resources to an urgent inquiry would result in delays to the completion of the historical inquiries, in which many claimants have been waiting to have their claims heard and reported upon.

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[24] Final Decision - Te Arawa Lakes Settlement (2006), Wai 837, paper 2.40
[25] *East Coast Settlement Report* (2010) Wai 2190, Chapters 2 & 4
[26] *The Te Arawa Mandate Report* (Wai 1150, 2004); *The Te Arawa Mandate Report – Te Wahanga Tuarua* (Wai 1150, 2005) and *East Coast Settlement Report* (Wai 2190, 2010) ch2
[27] *East Coast Settlement Report* (2010) Wai 2190, pp 59-60
[28] *East Coast Settlement Report* (2010) Wai 2190, 61-64

81. Thus we can only grant an urgent hearing in exceptional cases and only once we are satisfied that adequate grounds for according priority have been made out.

Discussion on the Issues

82. We review the evidence and closing submissions of the parties as we address the criteria for determining this application for urgency, and we have grouped these under the following headings:

- What is the nature and extent of the prejudice, if any, to the applicants and their supporters, are there any other relevant factors that we should consider, and is this an exceptional case that warrants granting urgency?

- Is there a "right" to a hearing and are the applicants and their supporters ready to proceed?

- Is there an alternative remedy for the applicants and their supporters?

Detailed Background

83. On 24 August 2009, the OTS first approved the MTA mandate strategy. However, OTS was not able to engage fully at that time, thus Te Puni Kōkiri (TPK) has had responsibility for the engagement of the Crown with MTA for mandating purposes. As a result of the *East Coast Settlement Report* (2010, Wai 2190), the MTA strategy was reviewed in 2010-2011 and then the process began afresh.[29]

84. Vivienne Taueki gave evidence that this was not known to the majority of Muaūpoko claimants.[30] She noted that it was only when an advertisement appeared in the *Horowhenua Chronicle* in May 2010 that she started to become aware that a mandate process was underway. By that advertisement, the MTA invited all of Muaūpoko treaty claimants to attend a hui to discuss how they could collaborate to advance and have their claims and interests properly recognised. The advertisement noted that the MTA had been in discussions with Ministers of the Crown, OTS and the Crown Forest Rental Trust (CFRT).

85. That hui was held on 22 May 2010 at Kawiū Marae where it was made clear that the MTA was keen to pursue direct negotiations with the Crown. The hui was recorded by Pahia Turia appointed by the OTS.[31] Her narrative of the meeting notes that the OTS had approved the MTA to proceed with the mandating process and that the CFRT had approved MTA as a client. During the meeting, a representative present from CFRT explained that OTS had acknowledged Muaūpoko as a large natural grouping and had signed off the mandate strategy MTA had proposed. The tensions between factions of Muaūpoko were also noted but it was recorded that only a minority did not want MTA to progress their claims. Approximately 30 people were present according to Vivienne Taueki. She claims that the narrative of the meeting recorded by Pahia Turia did not accurately record the level of opposition to the MTA. She also notes that there was never any vote taken to demonstrate support for the process to continue. She adopted

[29] Wai 2421, #A9, p 2
[30] Wai 2421, #A1
[31] Wai 2421, #A1(a), p 5

the same position of concern expressed by Ngāroimata Kenrick that the report prepared by Pahia Turia did not accurately record the outcome of that hui.[32]

86. The majority of claimants met together in December 2010 and formed the MCC. They complain about their lack of funding in comparison to that made available to the MTA. Ms Taueki noted that they did attend a Wai 2200 – Porirua ki Manawatū judicial conference held on 13 December 2010 at Takapuwāhia Marae where the MTA advised that they wished to go into direction negotiation and all the other MCC claimants opposed that. The Presiding Officer directed the Muaūpoko claimants to meet and that meeting took place on 9 March 2011. At that meeting the MTA attempted to advance their position concerning direct negotiations.

87. As a result, Ms Taueki's lawyer on 11 March 2011 wrote to the Director of the OTS and advised that the MCC did not support direct negotiations and that they wanted their claims to be heard by the Waitangi Tribunal. At the next judicial conference for the Wai 2200 – Porirua ki Manawatū district held at Kawiū Marae on 13 June 2011, the MCC and the Tribunal were advised that the MTA mandate strategy approved in 2009 was under review by the OTS. Again Ms Taueki's lawyer on 14 July 2011 wrote to the OTS setting out the MCC position that the claimants wished to have their claims heard by the Tribunal and then they would select their own representatives for any subsequent Treaty settlement negotiations.

88. In evidence before us, Vivienne Taueki detailed the many steps taken by certain claimants and the MCC to preserve their position concerning their opposition to direct negotiations over the period October 2011-June 2012.[33] These included litigation against the MTA and CFRT, research information requests to the MTA for a Waitangi Tribunal judicial conference held in February 2012, and attempts made to retrieve control over the Wai 52 claim – the generic claim for all of Muaūpoko filed by Hapeta (Jack) Taueki on 29 August 1989. That claim was subsequently amended and accepted by the Waitangi Tribunal in December 1997 and the named claimant was replaced by Tamihana Tukapua MBE. The Taueki family are very concerned about this as the original claim was filed by their uncle and they were never approached before the amendment was filed. Mr Phillip Taueki raised this for the first time with the Waitangi Tribunal administration in a letter to the Director dated 26 May 2008 and he also raised it at a judicial conference before a differently constituted Tribunal in 2009.

89. We note that Mr Phillip Taueki was concerned that the original claim filed appeared to have been redacted, but on our review it is clear that the original was filed on half a A4 size piece of paper, and that the black ink of the photocopier explains the blackened section of the copies of that statement of claim. That aside, the position of the MCC and the applicants is that Wai 52 was not filed for the MTA, and that the MTA does not and never has had a claim before the Waitangi Tribunal.[34] This matter will be the subject of further inquiry by the Wai 2200 – Porirua ki Manawatū Tribunal. But we note that there is Wai 2139 filed by Dennis Greenland on behalf of Muaūpoko and the MTA. He, however, has never made any submissions to the Tribunal in this or in the Wai 2200 – Porirua ki Manawatū Inquiry.

90. Leaving this to one side, Kererua Ray Savage gave evidence before us that the MTA submitted a draft deed of mandate on 1 June 2012. On 7 June 2012, a notice regarding the draft mandate was posted in the *Dominion Post* and information hui were advertised. These information hui, to be led by the MTA, were to be held on 23-24 June in

[32] Wai 2421, #A6
[33] Wai 2421, #A1, pp5-7
[34] Wai 2421, #3.1.22 & #3.1.22(a)

Masterton, Palmerston North and Levin. A similar notice was posted in three local newspapers on the 8 and 15 June 2012. The MTA, TPK and OTS also advertised the draft mandate strategy on their website. The opportunity to present submissions was provided over the period 7-29 June 2012. A large number of submissions was received – 152 in total. On 19 October 2012, the Crown conditionally endorsed the MTA mandate strategy.[35]

91. Vivienne Taueki immediately instructed her lawyer to write and record opposition to the draft mandate strategy. Letters and a submission dated 29 June 2012 were sent in this regard on behalf of the MCC to TPK during the month of June 2012.

92. On 9 July 2012, Kererua Savage for TPK responded to the submission, noting why the draft MTA mandate strategy was published. He advised that, as a result of the Waitangi Tribunal's recommendation in the *East Coast Settlement Report* (2010, Wai 2190) that all claimants should be consulted regarding the negotiation and settlement of their claims, the Crown now publishes all draft mandate strategies including the Wai claims to be settled. He also noted that the Tribunal had recommended that the Crown seek submissions on mandates. He advised that in doing so the Crown is not suggesting that all the Wai claimants should support the mandate. Nor is it endorsing or promoting the MTA, but rather it is seeking to ensure an engagement process is instituted which every mandated group must go through. It is for the MTA to engage with and obtain the support of claimants. He noted the concerns regarding whakapapa and he offered to meet with the MCC.[36]

93. TPK then conducted two hui with claimants. At the hui in Pakipaki on 15 September 2012 approximately 40 people attended, and in Levin on 19 October 2012 approximately 25 people attended. At the latter hui, a unanimous resolution was passed rejecting the draft MTA mandate strategy. This was the same day that the MTA mandate strategy was conditionally endorsed by the Crown, yet the applicants claim that those present at the hui on 19 October 2012 were not told of this.[37]

94. Conditions were imposed on the endorsement of the draft mandate strategy by the Crown on 19 October 2012, as a result of submissions received from claimants concerning the definition of the claimant community and their desire to be kept informed about the mandate process. The conditions were that: (1) the MTA undertake research regarding the Muaūpoko claimant definition, and consider research undertaken by the Crown regarding the Muaūpoko claimant definition, prior to beginning the mandate vote; and (2) the MTA offer a facilitated hui with Muaūpoko Wai claimants to discuss the MTA proposed mandate process. In terms of condition (1) this condition was achieved before voting began. In terms of condition (2) the facilitated hui was not held until April 2013, some months after the voting closed.

95. On 1 November 2012, at a judicial conference for the Wai 2200 – Porirua ki Manawatū inquiry held at Kauwhata Marae, the Crown announced that the MTA mandate had been conditionally endorsed. During our hearing, Vivienne Taueki advised that there was no discussion with the MCC about that, and that the judicial conference in November 2012 was the first time they were advised of it. On 21 November 2012, Vivienne Taueki's lawyer wrote again to TPK expressing her concern that the MCC had not been advised of this, and stating that the MCC claimants saw the hui held on 19 October as nothing more than a box-ticking exercise, essentially suggesting pre-determination.[38] In their

[35] Wai 2421, #A9, pp2-3 & 6
[36] Wai 2421, #A1(a), appendix 17
[37] Wai 2421, #A9, p3 & Wai 2421, #A1, pp 8-10
[38] Wai 2421, #A1, p 9

letter of reply dated 29 November 2012, TPK contended that they had advised the MCC claimants of this matter. TPK went on to offer a facilitated hui with the MTA.

96. From, 19 November 2012 until 12 noon on Sunday 16 December 2012, the opportunity to vote on the mandate was provided. The MTA used an independent election company – Electionnz.com Ltd – to facilitate and record the vote. The voting process included postal votes, internet votes, voting at mandate information hui, and voting at a Special General Meeting of the MTA. The mandate information hui were held on 8 and 9 December 2012 in Hastings, Palmerston North, Levin and Masterton. According to the MCC, there were approximately 70 people at the Palmerston North and Levin hui, 30 of whom they alleged opposed the mandate and were not registered with the MTA. At these hui, the MTA encouraged people to attend the Special Meeting of the MTA and cast their votes. For those who did not wish to give their votes to the MTA, they could contact Electionnz.com Ltd. The MCC was concerned that given that those unregistered with Muaūpoko only received their voting packs on 8-9 December 2012, people had a mere five days within which to vote and send those by surface mail to Electionnz.com Ltd. What they did not address was that the availability to cast an electronic vote.[39]

97. Prior to the postal vote, all MTA registered members over 18 years of age were sent information packs including a booklet that explained how they could vote. For unregistered voters, information packs and voting forms were made available at the mandate information hui.[40] Ms Taueki explained the voting process if a claimant attended a mandate information hui as she attended on 8 and 9 December 2012. She claimed that this was the first time she learned how a Muaūpoko voter not registered with the MTA was able to vote. First, she was given a form which *inter-alia* required people to provide their whakapapa for review by the MTA whakapapa committees. Second, a voting paper could be filled out at the hui and given to the MTA representatives or at the Special AGM to be held on 16 December 2012, or a voter could contact Electionnz.com Ltd to obtain a voting pack. She was concerned that there was insufficient time for other Muaūpoko to obtain the voting pack and send in their vote before the postal vote closed.[41]

98. Kererua Ray Savage in response noted that on 15 November 2012, the mandate information hui and the mandate voting period were advertised in the *Dominion Post*, *Manawatu Standard* and the *Daily Chronicle* (Horowhenua). This was three weeks before the first mandate hui was held. Those advertisements advised iwi members that they had the opportunity to vote on the mandate from 19 November 2012 until 12 noon 16 December 2012. The advertisements stated there would be provision for special votes for those not registered with the MTA who wished to vote. All those who did not wish to register with the MTA, had the opportunity to register on a separate register and make a special vote.[42]

99. Mr Savage also pointed out that the voting process had been set out in detail in the draft mandate strategy, including information on how special votes could be made for those not registered with the MTA. That document had been available since June 2012 and members of the MCC, including Ms Taueki, had made submissions on it. The strategy set out all the information required for special votes.[43] The Muaūpoko claimants in the Wai 2200 – Porirua ki Manawatū inquiry clearly never received direct notice of the draft deed of mandate or voting information packs.

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[39] Wai 2421, #A1(a), appendix 24
[40] Wai 2421, #A9, pp 6-7
[41] Wai 2421, #A1, pp10-11
[42] Wai 2421, #A9, pp 5-6
[43] Wai 2421, #A9, p 6

100. On 19 November 2012, the day that voting opened, the MTA wrote to the claimants inviting them to attend a facilitated hui to discuss the mandate process and the issues they had raised in their submissions. No date for such a hui was given. Attached were brochures outlining the mandate process and how people could vote, including those wishing to make a special vote.[44]

101. The response from Ms Taueki's lawyer, dated 21 November 2012, was sent to TPK instead of the MTA, and it *inter-alia* sought a date for the meeting and assurances from TPK that the process would be fair and safe for all participants. The actual response to the MTA invitation was not sent until 4 December 2012 and in that letter the request was made for a date for the facilitated meeting. In addition, a request was made that the MCC be allowed to present at the mandate information hui. The MTA responded on 6 December 2012 offering the date of 16 December 2012 for the facilitated hui (the day that voting was due to close). The MTA declined to allow presentations from the MCC during mandate information hui and it was noted that no unruly behaviour would be tolerated. On 12 December 2012, the offer was declined as MCC claimants could not attend on the 16 December date.

102. A letter dated 14 December 2012, was sent on behalf of the MCC to the Minister for Treaty of Waitangi Negotiations and the Minister of Māori Affairs outlining the concerns of the applicants regarding the process of acquiring a mandate, noting the MCC opposition to the MTA led process, objecting to the addition of two tīpuna and seven historical hapū, objecting to the failure to adhere to the conditions of the mandate, noting that voting packs were not available for Muaūpoko voters not registered with the MTA until the mandate information hui on 8-9 December 2012, noting the issue of time for those voters to cast their vote, and demanding that the Crown 'disaffirm' the process.[45]

103. Meantime, attempts to arrange further dates for the facilitated hui stalled. It eventually took place on 14 April 2013. It took place without members of the MCC present as they could not attend. That was due, they reported, to a clash of dates with another hui regarding the signing of the Lake Accord. So all that took place was a meeting between the lawyers for the MCC, members of the MTA (including the Board Chairman), some iwi members and Crown officials. The meeting was facilitated by Rau Kirikiri.

104. The final deed of mandate was submitted in May 2013. That final deed of mandate was advertised on 5 June 2013 in the *Dominion Post* and in one local newspaper on 7 June 2013. Twenty submissions were received with 14 in support of the mandate and six in opposition. On 24 September 2013, the relevant ministers recognised the MTA's deed of mandate to negotiate the settlement of Muaūpoko claims.[46] The Terms of Negotiation of Muaūpoko's Treaty settlement were signed at Kawiu Marae, Levin on 14 December 2013.

105. The MTA continues to be in direct Treaty negotiations with the Crown, currently in the stage of preparing an Agreement in Principle.

[44] Wai 2421, #A9(a), attachment KS12
[45] Wai 2421, #A1, appendix 24
[46] Wai 2421, #A9, pp8-9

Significant and Irreversible Prejudice

The Heart of the Dispute

106. The applicants and all other interested parties, other than the MTA, but including Mr Rudd, Mr Phillip Taueki and Mr Tama-i-uia Ruru, have as their central complaint that they do not wish to have the MTA negotiate and settle their claims. Rather they wish to proceed to a hearing before the Waitangi Tribunal so that they may have their claims heard. Mr David Stone for his clients noted that they want to prepare and present fully researched and articulated grievances to the Tribunal, to have it reported and then to enter into negotiations with the Crown. In his clients' view, this is the "honourable" process that they wish to follow. It is a principled position, he claimed, and they do not want to see their claims "hijacked."

107. The applicants say that the application was filed in the face of "significant Crown misconduct" in recognising the mandate of the MTA. They believe that they will face irreversible prejudice if this course of conduct is allowed to continue. That is because, they say, the Crown is negotiating with people with whakapapa to ancestors against whom the applicants have brought claims. In their view the Crown's recognition of the mandate process used in this case was biased and has favoured one particular group over another, contrary to the directions previously given to the Crown by the Tribunal in cases with similar circumstances. This is a clear case of tribal division, they say, and that division has been exacerbated by the Crown's settlement policy.

108. Mr Phillip Taueki submitted that the crux of the problem was that the "legitimate claimants," (those who descend from the chief Taueki and the other 75 Muaūpoko people who petitioned Parliament in 1893) were being marginalised by the Crown in its application of the "large natural groupings" settlement policy in favour of the MTA, who rely on the tīpuna Kawana Hunia and Te Keepa Rangihiwinui (Major Kemp) for their claims.

109. In Mr Phillip Taueki's view, these tīpuna, with the assistance of the Native Land Court during its investigation into the Horowhenua Block, deprived the "legitimate owners" of their ancestral lands and then proceeded to sell off large tracts of that land and keep the proceeds for themselves. He suggested that these tīpuna only had the right to claim tangata whenua status because of the agreement made by Taueki with the Ngāti Kauwhata chief Te Whatanui and the ahi kaa status that Taueki maintained on behalf of Muaūpoko.

110. Conversely, those who affiliate to these two chiefs deny such accusations and note that land sales were forced upon them as they struggled to protect the lands from enemies, to meet legal expenses, and to pay for surveys and rates. Mr Tama-i-uia Ruru, another unrepresented claimant, noted that the three chiefs Ihaia Taueki, Kawana Hunia and Te Keepa Rangihiwinui (Major Kemp) share a common whakapapa and that he did not want to get into a debate over who of these ancestors should be elevated over the others. Rather it was his view that the focus should be on the unfair flawed process used to recognise the MTA's mandate. Given the state of the governance of the MTA, he did not believe that the MTA was capable of conducting the negotiations for the tribe.

111. The Crown agrees with Mr Taueki that the relationship between the three chiefs, Taueki, Hunia, and Kemp, is a fundamental issue underlying the applicants' dispute. However, it was submitted that this Tribunal has no role to play as an arbiter of such disputes between Māori over matters of identity. Furthermore, counsel for the Crown argued that a Tribunal report is unlikely to make findings that would resolve such differences.

Tribunal View

112. We begin by pointing out that all parties agree that the essential complaint that goes to the heart of this matter concerns the fact that the applicants and those in support, do not wish their claims to be the subject of a negotiation and settlement process led by the MTA until they have had their historical claims heard and reported upon by the Waitangi Tribunal, after which they wish to chose their own negotiators to settle their claims. Essentially, they seek from this Tribunal a recommendation that the mandate process should cease or be redone, and if it is to be redone they want to be funded to the same degree to run a parallel process. But their statement of claim and submissions make clear that this should only happen once the Tribunal has heard their historical claims.

113. The MCC hold the view that as they comprise the majority of the registered Wai claimants before the Tribunal, then Muaūpoko should not go into direct negotiations (and their view on that issue should prevail over the views of all other iwi members).[47] The fact that the majority of the claimants have filed their claims purporting to represent Muaūpoko or its constituent hapū or their whānau is barely addressed. (See attached schedule of Muaūpoko claims) Rather, they have argued that the MTA either has no claim or has hijacked the Wai 52 claim, and they resent the fact that someone other than the MCC is leading the negotiations.

114. We agree with the Crown that this is the heart of the matter and that the issue concerns identity and who has the right to lead the iwi. It is our view that the claimants have not understood that the direct negotiation and settlement process involves hapū and iwi interests beyond those of individual Wai claimants. That is because the majority of the claims rest on what happened to these kin-groups in terms of the Treaty of Waitangi. What happened to individuals such as Taueki, Hunia and Kemp or what action they took in terms of the Treaty is important context, but it is the collective experience of the iwi as a whole that is assessed, both in the Waitangi Tribunal when it hears claimants and during the negotiation and settlement process. Thus the issue of whether to go to a Waitangi Tribunal hearing or whether to negotiate and settle claims is an issue that all of Muaūpoko have a right to express a view on, where such an opportunity is made available and whether or not they have a registered claim.

115. We do not agree with the Crown's view that this Tribunal never has a role to play in reviewing identity issues that come before it. That is because this Tribunal may need to ascertain how questions of identity have shaped the relationship that particular hapū within an iwi have had with the Crown. It may also need to identify how the Crown may have privileged some hapū over others. Such issues may go to the extent of any findings concerning Treaty breach.

116. However, we accept that the fundamental issue for the applicants is not one that an urgent Tribunal inquiry is likely to resolve. That is clear from the recommendations

[47] Wai 2421, #A6

sought. The crux of the matter for the applicants goes to historical issues and who has the right to lead Muaūpoko given its tribal history, as we discuss further below.

Unfair and Exceptional

117. The applicants and those in support contend that the mandating process has been unfair, manipulated, and biased in favour of the MTA. While the MTA has received significant funding to manage their mandate process, they say there has been no funding awarded to them to participate in the mandate process on an equal footing. Mr Rudd contended that this was unfair and not equitable, ending with his description of the Crown's process as one of "Divide and conquer, divide and rule." In their submission on the draft mandate strategy dated 29 June 2012, the MCC noted that the strategy did not present an opportunity for equal time and status to be given for a presentation from the MCC and those who oppose negotiations. This was described as inherently unfair, biased, and likely to produce a result that is intended to defeat the claimants' statutory right to a hearing before the Waitangi Tribunal.[48]

118. Mr Phillip Taueki was concerned that the Crown's allocation to the MTA of funding was unfair because it has not provided the Muaūpoko claimants with any money at all. The unfairness was aggravated by the fact, he believed, that some of the claimants cannot access legal aid. He points to a letter dated 24 August 2009 from the Minister of Treaty Negotiations providing advice to the MTA on how to conduct a "robust" mandate process, and indicating that the Crown considered the MTA a suitable group to be recognised under the "large natural groupings policy." This, he contends, indicates that the Crown had already recognised the MTA as the Muaūpoko representatives and that the mandate strategy process was in effect a charade. In addition, the Crown has allowed the claimants to be excluded from the process, including from a visit by the Minister as recent as 28 February 2014.

119. Mr Afeaki for his client contended that the process was unfair as the claimants lack resourcing to pursue their claim.

120. Mr Stone submitted that along with the process being unfair and biased, this case was exceptional and if urgency is not granted the applicants and those in support would suffer significant and irreversible prejudice by the loss of the right to a hearing, and that in turn would result not only in the loss of a claim, but also the loss of recognition of what happened to important tīpuna in breach of the Treaty. But in addition the applicants and their supporters would lose the possibility of Tribunal findings and recommendations that provide "vindication" for their claims.

121. Counsel for the Crown contended that the process through which the MTA achieved its mandate was robust, fair and transparent. While the Crown has been conscious of the difference of opinion between the claimants and the MTA, it has tried to ensure that the claimants were engaged at all stages of the mandate process. The Crown highlights the following opportunities for input and participation:

- Providing submissions for or against the proposed mandate strategy in June 2012;

- By meeting with the claimants after the release of the draft mandate strategy in June 2012;

[48] Wai 2421, #A1(a), appendix 16

- At the mandate information hui held by the MTA on 8 and 9 December 2012;
- In the form of votes for and against the proposed MTA mandate between 19 November and 16 December 2012. In this respect, multiple voting options were made available, including a special vote procedure;
- In submissions on the final deed of mandate made in June 2013; and
- In the facilitated hui with the MTA on 14 April 2013.

122. Crown counsel submitted that the Crown's approach, as demonstrated by the evidence of Mr Kererua Savage, indicated that the mandating process was fair and consistent with previous recommendations of the Waitangi Tribunal taken from the *East Coast Settlement Report* (Waitangi Tribunal, Wai 2190, 2010).

Tribunal View

123. We note that on 24 August 2009, the OTS first approved the MTA mandate strategy. Clearly this was not known to the applicants or the MCC as no public notice was advertised concerning this matter and no direct notice was ever provided to the Wai 2200 – Porirua ki Manawatū Muaūpoko claimants. Under those circumstances, we consider that it was entirely appropriate for the Crown to require the MTA to renew its mandate.

124. We accept that the Crown could have ensured that certain things were done better by the MTA, such as sending out direct notice of all relevant documents and information material to the claimants, such as requiring the MTA to conduct a facilitated meeting before the postal vote commenced or ensuring the MTA allowed a presentation from the MCC at the mandate information hui held on 8-9 December 2012. However, we equally accept that there were numerous alternative opportunities created for the claimants to tender their views and participate, and some chose to do so. At all times the MCC and the applicants were represented by counsel who actively participated in meetings with the claimants. But the fact that the claimants did not change the result of the vote, or that some claimants have chosen not to participate at all, cannot be the basis for concluding that the process was *per se* unfair.

125. In terms of the funding issue, CFRT policy is that it only funds recognised clients during the negotiation process. The MTA is their recognised client. The Crown is not responsible for that policy. As the majority of claimants made it clear that they do not wish to negotiate but rather wish to have their claims heard by the Waitangi Tribunal, the Crown cannot be held responsible for not funding their participation in the mandate process. The Crown does not usually fund participation in negotiations for groups such as the MCC. We note, however, that the Crown did partly fund their participation in the Wai 2200 - Porirua ki Manawatū inquiry by the support given for the Muaūpoko Kōrero Tuku Iho Hearing held at Kawiū Marae earlier this year. As to the future, the Wai 2200 – Porirua ki Manawatū Tribunal will be organising research that will assist all parties including the claimants participate in that process.

126. We also note that the applicants could have participated in stronger terms during the mandate process, but have at every opportunity chosen to maintain their position that they want a hearing before negotiations commence. In effect, no opportunities for

participation in the mandating process could have satisfied the applicants unless they had succeeded in preventing it from happening altogether.

127. With regard to whether this is an exceptional case, we consider that this is clearly a mandate dispute and that there is nothing *prima facie* exceptional or unfair in that. We accept the Crown's view that unanimity on Treaty settlements is rare. Furthermore, we accept that it is not unusual that claims will be extinguished by the settlement process without individual claimant consent. The Tribunal has recognised that large aggregate settlements cannot *prima facie* be a breach of the Treaty of Waitangi simply because a group claims to have been marginalised.

128. However, we do consider that the historical issues concerning the leadership of Muaūpoko, the implications for certain hapū, and the role of Taueki, Hunia and Kemp raised by the applicants and their supporters, are issues that need to be addressed. We outline below how we propose to deal with that below.

Other Procedural Flaws

129. The applicants challenged several aspects of the mandate process, claiming that the procedural defects in the process indicate that the process was flawed. These, they alleged, included:

- No public announcements were made that the MTA had been seeking and obtained a mandate in 2009 until 22 May 2010. Furthermore, concern was expressed that the hui reports of the discussions on mandate failed to record dissent at those hui. The example given was the first mandate hui held on 22 May 2010, as identified in the affidavit of Ngāroimata Kenrick).[49] Similar allegations were made by Robyn Zwaan regarding the hui held in April 2013, facilitated by Rau Kirikiri; [50]

- Despite two meetings with the MTA following directions given by the Wai 2200 - Porirua ki Manawatū Tribunal at a judicial conference held at Takapūwāhia Marae on 13 December 2011, when it should have been clear to the MTA that the claimants did not support direct negotiations, they continued down the path of seeking a mandate;

- Few people attended the mandate information hui facilitated by the MTA, and limited information beforehand was made available to those who did not register with the MTA but who wished to vote;

- The conditions imposed by the Crown on its endorsement of the MTA mandate were not fulfilled before the postal ballot. For example, there was no opportunity to discuss the definition of the claimant community because the MTA did not offer a date for the facilitated hui until after the postal ballot commenced.

- The election process favoured MTA supporters as they had access to information earlier, and those not registered were required to submit an application with supporting whakapapa to be reviewed by the MTA whakapapa

[49] Wai 2421, #A6 & #A1
[50] Wai 2421, #A3

committees. This point goes to the issue of whether the fact that many MCC members were not registered with the MTA may have disadvantaged them.

- The timeframe of 8 December through to 16 December 2012 did not give sufficient time to obtain and return a ballot to Electionnz.com Ltd by surface mail.

- The Deed of Mandate was notified by published notice in the newspapers with no direct notification to claimants or their counsel; and

- The relationship between the MCC and the MTA is fraught with violence. We note that there have been individuals from both sides who have allowed their emotions to rule the manner in which they have addressed each other, the Crown, and this Tribunal.

130. The applicants contend that the Crown should withdraw its recognition of the MTA mandate and cease negotiations until such time as the Muaūpoko claims have been heard by the Waitangi Tribunal. Alternatively that this Tribunal should recommend that the Crown should fund some sort of new or parallel mandate process requiring another vote.

131. The MTA and the Crown note that the applicants and their supporters were able to participate and did participate at various points in the mandating process, and that included members of those hapū who were not listed by or were not represented by the MTA.

Tribunal View

132. The Waitangi Tribunal in the *East Coast Settlement Report* (2010, Wai 2190) noted that the OTS should ensure that claimants receive direct notice of every step in a mandate, negotiation and settlement process. In this case the Wai 2200 – Porirua ki Manawatū Muaūpoko claimants did not receive direct notice of the draft mandate strategy. But we note that most of them must have ultimately received, or should have received, a copy of the draft strategy through their lawyers given the numbers who attended the hui with the Crown officials on the strategy held on 15 September 2012 in Pakipaki and on 19 October 2012 in Levin.

133. In terms of meeting the conditions imposed by the Crown when it endorsed the MTA mandate, we note that the condition concerning the "claimant definition" was addressed before the postal ballot. It is true that the applicants do not like the definition, but the Crown and the MTA have indicated that they are still open to that definition evolving.

134. We also note that the timing of the request dated 19 November 2012 from the MTA to hold the facilitated hui with the MCC was unfortunate, given that was the date the voting started. This indicates that the MTA had no intention of taking into account the views of the MCC before voting commenced. Equally, we consider it unfortunate that the Crown could not do more to influence the manner in which the mandate information hui held on 8 and 9 December 2012 were run. It seems to us that these hui were missed opportunities for extending claimant participation. However, by the time the MTA did invite the MCC to a facilitated hui, planning for the mandate information hui was reasonably advanced and notice had been given as to what would be covered. To deviate from that notice of agenda items may have confused participants. Ultimately,

the MTA were responsible for this problem and the Crown could do little about it by 29 November 2012, when it responded to the MCC letter of 21 November 2012.

135. In terms of the voting process, we also agree that the information packs should have been sent directly to the Wai 2200 – Porirua ki Manawatū Muaūpoko claimants. They are after all Muaūpoko and should have had the same courtesy extended to them as the rest of the iwi registered with the MTA. However, to some degree the seriousness of that was mitigated by the fact that the MCC members and the applicants must have known what would be required to cast a special vote for those people not registered with the MTA. That is because they received most of that information in the draft mandate strategy document. We cannot accept that just because a person was not registered, there was *per se* a chilling effect on their participation and that there was automatic disadvantage. The time to vote was not a lengthy period, but multiple options were available, including casting votes through the internet. While there may have been a few issues with the actual process for casting and recording votes, it was not the MTA or the Crown's process at that point, as Electionnz.com Ltd was responsible for facilitating the ballot. There was sufficient public notice of the process to indicate to anyone else what to do and we note that 97 special votes were in fact cast.

136. Thus we do not consider that those points are sufficiently serious that they warrant Tribunal intervention by way of an urgent hearing. After reviewing the evidence so far produced, we struggle to be convinced that these alleged flaws have been so serious or of sufficient magnitude that would warrant such a hearing. Furthermore, the applicants themselves have acknowledged that there is little further they can tell the Tribunal about the nature of these defects.

137. We also do not consider that such a course will assist the parties progress towards a resolution of the dispute in this particular case. That is because this dispute is not fundamentally about procedural flaws. Rather, it is the fact that the process led by the MTA is underway at all that concerns the applicants and their supporters. That is the real prejudice they see in these circumstances. The applicants also acknowledge that their objective has always been to proceed to a hearing on their historical claims before the Tribunal. Since 2010, they have done everything possible to have that view prevail for all of Muaūpoko. Thus we doubt that any urgent hearing on the mandate process would be productive in alleviating any prejudice they may claim should negotiations continue.

138. Even if the MTA were required to refresh their mandate, the real issue, and the only one for the applicants and their supporters, is whether the negotiations should continue at all. Principally, their concerns have focused on that; both during the mandate process and afterwards. We believe that those concerns are better accommodated within the Wai 2200 - Porirua ki Manawatū inquiry, as we outline below.

Claimant Definition Issue

139. Muaūpoko's origins have been the subject of dissent and challenge between the applicants and the MTA. The MTA have claimed they are the descendents of Tara, the grandson of Toi Kairakau and son of Whātonga. Some take the whakapapa back as far as the union between Kupe and Ruahine. Some emphasise the tīpuna Tuteremoana and Wharekohu, while others highlight their origins through Kurahaupo waka and Tupatanui. In their submission on the draft mandate strategy dated 29 June 2012, the MCC noted that they were not prepared to disclose the full whakapapa of Muaūpoko to assist the mandate process, but they did note their view that those in Levin and Lake

Horowhenua were descended from Potangotango (and others). As such they do not claim descent from any of the migration waka but rather claim to have lived in Horowhenua since time immemorial.[51]

140. What seems to be agreed from the statements of claims filed is that the tribe along with Ngāti Apa, Ngāi Tara and Rangitāne once controlled the lower North Island from Manawatū to Horowhenua, to Kapiti Island all the way down to Te Whanganui a Tara (Wellington). They also claimed interests in the top of the South Island and down into the West Coast.

141. We note that in the original draft mandate strategy released in June 2012, the "claimant definition" was described as follows:

> *… anybody who hold whakapapa to one or more of the following hapū:*
> - *Ngāi Te Ao;*
> - *Ngārue;*
> - *Ngāti Hine;*
> - *Ngāti Pārini;*
> - *Ngāti Tamarangi;*
> - *Ngāti Whanokirangi; and*
> - *Punahau*
>
> *These hapū are descended from the tīpuna Tara.*

142. Some of the applicants such as Vivienne Taueki challenged how the MTA defined Muaūpoko and sought to have further discussion around it. They considered the issue of "claimant definition" potentially opened the voting process to a larger group of people who were not Muaūpoko. These concerns were raised with the Crown and the MTA prior to the postal ballot. The definition was then altered, but the applicants argue that the definition became even more extensive in scope.

143. The new definition that was used for the purpose of the mandate being sought by the MTA was as follows:

> *Muaūpoko is defined as the descendents of Tara, Tuteremoana and Tupatanui who also affiliate to one of the following hapū: Ngāi Te Ao, Ngārue, Ngāti Hine, Ngāti Pārini, Ngāti Tamarangi, Ngāti Whanokirangi, and Punahau.*
>
> *This mandate also covers the following historical hapū as they relate to Muaūpoko: Ngāti Tairatu, Ngāti Kuratuauru, Ngāti Rongopatahi, Ngāti Te Riunga, Ngāti Puri, Ngāti Akahu and Ngāti Rangi.*

144. Thus two additional tīpuna were added. Now the descendents of Tara, Tuteremoana and Tupatunui are linked with the main whakapapa lines of Muaūpoko and one or more of the following hapū:

> *Ngāti Te Ao, Ngārue, Ngāti Hine, Ngāti Pariri, Ngāti Tamarangi, Ngāti Whanokirangi and Punahau.*

145. The applicants complain about the addition of these two tīpuna and seven historical hapū. These hapū were named on the voting papers as: *Ngāti Tairatu, Ngāti Kuratuauru, Ngāti Rongopatahi, Ngāti Te Riunga, Ngāti Puri, Ngāti Akahu and Ngāti Rangi.* The applicants claim that as a result there were people who were Muaūpoko not

[51] Wai 2421, #A1(a), appendix 16

entitled to vote based upon this definition (eg. Mr Karaitiana) and there were people who were not Muaūpoko who did vote because of the definition. No example of the latter was provided.

146. The MTA argued to the contrary, contending that the inclusion of historical hapū narrowed the definition and ensured that all who voted were Muaūpoko. They pointed out that they relied upon research commissioned by the Crown to add the seven historical hapū. Even though they did not consult the claimants, they consider that the opportunity to review the definition remains. They noted that it is not unusual for the claimant definition to evolve during negotiations and they committed to considering this matter further.

147. Mr Robert Warrington, as the whakapapa expert for the MTA, explained to the Tribunal the process used to define Muaūpoko and in doing so he referred to a report of Mr David Armstrong.[52] Mr Armstrong referred to a letter to the Crown dated March 1852 when Te Herewini Rakautihia, Rawiri Te Awahou and Kawana Hunia, wrote to the Crown purchase official, Donald McLean, and advised him that their rights in the South Island and on the West Coast were through Ngāti Tumatakokiri. He also identified a letter dated May 1852 from Himiona of Horowhenua listing the Muaūpoko hapū who agreed to accept payment for Tai Tapu. The letter lists 18 hapū, four more hapū than the MTA list. A copy of this letter from Himiona was produced to the Tribunal by Mr Warrington.[53]

148. Mr Afeaki established during cross-examination of Mr Warrington that his client's hapū, Ngāti Hamua and Ngāti Tūmatakōkiri, were omitted from the MTA list of hapū who constitute the "claimant definition". This in and of itself, Mr Afeaki submitted, demonstrates prejudice because those in the MTA who defined Muaūpoko, he argued, do not have the skills to do so. It potentially has resulted in members of the Karaitiana whānau being left out of the definition of who is Muaūpoko for the purpose of the negotiation and settlement process, yet their claim could potentially be extinguished.

149. It was also established that Ngāti Tamarangi was not participating in the Whakapapa Committees of the MTA. According to Vivienne Taueki, they voted to withdraw from the MTA at a hui a hapū held on 29 October 2011 and a formal letter was sent to the MTA on 3 November 2011 notifying that organisation of this result.

150. The MTA contended that the claimants from this hapū had the opportunity to nominate a representative to sit on the relevant Whakapapa Committee, had they participated fully in the process. The Crown also pointed out that while the applicants have been critical of the approach taken by the MTA, they themselves have not produced any whakapapa information demonstrating why the three named tīpuna or the 14 named hapū are not Muaūpoko.

151. Counsel for the Crown pointed out that a certain irony would be apparent should the Tribunal find that the claimants from Ngāti Tamarangi were prejudiced by their own decision not to participate.

152. It was contended that it would be unfair to allow such decisions from a small minority to invalidate the mandate process. Furthermore, members of Ngāti Tamarangi were still able to participate in the vote despite this lack of representation. Mr Phillip Taueki, for example, is a member of the MTA.

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[52] Wai 2421, #A21
[53] Wai 2421, #A22

Tribunal View

153. We note from the Armstrong report at pages 5-6, that Ngāti Hamua and three other hapū that appear in the 1852 list are also recognised as Rangitāne and likewise there is some overlap with Ngāti Kahungunu ki Wairarapa. Ngāti Tumatakokiri in the South Island appear in the 1852 list and have recorded affiliations with Ngāti Apa, Rangitane and Ngāti Kuia. This appears to be the reason why these hapū of particular concern to Mr Afeaki's client, were omitted from the MTA list.

154. In terms of Ngāti Tamarangi and their withdrawal from the MTA, we consider that to be an issue but not of such significance that it should result in granting urgency. Members could and can still participate despite there being some offence taken to other people from the MTA reviewing their whakapapa.

155. In the end we too share the concerns of the applicants and Mr Afeaki regarding the claimant definition but welcome the fact that the MTA is open to ensuring that the definition continues to evolve. Clearly, however, what this indicates is that further independent research is needed, and discussions need to continue among all Muaūpoko. Such research takes time and for the claimants is best dealt with through the Wai 2200 – Porirua ki Manawatū Inquiry process. That research will not be ready for an urgency hearing.

Support for the MTA v Applicants

156. A review of the 'Declaration of the Result' for the postal ballot filed by the Returning Officer from Electionz.com indicates that 392 votes were cast. Of those 97 were cast as special votes. Of the total 340 votes were cast in favour of the mandate and 51 against.[54]

157. The applicants note that of the 1,705 eligible voters registered with the MTA, only 294 voted (or 17.7% of those registered). They contend that the prejudice to them is greater than any alleged prejudice to the MTA if the process was stopped by the Tribunal intervening, as the MTA has only achieved limited support from Muaūpoko.

158. The applicants point to the lack of attendance at the mandate hui run by the MTA on 8 and 9 December 2012 (fewer than 20 at each of the three hui) and say that by comparison the hui held with claimants resulted in higher attendances.

159. The MTA say that they have taken steps to consult and test their mandate with the Muaūpoko people over the period 2008-2013. They contend that a much larger group of Muaūpoko registered with the MTA and gave expression to their view by exercising their democratic right to vote in favour of the MTA mandate and in support of direct negotiations. That is to be compared to the small number of claimants that form the MCC. The applicants have failed, they say, to demonstrate any significant support outside this relatively small number of claimants. They contend that the MCC concerns may be accommodated within the MTA settlement process and that the Waitangi Tribunal claimants may participate in that process where called upon to do so.

[54] Wai 2421, #A9(a), attachment KS25

160. The Crown notes that the applicants have provided no evidence of how many Muaūpoko support the application for urgency. In the Crown's view, the best estimate was 20-25 people who attended a claimant hui. Counsel noted that while Ms Vivienne Taueki suggested 2,000 people supported the application for urgency, there was no evidence provided to substantiate such an assertion. At the moment, there is nothing of real probative weight to suggest that the claimants are anything other than a small minority of individuals. That is to be compared to the MTA which, the Crown says, is an incorporated society with in excess of 3,000 registered members (1,700 of whom were eligible to vote). It has been recognised as:

- A Mandated Iwi Organisation for Muaūpoko under the Māori Fisheries Act 2004;
- An Iwi Aquaculture Organisation for Muaūpoko under the Māori Commercial Aquaculture Claims Settlement Act 2004; and
- A representative iwi authority for the purposes of the Resource Management Act 1991.

161. The applicants in response say that the Crown's position is an example of how it has failed to adequately assess support in favour of the applicants and claimants relative to support for the MTA. In this respect the Crown, they contend, has overly relied upon the postal ballot of 340 out of 392 votes in favour of the MTA proceeding as the mandated body. The overall number who voted was only a small minority of the 1,705 voters entitled to vote.

162. Mr Phillip Taueki also noted that this figure represents less than 20% of eligible voters and closer to 10% of those who identify as Muaūpoko. We note that in the 2013 census 2694 people identified as members of Muaūpoko. Mr Rudd questioned the numbers registered with the MTA and what their links to Muaūpoko hapū were. He queried the numbers in support of the MTA considering the small turn out at the Draft Mandate Strategy meetings and the electronic voting method adopted through Elections NZ.

163. In addition, the applicants argued that the Independent Review of the MTA headed by Sir Wira Gardiner made findings that suggest that the organisation was unfit to lead the negotiations. It was contended that the MTA has hidden its lack of "institutional fitness" and that, in turn, points to the fact that the Crown's process of recognising its mandate has lacked robustness. The MTA argued that the Gardiner report and its recommendations did not warrant a claim that the MTA is unfit to seek or hold a tribal mandate for Muaūpoko. Nor does it negate, in their view, the people's choice to support direct negotiations. The MTA position is that this Tribunal should see the report as a clear commitment from the MTA to be open, transparent and accountable to Muaūpoko. They note the important recommendations of the independent review and advise that they have been working towards implementing these.

Tribunal View

164. We accept that the MTA has been recognised as a tribal authority for the Muaūpoko people in many settings. It is an organisation that was established in 1997 as an Incorporated Society. It is governed by a Board of Elected Representatives from each of Muaūpoko's seven hapū (two representatives each). These representatives organise a whakapapa committee or whakapapa representative for their respective hapū. It has a Kaunihera Kaumātua (council of elders) that provides guidance and assistance on tikanga. It claims to have maintained an Iwi and a Membership roll so that those who did not wish to register with the MTA could still receive notices regarding voting etc. As

noted above, the number of people enrolled on the MTA register was declared to be 3084.[55] Its main purpose "is to build a stronger economic, social and cultural base for the Muaūpoko people".[56]

165. We note that Sir Wira Gardiner made a number of relevant recommendations to improve governance and management based upon his findings concerning the MTA. These findings in summary were that the MTA:

- Was dysfunctional with issues between the Board of the MTA and the CEO creating divisions;
- Board representation had failed to adequately provide effective leadership and representation across all hapū;
- Hapū representatives on the Board held variable skill sets and that the numbers on the Board should be reduced to one hapū representative;
- Should invest in achieving greater hapū participation and development;
- Should review the role of the Chair and the Board.

166. We note that the report makes it clear that the MTA has much work to do to improve hapū participation and we welcome the MTA's commitment to progress its work in this regard. However, and based upon the information available from that report, there is nothing in it to indicate that the Crown should not have recognised the MTA mandate.

167. In addition, the MTA has support from many Muaūpoko people. This is clear from the number of submissions and the postal vote that favoured the MTA. The attacks on the level of support for the MTA at hui and the degree of opposition expressed at those hui by the claimants, cannot be a total response to the numbers that voted and the submissions that favoured the MTA-led process. Much more was needed from the applicants to demonstrate that their position of opposition was widely supported.

168. In terms of the vote itself, while the figures indicate a low participation rate, they appear to be comparable to other iwi voting processes. Thus in the end we must conclude that the majority of Muaūpoko (based upon the MTA definition of the "claimant community") who cared enough to vote supported the MTA process, and they in total represent more than those in support of the applicants and the claimants, based upon the evidence heard to date by this Tribunal.

169. In such circumstances we must tread cautiously as both the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples underscore the importance of recognising the views of indigenous peoples' organisations and any collective expression of choice that they demonstrate, such as that expressed by the majority of Muaūpoko who have participated to date.

170. However, and as we discussed above, the views of the majority are only one factor we should consider in assessing support. In our view, the respective views of the hapū such as Ngāti Tamarangi and the whakapapa lines of those who do not support the MTA are very important cultural factors that must be considered. The issue of claimant definition is relevant to such an assessment. We are simply not in a position to determine how many of those who voted were or were not Muaūpoko, as any findings as to the "claimant definition" must await more detailed research.

171. In our view we consider that this case is really about mana and that has led to a very clear division between those who affiliate with the Potangotango and the Taueki line or

[55] Wai 2421, #A9(a), attachment KS1 & KS12
[56] Wai 2421, #A9(a), attachment KS12

those who want to have their claims heard in the Waitangi Tribunal, and those who affiliate with the Hunia and Kemp lines or those who want direct negotiations. They appear to be divided both geographically (MTA primarily at the southern end and MCC primarily at the northern end of Lake Horowhenua) and by hapū. Granted the applicants and the other claimants appear to be a minority (based upon the MTA definition of the claimant community), but they have very deep rooted concerns which will only ever be laid to rest by the production of high quality research and analysis.

172. In that respect the Wai 2200 – Porirua ki Manawatū District Inquiry has conducted the Kōrero Tuku Iho process for Muaūpoko and it has commissioned a scoping report on Muaūpoko to assist that hearing process. It is about to commission further research as a result of that scoping report. We consider that the research will assist the applicants, the MTA and the Crown to understand the cultural background of Muaūpoko, including the role of their chiefs, their respective hapū, their actions in terms of the Treaty of Waitangi, and their relationships with the Crown during the colonial period. The Crown could also undertake research as part of the negotiation process but in doing so, researchers should consult and make available that research to the MCC claimants.

The Ability to Proceed to Hearing and the Right to be Heard

173. Counsel for the applicants contended that they would be ready to proceed to an urgent hearing although she was concerned about what that may mean in terms of resourcing. She further argued that they have the right to be heard and to have the principles of natural justice applied to them. She relied on the Supreme Court decision in *Haronga v Waitangi Tribunal* [2011] NZSC 53 (*Haronga*) for the proposition that the claimants, including her clients, have a statutory right to be heard and that they are entitled to urgency. Counsel also referred to various articles of the United Nations Declaration on the Rights of Indigenous Peoples concerning the right to a hearing and the impact of the Crown's settlement policy on Muaūpoko.

174. The Crown contends that the *Haronga* decision does not apply to the circumstances of this application, noting that the Tribunal retains discretion to decline applications for urgency.

175. The Crown notes that the applicants have indicated through counsel that they may not be ready to proceed to an urgency hearing. Counsel contended that the "sole tangible prejudice" that the applicants have articulated is the loss of a hearing of the Muaūpoko claims. He noted that it is settled jurisprudence in this Tribunal, that it has rejected the notion that the loss of a hearing meets the threshold for the significant and irreversible prejudice test justifying an urgent inquiry. There must be something more than this to justify granting urgency. A contrary approach, if adopted by this Tribunal, will result in delay and will impact on the majority of Muaūpoko and thus cause significant prejudice to them.

Tribunal View

176. While the loss of the right to a hearing is a prejudice that the applicants and their supporters may or may not face, nevertheless more than that is needed before urgency can be granted. At this stage in the negotiation process the right to a hearing of the applicants' claims remains in the Wai 2200 – Porirua ki Manawatū District Inquiry.

177. Furthermore, *Haronga v Waitangi Tribunal* [2011] NZSC 53 (*Haronga*) does not support any proposition that the applicants have a *prima facie* right to an urgent hearing, particularly so early on in the negotiation and settlement process. Rather, the right to a hearing is one factor among others that the Tribunal must assess having regard to the circumstances of the case.

178. In this regard nothing is certain at this stage in terms of the negotiation process, so the full nature and extent of any prejudice to the claimants is not known. As a matter of logic, the Tribunal must retain in these circumstances the discretion to order its inquiries and manage its resources, and, in our view, nothing in *Haronga* suggests otherwise.

179. In addition, the real crux of this dispute, the applicants wanting a hearing rather than going through the negotiation and settlement process led by the MTA, can be addressed by a different means. In our view, that is by the Wai 2200 – Porirua ki Manawatū District Inquiry Tribunal granting priority to hearing the Muaūpoko claims once the historical research for Muaūpoko is available.

180. As we have found above, the majority of those who are actively participating in the negotiation and settlement process from Muaūpoko want the MTA to lead the negotiation process. That is their expression of their rangatiratanga, and both the Treaty and the United Nations Declaration on the Rights of Indigenous Peoples support their freedom to choose. The latter instrument is designed to recognise the collective rights of indigenous peoples and the choices they make must prevail over any rights of the individual concerned about the impact of the Crown's settlement policy on them. We do not consider the Treaty of Waitangi and its principles of rangatiratanga and partnership connote anything different.

181. We also do not consider that the applicants are ready to proceed to a hearing on the only issue that goes to the crux of this matter. That is the division between the applicants and their supporters and the MTA. As we have noted, that division rests on historical concerns that require major research and analysis. We reject counsel for the applicants' view that something less than full research can assist this Tribunal to make a decision on the issues raised. Research takes time and it would not be ready if an application for urgency was granted. As counsel for the applicants noted in closing, research is already underway and may be fully explored for the Wai 2200 - Porirua ki Manawatū district inquiry. That is where the applicants and their supporters will have the opportunity to test their views on tribal identity, whakapapa and mana.

Alternative Remedies

182. Counsel for the applicants submitted that they have no other remedy available to them. Counsel claims that participation in settlement negotiations is no substitute for a hearing before the Waitangi Tribunal and cannot remedy the "imposition of one group over the wishes, desires and legal rights" of another group. Essentially, they want the Crown to amend its settlement policy to review its recognition of the mandate for the MTA, stop settlement negotiations if that is what the tribe votes for, fund alternative mandate processes, "fair" hui, and voting processes that allow all the tribe to vote without favouring one group over another, all administered within reasonable timeframes.

183. Mr Stone essentially added that this case should be about recognising the wrong committed to the tīpuna of the claimants, and if that is recognised then the alternative remedies outlined by the Crown below are not alternative remedies at all.

184. The Crown notes that the claimants have alternative remedies available that would be reasonable for the applicants and their supporters to exercise, and these include opportunities to have input into the various accountability mechanisms set out in the MTA Deed of Mandate; to engage in the claims research committee work-stream; have input during the negotiation and settlement process through meetings with the MTA; vote on the proposed settlement and the post-settlement governance entity, and share the settlement benefits.

Tribunal View

185. The applicants clearly have the statutory right to a hearing for the claims before the Wai 2200 - Porirua ki Manawatū District Inquiry Tribunal. Negotiations are not so advanced at this stage that there is an imminent likelihood that their right to such a hearing will be removed, thus it remains an alternative remedy.

186. In addition, the applicants and their supporters may still participate in the negotiation process as outlined by the Crown, and they may test the mandate of the MTA further through the voting process for the settlement and the post-settlement governance entity. If the MTA does not achieve support from the majority, the settlement will not proceed. To that end the Crown should encourage their participation and not allow the claimants to be excluded from the process, such as when the Minister met with the MTA on 28 February 2014.

187. As some claimants are members of the MTA, they have the option of seeking a declaratory judgment before the High Court on the suitability or otherwise of the MTA to lead the claims.

188. It may be that once the negotiation reaches the Draft Final Deed of Settlement stage, a new application for urgency may be needed, but it is just too soon at this stage to grant this one.

Decision

189. The application for urgency is declined for the reasons given above. However, we note that there was some support for according the Muaūpoko claimants priority in the Wai 2200 – Porirua ki Manawatū District Inquiry, once the Muaūpoko research was finalised. Priority, subject to funding, will have major significance in the sense that it will mean that the Tribunal will accelerate its research programme for Muaūpoko. The Tribunal would need to be able to hear and issue a preliminary report on the claims before the introduction of any settlement legislation. It could also make findings that are hapū specific, where warranted.

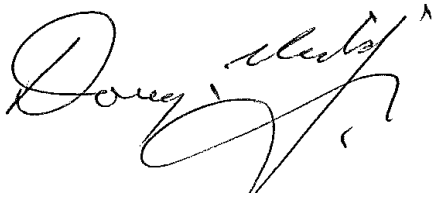
190. Accordingly, the Registrar is directed to add this decision to the Wai 2200 - Porirua ki Manawatū Record of Inquiry for further discussion with the Muaūpoko claimants in that inquiry.

The Registrar is directed to send a copy of this direction to counsel for the applicants, Crown counsel, and all those on the distribution lists for:

- Wai 2421, the Muaūpoko Tribal Authority Deed of Mandate Claim;
- Wai 2200, the combined record of inquiry for the Porirua ki Manawatū Inquiry.

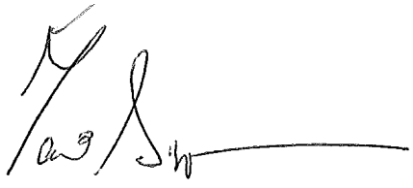
DATED at Wellington this 10th day of June 2014

Deputy Chief Judge Fox
Presiding Officer



Honourable Sir Douglas Kidd
Tribunal Member

Emeritus Professor Sir Tamati Reedy
Tribunal Member



Tania Simpson
Tribunal Member