

THE
NGĀPUHI MANDATE INQUIRY
REPORT

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REPORT

PRE-PUBLICATION VERSION

WAI 2490

WAITANGI TRIBUNAL REPORT 2015

Typeset 2015 by the Waitangi Tribunal, Wellington, New Zealand
Set in Adobe Minion Pro and Cronos Pro Opticals

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Waitangi Tribunal

Te Rōpū Whakamana i te Tiriti o Waitangi
Kia puta ki te whai ao, ki te marama

The Honourable Christopher Finlayson
Minister of Treaty of Waitangi Negotiations

The Honourable Te Ururoa Flavell
Minister for Māori Development

Parliament Buildings
WELLINGTON

9 September 2015

E ngā Minita, tēnā kōrua

Kia hangaia he whare kōrero – ko Papatuānuku te paparahi, ko Ranginui e titiro iho nei te tuanui. He roimata toroa ki te hunga kahurangi kua kakea te ara o poutama ki te pō tē whakaarahia. Kei ngā kairaranga i te kupu, kei ngā kaiwhatu i te kōrero – ngā uri whakaheke e noho tonu ki te pae, tēnā koutou.

Tēnei ka huakina ngā tatau o tēnei whare kia tiaho ai te māramatanga. Ko ngā kōrero kua rārangahia ki ngā tukutuku, kua whakairohia ki ngā poupou. E ōku rangatira, tomokia te whare nei.

We enclose the report of the Ngāpuhi Mandate Inquiry Tribunal, the outcome of an urgent inquiry conducted into the Crown's recognition of the Tūhoronuku Independent Mandated Authority (the Tūhoronuku IMA) as the body authorised to negotiate a settlement of all historical Ngāpuhi Treaty grievances.

Fifteen named claimants made claims on behalf of a range of groups, most of whom are Ngāpuhi hapū or hapū collectives. Foremost among their allegations was that the Crown had pre-determined its decision to recognise the Tūhoronuku IMA. For the reasons outlined in the report, we have not upheld that allegation. Their other allegations were variations upon a central theme – that is, that the Crown had breached

Level 7, 141 The Terrace, Wellington, New Zealand. Postal: DX SX11237
Fujitsu Tower, 141 The Terrace, Te Whanganui-ā-Tara, Aotearoa. Pouaka Poutāpeta: DX SX11237
Phone/Waea: 04 914 3000 Fax/Waea Whakaahua: 04 914 3001
Email/E-mēra: information@waitangitribunal.govt.nz Web/Ipurangi: www.waitangitribunal.govt.nz



the principles of the Treaty of Waitangi by failing to protect actively the ability of hapū to exercise their rangatiratanga in determining when and how they would settle their claims.

In addressing these allegations, this report focuses upon the outcome of the mandating process: the structure and processes of the Tūhoronuku IMA as the mandated representative entity for all Ngāpuhi. As we explain, hapū are the fundamental units of political organisation within Ngāpuhi. The strength of Ngāpuhi itself is embedded in its many constituent hapū. Within Ngāpuhi, the rangatiratanga of the hapū has always been respected and Ngāpuhi has only ever acted in concert with the agreement of the hapū. In the Ngāpuhi context, therefore, the Treaty principle of partnership requires that the Crown has a primary duty to protect actively the right of hapū to determine how and by whom the settlement of their historical claims will be negotiated.

We find that the Crown has failed to fulfil this duty by recognising the mandate of an entity that undermines the authority of hapū and their leaders. This is evident in the structure and processes of the Tūhoronuku IMA, an entity that fails to uphold hapū rangatiratanga in the following ways:

- ▶ the process for selecting of hapū kaikōrero, an integral feature of the mandated entity, undermines hapū tikanga by failing to ensure hapū control of the process;
- ▶ the minority of hapū kaikōrero participating in the Tūhoronuku IMA at the time of hearing have filled all of the representative positions on its board;
- ▶ as a result, the hapū representatives on the board of the Tūhoronuku IMA, drawn from the hapū kaikōrero, cannot be considered truly representative of hapū;
- ▶ the failure to include a workable mechanism enabling hapū to withdraw from the Tūhoronuku IMA means that hapū are included regardless of their views; and
- ▶ the Crown has failed to require an adequate level of hapū participation in the Tūhoronuku IMA before negotiations proceed.

We have determined that claimant hapū will be prejudiced through being represented in negotiations with the Crown by an entity which they did not mandate, and from which they cannot withdraw. There is potential for further prejudice if negotiations continue without the Crown addressing the issues we identify. The mandating of representatives for Ngāpuhi hapū for settlement negotiations, in accordance with hapū rangatiratanga and tikanga, is a crucial step towards repairing the

relationship between Ngāpuhi and the Crown. A representative entity that marginalises many hapū is unlikely to secure a durable settlement, a result that will obstruct the restoration of their relationship with the Crown. It is also likely to lead to further division and dissension within Ngāpuhi and further damage to hapū mana and leadership.

We have not recommended that the Crown withdraw its recognition of the mandate and re-run the mandating process, as we do not consider such a recommendation would be either practical or constructive. There is broad support for negotiations towards settlement within Ngāpuhi. While the flaws we have identified in the Tūhoronuku IMA are fundamental, they can be remedied. Once remedied, the Tūhoronuku IMA will be appropriately mandated to lead a negotiation on behalf of hapū. We have recommended the Crown halt its negotiations with the Tūhoronuku IMA to give Ngāpuhi breathing space to work through the issues identified. In particular:

- ▶ hapū leaders must be able to determine with the members of their hapū whether they wish to be represented by the Tūhoronuku IMA;
- ▶ hapū that wish to be represented by the Tūhoronuku IMA must be able to confirm or otherwise the selection of their hapū kaikōrero and the hapū representatives on the Tūhoronuku IMA;
- ▶ there must be a workable withdrawal mechanism for hapū who do not wish to continue to be represented by the Tūhoronuku IMA;
- ▶ the Crown should require as a condition of continued mandate maintenance that a clear majority of hapū included within the deed of mandate (and as determined through their having appointed hapū kaikōrero) remain involved in the Tūhoronuku IMA; and
- ▶ the Crown must support hapū that choose to withdraw from the Tūhoronuku IMA in their efforts to form alternative large natural groups.

In making these recommendations, we have weighed the possible prejudice to those Ngāpuhi individuals, groups, and hapū who presently support the Tūhoronuku IMA, and want the current negotiations to be able to continue. We acknowledge the process we recommend will take time, could possibly delay settlement, and that some hapū may choose to withdraw. We consider, however, that it is crucial for the Crown and Ngāpuhi to take this opportunity now to resolve the fundamental issues we have identified, before negotiations proceed further.

Hapū involvement has to be a matter of choice. If negotiations are to proceed on the right footing, hapū cannot feel they have been coerced, pressured, or trapped into taking part. There is no certainty that hapū will

leave the mandated body once they have the ability to do so, provided that the remedial steps we recommend are undertaken. Enabling the mandate to be tested in this way will result in a stronger mandate and ultimately a settlement which is more likely to be fair, robust, and enduring.

In order for the Treaty relationship to be restored, hapū must be returned to a position of authority at the earliest opportunity. The mandating of representatives to negotiate the settlement of their claims is one such opportunity, and a crucial one. When the mana of all parties is upheld, the restoration of relationships and reconciliation between Ngāpuhi and the Crown will become possible.

Nō reira, e kīa ana te kōrero, 'ko tāu rourou, ka ora ai te iwi'. Anei tā mātou rourou, hei whakaaro aro māu.

Nāku noa



Judge Sarah Reeves
Presiding Officer

PREFACE

This is a pre-publication version of the Waitangi Tribunal's *Ngāpuhi Mandate Inquiry Report*. As such, all parties should expect that in the published version headings and formatting may be adjusted, typographical errors rectified, and end-notes checked and corrected where necessary. Photographs and additional illustrative material may be inserted. The Tribunal's findings and recommendations will not change.

ABBREVIATIONS

app	appendix
CA	Court of Appeal
ch	chapter
comp	compiler
doc	document
ed	edition, editor
fol	folio
IMA	Independent Mandated Authority
IRO	Independent Returning Officer
IT	information technology
ltd	limited
n	note
no	number
NZLR	<i>New Zealand Law Reports</i>
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
PSGE	post-settlement governance entity
pt	part
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
sec	section (of this report, a book, etc)
vol	volume
Wai	Waitangi Tribunal claim

ACKNOWLEDGEMENTS

The Tribunal would like to thank the following staff who provided us with valuable support during the preparation of the inquiry, the hearing of the claims, and in the preparation of this report. Among them were Danny Merito, Toni-Faith Temaru and Jenny Syme (claims coordinators), Nyenyezi Siameja (registrar), Paige Bradey (deputy registrar), Caitlyn McKay and Sarah Gwynn (assistant registrars), Georgie Craw and Leanne Boulton (inquiry facilitators), Sam Hutchinson and Richard Towers (report writers).

During hearings, the Tribunal relied upon the special skills of Patrick Hape (master of ceremonies), Rangi McGarvey (interpreter and translator), and Alan Doyle (sound technician).

CHAPTER 1

INTRODUCTION TO THE URGENT INQUIRY

1.1 THE URGENT INQUIRY

1.1.1 Introduction

This report deals with claims made on behalf of a number of Ngāpuhi groups (including hapū) regarding the Crown's recognition of the Tūhoronuku Independent Mandated Authority (the Tūhoronuku IMA) as the body with the authority to negotiate a settlement of all historical Ngāpuhi Treaty grievances. The claims made to this Tribunal, heard under urgency, alleged that the Crown had breached the principles of the Treaty of Waitangi by failing to protect actively the ability of hapū to exercise their rangatiratanga in determining when and how they would settle their claims.

On 14 February 2014, the Crown recognised the mandate of Te Rōpū o Tūhoronuku (now the Tūhoronuku IMA) to negotiate a settlement of the historical Treaty claims of Ngāpuhi. In doing so the Crown accepted that, for the purposes of negotiating a settlement, the Tūhoronuku IMA represents all those whose historical claims are derived through Ngāpuhi whakapapa from the ancestor Rāhiri.¹ This is defined to include all Ngāpuhi individuals, whānau, hapū, trusts, and other groups, whether or not they are claimants in the Waitangi Tribunal's current Te Paparahi o Te Raki inquiry into grievances against the Crown or have been involved in the mandating process which is the subject of this inquiry. It also includes any individuals and groups with multiple whakapapa affiliations that include Ngāpuhi, to the extent that their claims relate to their Ngāpuhi whakapapa. This affects hapū in tribal border areas who affiliate to Ngāpuhi as well as to other iwi. It also affects the claim of any group or pan-iwi organisation (like that of Ngā Taura Tawhito o Hato Petera – a group of former pupils of Hato Petera College) to the extent that some members of those groups are Ngāpuhi. On 20 May 2015 the Crown and the Tūhoronuku IMA signed terms of negotiation, enabling settlement negotiations to begin.²

The 15 claimant groups in this inquiry argued that the Crown had erred in its decision to accept the Tūhoronuku IMA's mandate to represent them in settlement negotiations. In their view, the Crown was motivated by its desire to settle all

1. Document A25(a), pp [391]–[392]

2. Te Rōpū o Tūhoronuku Independent Mandated Authority and the Crown, 'Terms of Negotiation', 20 May 2015, http://www.tuhoronuku.com/store/doc/TIMA_And_Crown_Terms_Of_Negotiation.pdf

Ngāpuhi historical Treaty claims through a single settlement process with a single entity as quickly as possible, regardless of the preferences of Ngāpuhi claimants.

1.1.2 The mandating process

This inquiry focuses on the Crown's recognition of the Tūhoronuku IMA as having the authority and ability to represent all Ngāpuhi in settlement negotiations with the Crown. The Tūhoronuku IMA resulted from a series of events that took place over a five-year period beginning in October 2008 when Te Rūnanga-Ā-Iwi-O-Ngāpuhi (the Rūnanga) embarked on a process to garner the views of Ngāpuhi regarding the settlement of their claims.³ In March 2009 Te Rōpū o Tūhoronuku (Tūhoronuku) was formed as a sub-committee of the Rūnanga to explore the prospect of negotiating a settlement of Ngāpuhi Treaty claims.⁴ Two rounds of consultation hui were held during 2009, with 27 hui in all being held throughout Northland, in large centres outside Northland, and in Australia.⁵ A further 14 hui were held between June and August 2010 at which Tūhoronuku presented a strategy to obtain a mandate and proposed a structure for the mandated entity.⁶ This process saw Te Kotahitanga o Ngā Hapū Ngāpuhi (Te Kotahitanga), a large Ngāpuhi hapū collective, emerge as a source of opposition to Tūhoronuku as the proposed mandated entity.⁷

In early January 2011 the Crown endorsed Tūhoronuku's mandate strategy and, during the first half of that year, supported discussions between Tūhoronuku and Te Kotahitanga in an effort to reach some agreement regarding the mandate. No agreement was reached.⁸ Tūhoronuku put its proposed mandate to a vote during August and September 2011. Of the 6,794 people who voted, some 76 per cent were in favour of Tūhoronuku having a mandate to negotiate a settlement of all Ngāpuhi claims.⁹ During 2011 and 2012 the Crown funded facilitated discussions between Tūhoronuku and Te Kotahitanga aimed at finding a resolution to their differences.¹⁰ These were unsuccessful but discussions between the Crown, Tūhoronuku, and Te Kotahitanga from October 2012 to February 2013 led to amendments being made to the structure of Tūhoronuku in an attempt to address the concerns of Te Kotahitanga.¹¹ The Office of Treaty Settlements (OTS) advertised Tūhoronuku's amended deed of mandate from 6 to 20 July 2013, inviting submissions from Ngāpuhi on it.¹² Some 3,505 submissions were made on time, 63 per cent of which opposed the amended deed.¹³ On 14 February 2014 the Minister for Treaty

3. Document A108(a), pp 9–10; doc A98, pp 10–11; doc A108 p 8; doc A26(a), p 53

4. Document A98, p 10

5. Document A108, pp 11–12; doc A98, p 12

6. Document A108, p 17; doc A98, p 12

7. Document A146, p 1183

8. Document A26(a), p 128; doc A26, pp 15–16; doc A108, pp 23–26, 30–33; doc A144, pp [167]–[168]; doc A26(a), p 150; doc A26(a), pp 148–149

9. Document A25(a), pp [69]; doc A108, pp 34–35

10. Document A108, pp 36–37; doc A26(a), pp 238–301

11. Document A26, pp 35–36

12. For the amended Deed see document A25(a), pp [252]–[319]. For an example of the advertisement for the amended Deed see document A26(a), p 427.

13. Document A108, pp 59–60

of Waitangi Negotiations and the Minister of Māori Affairs officially recognised, with some conditions, that Tūhoronuku had secured a mandate to represent all of Ngāpuhi in settlement negotiations.¹⁴

1.1.3 The Tūhoronuku IMA

During the engagement process that followed the mandate vote, Tūhoronuku agreed that should its mandate be recognised it would become legally separate from the Rūnanga and all existing members of Tūhoronuku would vacate their positions.¹⁵ In essence, this meant that the Crown recognised an empty structure as having secured a mandate from Ngāpuhi, and that the individuals yet to be elected to fill all the vacant positions would be the mandated representatives of Ngāpuhi.

On 6 March 2014, Tūhoronuku became legally distinct from the Rūnanga through the establishment of the Tūhoronuku Independent Mandated Authority (the Tūhoronuku IMA) as a charitable trust.¹⁶ Elections to appoint the representative members of the Tūhoronuku IMA took place during the first half of 2014, with the results announced on 30 July 2014.¹⁷

The Tūhoronuku IMA is composed of 22 members representing the Ngāpuhi community. There are 15 representatives for Ngāpuhi hapū, four representatives for so-called 'urban' Ngāpuhi living in Auckland, Wellington and the South Island, a representative each for Ngāpuhi kuia and kaumātua, and one representative for the Rūnanga. Each of these representative positions is filled through appointment processes set out in the addendum to the Tūhoronuku IMA's deed of mandate.¹⁸

The hapū representatives are drawn from a larger group comprising those persons appointed by their hapū to engage with Tūhoronuku in the negotiation process – the hapū kaikōrero. The amended deed of mandate identifies 110 hapū that are each able to appoint a kaikōrero. The hapū kaikōrero are organised into five regional groups with the hapū kaikōrero of each region appointing three of their number to the Tūhoronuku IMA to represent all the hapū of that region. According to the Tūhoronuku IMA's draft engagement plan, hapū kaikōrero will play a key role in the negotiation process, working alongside the Tūhoronuku IMA and negotiators.¹⁹

1.1.4 The application for urgency

On 22 August 2011, the Tribunal received a statement of claim and an application for an urgent hearing from Rudolph Taylor, Lizzie Mataroria-Legg and Heremoananuiakiwa Kingi on behalf of themselves and a number of hapū who supported Te Kotahitanga. The claim was registered by the Tribunal as Wai 2341. The claimants alleged, among other things, that the Crown had funded and endorsed a mandating process that would see authority shift from hapū to an organisation

14. Ibid, p73

15. Ibid, pp 56–57

16. Document A25(a), p [2]

17. Document A98, pp 2–3

18. Document A25(a), pp [252]–[319]

19. Document A98(a), pp 192–197

created to achieve the Crown's objective of having all historical claims settled by 2014.²⁰ On 30 September 2011 the Deputy Chairperson of the Tribunal issued a memorandum-directions encouraging Te Kotahitanga and Te Rōpū o Tūhoronuku (as it was then) to take part in a proposed joint working party to consider the most appropriate way to achieve a unified Ngāpuhi approach to settlement.²¹ Both parties agreed to participate in the joint working party to address their differences. In October 2011, the Wai 2341 application for urgency was adjourned, with the claimants being granted leave to revive their application if necessary.²²

On 10 March 2014, following the Crown's recognition of the Tūhoronuku IMA's amended deed of mandate, the Wai 2341 claimants restarted their application for an urgent hearing. They sought an interim recommendation that the Tūhoronuku IMA's election process be deferred until the Tribunal had considered the application.²³ The Tribunal's Chairperson delegated the task of determining this urgency application to Judge Sarah Reeves on 17 March 2014.²⁴ On 21 March 2014, Judge Reeves granted leave for the Wai 2341 claimants to revive their application for an urgent hearing. In doing so the Judge declined to make an interim recommendation to defer the Tūhoronuku IMA's election process, noting both an absence of sufficient information and doubt as to the Tribunal's authority to make the recommendation sought.²⁵ Between April and June 2014, the Tribunal received a further 11 statements of claim and applications for an urgent hearing regarding the Crown's recognition of the Tūhoronuku mandate.

The claimants made six broad points in support of their applications for an urgent hearing of their claims, alleging that the Crown's actions were in breach of the principles of the Treaty of Waitangi and would cause irreversible prejudice. They submitted:

- ▶ They will be represented in settlement negotiations with the Crown by an entity that they did not mandate and by people that they do not want to represent them;
- ▶ The nature and extent of their rights that are at risk are fundamental and substantial and require a Tribunal inquiry;
- ▶ They were suffering substantial intra-tribal conflict as a result of the settlement process being pursued by the Crown;
- ▶ The Crown was funding Tūhoronuku to pursue direct negotiations but refusing to fund any group in opposition to the process. Further, those opposing the mandate did not have the capacity or resourcing to continue to oppose the deed of mandate while also progressing other matters of priority to them;
- ▶ They will be deprived of the right to achieve a fair, robust, and enduring settlement of their claims if the Crown continues to engage with Tūhoronuku; and

20. Claim 1.1.1, pp 8, 17–19; paper 3.1.1, p 3

21. Memorandum 2.5.3, p 2

22. Memorandum 2.5.5, pp 1–2

23. Memorandum 3.1.47

24. Memorandum 2.5.6

25. Memorandum 2.5.7

- ▶ They will be deprived of their statutory right under the Treaty of Waitangi Act 1975 to have their claims before the Waitangi Tribunal inquired into and reported on.²⁶

Judge Reeves was appointed as Presiding Officer for all the claims and applications for urgency filed in relation to the Crown's recognition of the Tūhoronuku IMA's deed of mandate. Tim Castle, Dr Robyn Anderson, and Kihi Ngatai were appointed as members of the Tribunal panel to determine the applications and inquire into the claims.²⁷ On 1 October 2014, Tureiti Lady Moxon was appointed as a further member of the Tribunal panel.²⁸ On 4 October 2014, Mr Castle stepped down from the panel following the expiration of his Tribunal warrant.²⁹

The Tribunal heard substantive submissions from all parties on the applications for urgency on 18 and 19 June 2014 at Waitangi. On 12 September 2014, the Tribunal delivered its decision, granting the applications for an urgent hearing. In doing so, it identified a number of matters with the potential to cause the claimants prejudice. These were:

- ▶ the Crown's failure to give proper regard to the views of hapū;
- ▶ the possibility that a settlement of claims would be negotiated without the consent of claimants;
- ▶ the process for withdrawal included in the deed was possibly unfair;
- ▶ the failure to provide claimants with a genuine opportunity to consider and possibly support alternatives to the Tūhoronuku IMA; and
- ▶ the Crown's failure to manage its relationships with and between iwi and hapū groups.³⁰

The Tribunal also acknowledged that granting an urgent inquiry had the potential to cause prejudice to the Tūhoronuku IMA and those who supported its mandate. It was not convinced, however, that this outweighed the likely and significant prejudice to the claimants if urgency was not granted.³¹

1.1.5 The issues for inquiry and the hearings

The Tribunal released a statement of issues prior to the December 2014 hearings. A revised statement of issues was sent to the parties on 11 March 2015. Broadly, the key issues for inquiry were:

- ▶ Was the Crown's recognition of the Tūhoronuku IMA's mandate pre-determined?
- ▶ What were the key factors that led the Crown to recognise the Tūhoronuku IMA's mandate? In particular, was it influenced by the Tūhoronuku IMA's support for treating the whole of Ngāpuhi as a single large natural group?

26. Memorandum 2.5.27, p 15

27. Memorandum 2.5.16, p 2

28. Memorandum 2.5.30, p 2

29. Memorandum 2.5.38, p 1

30. Memorandum 2.5.27, pp 29–35

31. *Ibid*, pp 35–36

- ▶ Given the sustained opposition to the mandate can the Crown continue to accept the results of the 2011 mandate vote as showing significant support for the mandate?
- ▶ How and to what extent did the Crown deal with hapū and other groups in relation to the Tūhoronuku IMA's proposed mandate?
- ▶ Did the Crown seek and consider alternative models to that proposed by the Tūhoronuku IMA and were Ngāpuhi consulted on alternatives?
- ▶ Was the Crown's funding of the Tūhoronuku IMA fair and reasonable?
- ▶ Has the Crown dealt appropriately with the concerns of the Wai 2490 claimants? In particular, to what extent does the amended deed of mandate address these concerns? Are the provisions for withdrawal of the mandate fair?
- ▶ Do the Wai 2490 claimants represent the groups on whose behalf the Wai 2490 claims are made?
- ▶ To what extent can the mandating process be considered to have been open, fair and transparent enough to produce a robust and enduring mandate? What effect has the process had on whakawhanaungatanga and to what extent is the Crown culpable for any negative impacts?
- ▶ Will a settlement of historical claims be negotiated without the consent of groups on whose behalf those claims were made?
- ▶ Do any of the Crown policies, practices, actions and omissions breach principles of the Treaty of Waitangi and, if so, have the claimants been prejudiced by such breaches? How might any prejudice be remedied?³²

The Ngāpuhi mandate inquiry hearings took place at the Copthorne Hotel, Waitangi, from 1 to 5 December 2014. A further hearing was held at the Waitangi Tribunal's offices in Wellington on 4 and 5 March 2015.

1.2 THE PATH TO SETTLEMENT

All participants in this inquiry wish to proceed to settlement. At issue is when and how that should happen. Two different approaches to those questions have developed within Ngāpuhi, under different leaderships and leadership structures, and drawing on different power bases and hapū, though hapū themselves may be divided over how best to proceed.

One side of the debate within, and about, Ngāpuhi says the people should 'catch the tide now'; that the Tūhoronuku IMA is fit for purpose, has the necessary support, and is capable of reaching a settlement that will be 'robust and enduring'.³³ It offers a mechanism by which hapū are able to 'participate in and support the settlement of Ngāpuhi's claims' within a 'broader settlement model' in accordance with their tikanga.³⁴ According to this view, a 'Ngāpuhi-wide body is the appropriate vehicle for settlement because it provides a strong, united front to the Crown in negotiation' and 'ensures that complex inter-hapū cross claims can be dealt with efficiently

32. Claim 1.4.1; claim 1.4.2

33. Document A104, p 5; doc A98, p 3

34. Document A98, p 39

under one process.³⁵ A different model, we were told, would ‘cause Ngāpuhi’s complex inter-hapū relationships (and tension) to worsen, adding even further delay to reaching an enduring settlement’ and, as a consequence, would ‘exacerbate the poverty within Ngāpuhi.’³⁶

The other side of the debate insists that the vessel they are being told to board is unseaworthy and incapable of carrying them to a place where their grievances can be laid to rest and goodwill restored. They say their ancestors never willingly ceded sovereignty to the Crown and that they themselves have never given any authority to the Tūhoronuku IMA to speak on their behalf. In their view it is unthinkable that they would hand over the responsibility for the settlement of their Treaty claims to people who have no collective interest in what happened to their hapū and whose leadership they do not trust. In the words of Ngāti Hine kaumātua and chair of Te Rūnanga o Ngāti Hine, Waihoroi Shortland: ‘the mandating process is flawed. It is loaded in favour of the Crown, more likely to yield a foregone conclusion rather than a real effort to come to a fair and just settlement.’³⁷ Those who are of this view want a full investigation of their claims by the Waitangi Tribunal, seeing real value in the public recording of what happened to their tupuna and the Tribunal’s capacity to report and make recommendations.

The two sides of the argument also reflect different socio-political values. The Tūhoronuku IMA (and the Crown) rely on a one-person one-vote democratic process as demonstrating support for a mandate that has been properly recognised as reflecting the majority of Ngāpuhi individuals.³⁸ The Tūhoronuku IMA says the claimants are a ‘loud minority’ and that there will always be those who are unhappy with the outcome of a voting process.³⁹ Supporters of the Tūhoronuku IMA see it as representing the ‘modern-day demographics of Ngāpuhi’, including ‘those Ngāpuhi who are not actively engaged presently, but who stand to benefit from the settlement of past wrongs.’⁴⁰

The claimants say that the hapū, as the basic building blocks of Ngāpuhi, must decide important issues regarding the settlement of their claims. They argue that their tikanga is not one of ‘democracy’ in western terms, but that it is perfectly capable of reaching consensus by requiring participation, discussion kanohi ki te kanohi, and resolution of differences on matters of shared concern.⁴¹ They see an outcome based on a majority vote by individuals, without establishing hapū consent, as undermining their rangatiratanga, especially when the issue is the crucial one of mandate to negotiate a Treaty settlement. In their view, this is not the way forward to an enduring settlement that will empower future generations (see chapter 2).

35. Ibid, pp 39–40

36. Ibid, p 4

37. Transcript 4.1.2, p 229

38. Document A98, pp 31, 37, 3, 26 ; doc A108, p 35; submission 3.3.29, pp 25, 41, 57, 76; submission 3.3.30, pp 8, 81, 167

39. Document A98, p 32

40. Ibid, p 3

41. Document A11, p 37

There are different views also on the fairness and transparency of the process. In particular, the claimants considered that the Crown had been disingenuous in its engagement with them, having predetermined its decision to recognise the mandate. There are also different interpretations of the voting numbers by which the mandate was conferred, and some matters of detail to which we refer later in the report. First, however, we turn to Ngāpuhi themselves. Who is it that the Tūhoronuku IMA has been established to represent?

1.3 WHO ARE NGĀPUHI?

Ngāpuhi are New Zealand's largest iwi and, today, one of its poorest.⁴² The need for settlement to restore a land base and social health and create an economic platform for present and future generations is urgent. Yet the very size and complexity of Ngāpuhi means that representing their interests – the histories of Ngāpuhi hapū as well as their land and resource rights – is particularly difficult, and the challenge to the Crown to ensure that it is dealing with the right people, in the right way, is all the greater.

There are many explanations of Ngāpuhi origins and identity. Hawaiki is the starting place, and the story that underpins Ngāpuhi tells of Kupe's first arrival in the north followed by the migrations of his descendants, Ruanui and Nukutawhiti.⁴³ Over time they were joined by the peoples of other waka – Kurahaupo, Mataatua, Takitimu, Tinana, and Mahuhukiterangi – intermarrying and 'creating multiple, overlapping lines of descent'.⁴⁴ All the major tribal groupings in the north are seen as related but, to this day, Ngāpuhi do not associate with any single waka.⁴⁵

It was Rāhiri who 'consolidated and expanded the influence of the people who came to be known as Ngāpuhi'.⁴⁶ His importance is expressed in the whakataukī: 'Kotahi ano te tangata horekau i puta i a Rāhiri. He kuri' ('the only Ngāpuhi person that did not descend from Rāhiri is a dog').⁴⁷ Rāhiri is also referred to as "te tumu herenga waka" – the stake to which the multiple waka of the north are bound'.⁴⁸ It is 'the descendants of the tūpuna Rāhiri' who are described in the deed of mandate as those conferring authority upon Tūhoronuku to negotiate the settlement of all Ngāpuhi historical claims.⁴⁹ We note that the name Tūhoronuku refers to one of the most famous traditions associated with Rāhiri as a source of Ngāpuhi kawa. When his two sons fell into dispute, he had them fly a kite (called Tūhoronuku) which

42. Document A98, p9

43. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wellington: Legislation Direct, 2014), p 26

44. Ibid, p 27

45. Ibid

46. Ibid

47. Ibid

48. Ibid

49. Document A25(a), p [35]

landed at Kaikohe, establishing a division of territory between ‘equals, independent of each other but offering aid in times of need’.⁵⁰

By the nineteenth century, the core territory of these people was encircled by the maunga that form the poupou of Te Wharetapu o Ngāpuhi – Pūhanga-Tohorā, Maunganui, Tūtāmoe, Manaia, Rākau-mangamanga, Tokerau, Maungataniwha, Papata, Panguru, and Whiria – and centred on the harbours of Hokianga, Whangaroa, Pēwhairangi (Bay of Islands), Whāngārei and Mahurangi.

The inter-tribal taua of the 1820s is often credited with having brought northern hapū together under a broader ‘Ngāpuhi’ identity. In its report on stage 1 of its district inquiry, the Te Paparahi o Te Raki Tribunal noted, however, that this was ‘an external perspective’. Kin groups maintained their rivalries and separate identities.⁵¹ This pattern persisted into the 1830s when ‘wars were still conducted by autonomous but related hapū, who could act in concert or separately’.⁵² Decision-making was conducted through lengthy debates between rangatira and hapū and while ‘[p]ressure was brought to bear on those who did not want to go [to war] . . . they could not be compelled to’.⁵³ Even when groups did choose to participate in conflict alongside other groups, each remained independent and acted according to its custom and preferences.⁵⁴

Ngāpuhi played a prominent role during early contact with Europeans, dominating trade and being in the vanguard of political developments, as hapū rangatira signed He Whakaputanga in 1835 and Te Tiriti in 1840. The realities of colonisation soon began to bite however. The impacts of colonisation on Ngāpuhi are currently a subject of the Tribunal’s Te Paparahi o Te Raki inquiry and, as such, we avoid drawing any broad conclusions here. Many of these impacts are, however, covered by existing scholarship and the Crown has (in the Te Paparahi o Te Raki inquiry) conceded that Ngāpuhi suffered prejudice as a result of a number of Crown policies and practices in the colonial period. We present here a brief account of how colonisation affected Ngāpuhi.

Within five years of the Treaty being signed, war had broken out in response to economic stagnation, increasing Crown control over affairs of importance to Māori, the related undermining of chiefly mana, and the encroachment of European settlers. War pitted hapū against hapū as well as against the Crown.⁵⁵ The Crown has conceded that large-scale land alienation resulted from its confirmation of pre-1840 transactions and its own purchasing activities. Just over one million acres of land were transferred out of Māori hands by 1865.⁵⁶ The different regions held by

50. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty*, p 29; doc A25, p 5

51. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty*, p 106

52. *Ibid*, p 263

53. *Ibid*

54. *Ibid*

55. James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: Penguin Books, 1998), pp 30, 32

56. Wai 1040, Crown statement of position and concessions, 1.3.2, p 98

Ngāpuhi were affected differently: some 24 per cent of Hokianga, 45 per cent of the Bay of Islands, and 95 per cent of Mahurangi lands had been alienated by this date.⁵⁷

The Crown has also conceded that further damage was caused to Ngāpuhi economic and social health by the introduction of native land laws in 1865 and ‘in particular the award of land to individuals and enabling individuals to deal with land without reference to iwi or hapu’. This made land ‘more susceptible to partition, fragmentation and alienation’ and ‘undermined traditional tribal structures which were based on collective tribal and hapu custodianship of the land’.⁵⁸ Forty years later, only 540,000 to 550,000 acres of land remained in Māori ownership in the wider region.⁵⁹ Although again the degree of impact differed between hapū, the Crown conceded that in some districts there was already insufficient land for Māori self-maintenance.⁶⁰

Increasing Crown control over the foreshore, rivers and other freshwater resources underscored the impact of that loss, which continued well into the twentieth century as a result of land board policies, failed development schemes, rating demands and public works. Under pressure from the loss of land and resources, and from economic, cultural and political marginalisation, many Ngāpuhi moved away from their homelands – a trend which many Māori see as being deliberately fostered by Crown policies for housing, employment and Māori Affairs.⁶¹

Raniera (Sonny) Tau, then chairman of the Tūhoronuku IMA, highlighted data from the census of 2013 which showed the Ngāpuhi population resident in New Zealand today numbers 125,601, or 18.8 per cent of the overall resident Māori population. They are a young population, 35.4 per cent being under the age of 15 years. And they are now a dispersed people. The census showed that only 19.9 per cent of Ngāpuhi (in New Zealand) were living in Northland, while 40.3 per cent now reside in Auckland (where some whānau have been living for several generations). Waikato and Bay of Plenty also have Ngāpuhi populations (accounting for 10.7 and 6.4 per cent, respectively) and there are sizeable communities in Australia. (The number now living overseas is unknown but believed to be substantial.) They are also an impoverished people. Mr Tau cited some shocking statistics of income, employment, housing, access to social services – and imprisonment. He drew our attention to the results of the recent census, which shows that:

- ▶ 35.4 per cent of Ngāpuhi members live in a single parent family;
- ▶ The median annual income for Ngāpuhi adults is \$21,700, well below the national average for adult New Zealanders of \$28,500;
- ▶ Some 47.5 per cent of Ngāpuhi earn \$20,000 or less per annum;
- ▶ Unemployment among Ngāpuhi aged 15 to 24 is 30.7 per cent;
- ▶ Some 33.5 per cent of Ngāpuhi receive income support as a source of income;

57. Wai 1040, Crown statement of position and concessions, 1.3.2, p 99

58. Ibid, pp 108–9

59. Ibid, pp 126–7

60. Ibid, p 131

61. Transcript 4.1.2, pp 125–126; see also Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p 4

- ▶ Only 68.3 per cent of Ngāpuhi aged 15 years and over hold a formal educational qualification;
- ▶ Some 55.5 per cent of Ngāpuhi live in rental accommodation; and
- ▶ Of Ngāpuhi over the age of 15, some 32.3 per cent smoke cigarettes regularly.⁶²

We were also told that Ngāpuhi are ‘fiercely loyal to our whanāu and hapū’ and that the ‘strength of the hapū within Ngāpuhi is . . . famous.’⁶³ Hapū rangatiratanga is a very important dynamic of the iwi, captured in the traditional pepeha ‘Ngāpuhi kōwhao rau’ (Ngāpuhi of a hundred holes). The late Erima Henare, kaumātua of Ngāti Hine, drew upon Professor Patu Hohepa’s explanation that the pepeha refers to ‘the strength of hapu autonomy within the maximal group Ngapuhi’. Mr Henare went on to note that it is ‘established tikanga based on whanaungatanga that hapu choose to unite and confederate of their own accord.’⁶⁴ Decision-making was always at a hapū level and this continues to be the case if tikanga is followed. He told us that ‘there was never an occasion where a decision affecting the hapu was not made by either the rangatira of the hapu at that time, or the hapu as a whole’. Further, ‘on every occasion where a decision was made without our consent, agreement or support there was resistance, opposition and often conflict.’⁶⁵ Being part of the wider Ngāpuhi collective was at the discretion of the hapū and the collective iwi cannot speak for individual hapū without their sanction.⁶⁶ Thus, ‘Ngāpuhi only exists when the hapu allow it to exist.’⁶⁷ Other claimants and their counsel spoke in a similar vein.⁶⁸ It was made clear to this Tribunal that just as there is no single waka, there is no single ancestral maunga and no tradition of a single ariki. Nor can Ngāpuhi be viewed as a confederation of iwi like Te Arawa.

There are numerous hapū. The Tūhoronuku IMA’s original deed of mandate (produced in 2012) suggested there could be in excess of 300 hapū.⁶⁹ At the time of this Tribunal’s hearings, the amended deed of mandate listed 110 hapū whose claims will be settled by the proposed negotiations. Questions have been raised about whether the list is comprehensive, and the extent to which it reflects distinct and extant communities today; but even the lower figure of 80 active hapū cited in Mr Tau’s brief of evidence (although hotly disputed by some groups who find that they are considered to no longer exist) is considerable.⁷⁰ Many members of Ngāpuhi now live away from the whenua and their traditional community, but hapū have an enduring relevance. This was acknowledged by Mr Tau who told us that ‘the role of hapū had been central throughout this [mandating] process.’⁷¹ The requirement for

62. Document A98, pp 8–9; doc A98(a), p 79

63. Document A98, pp 5–6

64. Document A64, pp 11–12

65. Ibid, pp 8–9

66. Submission 3.3.10, p 14

67. Ibid, p 14

68. Document A77, p 11; doc A63, p 7; doc A81, pp 6–7

69. Document A25(a), pp [37], [44]

70. Document A98, p 8; submission 3.3.25, pp 5–6

71. Document A98, p 10

strong hapū participation was also accepted in Crown submissions and in a number of the Crown policy documents and actions brought to our attention.⁷²

Whether those steps involving hapū went far enough is a key question to be answered in this inquiry. One of the underlying issues derives from the demographic circumstances described above: the role and responsibilities of the 19.9 per cent of Ngāpuhi (the hau kāinga) who continue to live under the sheltering poupou of the maunga of Te Whare Tapu as opposed to the rights of those who live outside. Questioned on this point, the claimants argued that the hau kāinga or home people have a crucial role in terms of Ngāpuhi tikanga. They are the embodiment of their hapū histories; they are the ahi kā; they are the ‘torchlight for those who are seeking illumination in the dark’.⁷³ Hapū have taken steps to maintain connections, assisted by modern telecommunications and social media and, in one case, a marae had been specially built in Auckland for their hapū members, but, we were told, the centre of decision-making for hapū had to be the home marae. This view was expressed as: ‘the ahi kā the whakapapa is with us, the marae is with us, the whenua is with us . . . so you come back and you huihui with us, korero with us’.⁷⁴ Without their consent, the claimants said, the Tūhoronuku IMA can have no authority to speak on behalf of the hapū.

1.4 THE PARTIES TO THIS INQUIRY

1.4.1 The claimants and their claims

The claims in this inquiry are made on behalf of a range of groups, most of whom are hapū or hapū collectives who share descent lines from the Ngāpuhi ancestors. They can demonstrate a long, well-documented tradition of autonomous decision-making and leadership and, in some instances, the capability to stand alone as an iwi if they so choose. They maintain that in alliance with other hapū – those with whom they have a history of relationship through whakapapa, contiguity and history – they can also satisfy the Crown’s ‘large natural group’ policy, discussed below. The collective named Te Kotahitanga has emerged over the course of the hearings before the Waitangi Tribunal in its Te Paparahi o Te Raki district-wide inquiry and the contemporaneous mandating process as leading the opposition to the Tūhoronuku IMA. It is, however, only one of a number of claimant parties.

The claimants also include Ngā Taurira Tawhito o Hato Petera (Ngā Taurira), a group of former pupils of Hato Petera College. As mentioned earlier, Ngā Taurira’s claim has been included within the scope of the Tūhoronuku IMA’s mandate although theirs is not a Ngāpuhi issue. Ngā Taurira opposes the settlement of their claim through negotiations between the Tūhoronuku IMA and Ngāpuhi in relation to those of its members who happen to be Ngāpuhi.

72. Submission 3.3.10, pp 129–133; doc A108, pp 74–75, 114; doc A108(a), p 276; doc A108(a), pp 394, 407; doc A108(a), pp 455, 465–466

73. Transcript 4.1.2, pp 366

74. Ibid, p 392

These different groups are drawn from all regions within the core Ngāpuhi rohe. They all oppose the Crown's recognition of the Tūhoronuku IMA as the organisation that will conduct negotiations for the settlement of all Treaty claims in the region, including their own.

The named claimants are as follows:

- ▶ Wai 2341, the Ngāpuhi (Taylor, Mataroria-Legg, Kingi and others) Settlement claim;
- ▶ Wai 2429, the Ngāti Hine Tūhoronuku Deed of Mandate claim;
- ▶ Wai 2431, the Te Kapotai Tūhoronuku Deed of Mandate claim;
- ▶ Wai 2433, the Te Waiariki, Ngāti Korora, Ngāti Taka Pari Tūhoronuku Deed of Mandate claim;
- ▶ Wai 2434, the Ngāti Torehina ki Matakā Tūhoronuku Deed of Mandate claim;
- ▶ Wai 2435, the Tūhoronuku Deed of Mandate (Harris, Taniwha, Kingi and Te Tana) claim;
- ▶ Wai 2436, the Tūhoronuku Deed of Mandate (Theodore, Porter, Nehua and Hotere) claim;
- ▶ Wai 2437, the Ngāti Manu Tūhoronuku Deed of Mandate claim;
- ▶ Wai 2438, the Ngāti Kahu o Torongāre me Te Parawhau Tūhoronuku Deed of Mandate claim;
- ▶ Wai 2440, the Ngāti Taimanawaiti Tūhoronuku Deed of Mandate claim;
- ▶ Wai 2442, the Ngā Tauira Tawhito o Hato Petera Tūhoronuku Deed of Mandate claim;
- ▶ Wai 2443, the Tūhoronuku Deed of Mandate (Engā Harris, Reihana, Porter, Egen and Te Tuhi) claim;
- ▶ Wai 2483, the Ngāti Kuta and Patukeha Tūhoronuku Deed of Mandate claim;
- ▶ Wai 2487, the Ngā Hapū o Te Hikitu Tūhoronuku Deed of Mandate claim;
- ▶ Wai 2488, the Waimate Taimai ki Kaikohe Tūhoronuku deed of Mandate claim; and
- ▶ Wai 2489, the Patuharakeke te Iwi Tūhoronuku Deed of Mandate claim.

The Wai 2440 claim was withdrawn from the inquiry on 26 November 2014.⁷⁵ The Wai 2487 claimants advised the Tribunal on 1 April 2015 that their inability to secure legal aid in a timely fashion had prevented them from taking an active part in the inquiry.⁷⁶

At the heart of the claimants' case is the protection of hapū rangatiratanga.⁷⁷ They allege that the Crown is attempting to transform the Ngāpuhi political structure to achieve a settlement outcome that is more to do with its policy preferences than those of Ngāpuhi.⁷⁸ They argue that this is a 'breach of the Crown's obligation to actively protect the hapū of Ngāpuhi to the fullest extent practicable in possession

75. Memorandum 2.5.49, p 1

76. Memorandum 3.4.62

77. Submission 3.3.28, p 2

78. Submission 3.3.20, pp 2, 25–26

and control of their ongoing distinctive existence as a people albeit adapting as time passes.⁷⁹

There are two major themes in this allegation. The first is that hapū have been denied the right to reach decisions according to their own tikanga during the mandating process. In particular, they have been presented with only one option, in which hapū rangatiratanga must be expressed through the Tūhoronuku IMA 'beneath the blanket of a single tribal mandate.'⁸⁰ The claimants see their refusal to endorse this approach as a legitimate expression of autonomy, not of disunity; indeed, in their view, it is the Crown's insistence that they accept this model that is damaging relations between whanaunga and distorting the relationship between the leadership and the community which underpins hapū rangatiratanga.⁸¹ Many decisions on the part of the Crown are alleged to have contributed to this situation, including (but not confined to):

- ▶ its erroneous application of the 'large natural groups' policy to the whole of Ngāpuhi when a more flexible approach is required, especially when other smaller and less diverse iwi have been permitted to organise themselves on regional lines and provide mandates for their negotiation of Treaty claims;
- ▶ a series of funding decisions which unfairly assisted the Tūhoronuku IMA to gain its mandate, predetermining that result;
- ▶ flawed assessments of the Tūhoronuku IMA's support and accountability and endorsement of a process which denied Ngāpuhi real options; and
- ▶ poor oversight of information hui, and failure to take proper account of the submissions process.⁸²

The other major theme within the claimants' overall argument concerns the outcome of the mandating process. They say the opposition to the structure and purpose of the Tūhoronuku IMA is widespread and significant, and remains so despite the Crown's efforts at facilitation and amendment to the deed of mandate.⁸³ This, they insist, is not a case of a few dissentients or 'fringe dwellers' and is unprecedented in the recent history of settlement negotiations.⁸⁴ The claimants say they have never authorised the Tūhoronuku IMA to carry the mana of their tūpuna. Yet they find themselves included in its mandate without their consent, despite repeated representations to both Tūhoronuku and the Crown, and requests to have their hapū names removed from the deed of mandate.⁸⁵

The claimants have three principal concerns in this context:

- ▶ There is insufficient provision for effective hapū representation; their support for a 'comprehensive settlement' has been misinterpreted and subsumed to the Crown's preference for a single settlement.⁸⁶

79. Submission 3.3.28, p 9

80. Ibid, p 10

81. Submission 3.3.20, pp 76–77; submission 3.3.28, pp 10–11

82. Submissions 3.3.20, pp 6–7, 12, 15–16, 19, 41, 49–51

83. Submission 3.3.25, pp 4–7

84. Transcript 4.1.1, p 213

85. Submission 3.3.20, pp 38–40; see also submission 3.3.25, pp 5–6.

86. Document A108, pp 60–61, 65–66; doc A130, pp 14–15

- ▶ The processes by which hapū kaikōrero are appointed and replaced are flawed, with the result that some hapū find themselves involved in the negotiations led by the Tūhoronuku IMA against their express wishes and contrary to the decisions reached according to established tikanga.⁸⁷
- ▶ There is no workable mechanism for hapū to withdraw from the Tūhoronuku IMA. As it stands only the Ngāpuhi claimant community as a whole can withdraw the Tūhoronuku IMA's mandate.⁸⁸

The claimants consider these defects in the structure of the mandated entity to amount to a breach of the Crown's obligations under the Treaty of Waitangi to protect hapū rangatiratanga. They allege that they are likely to suffer significant and irreversible prejudice should the Crown proceed to conduct negotiations with the Tūhoronuku IMA in its current form.

1.4.2 The Crown

The Crown considers that it has acted in accordance with Treaty principles at each stage of the mandating process. It was for Ngāpuhi to decide how that process would be run. It was open to the Crown to recognise that a mandate had been given to the Tūhoronuku IMA. The Crown considers that the process has been fair and that it made a 'careful, well-considered decision based on comprehensive advice'.⁸⁹ It believes that there is broad support within Ngāpuhi for a Ngāpuhi-wide settlement and significant support for the Tūhoronuku IMA. Not only did that entity receive 76 per cent approval from those who voted – a level of support that falls within the range of mandates accepted by the Crown – but many hapū have filed submissions in its support and have appointed hapū kaikōrero.⁹⁰

In the Crown's view, its actions leading to the recognition of the Tūhoronuku mandate were fair and reasonable. In particular, the Crown submitted that:

- ▶ it provided a reasonable level of funding that was necessary to get a mandating process going;⁹¹
- ▶ the level of funding provided was not unusual and does not show predetermination of outcome.⁹²
- ▶ it actively engaged with opponents to Tūhoronuku's mandating process over a period of three years;⁹³
- ▶ this engagement was at a senior level and involved both the Minister for Treaty of Waitangi Negotiations and the Minister of Māori Affairs;⁹⁴

87. Document A108, pp 60–61, 65–66; submission 3.3.15, pp 15–22

88. Document A108, pp 60–61, 65–66; submission 3.3.28, pp 16–17

89. Submission 3.3.30, p 6

90. Ibid, pp 81–85

91. Ibid, pp 156–157

92. Ibid, pp 154–162

93. Ibid, pp 10, 19–48

94. Ibid, pp 7, 49

1.4.3

- ▶ Ministers carefully considered the concerns of those opposed to the Tūhoronuku mandate and, following requests from the Crown, significant changes to the proposed mandate body were made;⁹⁵
- ▶ it proactively encouraged facilitation between Tūhoronuku and those opposing the Tūhoronuku mandate;⁹⁶
- ▶ it chose not to rush the mandating process or its decision and delayed the process to allow facilitation to occur;⁹⁷ and
- ▶ the Ministers' decision regarding the mandate followed substantial advice that canvassed all realistic options.⁹⁸

The Crown argued that the concerns of those groups who oppose the Tūhoronuku IMA have been addressed and ought to have been satisfied by the many changes made to its structure and processes for appointing and removing representatives.⁹⁹ There is adequate representation for all Ngāpuhi, including hapū.¹⁰⁰ Finally, the Crown questioned whether those bringing the claims in this inquiry can be shown to represent the majority of their hapū.¹⁰¹

1.4.3 The interested parties

There were over 70 interested parties in this inquiry. Most of these supported the claimants. A full list of interested parties is appended to this report. Only some of the interested parties took an active part in the inquiry. The Tūhoronuku IMA took part as an interested party opposing the claimants. It argued that the claimants represented nothing more than a vocal minority within Ngāpuhi who seek to impose their own vision of settlement upon Ngāpuhi katoa.¹⁰² A number of hapū who support the Tūhoronuku IMA also took part in the inquiry in opposition to the claimants. They argued that their rangatiratanga was as important a consideration for this Tribunal as that of claimant hapū. As such, the Tribunal should avoid recommending anything that would cause further delays, extra costs, and uncertainty in relation to their ability to enter settlement negotiations.¹⁰³

The Whatitiri Māori Reserve Trust took part in the inquiry as an interested party in support of the claimants. The Trust submitted that although its claim was included within the scope of the Tūhoronuku IMA's mandate, that entity lacked any mechanism through which the Trust or any similar group could engage in the negotiations process. This has the effect of excluding the Trust and other similar groups from the process of settling their claims.¹⁰⁴

95. Submission 3.3.30, pp 7, 10, 19, 44, 52–58

96. Ibid, pp 7, 10, 19, 43, 49–50

97. Ibid, pp 7, 10, 19, 44, 50–52

98. Ibid, pp 6, 7, 10, 19, 43, 44, 58–60

99. Ibid, p 52

100. Ibid, p 91

101. Ibid, pp 174–211

102. Submission 3.3.29, p 3

103. Submission 3.3.31, pp 5–6

104. Submission 3.3.17, pp 2–3

1.5 WHAT ARE THE FUNDAMENTAL ISSUES?

The task faced by this Tribunal is not a simple one. The Crown emphasised in its submissions, and previous Tribunals have acknowledged, that claims concerning mandate disputes are complex and, while aimed at the Crown, can disguise disputes that have arisen within an iwi. The Tribunal's purpose is to inquire and report on claims made against the Crown, not to be a forum for pursuing disputes between closely related kin groups. We discuss this more fully in the following chapter. It will suffice here to note that the Tribunal must act with caution, intervening only if the Crown has made clear errors of process, misapplied tikanga, or acted with apparent irrationality.¹⁰⁵

Much of the evidence we received from the parties focussed on the Crown's involvement in the lengthy mandating process. The claimants alleged that the Crown had predetermined the outcome of that process when it recognised the mandate of an entity it had funded and aided throughout. We consider, however, that the challenge posed by any mandating process for Ngāpuhi with its large and dispersed population would have required a level of Crown funding simply to get going, let alone succeed. Nor was the Crown's funding of Tūhoronuku assured at any stage – funds were provided retrospectively on a case-by-case basis and, for most of the mandating process, Tūhoronuku was not Crown funded. We also accept that it is inherently difficult for the Crown to fund competing mandating processes without inviting accusations of causing divisions within Ngāpuhi and undermining leadership. And, as the Te Arawa Tribunal stated, it is the Crown's right to make decisions regarding public expenditure and the resourcing of Treaty settlements.¹⁰⁶

The claimants also submitted that the Crown had prevented Ngāpuhi hapū from considering alternative mandate proposals to that put forward by Tūhoronuku. We do not agree. Alternative mandate options were developed through facilitated discussions between Tūhoronuku and Te Kotahitanga. The agreement which underpinned those discussions made clear the need for the parties to agree to the dissemination of any options developed. No such agreement was reached.¹⁰⁷ The Crown could have risked accusations of undue interference and a lack of good faith had it sought to ignore the terms of engagement between Tūhoronuku and Te Kotahitanga and take the options developed out to Ngāpuhi.

There are also unresolved – and perhaps unresolvable – issues about what happened in particular hui and meetings. We are satisfied, however, that the Crown did much that was right, making genuine attempts to comply with guidelines suggested by the Waitangi Tribunal in its earlier reports on mandating processes. Certainly the Crown was clear in its preference to negotiate a Ngāpuhi-wide settlement and Tūhoronuku sought a mandate to lead such a negotiation. But this does not mean

105. Submission 3.3.30, p 6; see also Waitangi Tribunal, *The Pakakohe and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), pp 56–57; Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p 93; Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 70; Waitangi Tribunal, *The East Coast Settlement Report* (Wellington: Legislation Direct, 2010), p 44

106. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua*, p 71

107. Document A26(a), p 200; doc A108, pp 40–44; doc A98, p 18

the Crown's decision to recognise the mandate secured by the Tūhoronuku IMA was predetermined.

The commonly recognised administrative law test for pre-determination, as stated by Justice Richardson in *CREEDNZ v Governor-General*,¹⁰⁸ is that it must be shown on the balance of probabilities that the decision maker was not open to persuasion and was merely going through the motions when addressing the criteria relevant to their decision.¹⁰⁹ But, there will have been no pre-determination where the evidence 'fall[s] short of showing closed minds'.¹¹⁰

Our analysis of the lengthy process that resulted in the Crown's decision to recognise the Tūhoronuku IMA's mandate has satisfied us that the Crown did not pre-determine that decision. We are persuaded by the Crown's submissions on this point. Briefly, the Crown submitted that:

- ▶ the Minister for Treaty of Waitangi Negotiations and the Minister of Māori Affairs kept open minds throughout the process leading to their mandate recognition decision;
- ▶ the Ministers genuinely considered the advice given to them; they did not 'rubberstamp' the advice;
- ▶ the Ministers may have formed prior views, but that is entirely acceptable in the circumstances and does not mean the Ministers predetermined their decision; and
- ▶ Crown funding of Tūhoronuku does not mean the Ministers' decision was pre-determined.¹¹¹

We are satisfied that all involved (the Tūhoronuku IMA, the claimants before us, and the Crown) made a considerable effort to meet the expressed desire of Ngāpuhi to move together to settlement in the challenging circumstances caused by a large dispersed population and different approaches to that goal. We consider that the Crown's involvement in the mandating process was typified by regular, genuine, and high-level engagement over many years. There is ample evidence of the parties having engaged in good faith and of making genuine efforts to accommodate differences.

That being said, we do not accept the Crown's contention that its role in this particular mandating process was limited. The evidence shows that the Crown had considerable influence, both directly, in insisting on changes to the deed of mandate, and indirectly, because of its known policy preference to deal with large natural groups of Treaty claimants. And while it is clear that claimant communities should be in charge of the mandating process, that does not diminish the Crown's Treaty responsibilities to all involved. As will be seen, we agree with the claimants' argument that, when the issue is a mandate to negotiate the settlement of claims brought by and on behalf of Ngāpuhi hapū, the Crown's primary Treaty duty is to protect those hapū. And we agree, as the Crown argued, that there is also a

108. *CREEDNZ v Governor-General* [1982] 2 NZLR 172 at 194

109. Submission 3.3.29, p 27; submission 3.3.30, p 99

110. Submission 3.3.29, p 27, citing Richardson J in *CREEDNZ v Governor-General* [1982] 2 NZLR 172 at 179

111. Submission 3.3.30, p 100

responsibility to ensure that all Ngāpuhi have an opportunity to be involved, a challenging task given the modern reality of a dispersed Ngāpuhi population.

We also note that one of the Crown's primary submissions about the mandating process was that its outcome – the Tūhoronuku IMA – provides adequate representation and accountability for all Ngāpuhi, including hapū. It is, the Crown said, a structure populated by the people and hapū of Ngāpuhi.¹¹² In other words, the mandating process for Ngāpuhi has resulted, in the Crown's view, in an entity that addresses the concerns expressed by claimants. The claimants dispute this, arguing that the Tūhoronuku IMA is not representative of hapū and, in fact, undermines their rangatiratanga (see chapter 3). It is our view that any remaining problems with the mandating process are evident in its outcome, namely, the structure and processes of the Tūhoronuku IMA. We therefore concentrate our efforts on an analysis of that outcome, examining aspects of the mandating process that have a direct bearing upon it. The questions we will consider are:

- ▶ How does the Tūhoronuku IMA represent hapū and other Ngāpuhi interests?
- ▶ Does the Tūhoronuku IMA protect the ability of hapū to exercise rangatiratanga?

112. Ibid, p 8, 10, 92, 96, 224

CHAPTER 2

TREATY PRINCIPLES AND STANDARDS

2.1 INTRODUCTION

In this chapter, we discuss the principles and standards that we apply to the Crown's conduct in the circumstances of this inquiry. First, we set out the jurisdiction of the Waitangi Tribunal, and outline the Treaty principles that previous Tribunals have relied on in mandating process inquiries.

2.2 THE TRIBUNAL'S JURISDICTION

Section 6 of the Treaty of Waitangi Act 1975 provides that any Māori may make a claim to the Waitangi Tribunal that they have been, or are likely to be, prejudicially affected by any legislation, policies, or practices of the Crown that are inconsistent with the principles of the Treaty. If, on inquiry, the Tribunal finds that a claim is well-founded, it may recommend to the Crown ways to compensate for or to remove the prejudice, or to prevent others from being similarly affected in the future. In making recommendations, the Tribunal must have regard 'to all the circumstances of the case'.¹

The context for the Tribunal's task is set out in the long title to the Treaty of Waitangi Act 1975, which states that the Act's purpose is:

to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.²

In this inquiry the 'practical application of the Treaty' is especially relevant. We are considering how the Crown can ensure that its recognition of a body with whom it will negotiate the settlement of Ngāpuhi claims is appropriate. The purpose of such settlement is to restore the relationships established by the Treaty.³

1. Treaty of Waitangi Act 1975, s6(3)

2. Treaty of Waitangi Act 1975

3. Office of Treaty Settlements, *Ka Tika ā Muri, ka Tika ā Mua/Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 2004), pp 4, 28, 31; see also Waitangi Tribunal, *The Te Arawa Settlement Process Reports* (Wellington: Legislation Direct, 2007), p195

2.3 PREVIOUS MANDATE INQUIRIES

The Crown's recognition of a mandate is a fundamental step towards the settlement of Treaty claims. As the Crown's guide to the settlement negotiation process notes:

Many of the grievances of the past relate to agreements made between Māori and the Crown, where the Crown dealt with people who did not have the authority to make agreements on behalf of the affected community. A strong mandate protects all the parties to the settlement process: the Crown, the mandated representatives and the claimant group that is represented.⁴

It is fundamental to the durability and fairness of any settlement that it is negotiated between the Crown and the accepted representatives of the group whose claims are to be settled. A mandating process is the means through which prospective representatives of claimant groups secure the proof of their authority and ability to negotiate with the Crown on behalf of those groups. The Crown's recognition of a mandate confirms that those prospective representatives have provided this proof.

The Crown's decision to recognise a mandate is vitally important because the goal of the settlement process is to restore the relationships established by the Treaty, through durable, full and final, settlements that remove the sense of grievance.⁵ Claimant communities must have confidence in those who represent them in settlement negotiations if they are to accept that the settlement of their claims is fair. The importance of the Crown's decision means it is appropriately made at the most senior level, by Ministers of the Crown.

The Waitangi Tribunal has previously conducted urgent inquiries into the Crown's actions in recognising mandates for claimant communities in Taranaki in *The Pakakohi and Tangahoe Settlement Claims Report* (2000), the Central North Island in successive Te Arawa reports (2004, 2005, 2007), and the East Coast in *The East Coast Settlement Report* (2010). Each Tribunal panel faced different circumstances and, as a result, examined to varying degrees the Crown's role in mandating processes and the character and extent of opposition to the recognition of a mandate.

It is clear there is no one-size-fits-all formula for Treaty compliance in mandating processes. In large part this is because, in the words of the Tāmaki Makaurau Settlement Process Tribunal:

Māori groups are not the same, and groups of Māori groups that together occupy different areas of the country, are definitely not the same. Each region has its own special features as a result of the combinations of people whose rohe is there. Add

4. Office of Treaty Settlements, *Ka Tika ā Muri, ka Tika ā Mua/Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, p 44

5. *Ibid*, pp 4, 28, 31

regional differences arising from factors such as settlement patterns and urbanisation, and you have sets of variables that cry out for tailored responses.⁶

Yet, the earlier Tribunal inquiries have provided guidance on the general nature of the Crown's role in mandating processes, as we now outline.

2.3.1 *The Pakakohi and Tangahoe Settlement Claims Report (2000)*

The earliest Tribunal mandate inquiry examined the situation of two Taranaki hapū, Pakakohi and Tangahoe, which sought to exclude themselves from the Ngāti Ruanui Treaty settlement. The Tribunal considered that the principles relevant to the groups' complaints were 'those guaranteeing rangatiratanga to Māori groups in the conduct of their own affairs, requiring the Crown and Māori to act reasonably and with absolute good faith towards one another, and enjoining the creation of fresh grievances from the treatment of historical claims'.⁷

In assessing Crown action, the Tribunal emphasised that any exercise of kawana-tanga by the Crown was constrained by respect for rangatiratanga. In determining its priorities for negotiations, the Crown must therefore provide for hapū and iwi to exercise their tino rangatiratanga in settling their claims. This required the Crown to consider possibilities for alternative processes for particular groups if their circumstances called for this.⁸ The Tribunal concluded: 'To attain true reciprocity, there must be consultation and negotiation in practice as well as in name, and flexibility in the application of policies where shown to be strictly necessary.'⁹

The Tribunal also, however, expressed the need for caution. As noted in chapter 1, it emphasised that its jurisdiction, to inquire into the actions of the Crown only, meant it must 'tread very carefully' when assessing the focus of claims that challenge a mandate.¹⁰ This was because '[a]lthough the claims are technically aimed at the Crown, they mask what is essentially an internal dispute between closely related kin groups as to which organisation at which level speaks for them. The Tribunal was not established to deal with these categories of dispute.'¹¹ The Tribunal sympathised with the Crown's policy of settling with large natural groups.¹² It also acknowledged that it could not simply substitute its own view of matters for the Crown's, nor second-guess political decisions on mandate recognition.¹³

The Tribunal considered that it could only intervene in the event of error in process, misapplication of tikanga or apparent irrationality. It thus set itself a high threshold, in the form of a series of tests, to determine whether claimants were

6. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 13

7. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p 55

8. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 71

9. Ibid

10. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report*, pp 55–56

11. Ibid, pp 55

12. Ibid, p 65

13. Ibid, pp 56–57

distinct cultural and political groups, with distinct claims, and, if so, whether the evidence demanded further investigation of the Crown's decision-making process. The Tribunal, in other words, needed to satisfy itself that groups seeking to exclude themselves from a settlement process were credible in tikanga terms and were not merely a 'dissenting minority'.¹⁴ Although the Tribunal found against the claimants in this case, it did consider that the distinct traditions of these two hapū should be accommodated within any final deed of settlement.

2.3.2 The Te Arawa mandate reports (2004, 2005, 2007)

In a series of reports on the Te Arawa mandate and settlement process the Tribunal reiterated that the Treaty principles applicable remained those of reciprocity, partnership, active protection, equity and equal treatment. Elaborating on what these principles required of the Crown in the circumstances of mandate claims, the Tribunal considered that it is the Crown's duty during the mandating process to act honourably and with the utmost good faith, fairly and impartially, actively to protect all Māori interests, to consult, and to avoid errors in process, the misapplication of tikanga Māori and irrationality.¹⁵

Complex circumstances confronted the Tribunal in examining mandate issues in Te Arawa. The Tribunal's initial inquiry looked at a dispute over the Crown's recognition of a mandated entity to negotiate a single settlement of the Treaty claims of all of Te Arawa's confederation of hapū and iwi. Although the Tribunal saw flaws in the mandating process, it did not recommend that the process start again since most of Te Arawa's constituent hapū and iwi wanted to continue towards settlement and the terms of negotiation were unsigned.¹⁶ It instead suggested that hapū and iwi representatives 'reconfirm' the mandated body (the executive council) to resolve issues over its representivity and accountability.¹⁷

When the inquiry resumed in 2005, the Tribunal observed that the Minister had since recognised the withdrawal of several Te Arawa hapū and iwi from the mandated body, while several other hapū and iwi continued to dispute their inclusion in the deed of mandate.¹⁸ The Te Arawa Tribunal therefore assessed whether these hapū or iwi should be able to withdraw from the deed of mandate.

The Tribunal observed that there were clear differences between the situation before it, where nearly half of Te Arawa now stood outside the mandating process, and the minimal opposition represented by the Pakakohi and Tangahoe claimants.¹⁹ The Tribunal considered that for the Crown to negotiate with little over half of Te Arawa, while effectively side-lining other groups and maintaining that this constituted a 'Te Arawa settlement negotiation', would be inconsistent with Treaty principles.²⁰ The Tribunal therefore suggested that the Crown negotiate Te Arawa's

14. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report*, p 58

15. Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, p 37

16. Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p 112

17. *Ibid*, p 113

18. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua*, pp 98–99

19. *Ibid*, p 108

20. *Ibid*, p 109

historical claims concurrently with more than one mandated group – a suggestion that involved a flexible and practical exercise of the Crown’s large natural groups policy.²¹ Further, all hapū would ‘need to be given the opportunity to properly and formally confirm their support or otherwise for the mandate of the executive council’.²²

In 2007 the Te Arawa Tribunal returned again to the issue of mandate. The Crown had not required the mandated body to amend its trust deed in line with the Tribunal’s previous suggestions. The Crown argued that it did not control the executive council; that the Tribunal’s suggestion clashed with the large natural groups policy; and that the claimants were merely individuals without hapū support.²³ The Tribunal reiterated that hapū ‘should have had the opportunity to confirm or withdraw their support’ from the mandate. It considered that the Crown’s actions, in refusing to allow hapū to decide whether or not to withdraw from the mandate suggested, at worst, that officials were ‘seriously concerned that support for the [executive council’s] mandate might haemorrhage if individual hapū were finally given the opportunity to affirm or withdraw their support’ for the group claiming to represent them.²⁴ The Tribunal found the Crown to have breached the principles of partnership, equity and equal treatment by not requiring the executive council to amend its trust deed.²⁵

In essence, the Tribunal concluded that hapū needed the opportunity to affirm or withdraw their support. This reconfirmation was required for communities to exercise their rangatiratanga, and should have taken place, in accordance with tikanga, at a hui-a-hapū. Only in this way, would the Crown finally gain ‘an accurate assessment of the level of hapū support enjoyed by the claimants’, and so be in a position to continue to recognise the mandate on a sounder basis. On this point the Tribunal noted that: ‘At present, no one really knows how the numbers within each hapū stack up.’ It went on to remind the Crown that the ability for hapū to withdraw from a mandate did not dictate that they would withdraw.²⁶

The Tribunal’s overall assessment was that: ‘Robust and transparent mandating is the critical factor.’ The Tribunal did not consider that the Crown had allowed for this. Instead, the Tribunal considered: ‘From allegedly murky beginnings, the initial structure has now locked in groups, possibly against their will, and at the least against the will of the claimants’.²⁷

2.3.3 The East Coast Settlement Report (2010)

The East Coast Settlement Tribunal considered claims by claimants who asserted their independence of the iwi, Ngāti Porou, that was entering settlement negotiations on their behalf. The Tribunal concluded that the claimants before it had been

21. Ibid

22. Ibid, p 111

23. Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, p 187

24. Ibid

25. Ibid, p 191

26. Ibid, pp 188–189

27. Ibid, p 188

unable to demonstrate strong evidence of support. However, the Tribunal did not give ‘a blanket endorsement for the Crown to extinguish historical claims against claimants’ will.’²⁸ Rather, it affirmed the need for the Crown to ‘be mindful of how much support lies behind a particular claim if those who submitted it are unwilling to have it extinguished.’²⁹ The East Coast Tribunal emphasised that it is necessary for the Crown to know: ‘Do the claimants represent a small dissident minority, or do they have substantial support behind them? To put it simply, numbers matter.’³⁰

For the East Coast Tribunal the nub of the matter in determining where the people’s preferences lay was that opponents to the mandate had little coherent community support: no one marae and no one hapū supported them.³¹ Opponents to the mandate were ‘unable to carry the day at any of the individual marae votes.’³² In other words, no one community clearly opposed the mandate. Endorsing the principle that the Crown is within its rights to extinguish a claim without the permission of a ‘small minority’ of individual claimants where it is clearly following the wishes of the majority of the community, the Tribunal found against the claimants.³³

The Tribunal then considered whether the claimants should be able to stand apart from the Ngāti Porou settlement process should they wish to. However, it saw this option as being at odds with the Crown’s desire for comprehensive settlements and reasoned that those standing apart would effectively relinquish their assets to other groups, resulting in litigation that could prevent the progress of settlement. Further, such a recommendation would allow ‘individual claimants to hold iwi to ransom.’³⁴

2.4 TREATY PRINCIPLES RELEVANT TO THIS INQUIRY

There is a high threshold for Tribunal intervention in matters of mandate but this does not mean that the Crown can avoid its Treaty responsibilities. The mandating process is a claimant-led process. There is comparatively little Crown action involved. The key Crown decision, whether or not to recognise a mandate, is political but is of fundamental importance to the Treaty settlement process.

The overarching aim of settlement is to restore the Treaty relationship which is one of partnership.³⁵ The principle of partnership is inherent in the Treaty exchange – the cession of kāwanatanga for the recognition of tino rangatiratanga. This exchange established ‘the rights of the Crown and Māori to exercise authority in their respective spheres.’³⁶ In the words of Justice Cooke in the Court of Appeal, this reciprocal relationship requires the Treaty partners:

28. Waitangi Tribunal, *The East Coast Settlement Report* (Wellington: Legislation Direct, 2010), pp 49–50

29. *Ibid*, p 50

30. *Ibid*, p 61

31. *Ibid*, p 35

32. *Ibid*, p 63

33. *Ibid*, pp 64, 49

34. *Ibid*, p 65

35. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua*, p 71

36. Waitangi Tribunal, *Whaia Te Mana Motuhake: In Pursuit of Mana Motuhake. Report on the Māori Community Development Act Claim* (Wellington: Legislation Direct, 2014), 26

each to act towards the other reasonably and with the utmost good faith. The relationship between the Treaty partners creates duties analogous to fiduciary duties. The duty of the Crown is not merely passive but extends to active protection of the Maori people in the use of their lands and waters to the fullest extent practicable.³⁷

Precisely what the Crown must do to carry out its duty of active protection of rangatiratanga differs according to the circumstances, in particular the strength and nature of support for or opposition to the mandate. Notably, in the East Coast inquiry, opponents to the mandate lacked community support: not one marae or hapū supported them. In the case of Te Arawa, however, the Tribunal considered that it was no longer possible by 2007 to determine whether some of the remaining hapū still supported their inclusion in the mandate.³⁸ It concluded that the Crown was obliged to provide iwi and hapū the opportunity of holding hui-a-hapū to show ‘how the numbers within each hapu stack up’.³⁹ As the Te Arawa Tribunal emphasised: where iwi and hapū clearly demonstrate ‘their preferred mode of exercising tino rangatiratanga in the settlement process’ reciprocity requires the Crown to make a ‘careful, fair, and practical response’.⁴⁰ In doing so the Crown would fulfil its duty of active protection of the rangatiratanga of these hapū.

We now turn to explain why, in the circumstances of this inquiry, we consider the primary Treaty duty of the Crown is to actively protect the tino rangatiratanga of Ngāpuhi hapū.

2.5 THE DUTY OF ACTIVE PROTECTION

The Waitangi Tribunal has long emphasised the Crown’s duty of active protection of tino rangatiratanga.⁴¹ As indicated above, the importance of this duty was also affirmed by the Court of Appeal in *New Zealand Maori Council v Attorney-General* (1987).⁴² Since then, the Tribunal has applied the principle to matters such as language, culture, and other taonga of an intangible nature.⁴³ It has taken ‘a more holistic interpretation of the Crown’s protective duty than merely ensuring that Māori retained (for as long as they wished) ownership of the land and other resources specifically mentioned in article 2’.⁴⁴

It has been long understood that the most valuable possession of Māori is the people themselves. The inference is that the right of self-regulation is an inherent

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

38. Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, pp 189–190

39. *Ibid*, p 189

40. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua*, p 71

41. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), pp 67–70

42. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), p 664

43. See Waitangi Tribunal, *Report of the Waitangi Tribunal on Te Reo Maori*, 2nd ed (Wellington: Department of Justice, 1989), p 20; Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Legislation Direct, 1992), p 270; Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993*, 2nd ed (Wellington: Legislation Direct, 2006), pp 100–101

44. Waitangi Tribunal, *Tauranga Moana: 1886–2006*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, p 21

element of rangatiratanga that also must be actively protected.⁴⁵ As other Tribunals have found, notably in the case of Orakei, Muriwhenua Fishing and, more recently, Tauranga Moana, ‘the Crown has a particular duty to respect and actively protect Maori autonomy, which they are entitled to as the natural expression of their tino rangatiratanga.’⁴⁶ Key to this is the capacity of Māori to exercise authority over their own affairs as far as practicable within the confines of the modern state. The Crown has a duty to protect and enhance ‘the Maori customary principle of social, political and economic organisation, or the right of any or all Maori to identify with the communities and support the leaders of their choice, in accordance with Maori custom.’⁴⁷

As already discussed, rangatiratanga constitutes the essence of Māori political and social organisation, and the foundation of Māori decision-making. The ways that rangatiratanga is exercised will, however, reflect the diverse contexts in which Māori choose to interact. Past Tribunals have seen the duty of active protection as applying to a variety of Māori political/organisational structures – iwi, councils and trusts, as well as hapū – depending on the circumstances of the case. In this inquiry, where we are concerned primarily with the selection and authorising of leaders to negotiate the settlement of Treaty claims for actions of the Crown which, above all, concern hapū, it is essential that hapū are empowered to make that choice according to the ‘cultural preferences underpinning the exercise of tino rangatiratanga, kaitiakitanga, mana, and Maori social organisation.’⁴⁸

In this inquiry the Crown placed considerable emphasis on the mandating process having been led by Ngāpuhi, and on its own right to make political decisions as a corollary of sovereignty. Even if accepted, however, neither of these factors absolves the Crown of its duty actively to protect hapū rangatiratanga. We recognise that how the Crown goes about fulfilling the duty of active protection is a delicate exercise. There are different sources of leadership among Ngāpuhi, with differing perspectives on how the settlement negotiations should proceed. There is the question of the democratic right of those Ngāpuhi individuals who voted in favour of the mandate to be weighed against the Treaty right of those hapū who have come to a contrary decision, according to their tikanga, and who defend their capacity to appoint their leadership according to their own preferences. The Crown must ensure that the negotiations are able to proceed in a way that does not cause prejudice to any group. The Crown has a duty to all Ngāpuhi. Yet it is clear to us that hapū rangatiratanga must be central to any entity whose mandate to settle Treaty claims of hapū is to be recognised and, in this context, it is hapū rangatiratanga that

45. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, p 269; Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993*, p 101

46. Waitangi Tribunal, *Tauranga Moana: 1886–2006*, vol 1, p 22; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Brooker & Friend Ltd, 1987), p 53; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wellington: GP Publications, 1988), pp 179–180

47. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p 215; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island* (Wellington: Legislation Direct, 2007), p 5

48. Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, p 21

must be protected first and foremost. Further, that duty of protection must extend to those who choose to stand outside the entity mandated to undertake such negotiations, provided they have the support of their hapū and do not undermine the right of others to proceed to settlement under their chosen leadership.

2.5.1 Rangatiratanga and tikanga

Rangatiratanga is at the core of article 2 in the Māori text of the Treaty. Deriving from its root word rangatira, the concept has been literally translated into English as ‘chieftainship’, but rangatiratanga extends to the authority of the wider community which, traditionally, meant the authority of hapū and iwi.⁴⁹ The Tribunal, in its report on stage 1 of the Te Paparahi o Te Raki inquiry, emphasised that ever since the time of Rāhiri, ‘the fundamental unit of economic and political organisation was the hapū’⁵⁰ As Rima Edwards told the Tribunal, it was ‘the Hapu that held the mantle of governance of the customs and things to be done.’⁵¹

The article 2 guarantee enshrined in Te Tiriti was thus ‘made to the communities at community level (ki ngā hapū) and to the community leadership (ki ngā rangatiratanga).’⁵² As the Ngāti Rangiteaorere Tribunal explained in 1990, the Treaty guarantee of tino rangatiratanga meant that ‘chiefs, acting as trustees for their iwi, had a right to be consulted over and indeed to control the disposal of their lands.’⁵³ Inherent to the exercise of rangatiratanga is the capacity of Māori groups to determine their own leadership and land and resource entitlements, and to make such decisions according to their own customary laws.⁵⁴ This autonomy of Māori communities promised in the Treaty is, in the view of the Turanganui a Kiwa Tribunal, ‘the single most important building block upon which to re-establish positive relations between the Crown and Maori.’⁵⁵ The active protection of this autonomy is thus of fundamental importance.

Tribal autonomy was necessary to protect Māori society, culture, economy and spirituality; to preserve a tribal base for future generations; and to exercise some control over the kinship group and its access to tribal resources.⁵⁶ The power of Māori chiefs was sustained by their whanaunga and relationships with their community. The concept of whanaungatanga was, and remains, essential to preserving rangatiratanga, given that it ‘encompassed the myriad connections, obligations and privileges that were expressed in and through blood ties, from the rangatira to the people, and back again.’⁵⁷ Further, the connection between rangatiratanga and mana is vital to the maintenance of tribal relationships. Indeed, the ‘respect paid

49. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, p185

50. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wellington: Legislation Direct, 2014), p30

51. Ibid

52. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 567

53. Waitangi Tribunal, *The Ngāti Rangiteaorere Claim Report 1990* (Wellington: GP Publications, 1990), p 31

54. Waitangi Tribunal, *Te Whanau o Waipareira Report*, p 215

55. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 739

56. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p181

57. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report*, p 6

to the independent mana or rangatiratanga of all groups was the key to keeping the peace.⁵⁸ In this regard, rangatiratanga carries responsibilities for Māori: ‘There are customary constraints, such as the obligations tribes have internally to manage rights between hapu, and there are external rights that must be managed with neighbouring tribes.’⁵⁹

Yet the exercise of rangatiratanga also extends beyond that traditionally exercised by hapū and iwi, given that many contemporary Māori communities are alienated from their traditional lands. The Te Whanau o Waipareira Tribunal considered that the ‘principle of rangatiratanga appears to be simply that Māori are guaranteed control of their own tikanga, including their social and political institutions and processes and, to the extent practicable and reasonable, they should fix their own policy and manage their own programmes.’⁶⁰ The character of this rangatiratanga, moreover, is not static but shaped by the dynamics of the community. Although its members can come and go, ‘the community can be discerned from the exercise of rangatiratanga.’⁶¹ Māori communities may establish legal structures for practical purposes – but these merely reflect a community’s rangatiratanga; they do not take the place of the community itself. Indeed, ‘A group that does not act as a community (whatever its legal constitution) cannot properly be said to exercise rangatiratanga.’⁶²

Rangatiratanga in this sense stands for ‘a dynamic relationship; popular support, freely given, can equally freely be withheld or transferred in order to better secure the interests of individual members or the community.’⁶³ This means that the Crown’s guarantee was to protect ‘the right of any or all Maori to identify with the communities and support the leaders of their choice, in accordance with Maori custom’, while Māori ‘dealings with the Crown will, as far as is reasonable and practicable, enhance the autonomy of any such community and the authority of its leaders.’⁶⁴ Any claims to rangatiratanga by a Māori group therefore demand the Crown’s fair and respectful appraisal. The Crown must, in other words, ‘demonstrate good faith and act at all times to enhance rangatiratanga; just as it did at Waitangi in 1840 when it accepted without question the bona fides of the rangatira who signed the Treaty’.⁶⁵

In the settlement context, too, rangatiratanga is entwined with the safeguarding of relationships between Māori groups. One consequence of the Crown’s past failures to uphold the guarantee of tino rangatiratanga was the breakdown of the Māori social structures that expressed whanaungatanga.⁶⁶ The Tāmaki Makaurau Tribunal viewed the recent strengthening of hapū and iwi ties as ‘today’s expression

58. Waitangi Tribunal, *The Ngāti Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p 30

59. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1246

60. Waitangi Tribunal, *Te Whanau o Waipareira Report*, p 26

61. *Ibid*, p 25

62. *Ibid*

63. *Ibid*, p 214

64. *Ibid*, p 215

65. *Ibid*, p 25

66. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report*, p 6

of te tino rangatiratanga – that is, the authority of Māori kin groups to determine their own path and manage their own affairs.⁶⁷ It predicted new grievances would result if the Crown continued an approach which saw Crown resources unequally benefiting one group while disregarding any understanding of whanaungatanga between groups.⁶⁸

Inseparable from the exercise of rangatiratanga is tikanga – or the beliefs and customs worked out over time to guide ‘tika’ conduct of Māori affairs, including how people should interact, identify themselves and behave.⁶⁹ In contrast to English-derived law, which is based on individual rights and responsibilities for the common good, tikanga is predicated on personal connectedness and group autonomy.

In the context of settling historical claims in a manner consistent with Treaty principles, Tribunals have reminded the Crown that it must have a practical understanding of tikanga. The Office of Treaty Settlements (OTS) has a particularly important role in this regard, because it is primarily responsible for providing the advice on which Ministers of the Crown decide whether or not to recognise a mandate. The Tāmaki Makaurau Tribunal observed of OTS: ‘Of all the departments, agencies, and institutions of the Crown, it is the one that lives and breathes the Treaty of Waitangi.’⁷⁰ For Treaty settlement processes, this means that compliance with natural justice must be accompanied by a focus on the quality of the Treaty relationship, including the obligations to respect Māori values.⁷¹

This sets the standard for the Crown’s observance of tikanga. The Te Arawa Tribunal stated that ‘When designing and implementing Treaty settlement processes, it is important for the Crown, through OTS, to know and understand the tikanga that gives practical expression to the cultural preferences underpinning the exercise of tino rangatiratanga, kaitiakitanga, mana, and Maori social organisation.’⁷² In order to fulfil ‘its obligation to cultivate the living partnership between the Crown and Maori’, it is incumbent on OTS that its understanding of the tikanga of affected iwi and hapū is reflected in its development of settlement policies.⁷³ Knowing the tikanga of the iwi and hapū involved, enables the Crown to: engage more effectively, and to reach the ‘right’ decision in tikanga terms, and the right decision for sustainable Treaty settlements.⁷⁴

More specifically, the implementation of a sophisticated understanding of the very people whose Treaty claims it is seeking to settle requires the Crown to maintain flexibility in the application of key settlement policies. The Crown’s large natural groups policy is of particular importance in the present inquiry. The Tribunal has previously endorsed this policy in principle but has been clear that, to be

67. Ibid, p7

68. Ibid, p 101

69. Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, pp 21–22; Hirini Moko Mead, *Tikanga: Living by Maori Values* (Wellington: Huia Publishers, 2003), pp 11–12

70. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report*, p 17

71. Ibid

72. Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, p 21

73. Ibid, pp 22, 64, 189; see also Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report*, p 19.

74. Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, p 189

consistent with the Treaty, the Crown's application of it must take into account the particular circumstances of the affected Māori groups.⁷⁵ To put it plainly, the large natural groups policy cannot be applied in a manner that will override the rangatiratanga and tikanga of groups with whom the Crown is attempting to restore its Treaty relationship.

Questions of rangatiratanga and related matters of tikanga take on particular significance as Ngāpuhi seek, through the mandating of representatives to enter into settlement negotiations, to begin to re-establish their relationship with their Treaty partner and work towards enhancing their political, cultural and economic position. The claimants in this inquiry have asserted the strength of their hapū rangatiratanga and the need for it to be protected in the mandating process. The Crown has argued that these matters are for Ngāpuhi to decide and that the Crown's role is limited to that of being an honest broker in the process. We therefore pose the following questions – what is hapū rangatiratanga in the Ngāpuhi context? And, what is the Crown's role in protecting hapū rangatiratanga?

2.5.2 Hapū rangatiratanga and tikanga within Ngāpuhi

In this inquiry we are asked to consider whether the Crown's recognition of the mandate of the Tūhoronuku Independent Mandated Authority (Tūhoronuku IMA) to represent all of Ngāpuhi sufficiently protects the rangatiratanga of Ngāpuhi hapū. In his evidence for stage 1 of the Te Paparahi o Te Raki inquiry, Professor Hohepa emphasised why hapū have a particularly important role in Ngāpuhi:

Kei i a hapū, kei i a iwi, kei i a whānau tōnā ake mana. Hererekē mātou ki ētahi atu iwi, he ariki kei runga, he whānauariki kei runga hei whakahaere, he hapu-ariki kei runga, kāhore ko te mana, i tīmata mai i te kōtahi, puta atu ki te whānau, puta atu ki te hapū mehemea e hiahia ana ka honohei iwi, mehemea hiahia ana ka hono hei roopū mō te katoa, arā, ko Te Tai-Tōkerau

Each hapu was responsible for its own mana. Other iwi have ariki on top. There's an Ariki family. We don't have that. So it's a reversal, you begin at the bottom with one into the whānau, then to the hapū and then you might come together [as a larger group] on specific purposes.⁷⁶

Hapū were led by rangatira – the weavers of people. But though rangatira exercised authority over people and land, the relationship between rangatira and their hapū was consensual. As Pita Tipene told that Tribunal:

Mā ngā hapū e whakahaere ngā tikanga, ko te hapū te rangatira o ngā rangatira. Mai rānō i pērā ai, he kawa tūturu i heke mai i ō mātou mātua tūpuna. Mehemea kei a koe te mana hei whakahaere, kei a koe te whakapapa, mehemea ka piki haere tō [pai] mō te whakamahi i ēnā mahi, ka whakatūria koe, he kai-hau-tū hei rangatira mō te iwi. Engari, rerekē ki a mātou te rangatira ki ētahi atu. Ko te rangatira, ko te

75. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua*, pp 71–72

76. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty*, pp 35–36

kaiwhakarāranga i te tira, i tō taha. Ehara te rangatira kei runga ake i te hapu, koia me whakarongo ki te hapū i runga hoki i te tikanga, ka kore koe e whakarongo ka whakarereka koe.⁹⁰

It is the hapu who are in charge, the hapu is the chief of the chiefs. This is how it has been since time immemorial, these traditions and principles that descend from our ancestors. If you have the mana to lead, if you have the genealogy, if you have the capacity to do the work, you will be recognised and you will be the chief for your people. But our own views of what a rangatira is, are different to others views. To us a rangatira is a person who weaves people together, a person at your side. The rangatira is not above the hapu. The rangatira must listen to the hapu, in accordance with tikanga. If they do not listen they will be cast aside . . .⁷⁷

Then, as now, it was rangatira who acted as mediators and leaders within their own hapū, and as diplomats on behalf of their hapū in discussions with other peoples.⁷⁸ These were the roles appropriately played by rangatira in agreeing to sign te Tiriti.

It is an axiom that the strength of Ngāpuhi is embedded in their many constituent hapū and traditionally, if tikanga was followed, the rangatiratanga of each of those hapū was respected. Waimarie Bruce-Kingi illustrated the point by referring to the actions of her tupuna Hongi Hika. When he had an important take (cause), Hongi would consult with different hapū, laying his mere on the ground. Some would pick it up, but not all.⁷⁹ Acting together as Ngāpuhi was thus a political decision as well as a concomitant of whakapapa. In the words of Mr Shortland:

Ngapuhi exists when hapu choose, of their own accord, to confederate. It has rarely been a 'one in, everybody in' proposition that the mandate espouses. In essence, you may call hapu together, but they are not obliged to come. It is tikanga based on whanaungatanga and not of convenience. Our history is full of examples where the body corporate has not garnered the full will of the iwi.⁸⁰

The Tribunal in its report on stage 1 of the Te Paparahi o Te Raki inquiry emphasised that rangatira signed Te Tiriti as leaders for and representatives of their hapū; in doing so, they did not intend to relinquish their authority over their people or their territories.⁸¹ As Mr Henare reaffirmed to us, tūpuna signed Te Tiriti as rangatira of their hapū not on behalf of Ngāpuhi as an iwi – indeed Ngāpuhi, the iwi, is never mentioned.⁸² It is that legacy and responsibility that the claimants strive to uphold to this day.

The central issue in this inquiry, then, is the opposition to the Crown's recognition of a mandated entity which purports to represent Ngāpuhi hapū despite,

77. Ibid, p 31

78. Ibid, p 271–272

79. Transcript 4.1.2, p 380

80. Document A63, p 7

81. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty*, p 527

82. Document A64, p 9

according to claimants, never gaining the assent of these hapū to do so, nor allowing them the ability to withdraw from this entity. Again, some guidance is to be found in previous Tribunal reports. For example, the Tribunal has in the past supported the goal of an iwi-wide, unified approach to settlement negotiations as likely to provide claimants with the best results, but recognised that they might wish, and had the right, to organise themselves in smaller regional collectives where hapū are closely related by whakapapa and shared history.⁸³ A related point was made by the Whanganui River Tribunal. It considered the claimants needed to act collectively to present a united front with reference to their ancestral awa, but recognised that the case might be different in the circumstances of their land issues.⁸⁴

Our assessment of the claims before us requires a clear understanding of the vitality of Ngāpuhi hapū, the strength of hapū rangatiratanga, and the implication this has for a mandate that seeks to represent the iwi as a whole. In particular, it demands an appreciation of Ngāpuhi tikanga as it relates to mandate matters. There were many references to these underpinnings of tikanga in claimant submissions, which argued that they had been ignored or displaced in, among other things, the structure of the Tūhoronuku IMA. Insofar as tikanga and rangatiratanga guide the decisions of Ngāpuhi hapū in mandating representatives to negotiate their Treaty claims, the two concepts work through one another. In a letter addressed to the Minister for Treaty of Waitangi Negotiations in December 2012 supporters of Te Kotahitanga suggested that tikanga in the regulation of collective hapū affairs was guided by the principles (matapono) of:

- ▶ Mana Motuhake or hapū self-determination;
- ▶ Kotahitanga or unity of purpose;
- ▶ Whanaungatanga and Karangamaha or kinship and maintaining relationships;
- ▶ Kōwhaorau or strength through diversity;
- ▶ Ahi Kā or the burning fires;
- ▶ Ngāpuhi Taniwharau or leadership that is proactive, bold, and has integrity, compassion, and passion;
- ▶ Whakapapa or identity and recognising relationships;
- ▶ Taumatatanga or excellence;
- ▶ Puāwaitanga or to grow and achieve;
- ▶ Manaakitanga or care for people; and
- ▶ Tikanga or acting correctly in spiritual, mental, physical, and cultural conduct.⁸⁵

Of most relevance to our discussion are the principles of self-determination, the idea of strength through diversity, ahi kā, whanaungatanga and whakapapa. These concepts seem to be widely accepted by parties in this inquiry but there is little agreement between the claimants and those opposing them as to whether they have been followed.

Unsurprisingly, hapū rangatiratanga (and what claimants see as the Crown's attack upon it) was repeatedly emphasised by claimants. For Arapeta Hamilton,

83. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p742

84. Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p13

85. Document 26(a), p347

giving evidence on behalf of Ngāti Manu and the descendants of Pōmare, hapū rangatiratanga is paramount. He told us that Ngāti Manu have:

fiercely maintained their own independence and authority. It is this very real tradition of Ngāti Manutanga, a tradition which encapsulates our independence and autonomy that we now present before the Tribunal [. . .] Assertions of our independence have not been confined to a historical context either. In the modern context of Treaty Claims and settlements we have consistently sought to assert our own Mana Motuhake. Ngāti Manu have not tolerated any attempt to takahi (coerce or disrupt) our Rangatiratanga and mana whenua, whether it be by the Crown, local or regional Government, any rūnanga or any other Hapū.⁸⁶

Those opposing the mandate are clear in their view. The duty owed to their tūpuna is theirs as is the obligation to their mokopuna. Such obligations are all the more important in the settlement of historical claims. When questioned on why, given shared historical experiences arising out of Crown actions, they should not go forward together, Mr Shortland emphasised that Ngāti Hine had ‘no fear of moving together but together doesn’t mean you ride on the same waka.’⁸⁷ As expressed by counsel for Ngāti Torehina ki Mataka and Te Waiariki, these hapū, ‘want to run their rights, their claims of right, their rights of remedy out to the conclusion [. . .] they both decline to abdicate that right, that task, that responsibility to another.’⁸⁸

Claimants similarly emphasised the importance of collective decision-making at hui held on the marae. Herb Rihari of Ngāti Torehina ki Mataka explained: ‘We maintain the key institution of hui through our tikanga. For key decisions we always take our matters back to hui of our Hapū. We don’t proceed without a mandate of our Hapū. A single person is unable as a matter of tikanga to bind our Hapū. A hui is required to bind the Hapū.’⁸⁹ The same tikanga applied in the case of Ngāti Kaharau and Ngāti Hau: ‘in order to exercise this mana (or authority) on behalf of the Hapu, there *MUST* be a hui at our Marae, where the people can come, listen, debate and decide the issue together as a people.’⁹⁰ A similar point was made by Willow-Jean Prime for Te Kapotai and Ngāti Hine:

Ko tō mātou tikanga mā te hapū anō te hapū e whiriwhiri. Mā te hapū e whiriwhiri ko wai te kaikōrero mō te hapū i runga i te marae o Waikare. Koira te tikanga mai rā anō mō ēnei momo kaupapa nui, mō ēnei momo kōrero me hui ki te marae o Waikare.

In our tikanga the hapū itself deliberates over such matters and they decide who are the spokespersons for the hapū on the marae at Waikare. That is our tradition from old times, and for significant matters, we must hold a hui at our marae of Waikare.⁹¹

86. Document A77, p 3

87. Transcript 4.1.2, p 258

88. Transcript 4.1.1, p 57

89. Document A10, p [5]; see also doc A18, p [8]

90. Document A39, p 3

91. Transcript 4.1.2, p 211 [translation]

On such occasions, she told us, people would come from outside the rohe depending on the kaupapa of the hui.⁹²

The suggestion that this practice undermines the mana of the individual was roundly rejected by claimants. Shirley Hakaraia, for example, stated in her evidence that ‘the mana of an individual can never override the mana of the hapū or the legal rights of the actual claimants. [. . .] If an individual does not have the support of their hapū then the individual does not have the mana to occupy that role, has no understanding of hapū rangatiratanga and is thinking only of themselves.’⁹³

We note that a number of witnesses who have decided to participate in the Tūhoronuku IMA emphasised that their decision was made in accordance with their hapū tikanga as well – that is, the matter was fully discussed in hui and the decision made to appoint a hapū kaikōrero.⁹⁴ There is no incompatibility between this position and that of the claimants although they disagree on the capacity of the Tūhoronuku IMA structure to empower the hapū and on the integrity of the overall process.

Underlying the emphasis on collective decision-making on the home marae as the correct course is the principle of ahi kā. All sides have acknowledged the importance of this aspect of tikanga but have placed differing weight upon its importance in the process for achieving a mandate for Ngāpuhi Treaty settlement negotiations. For the claimants, ahi kā is crucial: their role and responsibility is to look after the whenua and safeguard the interests of those who no longer live on it.⁹⁵ That obligation includes the settlement of Treaty grievances concerning their tūpuna and hapū – a task which they cannot, under tikanga, abandon before resolution. A contrary view was expressed by Mr Tau in his verbal submissions. He accepted that ahi kā is important, but argued that mandating and settlement processes must reflect the modern realities of Ngāpuhi society, and the need to represent all those who whakapapa to Ngāpuhi whether they live within or outside of the rohe. He emphasised:

Whether you are born under the tōtara tree in Tautoro or whether you are born under the eucalyptus tree in Perth where my mokopuna were born, you are no different than anybody who has the privilege to stay at home. You are no different – the *toto* that goes through your *uaua* is the same as you and I who are here. Tūhoronuku will not disenfranchise those Ngāpuhi despite where they live. We do have a concept of *ahi kā* and all that, but the true *tikanga* and the true *ahi kā* is someone who looks after the fires . . . It is not someone that usurps the right, the mana of some descendant of Ngāpuhi born anywhere in this world . . . We all have the same whakapapa . . .⁹⁶

It is this whakapapa and whanaungatanga that holds Ngāpuhi hapū together. As expressed by counsel for Ngāti Manu, the preservation of hapū rangatiratanga

92. Transcript 4.1.2, p 199

93. Document A117, p 5; see also doc A39, p 3.

94. Document A89, pp 1–2; doc A90(b), pp 3–5, 7; doc A92, pp 1–3; doc A93, pp 1–2; submission 3.3.31, p 3

95. Transcript 4.1.2, p 366

96. Ibid, p 1143

entails that whakapapa, whanaungatanga and the values underpinning tikanga are also preserved.⁹⁷ As such, claimants in this inquiry say they prefer to join with those hapū with whom they have traditionally shared interests and with whom they have whakapapa ties. Ms Hakaraia told us, for example, that her hapū of Ngāti Patukeha and Ngāti Kuta were committed to working with their neighbouring hapū in Te Takutai Moana, developing and strengthening their ‘whakapapa, whanaungatanga, trust and common purpose’.⁹⁸ In their view, this collective is the appropriate vehicle for negotiation, being more likely to result in a robust and durable settlement because it is one they choose rather than are forced to join.⁹⁹ When questioned on the matter, Dr Guy Gudex, representing Patuharakeke, also affirmed his understanding that Patuharakeke would seek to collectivise with neighbouring hapū based on whakawhanaungatanga.¹⁰⁰

2.6 THE CROWN’S OBLIGATIONS TO NGĀPUHI

The above discussions provide certain insights into the general nature of the Crown’s obligations to Ngāpuhi in the mandating process. The Treaty guarantee of tino rangatiratanga means the protection of the ability of Māori communities to exercise their tribal authority according to their tikanga, including the decision over whether or not to come together according to their custom and preferences. The exercise of rangatiratanga will thus depend on the character, traditions and internal dynamics of the community that claims it.

The mandating process involves a claimant group or groups determining who has the right to represent them in settlement negotiations with the Crown. The selection of these representatives is clearly critical to an enduring settlement. Though the Crown acknowledges it must monitor the mandating process and engage with those opposing the mandate, it views its role within the process as minimal.¹⁰¹ It is, the Crown argues, up to the Māori groups concerned to determine their own pathways to settlement. This is undoubtedly true. For it to happen, however, the Crown has obligations to protect, when necessary, the rangatiratanga and tikanga of those affected Māori groups in making these determinations. The key Treaty principle to be applied in our inquiry is therefore that of active protection by the Crown of Māori interests, and particularly of the exercise of hapū rangatiratanga in mandating processes. Applying that principle in the present circumstances is complicated both by the disunity among Ngāpuhi hapū over the outcome of the mandating process, and the existence of Ngāpuhi interests that are not hapū-based.

While previous Tribunal inquiries into mandate challenges have each involved quite different circumstances, they provide some clear guidelines for our approach in this inquiry. The Crown’s closing submissions make frequent reference to *The*

97. Ibid, p 420

98. Document A17(b), p 3

99. Ibid, pp 3–4, 11, 15; doc A117, pp 6, 12, 15

100. Transcript 4.1.2, pp 443, 446

101. Submission 3.3.30, p 16

East Coast Settlement Report.¹⁰² There are, however, mandate reports that have examined circumstances bearing closer resemblance to the state of affairs within Ngāpuhi. The Te Arawa mandate reports looked at the situation of a large group of strong hapū and iwi interests, including significant groups that sought to withdraw from the mandated entity representing them in settlement negotiations. We return to this point in the following chapters. Here we reiterate that a practical resolution to the dispute before us requires an approach that adapts to the lie of the land.

With its extensive geographical scope, widespread diaspora, intricate internal dynamics and complex history, Ngāpuhi poses distinct challenges to the settlement of historical Māori Treaty claims. We have heard repeatedly that the claimants' hapū rangatiratanga and tikanga cannot be compromised in any mandating process. Our analysis of the situation in this inquiry therefore demands a particularly steady focus on the strength of these concepts within Ngāpuhi.

We bring the threads of this chapter together in the following statement of the minimum standards that we consider the Treaty principle of active protection requires the Crown to adhere to when making the decision to recognise a mandate to negotiate historical Treaty claims. We understand that the Crown has Treaty obligations to:

- ▶ ensure it is dealing with the right Māori group or groups having regard to the circumstances specific to that claimant community so as to protect its intra-tribal relationships;
- ▶ practically and flexibly apply the large natural groups policy according to the tikanga and rangatiratanga of affected groups;
- ▶ allow for an appropriate weighing of interests of groups in any recognised mandated entity, one that takes into account factors including the number and size of hapū, the strength of affected hapū, and the size and location of the population;
- ▶ recognise that the structure of the mandated entity must allow for hapū interests to be tested and heard; and
- ▶ on the basis of this assessment, actively protect the rangatiratanga and tikanga of those hapū who are opposed to their claims being negotiated by the mandated entity, and weigh this protection of hapū with that of non-hapū interests in the modern context.

102. Submission 3.3.30, pp 7, 10, 12–16, 19, 21–22, 44, 60–61, 104, 115, 134–136, 174, 180–181, 212, 220, 223

CHAPTER 3

THE PARTIES' POSITIONS

3.1 INTRODUCTION: THE ESSENCE OF THE DIFFERENCE BETWEEN THE PARTIES

We summarise here the major differences between the claimants' and the Crown's positions in relation to the ability of hapū to exercise rangatiratanga within the Tūhoronuku IMA. In particular, we focus on their arguments about the process for appointing hapū kaikōrero and the inability of hapū to withdraw from the scope of the mandate. We also outline the position of the interested parties on these issues.

3.2 THE ABILITY OF HAPŪ TO EXERCISE RANGATIRATANGA WITHIN THE TŪHORONUKU IMA

3.2.1 The claimants

The claimants' essential submission is that the Crown must accept and protect the ability of hapū to exercise rangatiratanga in the conduct of their own affairs. The Crown's failure to do so, including denying hapū the ability to choose their own path towards settlement, is the basis of their claims to the Tribunal.¹ The critical importance of hapū rangatiratanga, as articulated in the closing submissions for Ngāti Hine and Te Kapotai, derives from the status of hapū as the fundamental unit of economic and political organisation within Ngāpuhi. As such, it is for hapū to decide how their claims are to be settled. These claimants drew attention to the evidence of Mr Henare, who said this Tribunal must ask itself 'what is the nature of hapū rangatiratanga; of Ngāti Hine mana and rangatiratanga?' He provided one answer, stating that 'The concepts of mana and rangatiratanga are bound to the land'. This being the case, the claimants said, it is abhorrent to their tikanga that their claims to the land could be settled by a group that they do not support and which does not provide for sufficient hapū autonomy.²

In the claimants' view, hapū are necessarily central to any settlement process as it is hapū who suffered the losses that resulted from the Crown's historical breaches of the Treaty. Hapū are pursuing claims against the Crown in the Waitangi Tribunal's Te Paparahi o Te Raki inquiry and it is those claims that the Crown is seeking to settle through negotiations with the Tūhoronuku IMA. Claimants want to maintain

1. Submission 3.3.28, pp 2–3

2. Submission 3.3.20, pp 7–9; see also submission 3.3.24, pp 16–17, 19; submission 3.3.27, p 17

tino rangatiratanga over their claims and the settlement process but, they said, the Tūhoronuku IMA does not cater for this. The Crown is trampling the mana of hapū by failing to recognise and respect their tino rangatiratanga.³ This is the opposite of what should be occurring. As Ngāti Manu put it, the loss of rangatiratanga is at the heart of the claims regarding the Crown's historical Treaty breaches. In seeking to settle those claims the Crown is required to do what is necessary to restore the rangatiratanga and hence the mana of the claimants.⁴

Some claimants submitted that the Crown had manufactured the appearance of Ngāpuhi consent for a settlement process that disempowers hapū. In recognising the Tūhoronuku IMA's mandate the Crown had ignored hapū rangatiratanga and tikanga, the essential significance of which to Ngāpuhi identity was clear from such fundamental events as the signing of He Whakaputanga o te Rangatiratanga o Niu Tireni and Te Tiriti o Waitangi. They also argued that the Crown appears to consider that the basis on which their tūpuna sought to maintain authority is redundant for the purposes of engagement to settle claims.⁵ While the Crown argues that the Tūhoronuku IMA provides for the exercise of hapū rangatiratanga, it is clear that the Tūhoronuku IMA holds a mandate to represent Ngāpuhi as an amorphous group.⁶

Other claimants submitted that the Crown's preference for a single mandated body to represent the whole of Ngāpuhi constitutes a misapplication of its large natural groups policy. They accepted that past Tribunals had endorsed the Crown's policy but pointed out that this support was qualified. In particular, the claimants said, the Crown could not consider the support as condoning the breach of its responsibilities under the Treaty and/or the tikanga of hapū and iwi.⁷ Drawing upon the *Tāmaki Makaurau Settlement Process Report*, the claimants also submitted that although the policy had sensible underpinnings, its application in the Ngāpuhi context had not been sensible. In their view, settlement negotiations could not commence until the Crown took a more considered and rational approach to identifying the best groups for negotiations.⁸ Ngāti Manu sought a recommendation from the Tribunal that they be considered a large natural group in their own right.⁹

The Crown's reliance on the 2011 vote to demonstrate the level of support for the mandate highlighted, in the claimants view, the fundamental flaw in the Tūhoronuku IMA. The one-person one-vote approach ignored the hapū-based structure of Ngāpuhi, being an exercise in individual democracy rather than a tika process of hapū collective decision-making. It enabled the Crown to show that

3. Submission 3.3.18, pp 9–10, 17; see also submission 3.3.28, pp 2–3, 36; submission 3.3.19, pp 4–5; submission 3.3.24, pp 24–25; submission 3.3.25, pp 5, 9; submission 3.3.25, p 14; submission 3.3.26, p [3]; submission 3.3.27, pp 4–5

4. Submission 3.3.25, p 11, 17

5. Submission 3.3.28, p 3

6. Ibid, p 10

7. Submission 3.3.20, pp 15–17

8. Ibid, pp 81–82; see also submission 3.3.25, pp 4–5, 13–17; submission 3.3.37, pp [2]–[4]; submission 3.3.44, p 6.

9. Submission 3.3.25, p 27

some 5,210 individuals supported the Tūhoronuku IMA mandate, but left unanswered the question of hapū support. There was no process to determine the support of marae or hapū, something the Crown should have insisted upon if it was committed to protecting hapū rangatiratanga. The claimants consider that the submissions process for the amended deed of mandate in 2013 provides a much clearer picture of the level of support for the Tūhoronuku IMA. A clear majority of submissions oppose the Tūhoronuku IMA mandate, with many submissions made by hapū and marae committees.¹⁰

Ngāti Kahu o Torongare me Te Parawhau argued that the Crown should have been well aware of its duties to hapū as it had been a party to many previous Tribunal inquiries. It was incumbent upon the Crown, they said, to make itself familiar with hapū relationships, with the tikanga of the respective hapū, to engage meaningfully with those hapū, and do its utmost to protect their tino rangatiratanga before recognising any mandated body. In their view, the Crown was failing to do this, preferring instead to deal with a single entity (the Tūhoronuku IMA) which provided a simpler alternative.¹¹ Claimants also submitted that the Crown's preference required hapū to cede their rangatiratanga to the Tūhoronuku IMA against their will. Hapū are caught within the Tūhoronuku IMA structure and are unable to make their own choices.¹²

Ngāti Manu argued that the Crown's determination to settle all Ngāpuhi claims through negotiations with a single entity had caused it to lose sight of the primary goal of the settlement process. Restoring the economic base of the claimant group is clearly important, they said, but the settlement of claims is supposed to be about the Crown acknowledging the grievances and restoring the rangatiratanga and mana of the claimants. This could not happen, they submitted, while the Crown sought to achieve a settlement at the expense of the mana and identity of hapū. Settlement of all the grievances of all the claimants can only occur through a process which avoids compounding the claimants' sense of powerlessness. It cannot be achieved through coercion.¹³

Patuharakeke are a hapū that affiliates strongly to Ngāti Wai, Ngāpuhi, and Ngāti Whātua. The Crown has advised Patuharakeke that their claims against the Crown will be settled through the three distinct settlement processes for those iwi, including that for Ngāpuhi led by the Tūhoronuku IMA. Patuharakeke submitted that the Crown entirely neglected to engage with them before deciding on how it would settle their claims. As a result, Patuharakeke are now involved in three settlement processes, none of which they were consulted on or agree to.¹⁴ No balance has been achieved, they said, between the need to cater for the distinct identity of Patuharakeke and the desire to settle all Ngāpuhi claims through a single process guided by a single mandated entity. In their view, the whanaungatanga that should

10. Submission 3.3.43, pp 5–6, 21, 30, 41–42; submission 3.3.44, pp 12–13; submission 3.3.15, p 8; submission 3.3.34, p 7; submission 3.3.38, pp 11–18

11. Submission 3.3.26, p [4]

12. Submission 3.3.28, pp 8–9

13. Submission 3.3.25, p 17

14. Submission 3.3.19, pp 4–6

have guided the mandating process and the design of the mandated entity was sacrificed for the sake of convenience.¹⁵

Some claimants argued that an important aspect of hapū rangatiratanga is the ability for hapū to choose to have the Tribunal report on their claims and determine whether it will exercise its binding remedial jurisdiction in their favour. The Crown's recognition of the Tūhoronuku IMA's mandate and its desire to move ahead with settlement negotiations threaten this choice because if the Tribunal's process is not completed before settlement occurs, its ability to make recommendations, including binding recommendations, will be removed. For some hapū, the Crown's recognition of the mandate thus represents the loss of potentially valuable rights of redress. Claimants oppose the removal of the possibility of obtaining binding recommendations from the Tribunal in favour of redress secured through the Tūhoronuku IMA, an entity they do not support.¹⁶

Other claimants rejected their inclusion within the scope of the Tūhoronuku IMA's mandate, arguing that they are not Ngāpuhi claimants. Ngā Tauria Tawhito o Hato Petera (Ngā Tauria), is a charitable trust comprising about 1200 Catholic Māori who share an affiliation to Hato Petera College on Auckland's North Shore. Ngā Tauria's historical claim was included within the scope of the Tūhoronuku IMA's mandate on the basis that the land to which their claim relates falls within the area covered by the mandate. The Crown has advised Ngā Tauria that it considers their claim to have been partially settled on the basis that some members of Ngā Tauria affiliate to iwi that have settled their historical claims. It is the Crown's intention to continue settling the Ngā Tauria claim in this piecemeal fashion without ever dealing with Ngā Tauria itself. Ngā Tauria submitted that the iwi affiliations of individual members should not be used as a basis for settling Ngā Tauria's claim as the claim is not based on those affiliations. Rather, the Crown should accept that Ngā Tauria is a distinct group in its own right and, insofar as its claim affects the interests of Ngāpuhi, Ngā Tauria should be considered a cross claimant regarding any Ngāpuhi settlement.¹⁷

3.2.2 The Crown

The Crown's fundamental submission is that its recognition of the mandate held by the Tūhoronuku IMA resulted from a claimant-driven mandating process in which the Crown had a limited role. In the Crown's view, respect for rangatiratanga means that it needs to respect the autonomy of Ngāpuhi, as a claimant community, to decide mandate issues for themselves. As such, it cannot dictate how a mandate should be sought. Rather, great care has to be taken in any mandating process to ensure that it remains within the control and tikanga of the group from whom a mandate was sought.¹⁸

15. Submission 3.3.19, pp 7–8, 10–11

16. Submission 3.3.23, pp 5, 10–11; submission 3.3.22, pp 111–116; submission 3.3.25, pp 21–22

17. Submission 3.3.21, pp 2, 4–8

18. Submission 3.3.30, pp 6, 16

The Crown stated that restrictions also applied to the Tribunal's involvement in mandating processes. It noted that past Tribunals have recognised this fact and determined that they would only intervene where there was a clear error in process, misapplication of tikanga Māori, or apparent irrationality in Crown decision-making – any of which would be in breach of Treaty principles. The Crown submitted that it is not a breach of Treaty principles simply for it to have made a mandate decision that the Tribunal would not have made. This is because it is the Crown's role to determine whether or not to recognise a mandate and its decision is a political one, in the making of which it is entitled to an appropriate degree of latitude. The Crown submitted that if Tribunal members might have reached a different decision in the present case, that would mean only that they would have weighed the competing political considerations in a different way towards a different outcome. It would not mean that the Ministers' decision to recognise the Tūhoronuku IMA's amended deed of mandate was wrong, a clear case of an error in process, or the misapplication of tikanga, or that it was irrational.¹⁹

The Crown stated that it considered the role of hapū throughout the mandating process and engaged directly with hapū members. When considering whether or not to recognise the mandate, Ministers sought advice on how any settlement could be structured to deal with interests at a hapū, pan-hapū, regional, pan-regional and iwi level. In the Crown's submission, this request for advice shows the concern that Ministers have for the role hapū will play in the negotiation and settlement processes.²⁰ Ministers received advice which considered the role of hapū in numerous ways. This included advice on the nature of Ngāpuhi as strongly hapū-based within their rohe, the role hapū play in the mandate structure, the hapū kaikōrero appointment process, and the direct engagement between the Crown and hapū during negotiations.²¹

On the large natural groups policy the Crown submitted that its strong preference is to negotiate Treaty settlements with large natural groups of tribal interests, rather than with individual hapū or whānau. Its decision to recognise Tūhoronuku's amended deed of mandate was influenced by Tūhoronuku's proposal that Ngāpuhi enter negotiations as one group. The Crown emphasised that neither the large natural groups policy nor its recognition of Tūhoronuku's mandate dictates that a settlement will be inappropriately targeted at a Ngāpuhi-wide level.²² It also submitted that five previous Tribunal reports had supported the large natural groups policy. The Crown recognised that this support was qualified and that consultation with claimants affected by it is a minimum requirement, as is early engagement with opponents to a mandate. It submitted that engagement with these groups had occurred throughout the mandating process.²³

19. Ibid, pp 11–13, 18, 223

20. Ibid, pp 129–133

21. Ibid, pp 132–133

22. Ibid, pp 120–123

23. Ibid, pp 15–16

The outcome of the Ngāpuhi mandating process – the Tūhoronuku IMA – provides, in the Crown’s view, adequate representation for all Ngāpuhi, including hapū. It is a structure to be populated by the people and hapū of Ngāpuhi.²⁴ The structure ensures that hapū are central to its operations, with hapū representatives forming a clear majority of board members. Each hapū listed in the deed of mandate is able to appoint a hapū kaikōrero. These hapū kaikōrero are then able to act collectively at a regional level and are responsible for appointing the majority of representatives on the Tūhoronuku IMA board.²⁵ Further, the Tūhoronuku IMA’s draft communications and negotiation plan demonstrates the potential for hapū to be involved in the negotiation process by working directly with negotiators and, through them, the Crown.²⁶ Hapū-specific redress is possible if this is desired.²⁷ The Crown concluded that the Tūhoronuku IMA, when assessed objectively, is representative of, and accountable to, all Ngāpuhi, including all hapū.²⁸

3.2.3 The interested party in support of the claimants

The Whatitiri Māori Reserves Trust appeared as an interested party in support of the claimants. The Trust submitted it had effectively been cut out of the settlement process through lack of representation for organisations of its kind. The Trust is not a hapū and has no representative on the Tūhoronuku IMA but its claims have been included within the Tūhoronuku IMA’s mandate, without any consultation. The lack of provision for groups like the Trust to engage with the Tūhoronuku IMA creates the risk that their claims will be settled without their involvement.

The Trust accepted that traditional hapū structures and decision-making had to be respected and given proper weight. In its view the Crown’s method of testing mandates through postal votes gave undue weight to the views of uninformed individual members of Ngāpuhi living outside the rohe. As a result, the interests of those living in the rohe and maintaining the hapū at the marae could be overlooked. The Trust submitted that the Crown needed to recognise that the size of the Ngāpuhi population and its national and international diasporas, unique in scale among iwi, necessitated a reassessment of its general approach to mandating processes. What was required was some form of test for local hapū support (like a vote on marae) alongside the individual postal vote. In addition, the Trust sought the inclusion of a clause in the Tūhoronuku IMA’s deed of mandate providing for arbitration to be available to claimants in the event that a settlement failed to accommodate their circumstances.²⁹

3.2.4 The interested parties in opposition to the claimants

The Tūhoronuku IMA submitted that it is not a Crown-created entity but the result of a Ngāpuhi-led process that has confirmed widespread support for a single

24. Submission 3.3.30, pp 8, 92, 96

25. Ibid, pp 92–96

26. Ibid, pp 117–118

27. Ibid, pp 121–122

28. Ibid, p 224

29. Submission 3.3.17, pp 2–5

mandated entity to represent all Ngāpuhi.³⁰ The concerns raised by the claimants during the mandating process have been accommodated through changes made to its structure.³¹ The Tūhoronuku IMA considers itself to be a hapū-led entity based upon a regional or rohe-based model. This is further reflected in the draft engagement plan which includes the development of hapū profiles, regionally-based working groups, direct contact between hapū and negotiators and the Crown, and the possibility of devolved or hapū-specific redress.³²

In the Tūhoronuku IMA's view a single mandated entity that provides for all Ngāpuhi wherever they live, and regardless of whether they are active in their hapū, is best placed to provide justice to all Ngāpuhi. This includes those so badly impacted by the loss of land and family structure that they do not know how to find their way back to whānau, hapū, and iwi. The Tūhoronuku IMA contended that it is fundamentally wrong to approach mandating and settlement decisions from a position that excludes those outside the hau kāinga.³³

The Crown has struck an appropriate balance, the Tūhoronuku IMA said, between allowing Ngāpuhi to develop their own settlement framework while attempting to protect certain interests and bring differing views together. In particular, the Crown had introduced conditions on its recognition of the Tūhoronuku IMA's mandate that, among other things, buttressed the role of hapū.³⁴ The Crown also took account of various considerations before recognising the mandate, including whether the structure of the Tūhoronuku IMA provides for all Ngāpuhi to be represented and the changes made to increase hapū representation.³⁵ The Tūhoronuku IMA said that ultimately it 'provides an open, transparent structure through which all hapū can exercise their rangatiratanga in a co-ordinated manner to achieve the best possible settlement for Ngāpuhi katoa'.³⁶

A number of other parties took part in our inquiry in opposition to the claimants and in support of the Crown's decision to recognise the mandate gained by the Tūhoronuku IMA.³⁷ They spoke on behalf of their hapū, some of whom had previously opposed the Tūhoronuku IMA. They had withdrawn their opposition following what they considered to be extensive and lengthy facilitation and engagement processes between themselves and the Tūhoronuku IMA. These parties argued that they exercise hapū rangatiratanga and employ tikanga while engaged with and within the Tūhoronuku IMA.³⁸ They submitted that the rangatiratanga of hapū currently engaged in the Tūhoronuku IMA is as relevant a consideration for

30. Submission 3.3.29, pp 1, 36–37, 53–54

31. Ibid, pp 1–2, 20–23, 43–45, 51–53

32. Ibid, pp 2–3, 38–39, 49

33. Ibid, pp 67–68

34. Ibid, pp 41–42

35. Ibid, pp 25–26

36. Ibid, p 3

37. The interested parties opposing the claimants included Wai 1709 – Ngāti Moerewa; Wai 492 & 1341 – Ngāti Rēhia; Te Whiu; Te Pōpoto; Ngāti Te Rino; Te Kumutu; Wai 2003 – Ngāti Whārara, Ngāti Korokoro, and Te Pouka; Wai 1679 – Ngare Hauata and Te Uri Kanapa; Wai 1131 – Ngāti Hineira and Te Uri Taniwha; Wai 1478 – Te Uri o Hua. See submission 3.3.31, p 1.

38. Submission 3.3.31, p 3

the Tribunal as that of claimant hapū, so that the Tribunal should act with caution should it find any of the claims to be well-founded. They argued that they could suffer serious prejudice through further delays, extra costs, lost opportunities and the uncertainty that might result from recommendations that caused the Crown to revoke its recognition of the Tūhoronuku IMA mandate and to cease or delay negotiations.³⁹

3.3 THE HAPŪ KAIKŌRERO APPOINTMENT AND DISMISSAL AND PROCESSES IN THE TŪHORONUKU IMA'S AMENDED DEED OF MANDATE

3.3.1 The claimants

Claimants accepted that hapū kaikōrero are intended to be the building blocks of the Tūhoronuku IMA, comprising a large group from which the majority of its trustees are appointed and its governance established. They argued that because of this, the process by which hapū appoint their kaikōrero is crucial to the ability of the Tūhoronuku IMA to represent the hapū of Ngāpuhi. Claimants submitted that while changes had been made to the appointment process in response to concerns they raised, the changes in fact worked to undermine hapū. In their view the amended hapū kaikōrero appointment process allows individuals, acting without hapū support, to determine whether hapū will appoint a kaikōrero and to choose who the kaikōrero will be. These amendments resulted from a process in which the Crown determined the changes that would be made instead of working with hapū to determine the changes. Claimants maintained that by recognising the mandate held by the Tūhoronuku IMA and thereby endorsing its hapū kaikōrero appointment process, the Crown had failed to protect the tikanga of hapū and respect their rangatiratanga.⁴⁰

This situation is compounded, claimants submitted, by the onerous process hapū are required to undertake in order to dismiss and replace their kaikōrero. Under the appointment process a hapū kaikōrero could be appointed via a single nomination from an individual hapū member, without the knowledge of the wider hapū. Yet at least 90 members of the hapū are required to initiate the process to dismiss and replace that kaikōrero. Of those who might then vote on the issue (a minimum of 60 eligible voters is required), at least 75 per cent must vote in favour of dismissing the kaikōrero for that to take effect. Should a hapū succeed in dismissing their kaikōrero, the original process for appointing a (replacement) kaikōrero will be triggered, a process over which hapū can exert no effective control.⁴¹ The claimants submitted that these provisions are unfair and designed to protect the Tūhoronuku IMA and allow it to continue with negotiations in spite of opposition.⁴²

39. Submission 3.3.31, pp 5–6

40. Submission 3.3.15, pp 11–12, 15–22; submission 3.3.18, pp 20–22; submission 3.3.20, pp 39–40; submission 3.3.38, p 8; submission 3.3.43, pp 42–47; submission 3.3.44, pp 13–14

41. Submission 3.3.15, pp 20–22; submission 3.3.18, pp 21–22

42. Submission 3.3.43, p 47

The Wai 2341 claimants also alleged that a number of hapū kaikōrero are participating in the Tūhoronuku IMA under duress. They pointed to the evidence of Whakatau Kopa, hapū kaikōrero for Ngāi Tu, who stated that Ngāi Tu did not support the Tūhoronuku IMA but decided to fill the position of hapū kaikōrero purely to prevent anyone else from standing and purporting to speak for them. They felt this was necessary as the appointment process allows individuals to nominate kaikōrero against the wishes of the hapū, thereby undermining their rangatiratanga.⁴³

Claimants also submitted that most hapū continue to be unrepresented by the Tūhoronuku IMA. This is the result, they said, of most hapū simply not supporting the Tūhoronuku IMA's mandate.⁴⁴ At the time of our March hearing just 47 of the 110 hapū listed in the deed of mandate had appointed hapū kaikōrero. The Wai 2435 and 2488 claimants submitted that the participation of hapū could be considered the primary reflection of support for the mandate held by the Tūhoronuku IMA. The fact that most hapū have not appointed hapū kaikōrero necessarily brought into question the ability of the Tūhoronuku IMA to represent the Ngāpuhi claimant community.⁴⁵

3.3.2 The Crown

The Crown submitted that the processes for appointing hapū kaikōrero are adequate and democratic and allow each hapū to be involved.⁴⁶ That process, contained in the addendum to the deed of mandate, was created by Tūhoronuku specifically to address concerns raised by Te Kotahitanga. Originally, hapū were to appoint hapū kaikōrero according to their own processes but Te Kotahitanga raised a number of concerns about this and asked for amendments to be made. The Crown considered that the essence of these concerns was:

- ▶ the need for a more transparent nomination process;
- ▶ that hapū should hold hui to elect a mandated hapū kaikōrero from those nominated; and
- ▶ that voting would occur only where necessary.⁴⁷

In the Crown's view, Te Kotahitanga's concerns are met by the changes made by Tūhoronuku in the addendum to the deed of mandate. Fresh concerns that were then raised, namely that the amended process does not require hui at which hapū decide upon and vote for nominees, are unfounded as the process does not prevent such hui taking place. Also unfounded are criticisms that the process allows for people living outside the rohe to represent their hapū. The Crown submitted it was open to Tūhoronuku to design a process that allows for this and it would have been a step too far for the Crown to insist that hapū representatives live within the rohe.⁴⁸

43. Submission 3.3.28, pp 26, 28–29; see also doc A67, p 4

44. Submission 3.3.26, p [10] (PDF)

45. Submission 3.3.15, p 12

46. Submission 3.3.30, p 171

47. Ibid, pp 169–170

48. Ibid, pp 170–171

3.3.3 The interested parties in opposition to the claimants

The Tūhoronuku IMA submitted that the appointment process for hapū kaikōrero is fair and ensures each hapū can exercise its hapū rangatiratanga. Hui remain a key part of the appointment process, it said, with both nomination and voting processes able to take place at hui-ā-hapū. The process also allows for nomination and voting to take place outside of hui-ā-hapū, reflecting the widely dispersed nature of the Ngāpuhi population and the importance of allowing all Ngāpuhi to participate. While the Tūhoronuku IMA did not challenge the importance of the home marae, it considered that mandate and settlement processes have to reflect the modern realities of Māoridom. This includes the urbanisation and remoteness caused by colonisation. In its view, there is no basis to complain of a process that reflects the reality of the dispersed Ngāpuhi population.⁴⁹

3.4 THE WITHDRAWAL PROVISIONS IN THE TŪHORONUKU IMA'S DEED OF MANDATE**3.4.1 The claimants**

As stated, claimants submitted that the Crown's preference for a single settlement of all Ngāpuhi claims had led it to support a mandate that essentially compels hapū to cede their rangatiratanga to the mandated entity. They consider the clearest example of this is the Crown's refusal to allow a provision to be included in the Tūhoronuku IMA's deed of mandate that would enable individual hapū, or any number of hapū, to withdraw their support for the mandate. The only way that any hapū can withdraw from the mandate held by the Tūhoronuku IMA is to follow the generally worded withdrawal of mandate provision in the deed. It requires those seeking to withdraw to undertake a process analogous to that undertaken by the Tūhoronuku IMA in order to obtain its mandate. That process included a number of hui conducted in New Zealand and Australia and a vote involving the whole of Ngāpuhi. The claimants argued that they are unable to undertake such an onerous task as they lack the resources available to the Tūhoronuku IMA during its mandating process. The result effectively guarantees that hapū do not have a choice whether to support the Tūhoronuku IMA, instead finding themselves trapped within the Crown-recognised mandate. Among those so trapped are hapū that have consistently opposed their inclusion in the mandate held by the Tūhoronuku IMA and demanded their withdrawal from it.⁵⁰

At the very heart of their case, claimants said, is their opposition to the Crown's contention that hapū cannot withdraw from the Tūhoronuku IMA because its mandate was not bestowed by hapū but by Ngāpuhi as a whole. The fact that hapū were never consulted on the mandate or asked to support it is, the claimants say, the fundamental problem. Rather than supporting the Tūhoronuku IMA, the Crown's

49. Submission 3.3.29, pp 59–62

50. Submission 3.3.20, pp 6–7, 65–70; submission 3.3.15, pp 30–34; submission 3.3.18, pp 34–38; submission 3.3.19, pp 11–12; submission 3.3.22, pp 27, 35; submission 3.3.25, pp 4–5; submission 3.3.26, p [17]; submission 3.3.28, pp 16–17

obligation is to protect the rangatiratanga of hapū.⁵¹ Including a withdrawal provision for hapū is one way in which the Crown could meet this obligation.⁵²

3.4.2 The Crown

The Crown submitted that a withdrawal mechanism for hapū would fundamentally undermine the mandate that the Tūhoronuku IMA secured from Ngāpuhi. That mandate was secured from all of Ngāpuhi to settle all Ngāpuhi claims. The 2011 vote did not ask whether Tūhoronuku had a mandate to represent hapū. It asked whether all Ngāpuhi should join together in a unified negotiation with the Crown through Tūhoronuku. The Crown recognised Tūhoronuku as having secured that mandate. It follows that the withdrawal of that mandate can only be decided by all Ngāpuhi as it will necessarily impact on the ability of all Ngāpuhi to enter negotiations. In the Crown's view, a specific provision allowing hapū to withdraw from the mandated entity would be fundamentally inconsistent with what Ngāpuhi said they wanted through the 2011 vote.⁵³

The Crown also considered that a specific hapū withdrawal clause would be inconsistent with the desire of Ngāpuhi, including many of those opposed to the Tūhoronuku IMA, to move forward together through the settlement process. Any hapū withdrawal would necessarily affect all those who remained within the Tūhoronuku IMA, as the Crown would need to reconsider its recognition of the mandate. It was only logical, the Crown said, that a robust and thorough process of consultation with all those potentially affected would have to be followed for a hapū to withdraw their mandate from the Tūhoronuku IMA. In the Crown's submission, the existing withdrawal provisions are fair and provide for the desire to achieve a Ngāpuhi-wide settlement and avoid the potential fracturing of Ngāpuhi.⁵⁴

3.4.3 The interested parties

The Tūhoronuku IMA also regards the withdrawal provisions in its deed of mandate as fair and consistent with a mandate gained from the whole of Ngāpuhi, rather than from each and every Ngāpuhi hapū. It submitted it is fair that the withdrawal process be as rigorous as the process Tūhoronuku went through to secure the mandate, given that the withdrawal of individual hapū would destabilise the mandate gained and put at risk the settlement negotiations for all remaining Ngāpuhi. The Crown cannot, it said, insist on a hapū withdrawal process for that would ignore the wishes of the majority of Ngāpuhi who voted in favour of a Ngāpuhi-wide mandated entity. In the Tūhoronuku IMA's view, hapū who want to withdraw must seek the approval of all Ngāpuhi to do so.⁵⁵

51. Submission 3.3.32, p 6; submission 3.3.33, p 5; submission 3.3.38, p 8–9; submission 3.3.43, pp 47–48

52. Submission 3.3.43, p 30

53. Submission 3.3.30, pp 172–173

54. Ibid, pp 173–174

55. Submission 3.3.29, pp 64–66

3.5 CONCLUSION

The claimants (and the interested parties in support) emphasised the critical importance of hapū rangatiratanga to Ngāpuhi and the need for this to be reflected in any group or entity that seeks to represent them in settlement negotiations. In short, any group or entity seeking a mandate to represent Ngāpuhi must be able to show that it secured that mandate from the hapū of Ngāpuhi. Further, the support of hapū must be reflected in the way that entity operates. This is the only way, they said, to ensure that a mandated group or entity reflects the will of hapū and their preferred approach to settlement negotiations. In their view, the Crown's failure to require the Tūhoronuku IMA to produce clear evidence showing it had secured the support of hapū is fatal to any assertion that the Tūhoronuku IMA has a mandate to represent Ngāpuhi. This fundamental flaw is reflected in the failings of the Tūhoronuku IMA's hapū kaikōrero process and the inability of hapū to withdraw from the scope of its mandate.

Fundamentally, the Crown's view is that the mandate held by the Tūhoronuku IMA reflects the wishes of a majority of Ngāpuhi. The Crown (and the interested parties opposing the claimants) emphasised that it was the Tūhoronuku IMA, not the Crown, that chose to pursue a mandate to represent all of Ngāpuhi. The Tūhoronuku IMA decided to approach the whole of Ngāpuhi for their support, rather than secure the support of Ngāpuhi through its hapū. Nevertheless, in the Crown's view, the importance of hapū is reflected in the structure and processes of the Tūhoronuku IMA. All hapū can, it said, be directly involved in the negotiations process through their hapū kaikōrero and hapū representatives make up a clear majority of the Tūhoronuku IMA's board. The withdrawal provisions contained in the deed of mandate are fair, were designed by the Tūhoronuku IMA, and reflected the need for stability during the negotiations process.

The parties are divided over the role of hapū in determining whether and how the Tūhoronuku IMA can represent Ngāpuhi in settlement negotiations. For the claimants, the support of hapū is integral to any entity that asserts to represent them. This support must be reflected in the way that entity operates – this includes the means by which representative positions are filled and the way in which support for the mandate is maintained. The acknowledgement of, and respect for, hapū rangatiratanga and tikanga are crucial in this regard. The Crown asserts that the Tūhoronuku IMA sought and secured a mandate from the whole of Ngāpuhi as a single group, regardless of their hapū affiliations. Yet, the importance of hapū is clearly recognised in the structure of the Tūhoronuku IMA and the role that hapū will play in negotiations through that entity.

In sum, the parties are divided over two fundamental matters: the role of hapū in the process of a mandate being obtained to settle the historical claims of Ngāpuhi claimants; and the role of hapū in the structure and processes of the mandated entity itself. In the next chapter, we focus on the latter issue, analysing how the Tūhoronuku IMA represents hapū and allows them to exercise rangatiratanga.

CHAPTER 4

**THE TRIBUNAL'S ASSESSMENT OF
THE CURRENT STRUCTURE OF THE
T HIRONUKU IMA**

4.1 INTRODUCTION

In chapter 2 we discussed the vital importance to Ngāpuhi of tikanga-based decision-making processes and the exercise of hapū rangatiratanga. The parties to this inquiry disagree fundamentally on whether the Tūhoronuku Independent Mandated Authority (the Tūhoronuku IMA) supports the use of tikanga and whether it protects the ability of hapū to exercise rangatiratanga in the settlement negotiation process. The Crown contends that the Tūhoronuku IMA is inherently representative of and accountable to the people of Ngāpuhi, including its hapū.¹ The claimants contend that the Tūhoronuku IMA is incapable of representing hapū as it does not allow for hapū to exercise rangatiratanga (see chapter 2). In this chapter, we consider the extent to which the Tūhoronuku IMA, through its representative model and accountability processes, will allow Ngāpuhi hapū to utilise their tikanga and exercise their rangatiratanga in the negotiation of the settlement of their claims.

First, however, we address an issue raised during our hearings and pursued by the Crown in its closing submissions. The Crown cast doubt on whether the claimants in this inquiry were truly representative of their hapū.² For example, while the Crown acknowledged that Te Rūnanga o Ngāti Hine involved the senior leadership of Ngāti Hine, it submitted that it was 'unclear' whether that Rūnanga was representative of the wider hapū.³ In pursuing this line of argument the Crown referred to *The East Coast Settlement Report* wherein, the Crown contends, the Tribunal stipulated that it would 'require evidence in the form of hui decisions/minutes, and/or signed representation lists, before accepting that claims represent anyone other than the named applicant(s)'.⁴ The Crown made much of the apparent failure of claimants in our inquiry to produce this type of evidence.

1. Submission 3.3.30, p 94

2. Ibid, pp 174–212

3. Ibid, p 181

4. Ibid, pp 174–175

The Crown's raising of this issue appears to signal a rethinking of its position as expressed earlier in this inquiry. During our judicial conference of 18 and 19 June 2014, we noted that the Crown relied on the findings in *The East Coast Settlement Report* in opposing the application for urgency. The East Coast Settlement Tribunal rejected the claims subject of its inquiry in part because it viewed the claimants as fringe groups who did not represent the hapū they claimed to represent. We asked whether the Crown considered this to apply to the claims subject to this inquiry. Crown counsel acknowledged that while it was apparent that some of the claimants were speaking as individuals, there were also hapū-based groups involved. In this way our inquiry was seen as distinct from the East Coast Settlement inquiry. For this reason, the Crown chose not to make the question of representivity one of its key issues although it otherwise relied heavily on the Tribunal's findings in *The East Coast Settlement Report*.⁵ The Crown's primary witness in our inquiry, Maureen Hickey (Negotiation and Settlement Manager at the Office of Treaty Settlements (OTS)), also acknowledged that the leaders of Te Rūnanga o Ngāti Hine spoke on behalf of their hapū.⁶ More significantly, both OTS and the Minister for Treaty of Waitangi Negotiations have, over the past five years, met with a number of leaders purporting to represent their hapū and the wider collectives of Te Kotahitanga and Ngā Hapū o Te Takutai Moana without questioning their authority to do so.

This Tribunal does not doubt the representative nature of the claimants in our inquiry and we question the validity of the Crown submissions on this issue. First, the passage in *The East Coast Settlement Report* to which the Crown referred came originally from a memorandum-directions of Judge Stephanie Milroy dated 14 July 2006, not, as the Crown indicated, from the East Coast Settlement Tribunal itself.⁷ That Tribunal (in which Judge Craig Coxhead presided) quoted the memorandum-directions as it related to particular claimants who had taken part in the East Coast Inquiry and who were pursuing claims in the East Coast Settlement Inquiry three years later. More particularly, the East Coast Settlement Tribunal discussed the failure of those particular claimants to produce the evidence of support for their claims that Judge Milroy had indicated would be required.⁸ Judge Milroy's directions were not intended and cannot be considered to be a blanket requirement for claimants in all inquiries. The East Coast Settlement Inquiry did not treat them as such and it is disingenuous of the Crown to indicate otherwise.

Secondly, and as we have already noted, the Crown appears to have changed its stance on this issue, having previously conceded that claimants spoke on behalf of their hapū. The Crown, in its closing submissions, pointed to an apparent lack of evidence of the support enjoyed by the claimants, but this reflects the fact that we did not direct or otherwise require the claimants to produce such evidence. The claimants in our inquiry are some of the same people the Crown has engaged with

5. Transcript 4.1.1, p 131

6. Submission 3.3.30, p 181

7. Judge Milroy's memorandum is found in the record of inquiry for the East Coast Inquiry: Wai 900, memo 2.5.19, p 3.

8. Waitangi Tribunal, *The East Coast Settlement Report* (Wellington: Legislation Direct, 2010), p 35

over many years through the Te Paparahi o Te Raki Inquiry (Wai 1040) and through the mandating process since 2009. We saw no suggestion of the Crown questioning their representative nature in the evidence provided to us, which includes official correspondence from Ministers and officials and records of many face-to-face meetings over a number of years.

Finally, we note that in questioning the support that the claimants had for their claims, the Crown (and the Tūhoronuku IMA) relied entirely on numbers, contrasting the difficulties faced by hapū and marae committees in contacting their constituent groups with the support and breadth of communication achieved by the Tūhoronuku IMA. It also highlighted the number of votes involved in particular hapū kaikōrero elections, as opposed to resolutions taken at hui on the marae which rejected any involvement with the Tūhoronuku IMA.⁹ The Crown said nothing about traditional leadership structures or the authority of traditional leaders to speak on behalf of the collective, nor of forms of decision-making that are tika and pono. The doubts expressed as to the capacity of acknowledged leaders to speak for their people suggests a regrettable disregard, or misunderstanding, of tikanga.

4.2 HOW DOES THE TŪHORONUKU IMA REPRESENT HAPŪ AND OTHER NGĀPUHI INTERESTS?

4.2.1 The Tūhoronuku IMA – its structure and representative model

(1) *Defining the group to be represented*

A crucial part of any deed of mandate is the definition of the group whose claims will be settled through negotiation between the mandated entity and the Crown. The definition describes who conferred the mandate and, therefore, who has the ability to withdraw it. Tūhoronuku (the precursor to the Tūhoronuku IMA) presented a deed of mandate to the Crown in 2012. The deed states that it ‘formally demonstrates that Tūhoronuku has obtained a durable mandate to represent Ngāpuhi in negotiations with the Crown’ to settle all the historical claims of Ngāpuhi.¹⁰ It then defines Ngāpuhi as ‘all the descendants of the tūpuna Rāhiri’.¹¹

The Tūhoronuku deed states that there are perhaps 300 Ngāpuhi hapū, that 150 have been identified, and that at least 40 are considered ‘active’ (rather than historical or inactive) in nature.¹² An appendix to the deed lists the hapū and marae which are necessarily included within the definition (we discuss further below the number of hapū represented by the Tūhoronuku IMA).¹³ But, for the purposes of the mandate, Ngāpuhi are defined as the single all-encompassing group consisting of Rāhiri’s descendants.¹⁴ It was this very large group of individuals, rather than the whānau and hapū to which they belong, that is said to have conferred a mandate upon Tūhoronuku.

9. Submission 3.3.30, pp 193–194; transcript 4.1.2, pp 189, 190, 199, 436–437, 642–643

10. Document A25(a), p [34]

11. Ibid, p [35]

12. Ibid, p [37]

13. Ibid, pp [70]–[80]

14. Ibid, p [35]

Negotiations between the Tūhoronuku IMA and the Crown will therefore settle all claims of those people who whakapapa to Rāhiri. Claims registered with the Waitangi Tribunal that are affected by this definition are listed in an appendix to the deed of mandate.¹⁵ This includes the claims of all Ngāpuhi hapū, whānau, and individuals as well as any other Ngāpuhi groups, such as the Whatitiri Māori Reserves Trust. It also includes the claims of hapū and other groups who, to some extent, whakapapa to Rāhiri, but whakapapa to other tūpuna as well. The claims of such hapū will be settled to the extent that they relate to their Ngāpuhi whakapapa. In our inquiry both Patuharakeke and Ngāti Manu raised this as an issue, stating that their identities are defined by their whakapapa links to tūpuna other than Rāhiri.¹⁶ As mentioned in chapter 2, Ngā Tauira are a group comprising individuals who share a link to Hato Petera College. Some members of Ngā Tauira are Ngāpuhi and the Crown has advised Ngā Tauira that their claim will be settled through its negotiations with the Tūhoronuku IMA in so far as it relates to those members.¹⁷

(2) *The representative structure and appointment processes*

The representative structure in the 2012 deed of mandate consisted of a 15-member board comprised of seven representatives for hapū, two representatives for Ngāpuhi based in Auckland, a representative each for Ngāpuhi in Wellington and the South Island, a representative each for kuia and kaumātua, and two representatives from the Rūnanga. The hapū kaikōrero were to meet and appoint seven of their number to be the hapū representatives.¹⁸ This structure was amended on 3 July 2013 by an addendum to the deed of mandate. The amendments included both the separation of Tūhoronuku from the Rūnanga, of which it had been a sub-committee, and changes to the size and make-up of the board of the newly separate Tūhoronuku IMA.¹⁹

The Tūhoronuku IMA consists of the 22-member board that includes the appointed representatives of hapū, kuia, kaumātua, Ngāpuhi from outside the rohe, and the Rūnanga. Hapū representation was increased from seven representatives to 15, with the Rūnanga retaining a single representative. More particularly, the 22-member Tūhoronuku IMA board, as amended by the 2013 addendum, comprises:

- ▶ 15 hapū representatives – spread between the five geographical regions of Hokianga, Kaikohe-Waimate Taiāmai, Whangaroa, Te Pēwhairangi, and Whāngārei ki Mangakāhia, with the hapū of each region each having three representatives;
- ▶ two kaumātua/kuia representatives – selected by kaumātua and by kuia;
- ▶ four Ngāpuhi ā rohe (urban) representatives – one representative each for Tāmaki Central/West, Tāmaki South, Pōneke (Wellington), and Te Waipounamu (the South Island); and

15. Document A25(a), pp [70]–[80]

16. Submission 3.3.19, pp 5–6; submission 3.3.25, p 22

17. Submission 3.3.21, p 6

18. Document A25(a), pp [41]–[43]

19. Ibid, pp [252]–[319]

- ▶ one representative from the Rūnanga.²⁰

These representatives do not hold individual mandates and cannot be negotiators, being responsible instead for appointing and instructing negotiators. The deed requires them to act in a manner that is transparent, accountable, and inclusive. They will meet those requirements by developing and carrying out a comprehensive communications plan utilising a website, e-panui, and regular hui-a-iwi.²¹

As mentioned in chapter 1, when the Crown conditionally recognised the mandate, it did so having already agreed that the existing board members elected under the original structure would vacate their positions.²² This effectively meant that the Crown recognised the mandate of an empty organisational structure that would be populated through appointment processes that were yet to occur. The appointment processes are set out in the addendum to the deed. Board members are appointed by those they represent through a formalised nomination and election process run by an Independent Returning Officer (IRO). A company called ElectionNZ acts as the IRO for the Tūhoronuku IMA's election processes. In brief, the process is initiated by the IRO calling for nominations from anyone in the group eligible to take part in any given appointment process. For example, the appointment process for the urban representative for Wellington is triggered by a call for nominations from Ngāpuhi based in Wellington. Where more than one nomination is received an election is triggered.

All Tūhoronuku IMA board positions are subject to distinct appointment and replacement processes in which their constituent communities engage, except for the Rūnanga, whose single representative is appointed (and can be replaced) by a majority resolution of Rūnanga Trustees at a regular Rūnanga board meeting.²³ For the kaumātua and kuia representatives, this community comprises those Ngāpuhi over 55 years of age who are either registered with the Rūnanga or who complete a register-to-vote form that is validated by the IRO.²⁴ The community for each of the four Ngāpuhi ā rohe (urban) representatives comprises those Ngāpuhi aged over 18 who live within each of the regions concerned and who are registered with the Rūnanga or have completed a register-to-vote form that is validated by the IRO.²⁵

The process for selecting the kaumātua, kuia and urban representatives begins when the IRO issues a public notice calling for nominations over a 21-day period. In the case of kaumātua and kuia representatives, a private notice is also sent to all those over 55 years of age who are registered with the Rūnanga. Self-nomination is not permitted. If only one person is nominated for a position then that person is accepted and appointed to the relevant position, thereby becoming one of the 22 board members of the Tūhoronuku IMA.²⁶

20. Ibid, pp [261]–[262]

21. Ibid, p [57]

22. Document A108, pp 53, 57, 58

23. Document A25(a), p [275]

24. Ibid, p [270]

25. Ibid, p [274]

26. Ibid, pp [266], [73]

An election takes place when more than one nomination is received. Within 14 days of the close of nominations, the IRO must provide 21 days' notice of a hui to elect a representative. This notice will give the particulars of the time, date, place and intent of the hui and advertise the availability of candidate profile information on the IRO and the Tūhoronuku IMA websites. This information will also be provided at the hui. The following minimum criteria must be met in any election hui:

- ▶ An attendance register must be kept.
- ▶ Voting is undertaken by persons present at the hui by way of paper ballot, or online, or by postal ballot.
- ▶ Voters must be registered with the Rūnanga or complete a register-to-vote form.
- ▶ All those over the age of 55 may take part in the vote for kaumātua and kuia representatives.
- ▶ All those over the age of 18 living within one of the four urban districts may take part in the election for their urban representative.

Public notice of the successful candidates must be issued within seven days of the completion of the voting period. Each successful candidate is then one of the 22 board members of the Tūhoronuku IMA.²⁷

The 15 hapū representatives on the Tūhoronuku IMA board are selected through a two-step process. First, each hapū is able to select an individual as their official spokesperson – or hapū kaikōrero. (The importance of hapū kaikōrero and their appointment and replacement processes are looked at in more detail below.) The hapū kaikōrero are then called upon to attend hui to appoint 15 hapū representatives to the Tūhoronuku IMA. As mentioned, the hapū kaikōrero are grouped into five geographical regions. The hapū kaikōrero within each region appoint three of their number to the Tūhoronuku IMA board to represent all the hapū of their region.

The IRO triggers this process by giving 21 days' private notice to all hapū kaikōrero of a hui to appoint representatives for their region. The IRO then convenes hui for each region and ensures that an attendance register is kept and that nomination is undertaken by the mandated hapū kaikōrero present at the hui. Self-nomination is not permitted. If three or fewer hapū kaikōrero are nominated they are duly appointed to the Tūhoronuku IMA board as hapū representatives for their region. Where four or more hapū kaikōrero are nominated, the three representatives are elected via a vote undertaken by the hapū kaikōrero present at the hui by way of paper ballot. Public notice of the persons appointed as hapū representatives is to be given within seven days of the hui.²⁸

(3) Hapū kaikōrero: their appointment and role in negotiations

The extent to which hapū can exercise rangatiratanga in the settlement negotiation process is at the core of this inquiry. The deed of mandate stipulates that hapū are able to engage with the Tūhoronuku IMA board and in the negotiation process through the appointment of an official spokesperson – their hapū kaikōrero. The

27. Document A25(a), pp [266]–[267], [273]–[274]

28. Ibid, pp [270]–[271]

method of appointment and the ways in which hapū kaikōrero can engage in negotiations were of significant concern to many of the claimants and the subject of much debate during the inquiry.

The election process for hapū kaikōrero is similar to that outlined above for kaumātua, kuia, and urban representatives on the Tūhoronuku IMA board and is triggered when the IRO issues a public notice calling for nominations in each of the five regions. To summarise, the nomination period runs for 21 days, is run by the IRO, and is open to all hapū members 18 years of age or older. Nomination forms are available from the IRO and when completed are sent to the IRO. Each individual hapū member is able to nominate any other hapū member for the role of hapū kaikōrero. Self-nomination is not permitted. If only one person is nominated that person becomes the Mandated Hapū Kaikōrero for their hapū.²⁹

An election is held if more than one person is nominated. The IRO liaises with affected hapū within 14 days of the close of nominations to facilitate an election hui. The IRO must provide 21 days' notice (including time, date, place and purpose) of a hui to elect a hapū kaikōrero and advertise the availability of candidate profile information on the websites of the IRO and Tūhoronuku IMA. This profile information will also be provided at the hui. Ngāpuhi who are 18 years of age or older and who whakapapa to the hapū can vote if they are registered with the Rūnanga or complete a register-to-vote form. Voting can take place at the hui by way of paper ballot, or online, or by postal vote. Notice of the successful candidates must be issued within seven days of the close of voting.³⁰

The 2013 addendum to the deed of mandate identifies the 110 hapū that the Tūhoronuku IMA represents and which can appoint a hapū kaikōrero.³¹ These hapū are also listed in the Tūhoronuku IMA's draft engagement plan, which provides further information on how these hapū, through their kaikōrero, will be involved in negotiations. It states that 'Hapū will be actively involved throughout the negotiations with the Crown to Agreement in Principle including through setting the priorities for redress.'³² The draft plan defines hapū kaikōrero as 'information conduits' between the hapū and negotiators. One of the key roles of hapū kaikōrero will be to develop 'hapū negotiation profiles', which are intended to summarise hapū identity and aspirations. These will be informed by oral histories, research and mapping summarised from the Waitangi Tribunal's Te Paparahi o Te Raki inquiry process and other information provided by the hapū. There is no template for these profiles and each hapū will be able to produce their own profile.³³ Hapū kaikōrero will also be expected to hold regular meetings with their hapū and with the other hapū kaikōrero for their region, though the draft plan does not define what 'regular' means. Similarly, negotiators are to meet 'regularly' with hapū kaikōrero.³⁴

29. Ibid, p [269]

30. Ibid, pp [269]–[270]

31. Ibid, p [286]

32. Document A98(a), p 192

33. Ibid, p 196

34. Ibid, p 197

The importance of hapū kaikōrero to the structure and operations of the Tūhoronuku IMA is clear (see diagram on facing page). They are not part of the Tūhoronuku IMA board, existing in a space of their own between it and the hapū of Ngāpuhi, but are essential to its make-up and functioning. It is the hapū kaikōrero (organised into five regionalised groups) that are responsible for selecting (from their own number) the majority of representatives on the Tūhoronuku IMA board. Moreover, the deed confirms that hapū kaikōrero will play a direct role in the negotiation process. They are expected to speak for their hapū on matters relating to settlement negotiations and keep them informed. Alongside the Tūhoronuku IMA board, hapū kaikōrero will communicate and seek feedback on Ngāpuhi objectives for settlement and the make-up and appointment of negotiators, they will instruct those negotiators, and sign off the terms of negotiation, the Agreement in Principle, and the initialled deed of settlement. They will also be involved in the planning and development of the body or bodies which will receive settlement assets (the post-settlement governance entity or PSGE).³⁵

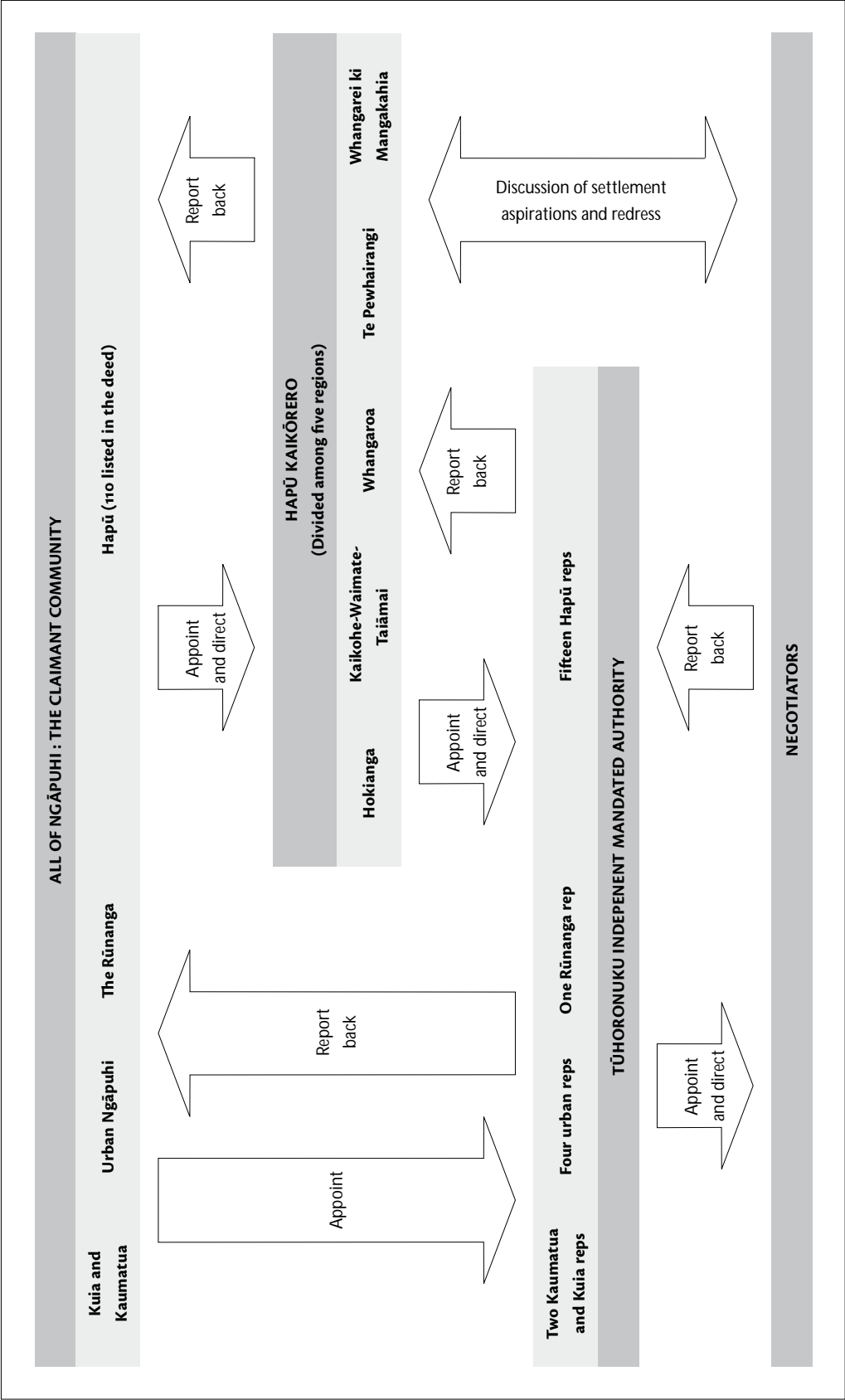
4.2.2 How are hapū kaikōrero and the Tūhoronuku IMA representatives accountable?

The accountability of the individual members of the Tūhoronuku IMA board and of hapū kaikōrero rests on the ability of those they represent to replace them. As with any mandated entity, the accountability of the Tūhoronuku IMA as a whole to the Ngāpuhi claimant community ultimately relies upon the ability of that community to withdraw the mandate the Crown has recognised as having been granted. Here we outline the replacement processes for Tūhoronuku IMA board members and the hapū kaikōrero, and the withdrawal of mandate provisions in the Tūhoronuku IMA deed and its addendum.

(1) Accountability processes: the replacement of Tūhoronuku IMA representatives

Tūhoronuku IMA board members are appointed and can be replaced by those they represent. The Rūnanga representative can be replaced by a majority resolution of Rūnanga Trustees at a regular board meeting. Hapū, urban, kuia, and kaumātua representatives can be replaced by following the process outlined in the addendum to the deed of mandate. In summary, any person eligible to elect a particular type of representative can apply to have that type of representative replaced. The Tūhoronuku IMA board will consider the application and, if appropriate, convene a hui between the representative subject to replacement and the person making the replacement application, to attempt to resolve the concerns raised. The Tūhoronuku IMA board may also determine whether further action to assist resolution is needed. If resolution is not achieved then a minimum number of people eligible to vote for the particular representative position must, in writing, notify the Tūhoronuku IMA board of their intention to hold a hui to replace the affected representative. They must provide proof of their registration with the Rūnanga or

35. Document A25(a), p [34], [43]



The structure of the Tūhoronuku IMA

completed register-to-vote forms. The minimum numbers needed to give written notice of their intention to replace a representative are:

- ▶ 80 for kuia and kaumātua representatives;
- ▶ 80 for the Pōneke and Te Waipounamu representatives;
- ▶ 180 for the Tāmaki Central/West and Tāmaki South representatives; and
- ▶ a majority of the hapū kaikōrero in the region affected for hapū representatives.

Within 14 days of such notice the Tūhoronuku IMA board must instruct the IRO to give 21 days' notice of a hui to replace the representative. Minimum attendances at replacement hui are:

- ▶ 50 eligible voters for kuia and kaumātua representatives;
- ▶ 50 eligible voters for the Pōneke and Te Waipounamu representatives;
- ▶ 150 eligible voters for the Tāmaki Central/West and Tāmaki South representatives; and
- ▶ 50 per cent of the hapū kaikōrero for the affected region.

The existing representative must be given the opportunity to speak at the hui. Replacement of that representative will occur only if at least 75 per cent of those present vote in favour of replacement.³⁶

(2) Accountability processes: the replacement of hapū kaikōrero

To replace a hapū kaikōrero, a hapū member must first notify the Tūhoronuku IMA board in writing of the reason(s) for seeking replacement. The board will consider the application and, if appropriate, convene a hui between the kaikōrero and the person seeking their replacement, to attempt to resolve the concerns raised. The board may also determine whether further action to assist resolution is needed.

If a resolution cannot be achieved then a replacement process can take place. To begin that process, a minimum of 90 hapū members over the age of 18 must, in writing, notify the Tūhoronuku IMA board of their intention to replace their hapū kaikōrero, each providing proof of their registration with the Rūnanga or a completed register-to-vote form. Within 14 days of such notice the Tūhoronuku IMA board must direct the IRO to give 21 days' notice of the replacement hui. Minimum attendance at the hui is 60 hapū members of voting age (those 18 years and older) and the existing hapū kaikōrero must be given the opportunity to speak. Of those in attendance, at least 75 per cent must vote in support of replacing the hapū kaikōrero. If this level of support is achieved then the original process to select a new hapū kaikōrero is triggered.³⁷

(3) Accountability processes: the withdrawal of the mandate

The ability of any group to ensure that its mandated representatives are collectively accountable ultimately rests on that group's ability to withdraw its mandate from the entity to which it was granted. In the case of the Tūhoronuku IMA, the addendum to the deed states:

36. Document A25(a), pp [267]–[268], [272]–[273], [274]–[275]

37. Ibid, pp [271]–[272]

ASSESSMENT OF THE STRUCTURE OF THE TŪHORONUKU IMA 4.2.2(4)

The mandate held by Te Rōpū o Tūhoronuku was conferred by the people of Ngāpuhi following the processes set out in the Deed of Mandate. These processes were robust and thorough. Any process for the withdrawal of the mandate conferred upon Te Rōpū o Tūhoronuku by the people of Ngāpuhi must be as robust and thorough as those processes.

If the Crown recognises the mandate conferred upon Te Rōpū o Tūhoronuku by the people of Ngāpuhi and any such process is followed that seeks the withdrawal of that mandate, the Crown would need to decide whether it continues to recognise, or no longer recognises, the mandate conferred by Ngāpuhi on Te Rōpū o Tūhoronuku.³⁸

This withdrawal clause is very general in nature, simply stating that any process undertaken to withdraw the mandate must be comparable in nature and scale to the process undertaken by the Tūhoronuku IMA to secure it. The particulars of the mandating process are outlined in the deed of mandate, giving an indication of the type and scale of the process required to withdraw the mandate. The withdrawal provision is pitched at the level of a complete withdrawal of the mandate from the Tūhoronuku IMA. It does not include any reference to a process allowing hapū or groups of hapū to withdraw from the scope of the mandate.

The Tūhoronuku IMA's draft engagement plan does, however, suggest that groups (such as hapū) may be able to withdraw from the scope of the mandate secured by the Tūhoronuku IMA. It states that any group seeking to the remove itself would need to embark on 'a sufficiently robust process involving notification and engagement with the entire Ngāpuhi community'. It would then be for the Crown to consider whether to recognise the withdrawal.³⁹ As we describe later in this chapter, the requirement to engage with the large and dispersed Ngāpuhi community places a significant burden on any group attempting to withdraw from the scope of the mandate.

(4) *The Crown's conditions relating to the Tūhoronuku IMA's mandate*

The Crown's recognition of the mandate secured by the Tūhoronuku IMA is dependent upon the Tūhoronuku IMA fulfilling a series of Crown-imposed conditions. These conditions are a mixture of actions required in the period immediately following the recognition of the mandate, actions required in the future at specific points in the negotiation process, and ongoing requirements to be fulfilled throughout that process. Set out in a letter of 17 February 2014 from the Minister for Treaty of Waitangi Negotiations to all Ngāpuhi, these conditions require the Tūhoronuku IMA to:

- ▶ Develop detailed communication and negotiation plans that recognise specific hapū interests to be included in the Terms of Negotiation to be signed with the Crown. The Crown expected that these plans would outline how and when the Tūhoronuku IMA would regularly communicate with the claimant community and include them in the negotiation and design of the redress package;

38. Ibid, p [265]

39. Document A98(a), p 199

- ▶ Provide detailed and regular mandate maintenance reports. This requires the Tūhoronuku IMA to report every three months on how it is implementing its communication and negotiation plans;
- ▶ Explore options for the PSGE early in the negotiations. This requires the Tūhoronuku IMA to engage with Ngāpuhi on PSGE options at the agreement in principle stage of negotiations, generally earlier than has occurred in other settlement processes;
- ▶ Allow votes for elected members only. The Tūhoronuku IMA was required to amend its deed of mandate to ensure only elected members can vote rather than allowing proxy representatives to vote; and
- ▶ Provide clarity with overlapping iwi on their claimant definition. Te Aupōuri, Te Roroa and Ngāti Whātua o Kaipara had raised concerns regarding the Ngāpuhi area of interest outlined in the deed of mandate. The Tūhoronuku IMA was required to agree the technical terms of its claimant definition with the Crown for inclusion in the Terms of Negotiation and to undertake consultation with Te Aupōuri, Te Roroa and Ngāti Whātua o Kaipara in the three months following the recognition of its mandate to ensure there is clarity with all overlapping iwi regarding whom the Tūhoronuku IMA represents.⁴⁰

Ms Hickey, in her brief of evidence, stated that the conditions imposed are robust and constitute a genuine response to concerns raised regarding the mandate.⁴¹

4.3 DOES THE TŪHORONUKU IMA PROTECT THE ABILITY OF HAPŪ TO EXERCISE RANGATIRATANGA?

4.3.1 Introduction

As the Te Arawa Tribunal stated, the design and implementation of settlement processes (including assistance in achieving, and ultimate recognition of, the mandate of a negotiating party) relies on the Crown being able to identify and understand the customs and cultural preferences of the communities involved. This, the Tribunal stated, ‘requires that the Crown has a sound understanding of, respect for, and engagement with tikanga.’⁴² Having set out the representative and accountability processes of the Tūhoronuku IMA we now analyse how and to what extent the Tūhoronuku IMA structure allows for the use of tikanga and protects hapū rangatiratanga. In this regard, we pay particular attention to the processes for appointing and replacing both the hapū kaikōrero and the hapū representatives on the Tūhoronuku IMA board, and to the withdrawal provisions in the deed of mandate.

4.3.2 The definition of Ngāpuhi

(1) *Hapū are missing from the definition*

The Tūhoronuku IMA’s deed of mandate states that it will represent Ngāpuhi in negotiations with the Crown to settle all the historical claims of Ngāpuhi. Ngāpuhi are

40. Document A26(a), pp 500–501

41. Document A108, p 75

42. Waitangi Tribunal, *The Te Arawa Settlement Process Reports* (Wellington: Legislation Direct, 2007), p 21

defined in the deed as a single large natural group that includes the descendants of the tupuna Rāhiri. It is the historical claims of this group of people that will be settled through negotiations between the Tūhoronuku IMA and the Crown. We discussed in chapter 1 the importance of Rāhiri to the Ngāpuhi identity, as the ancestor who consolidated and expanded the influence of those who came to be known as Ngāpuhi. Rāhiri is ‘te tumu herenga waka’ – the stake to which the waka of the north are bound.⁴³ It is not possible to define Ngāpuhi without reference to Rāhiri.

There are, however, other vitally important aspects of the Ngāpuhi identity which should have been taken into account when defining ‘Ngāpuhi’ for mandating purposes. The autonomous nature of the many hapū which make up Ngāpuhi is one of these. All participants in our inquiry (the claimants, the Crown and the interested parties) confirmed the central importance of hapū autonomy to the Ngāpuhi identity. Mr Tau agreed in evidence that the strength of the hapū within Ngāpuhi is famous and reflected in the saying ‘Ngāpuhi kōwhao rau’ which he translated as ‘Ngāpuhi of a hundred pitfalls.’ He stated that it has always been the Ngāpuhi way for there to be real contention between whānau, hapū, and iwi and for supposed agreements to fail when a whānau or hapū pursued their own course, contrary to the wishes of others.⁴⁴

Mr Henare expressed a different view of the meaning and significance of this pepeha to the Ngāpuhi identity. He agreed that controversy and strife within and between the hapū of Ngāpuhi is not new and is to be expected in an iwi the size of Ngāpuhi. He believed, however, that this had led many to misinterpret ‘Ngāpuhi kōwhao rau’ as a reflection of Ngāpuhi as a divided people. In his view, it spoke to the strength of the unity within Ngāpuhi despite their diversity and independence.⁴⁵

Mr Hamilton viewed the notion of Ngāpuhi as a large single entity as a Pākehā construct. For him ‘Ngāpuhi kōwhao rau’ reflected the pride Ngāpuhi have in their diversity.⁴⁶ Hinerangi Cooper-Puru recounted a conflict that occurred during the 1820s between Ngāti Korokoro and Ngāti Manawa. Existing tensions were reignited and war seemed likely until the hapū took it upon themselves to exercise their rangatiratanga and settle the dispute.⁴⁷

Mr Shortland emphasised that while there had been times of shared experience, each hapū also had its own history. He noted that when people from Te Orewai were thrown off their lands as a result of Crown policy, it did not affect people who were living at Hokianga or Whangaroa, who were busy fighting their own battles.⁴⁸ He went on to state:

They may have been similar but I can remember when my uncle was forced to live in a cowshed when he was thrown off his land and then they thought they’d do him

43. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wellington: Legislation Direct, 2014), p 27

44. Document A98, p 6

45. Document A64, p 18

46. Document A77, p 11

47. Document A68, p 3

48. Transcript, 4.1.2, pp 258–259

the great honour of finding him a State house in Whangārei and they moved him in . . . he died within two months, that's what I remember.⁴⁹

The Crown confirmed that it knew of these dynamics within Ngāpuhi and said it had considered the role of hapū throughout the mandate.⁵⁰ Ms Hickey's evidence was that the Crown is aware that while Ngāpuhi espouse a strong "Ngāpuhi" connection they also have a focus on preserving hapū autonomy.⁵¹ This view was reflected in advice provided to the Minister for Treaty of Waitangi Negotiations in March 2009, when the mandating process was just taking shape. The Minister was advised that within Ngāpuhi there was 'a strong focus on preserving and exercising hapū autonomy within the wider iwi structure'. He was also told that there were likely to be 'different views between hapū and from individual Ngāpuhi claimants' regarding both the timing of settlement negotiations and the level at which any settlement negotiations should occur – that is, at a hapū, regional, or iwi level. The Minister was asked to discuss with Mr Tau how Tūhoronuku intended to address hapū autonomy.⁵² The Crown seemed to anticipate that the strength of hapū autonomy within Ngāpuhi would need to be reflected in its approach to negotiations. In our view this aspect of Ngāpuhi identity should also have shaped the approach taken to securing a mandate for an entity that would negotiate all the historical claims of Ngāpuhi.

When the mandating process was in its early stages, the importance of hapū to the process was clearly articulated to the Crown by Tūhoronuku. According to Ms Hickey, when Mr Tau met with the Minister on 13 March 2009 he tabled a document setting out, in broad terms, how Tūhoronuku intended to gauge the views of Ngāpuhi regarding settlement. One of the key messages that Tūhoronuku intended to communicate was that it was proposing 'an all of Ngāpuhi approach, a settlement between the Crown and Ngāpuhi (a collective of hapū)' and that all whānau, hapū, and marae would have an opportunity to participate.⁵³ Further, in a letter to the Minister of 7 May 2009, Mr Tau advised that initial hui provided an opportunity for all Ngāpuhi – hapū and individuals – to begin discussing how they wished to deal with their Treaty claims. He stated that hapū had consistently conveyed the importance of their having an opportunity to discuss these important take among themselves. The Rūnanga supported that view and was considering how it might assist hapū in completing these discussions.⁵⁴

Despite these acknowledgements, there is little evidence that Ngāpuhi hapū were able to shape the mandating process in this way. The claimants emphasised the uniqueness of the experiences of each hapū as being crucial to the design of any entity that would lead the settlement of their claims. Yet the Tūhoronuku IMA seeks to represent Ngāpuhi as a single large group of individuals and fails to acknowledge

49. Transcript, 4.1.2, p 259

50. Document 3.3.30, p 129

51. Document A26, p 9

52. Document A26(a), pp 54–55

53. Document A108, pp 8–9

54. Document A108(a), pp 9–10; doc A108, p 10

the place of its highly autonomous hapū as a defining element of Ngāpuhi. The uniqueness of hapū experiences has been ignored in shaping the approach taken to deciding how the claims of those hapū will be settled.

(2) *The mandate was sought from individuals*

The absence of hapū as a defining feature of Ngāpuhi is reflective of a mandating process in which hapū were not asked if the Tūhoronuku IMA was the right entity to represent them. In 2011 Tūhoronuku determined to test the support for its mandate through a vote. The vote was open to all Ngāpuhi individuals of voting age and they were asked if they supported Tūhoronuku having a mandate to enter settlement negotiations with the Crown. An estimated 60,000 Ngāpuhi individuals were eligible to take part in the vote. Tūhoronuku was able to send voting packs to the 29,289 people for whom a contact address was known. Of the 6,749 individuals who voted, some 5,210 (about 76 per cent) voted in support.⁵⁵ No process was undertaken to ascertain the views of hapū on this vital question.

The Crown submitted that it could not ignore the 2011 vote, which was a critical element of the Tūhoronuku IMA's mandate to represent all of Ngāpuhi.⁵⁶ The Tūhoronuku IMA submitted that the mandate was sought from all the individuals who make up Ngāpuhi.⁵⁷ In its view the 2011 mandate vote showed that Ngāpuhi overwhelmingly wanted to move to settlement on the terms it had put to them.⁵⁸ On the issue of who should be involved in the mandating process Mr Tau recognised the importance of ahi kā but stated that this referred to one who 'looks after the fires' not one who usurps 'the mana of some descendant of Ngāpuhi born anywhere in the world'. In his view, the importance of whakapapa was paramount and the Tūhoronuku IMA was committed to including all Ngāpuhi regardless of where they live.⁵⁹

The claimants submitted the mana of hapū is paramount.⁶⁰ As expressed in the closing submissions for Te Waiariki, Ngāti Korora and Ngāti Te Taka Pari, wherever the rights of hapū are at issue, the hapū is an indispensable party to determining what happens to those rights. Hapū had always decided matters of importance through the age old institution of hui-ā-hapū.⁶¹ Claimants argued that the vote by postal ballot ignored the hapū, subverted the more tika practice of voting in person at hui and promoted the views of individuals, allowing those views to bind the hapū.⁶² Mr Tau's interpretation of tikanga (quoted above) was questioned by Ngāti Kahu, who argued that the inclusion of rāwaho (those who live outside the rohe) in the mandating process meant, in effect, that the wishes of the hapū were being

55. Document A108, pp34-35

56. Submission 3.3.30, p 166

57. Submission 3.3.29, p 65

58. Ibid, p 17

59. Transcript 4.1.2, p 1143

60. Ibid, p 19

61. Submission 3.3.23, p 17, 20

62. Ibid, pp 21-22; submission 3.3.15, pp 6-8; submission 3.3.38, p 12; 3.3.43, pp 41-42; submission 3.3.44, pp 12-13

overridden not, primarily, by their own displaced people, but by complete outsiders with whom they share only tenuous whakapapa links.⁶³ Dallas Williams (witness for Ngāti Kaharau and Ngāti Hau) stated that even if individuals from a hapū voted for the mandate, this could not 'outweigh the clear collective decision making processes adopted by our people, according to our tikanga, at our marae'.⁶⁴

The clear majority of the votes cast were in favour of the Tūhoronuku IMA having a mandate to represent all of Ngāpuhi in settlement negotiations. Yet, the Crown had no way of knowing how this support was distributed. In particular, the vote did not disclose whether support for and opposition to the Tūhoronuku IMA was focused within particular hapū. This is because, as Ms Hickey confirmed during our hearing, the 2011 vote did not record the hapū of those individuals who took part.⁶⁵ As such, the 2011 vote cannot be used to determine the level of support (or opposition) of any hapū for the Tūhoronuku IMA. Nonetheless, the Crown considered that the 2011 vote was a significant show of support for (what is now) the Tūhoronuku IMA. The Crown also considers it significant that the 76 per cent of Ngāpuhi voters who voted in favour of the deed of mandate did so before it was amended to improve the role that hapū play in the Tūhoronuku IMA.⁶⁶

We accept that the 2011 vote indicates that a significant number of those who took part supported Tūhoronuku and wished to proceed to settlement. We also note that changes have since been made to the structure of the Tūhoronuku IMA which attempt to strengthen the role of hapū (we give our views on these changes below). What the 2011 mandate vote cannot tell us (or the Crown) is what hapū had decided regarding when and how they wished to proceed to settlement. As a defining feature of Ngāpuhi, the views of its hapū regarding the settlement of their claims should have been critical to the Crown's evaluation of the strength of support enjoyed by the Tūhoronuku IMA as the proposed mandated entity for Ngāpuhi. Although hapū were not given the opportunity to express their support for, or opposition to, the mandate through the 2011 vote, many had made their views clear to the Crown. For example, the large hapū collective Te Kotahitanga o Ngā Hapū Ngāpuhi (Te Kōtahitanga) advised the Crown in July 2010 that they were exploring possible settlement options.⁶⁷ By September 2010 the Crown was able to advise Tūhoronuku that it understood Te Kotahitanga was developing an alternative mandating process.⁶⁸ On 23 February 2011 it was reported that Te Kotahitanga was holding regular hui regarding a possible alternative mandate within Te Taitokerau (Northland).⁶⁹ By March 2011 it was also clear to OTS that Ngāti Hine did not support Tūhoronuku's proposed mandate. Ngāti Hine considered that the mandated entity then proposed would not guarantee that hapū representatives were chosen by hapū.⁷⁰

63. Submission 3.3.26, p [2]

64. Document A39, p 8

65. Transcript 4.1.2, p 836

66. Submission 3.3.30, pp 8, 81

67. Document A108, p 19

68. Document A146, p 1183

69. Document A108, pp 25–26

70. Ibid, p 27; doc A144, p [167]–[168]

In July 2013, the Crown asked for submissions, views, and inquiries from Ngāpuhi on the amended deed of mandate. Some 4,015 submissions were received in total, including 510 after the close of the submissions period. Of those received on time some 63 per cent opposed the amended deed of mandate.⁷¹ Officials from OTS and Te Puni Kōkiri, in their advice to the Ministers regarding recognition of the mandate, noted that many submitters opposed the inclusion of their marae and hapū within the scope of the mandate. Others sought their withdrawal from the mandate, while others indicated support for settlement at a regional level.⁷²

The Crown told us that the submissions process could not be considered as a second vote on the mandate. As Ms Hickey stated in her evidence, people were able to provide more than one submission, there was no requirement that those submitting be either Ngāpuhi or of voting age, and there was no process for verifying the identity of submitters. As for the substance of the submissions, Ms Hickey noted that the concerns raised were not new.⁷³ In their advice to the Ministers regarding recognition of the mandate, Crown officials did not consider that the submissions raised concerns that necessitated either a pause in the mandating process or further changes to the deed of mandate.⁷⁴

We acknowledge the difference between the submissions process and the mandate vote. The factors Ms Hickey identified do make it difficult to determine accurately the level of support or opposition that the submissions represent. To us, that suggests a weakness, of imprecision in the submissions process itself. Further, the number of submissions expressing objections suggests to us that the level of opposition within Ngāpuhi at that time remained strong. On one reading of the (imprecise) evidence, opposition may have grown since the earlier vote: the number of submissions opposing the mandate was 748 more than had voted in opposition in 2011. Whatever the case, the submissions process offered an opportunity for individuals and groups to express their views on the mandate and highlight any concerns they had with it. It is clear that many hapū and marae utilised the opportunity to express their opposition to the Tūhoronuku IMA. Yet the Crown relies on the 2011 mandate vote as an expression of support for the Tūhoronuku IMA mandate. The view of anonymous individuals has become a determining factor in a situation that tikanga demands be guided by the will of hapū.

(3) Hapū did not agree to be part of a single large natural group

One of the issues raised during the 2013 submissions process and pursued by the claimants in this inquiry was the lack of opportunity for hapū, acting through the Tūhoronuku IMA, to lead the mandating process. A significant outcome of this, they said, was the treatment of all of Ngāpuhi as a single large natural group for settlement purposes.

71. Document A108, p 60

72. Document A26(a), pp 446–447

73. Document A108, p 60

74. Document A26(a), pp 447–451

The Crown submitted that its preference is to negotiate settlements with large natural groups of tribal interests, rather than with individual hapū or whānau within a tribe. It stated, however, that the choice to pursue a single settlement for all Ngāpuhi was made by Ngāpuhi. This was the approach Tūhoronuku pursued, and it attracted the support of a clear majority of those who voted on the mandate. The Crown considered that vote to be an endorsement by Ngāpuhi of a unified Ngāpuhi mandate.⁷⁵

The Crown also emphasised that a single Ngāpuhi settlement did not preclude hapū involvement in negotiations or the provision of redress at the hapū level. In short, entering negotiations as a single large natural group does not determine how an eventual settlement will be structured. This includes the design of the PSGE that will receive settlement assets. The Crown said that it was open to Ngāpuhi to having one or more such entities, holding assets at the iwi or regional level, or a mix of both.⁷⁶

The claimants supported the view that all Ngāpuhi should settle their claims at the same time. They rejected however, the view that this result could only be achieved through the imposition of an approach that treats the whole of Ngāpuhi as a single large natural group. As Ngāti Manu put it, the Crown had opted for a ‘mega-settlement’ approach in recognising the Tūhoronuku IMA’s mandate. While Ngāti Manu acknowledged the potential of larger groups to exert greater leverage in settlement negotiations, it submitted it was for the claimants to decide whether they should adopt this approach. Ngāpuhi hapū had not had the opportunity to decide this.⁷⁷ Ngāti Hine and Te Kapotai agreed, submitting that a settlement process for Ngāpuhi could not commence until the Crown had taken a more considered and rational approach to identifying the best groups for negotiations.⁷⁸ Patuharakeke reiterated these views and submitted that the Crown, in recognising Ngāpuhi as a single large natural group, had ignored the limitations that previous Tribunals had applied to the large natural groups policy.⁷⁹

The Wai 2341 claimants also raised concerns regarding the type of PSGE that might eventuate from the mandate for all Ngāpuhi held by the Tūhoronuku IMA. They highlighted comments made by Mr Tau in September 2014 in his role as chairman of the Rūnanga. Mr Tau, who at that time was also the chair of the Tūhoronuku IMA, suggested that the Rūnanga was an option Ngāpuhi should consider as a PSGE.⁸⁰ The fear for these claimants was that the recognition of the Tūhoronuku IMA’s mandate had closed off options regarding how a settlement could be structured. Though the Crown was telling them otherwise, events on the ground were pointing to a likely result they did not support. These fears were shared by Ngāti Kuta and Patukeha who pointed out that the amended deed of mandate contained

75. Submission 3.3.30, pp 120–121

76. Ibid, pp 121–122

77. Submission 3.3.25, pp 14

78. Submission 3.3.20, pp 81–82

79. Submission 3.3.37, pp [2]–[3]

80. Submission 3.3.28, p 32

no statement that redress could or would be provided to hapū. Without such provision the Crown's assurances that such redress could be provided were simply theoretical.⁸¹

Some claimant witnesses emphasised the importance of hapū being able to decide how they would come together to enter the settlement process. Ms Hakaraia, for example, stated that hapū had to have an opportunity to decide how they would work together, rather than this being decided by the Crown. She said that Ngāti Kuta and Patukeha had committed to working with their whanaunga hapū as they share the same values and beliefs and are working towards a common goal, a hapū-based settlement.⁸² Ms Prime, in her evidence for Te Kapotai and Ngāti Hine, stated that treating Ngāpuhi as a single large natural group ignored the complex historical web of mutual obligations, rights, patterns of political authority, hapū and land tenure. It also ignored the dynamic and evolving nature of their hapū. She felt that the Crown had to distinguish between a descent group that is an identifiable category of people, like Ngāpuhi, and the descent group that is a functioning, independent political unit, like the hapū of Ngāpuhi.⁸³

The claimants acknowledged both the need to move together towards settlement and the requirement to do so as part of a large natural group. The important point for them was that decisions regarding large natural groups – what they look like, and whether there should be one or more to negotiate Treaty settlements – must be taken by the hapū of Ngāpuhi. They were committed to deciding these issues and would be guided in this by whanaungatanga – the natural relationships within Ngāpuhi that have emerged from their histories of shared experience.

Previous Tribunals that have considered the large natural groups policy have generally endorsed its underpinnings but this support has been qualified. In chapter 2 we noted that previous Tribunals have set a high standard for the Crown's observance of tikanga, including in the mandating process. In particular, the Te Arawa Tribunal noted the importance of the Crown knowing and understanding 'the tikanga that gives practical expression to the cultural preferences underpinning the exercise of tino rangatiratanga, kaitiakitanga, mana, and Maori social organisation'.⁸⁴ This must include a flexible approach by the Crown to its large natural group policy. The way the policy is implemented should always take into account the circumstances of the iwi and hapū in question.⁸⁵ In relation to the claims addressed in its third report, the Te Arawa Tribunal stated that robust and transparent mandating was the critical factor, and that such a process should not be compromised by large natural groups policy.⁸⁶

We too are faced with claims that question the robustness and transparency of a mandating process and its outcome – the Tūhoronuku IMA. Like other Tribunals,

81. Submission 3.3.18, p 10

82. Document A17(b), p 3; doc A59, p 10

83. Document A78, pp 26–27

84. Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, p 22

85. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005) p 71

86. Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, p 190

we see the sense in the large natural groups policy but, as we noted in chapter 2, the Crown's view of the practical benefits of a particular application of that policy must not override the rangatiratanga and tikanga of the hapū with whom the Crown is attempting to restore its Treaty relationship. The Crown told us that it was influenced in its acceptance of Ngāpuhi as a single large natural group by the 2011 mandate vote. It viewed the vote as an endorsement by Ngāpuhi of a unified mandate.⁸⁷ But as we have already explained, the 2011 vote did not give voice to the views of hapū. Neither the Tribunal nor the Crown can know for certain that hapū would have chosen to come together as a single large natural group. Some of the evidence we received indicates that they might have chosen a different path towards the same settlement goal. The important point is that the decision to treat all of Ngāpuhi as a single large natural group – by recognising the Tūhoronuku IMA's deed of mandate – occurred in the absence of evidence indicating that hapū accepted this approach. The Crown, knowing what it did of Ngāpuhi and the importance of hapū rangatiratanga, should have regarded the need for such evidence as being critical to its consideration of the mandate.

4.3.3 The representivity and accountability of hapū kaikōrero

(1) *Hapū kaikōrero may not be representative of their hapū*

The Crown told us that hapū support for the mandate was important. Yet Ngāpuhi hapū were not asked for their support because, as the Crown noted, 'the mandate was not sought on a hapū basis.'⁸⁸ These positions seem so at odds as to defy any attempt to reconcile them. The Crown has argued strongly, however, that the Tūhoronuku IMA provides adequate representation and accountability for all Ngāpuhi, including hapū.⁸⁹ Its argument implies that the inability of the Tūhoronuku IMA to demonstrate clearly that it enjoys the support of hapū is mitigated by its ability to allow for hapū autonomy through its representative structure and accountability processes.

We outlined earlier in this chapter the role of hapū kaikōrero in the Tūhoronuku IMA's structure and its approach to settlement. Hapū kaikōrero, as the spokespersons and agents for their hapū, have an important role in the negotiation process. With the other hapū kaikōrero in their region, individual hapū kaikōrero also wield real power, being responsible for appointing the majority of the 22-member board of the Tūhoronuku IMA which, in turn, appoints and instructs the negotiators and guides the settlement process. Hapū kaikōrero are vitally important to the integrity of the Tūhoronuku IMA representative model and to its operation. Given their importance in settlement negotiations, the ability for hapū to decide who will be their hapū kaikōrero is of crucial importance to any assertion that the Tūhoronuku IMA is representative of hapū.

The Crown and the Tūhoronuku IMA argued that the appointment process does not preclude or prevent hapū from holding hui to choose nominees.⁹⁰ The

87. Submission 3.3.30, p 121

88. Ibid, p 42

89. Ibid, p 92

90. Ibid, pp 170–171; submission 3.3.29, p 60

Tūhoronuku IMA also argued that the process enabled all Ngāpuhi to be involved regardless of where they live and thus reflected the view that all Ngāpuhi are important in the process.⁹¹ The Crown pointed to the evidence of a number of the interested parties opposing the claimants, which showed that their hapū (Ngāti Te Rino, Ngāti Rēhia, Te Whiu, Te Pōpoto and Te Kumutu) had held hui to appoint hapū kaikōrero.⁹²

It is indeed the case that hapū can hold hui to appoint their kaikōrero. However, the process prescribed in the deed of mandate does not ensure that hapū kaikōrero are appointed in this fashion. The nomination process is open to all hapū members of voting age. Individual hapū members can nominate a person for the role in writing to the IRO without reference to the rest of the hapū. A nomination, if unchallenged, will result in the nominee being appointed the kaikōrero for their hapū. Where more than one nomination is received the IRO runs an election. Hui are held at which the nominees address their hapū, but the voting process is open to all individuals who whakapapa to the hapū, with votes cast by paper ballot at the hui as well as via postal ballot and on-line voting. Thus, while it is possible for hapū to meet to discuss the appointment of a kaikōrero it is also open to individual hapū members, outside of hui-ā-hapū, to nominate and elect candidates regardless of the wishes of hapū as determined and expressed at hui-ā-hapū in accordance with their tikanga.

A number of the claimants in our inquiry stated that their hapū kaikōrero had been appointed against the wishes of the hapū. For example:

- ▶ Ms Hakaraia advised that Patukeha had held a hui to discuss the appointment of a hapū kaikōrero. It was resolved at the hui that anyone who wanted to represent the hapū should seek endorsement from the hapū. In spite of this Patukeha now find that they have a hapū kaikōrero, a nomination having been made to the IRO without the knowledge of the hapū. Being the only nominee that person was duly confirmed as hapū kaikōrero for Patukeha.⁹³
- ▶ Mr Shortland's evidence was that, against the wishes and without the knowledge of Ngāti Hine, hapū kaikōrero nominations were received for three of its eight hapū – Ngāti Hine, Ngāti Kopaki, and Te Kau i Mua. Just one nomination was received for each hapū and the nominees were duly appointed as hapū kaikōrero. Moreover, only one of these hapū kaikōrero lives within New Zealand, the other two residing in Australia and Vanuatu, separated from the hapū they are supposed to represent.⁹⁴
- ▶ Ms Bruce-Kingi of Ngāti Kahu o Torongare me Te Parawhau advised that in April 2014 Ngāti Kahu held a hui at Ngarara-i-tunua Pā at which it was decided that no hapū member would participate in the Tūhoronuku IMA election process. Yet the following month they were advised that hapū kaikōrero would be

91. Submission 3.3.29, p 61

92. Submission 3.3.30, p 171

93. Document A59, pp 3-4

94. Document A63, pp 14, 16

appointed for both Ngāti Kahu and Te Parawhau as a single nomination had been received for each of these hapū.⁹⁵

- ▶ As mentioned in chapter 2, Mr Kopa is the hapū kaikōrero for Ngāi Tu. Ngāi Tu oppose the Tūhoronuku IMA having a mandate to represent them in settlement negotiations. Despite this they felt compelled to appoint Mr Kopa as their hapū kaikōrero as the process allowed an individual to fill the position if left vacant.⁹⁶
- ▶ Ms Prime outlined how a hapū kaikōrero for Te Kapotai was appointed against the wishes of hapū. Two individuals were nominated for the position without the knowledge of the hapū. The nominations were opposed at a marae meeting, Māori Committee meeting, and hapū Treaty claims hui. Nevertheless, the IRO called a hui, held on 3 June 2014, to allow the nominees to address the hapū and argue for their appointment as hapū kaikōrero. During this hui a motion was passed that those present opposed the nominations and opposed the election process. An election took place, however, in which a large number participated and a hapū kaikōrero for Te Kapotai was subsequently appointed.⁹⁷

The evidence of Mr Rihari of Ngāti Torehina ki Matakā confirms that it is individuals, rather than hapū, who hold the power in the hapū kaikōrero appointment processes. He recounted how his hapū had consistently opposed the efforts of the Tūhoronuku IMA to obtain a mandate to settle the claims of Ngāti Torehina ki Matakā, utilising hui-ā-hapū to confirm this opposition and filing submissions with the Crown opposing the Tūhoronuku IMA's deed of mandate. Nonetheless, in March 2014, Ngāti Torehina ki Matakā discovered that one of their number had accepted a nomination to be their hapū kaikōrero. On 24 March 2014 lawyers for Ngāti Torehina ki Matakā wrote to both the IRO and the Tūhoronuku IMA requesting withdrawal of the nomination form and of Ngāti Torehina ki Matakā and their claims from the deed of mandate.⁹⁸ The Tūhoronuku IMA refused this request and it appears that the IRO did not respond.⁹⁹ However, on 3 April 2014 the nominee for hapū kaikōrero e-mailed the IRO requesting the withdrawal of the nomination and the IRO responded that same day to confirm the nomination's withdrawal.¹⁰⁰ It therefore appears that only the nominated individual's request to withdraw prevented a hapū kaikōrero being appointed for Ngāti Torehina ki Matakā. The views of the hapū were of no consequence.

The opportunity for hapū to determine their hapū kaikōrero is undermined by the capacity of individual hapū members to nominate and elect candidates for the role. In our view the Crown should have been aware of this situation and recognised it as revealing a significant problem in the structure of the Tūhoronuku IMA. The appointment process emerged from its facilitation between Te Kotahitanga and

95. Document A81, pp 9–10

96. Document A67, p 4

97. Document A36, pp 7–10; doc A78, pp 72–73

98. Document A10, p [9]–[11]; doc A10(a), pp 342–343

99. Document A10, p [11]; doc A10(a), p 344

100. Document A10(a), pp 346–347

the Tūhoronuku IMA.¹⁰¹ Originally the appointment of hapū kaikōrero was to be handled by hapū ‘in accordance with their own processes’, allowed all hapū members to nominate candidates and included the ability to self-nominate.¹⁰² The deed of mandate stated that hapū should determine who was appointed as their hapū kaikōrero through a hui held in their rohe. Hapū were required to give hapū members ‘sufficient notice’ of both the nomination process and the hui to decide who would be appointed. It was up to hapū to ensure that the process was fair and durable and to determine the process of voting. Tūhoronuku also required written confirmation of the date of the hui, the record of attendance and the resolution made.¹⁰³

During the last few months of 2012 the Crown worked with Te Kotahitanga and Tūhoronuku to try to resolve their differences regarding Tūhoronuku’s proposed mandate. Relations between the two parties had soured to the point that joint meetings were not possible. The Crown took the proactive step of talking separately to each party in order to find common ground or a way through the impasse. These discussions enabled the Crown to identify a number of issues that it thought needed to be addressed before the mandating process could advance. One of these issues was the need to develop accountable and transparent election processes.¹⁰⁴ On 28 November 2012 the Crown wrote to Te Kotahitanga and Tūhoronuku proposing changes to the deed of mandate that the Crown believed would resolve the concerns raised by Te Kotahitanga. Attached to this letter was an outline of options for the election processes for the representative positions on what would become the Tūhoronuku IMA board.¹⁰⁵ It appears that the Crown did not consider these options would apply to the appointment process for hapū kaikōrero.

In a letter to the Minister on 7 December 2012, Te Kotahitanga agreed that a defined and transparent election process was important to strengthen the accountability of a mandated entity. This included the election process for hapū kaikōrero. Te Kotahitanga suggested an appointment process that it believed could achieve the goal of having the best people for the job who have the support of their hapū. This involved hapū, either individually or in a small collective, meeting to decide the number of hapū kaikōrero they wanted, the authority and role that the hapū kaikōrero would have, and whether hapū would be represented collectively or individually. Resolutions reached would be recorded in writing. Nominations for hapū kaikōrero would be made at the hui and nominees invited to address those present regarding their suitability for the role. The hapū would then decide who to appoint as hapū kaikōrero by a consensus or, if this was not possible, by a vote.¹⁰⁶

In its submissions to us, the Crown stated that the key suggestions from Te Kotahitanga were that there be a more transparent nomination process, that hapū hold hui to elect a hapū kaikōrero from those nominated, and that voting would

101. Submission 3.3.29, pp 62–63; submission 3.3.30, pp 169–170

102. Document A25(a), p [43]

103. Ibid, p [87]

104. Document A108, pp 50–51; doc A26(a), pp 313–315

105. Document A108, pp 51–52; doc A26(a), pp 323–334

106. Document A26(a), p 345

occur only where necessary.¹⁰⁷ We disagree with the Crown's assessment of the changes sought by Te Kotahitanga. While Te Kotahitanga clearly sought a more transparent process the alternative it proposed was aimed at maintaining hapū control over the entire process. It suggested that hapū have control of the nomination and appointment process, removing the ability of individual hapū members, outside of hui-ā-hapū, to nominate themselves or others as candidates. Fundamentally, Te Kotahitanga sought an appointment process for hapū kaikōrero that was controlled at each stage by hapū through hui-ā-hapū. We saw no evidence that these suggestions were carefully considered by the Crown.

Both the Crown and the Tūhoronuku IMA believe that the appointment processes introduced by the addendum to the deed of mandate addressed the concerns raised by Te Kotahitanga.¹⁰⁸ In June 2013 the Crown reviewed these amended appointment processes. Officials noted the processes had been drafted and budgeted in consultation with ElectionNZ, the company that also acts as the IRO. Te Kotahitanga had by this time raised concerns about the lack of automatic police vetting for hapū representatives on the Tūhoronuku IMA board and about the fact that only hapū kaikōrero could be considered for these representative positions. In response, officials stated that hapū would be aware that their kaikōrero could potentially sit on the Tūhoronuku IMA board and that the onus would be on hapū to elect the best person for the job.¹⁰⁹

For hapū to appoint the person they consider to be the best for the job requires an appointment process that hapū can control. As we have illustrated, the Tūhoronuku IMA's process for appointing hapū kaikōrero can take control away from hapū, for individuals are able to nominate candidates without the wider hapū even being aware, let alone meeting to discuss the issue. As we set out above, there have been instances where such nominations have led directly to the appointment of hapū kaikōrero without the knowledge of the wider hapū. This has also occurred where hapū, through hui-ā-hapū, have resolved not to appoint a hapū kaikōrero. In those instances where elections have been held, the matter has been decided by individual vote, not by the hapū in accordance with their tikanga.

It also appears to us that the current model for appointing hapū kaikōrero unfairly advantages those hapū members living outside the hau kāinga. The ability for these people to vote for hapū kaikōrero by postal ballot or online undoubtedly helps them to be part of the process. But it does so without recognising that those living in Auckland, Wellington, and the South Island are represented on the Tūhoronuku IMA board by other representatives. In effect, the current model allows the majority of Ngāpuhi individuals resident in New Zealand but outside the hau kāinga to take part in two appointment processes. This means it is possible that such individuals will be represented by two board members of their choosing. No one could object to a hapū kaikōrero appointment process that is open to all hapū members. But the only way to ensure that these processes reflect the decisions of

107. Submission 3.3.30, p170

108. Ibid; submission 3.3.29, pp 62–63

109. Document A108(a), pp 391, 392–393

the collective is for hapū to determine matters in accordance with their tikanga at hui-ā-hapū. Nominating and voting from afar, outside of hui-ā-hapū and so uninformed of the views of the collective, cannot result in appointments that reflect the decisions of hapū. That this can happen in a situation where those living outside the hau kāinga are already represented on the Tūhoronuku IMA board exacerbates the flaws in the appointment process.

We note here that on 1 August 2013, during the submissions process regarding the amended deed of mandate, Te Kotahitanga wrote to the Minister raising concerns regarding the amendments, including the appointment processes. It considered that hapū representation was undermined by those processes and by a lack of accountability.¹¹⁰ The Minister replied on 15 August 2013, asking for Te Kotahitanga to outline in detail its particular concerns regarding hapū representation and what it considered to be a better approach.¹¹¹ That Te Kotahitanga did not respond to the Minister's request must be considered a missed opportunity for it to have had further input into development of the deed. Yet its letter of 1 August 2013 had also noted that the publication of the amended deed of mandate was the first opportunity it had been given to see the changes that had been made.¹¹² These changes clearly ignored its previously expressed views on an appropriate appointment process for hapū kaikōrero. Though we cannot be sure, it appears that Te Kotahitanga had lost faith in its ability to influence change through engagement with the Crown.

(2) *The accountability process is overly onerous*

The problems with the hapū kaikōrero appointment process are compounded by the requirements of the process for their replacement. We have outlined the replacement procedures earlier in this chapter. In summary, it can only be initiated following an application from at least 90 hapū members of voting age who are registered with the Rūnanga or have completed a register-to-vote form. Of the minimum 60 hapū members of voting age (who are registered with the Rūnanga or have completed a register-to-vote form) who must attend a subsequent hui to discuss replacing their hapū kaikōrero, at least 75 per cent must vote in favour of replacement. The claimants' concern with the replacement process was with the startling disparity between it and the process to appoint hapū kaikōrero. In their view, the requirements of any appointment and replacement processes should be broadly similar.¹¹³

The Tūhoronuku IMA submitted that its hapū kaikōrero replacement process strikes a balance between enabling hapū to change their hapū kaikōrero when they see fit, and 'providing sufficient stability' for the Tūhoronuku IMA. If hapū kaikōrero were constantly and easily changed, it said, this would 'materially affect the manner in which hapū interact with each other within Tūhoronuku IMA, and

110. Ibid, p 437

111. Ibid, p 436

112. Ibid, p 437

113. Transcript, 4.1.3, pp 247–248

with negotiators.¹¹⁴ The Crown submitted that it understood that reasoning and did not believe it had a role in requiring any changes to the hapū kaikōrero replacement process.¹¹⁵

Requiring hapū to go through a robust process in order to replace their kaikōrero is necessary. The level of involvement that hapū kaikōrero are to have in settlements negotiations means that the replacement of a hapū kaikōrero may, as the Tūhoronuku IMA argued, materially affect those negotiations. This would certainly be the case if a hapū kaikōrero who was sought to be replaced was one of the 15 hapū representatives on the Tūhoronuku IMA board. However, we agree with the claimants that the clear disparity between the hapū kaikōrero appointment and replacement processes is problematic.

As it stands, a hapū kaikōrero appointed to their position on the strength of a nomination from one hapū member, perhaps against the will of the hapū as a whole as expressed at hui-ā-hapū, cannot be replaced except by a concerted effort from at least 90 members of that hapū. This procedural robustness is exactly what is missing (and what the claimants argue is needed) in the appointment process. We note, however, that although the replacement process requires broad support for any replacement, it does so in a manner which relies on the strength of a vote by individuals. Like the appointment process, that for replacing hapū kaikōrero fails to ensure that it is hapū that determine the matter at a hui-ā-hapū in accordance with their tikanga.

4.3.4 The representivity and accountability of hapū representative members of the Tūhoronuku IMA board

As we outlined earlier in this chapter, the Tūhoronuku IMA board comprises 22 members who represent Ngāpuhi hapū, kuia, kaumātua, Ngāpuhi living outside the rohe, and the Rūnanga. Ngāpuhi hapū, through their hapū kaikōrero, appoint and can replace 15 of these representatives. Replacing a hapū representative can be achieved if a majority of hapū kaikōrero in the affected region vote in favour of replacement. In this way, hapū kaikōrero acting together at a regional level will comprise a majority of the Tūhoronuku IMA board. The Tūhoronuku IMA argued that this is proof that it is a hapū-led entity that allows hapū to exercise their rangatiratanga and can deliver hapū-specific redress while representing the whole of the Ngāpuhi population.¹¹⁶ The Crown agreed, submitting that hapū are central to the operations of the Tūhoronuku IMA.¹¹⁷

The appointment and replacement processes for hapū representatives on the Tūhoronuku IMA board require a meeting of hapū kaikōrero and either their consensus or majority support. A clear majority of the members of the Tūhoronuku IMA board are appointed by the hapū kaikōrero. It might seem from these provisions that the particular concerns and aspirations of hapū would be at the forefront

114. Submission 3.3.29, p 64

115. Submission 3.3.30, pp 171–172

116. Submission 3.3.29, pp 2–3, 38–39, 49

117. Submission 3.3.30, pp 93–94

of settlement negotiations. In any decision to be made by the board the voices of hapū would be the strongest. Acting together they could effectively guide the settlement process for Ngāpuhi. However, as we have outlined, the procedure for appointing hapū kaikōrero lacks any requirement that would ensure they have the broad support of their hapū. This fundamental flaw, coupled with the fact that hapū representatives are appointed by the hapū kaikōrero from their own number, seriously undermines any assertion that the hapū representatives on the Tūhoronuku IMA board are representative of and accountable to hapū.

A related problem raised by some claimants was the presence of the full quota of 15 hapū representatives on the current board of the Tūhoronuku IMA despite the fact that at the time of our hearing only a minority of the hapū had appointed a hapū kaikōrero. The elections for hapū kaikōrero and the Tūhoronuku IMA's representative board took place from 28 February to 25 July 2014.¹¹⁸ At the time of our hearings just 47 hapū kaikōrero had been appointed, although the addendum to the deed of mandate lists 110 Ngāpuhi hapū. This means that a majority of hapū listed in the deed did not participate in the process by which the 15 hapū representatives on the Tūhoronuku IMA board have been appointed. In the claimants' view, the Tūhoronuku IMA can only claim to be truly representative if all hapū are engaged. Without the full participation of hapū, they said, gaps in representation are inevitable.¹¹⁹

We agree with the claimants. There is no mechanism in the Tūhoronuku IMA's deed of mandate to relate the number of hapū representatives on the board to the number of hapū that have appointed hapū kaikōrero. The 15 hapū representatives on the Tūhoronuku IMA board at the time of our inquiry were appointed from the 47 hapū kaikōrero appointed in the election process following the Crown's recognition of the mandate. Those 47 hapū kaikōrero include those whose positions are challenged by claimants in this inquiry, and Mr Kopa who holds that position only to prevent others from doing so. Despite this, the Crown and the Tūhoronuku IMA are advancing with their settlement negotiations, having agreed terms of negotiation on 20 May 2015.¹²⁰ All hapū are considered to be represented by the 15 hapū representatives even though fewer than half of the hapū listed in the deed of mandate had appointed a hapū kaikōrero.

We note that Crown officials had previously expressed concern at the lack of hapū engagement with the Tūhoronuku IMA. On 16 May 2014, in an internal OTS report (called a 'Health Check'), officials pointed to a lack of hapū engagement in the hapū kaikōrero elections taking place at that time. The report stated that OTS officials were concerned that 'the election process has not (at this stage) demonstrated wide support for the Tūhoronuku mandate'. Later, the report noted that there was a high level of risk that the insufficient hapū would elect hapū kaikōrero and that, as a consequence, the Crown would be unable to begin negotiations with

118. Document A108, p 79

119. Submission 3.3.15, p 12

120. <http://www.tuhoronuku.com/panui-news/a-step-closer-to-settlement-ngapuhi-and-the-crown-sign-terms-of-negotiation>

the Tūhoronuku IMA. In order to mitigate this risk the Crown planned to engage with the Tūhoronuku IMA to express concerns regarding its mandate and to develop a strategy to consolidate the mandate.¹²¹ These same concerns and the same risk mitigation strategy were repeated in a further ‘Health check’ the following month.¹²²

Concerns of this nature were repeated again in a draft report to the Minister for Treaty of Waitangi Negotiations of September 2014. The draft report cited a letter of May 2013 from the Crown to the Tūhoronuku IMA which stated that negotiations could begin ‘if the Crown is satisfied the election process has resulted in Tūhoronuku IMA having sufficient trustees in place to be representative of the claimant community in terms of the agreed structure’. It also cited letters to Ngāti Hine, Ngāti Manu, and Ngāti Kuta Patukeha confirming the Crown’s intent to assess the election process in light of the Crown’s conditional recognition of the mandate and to ‘form a view on whether negotiations should begin or whether further work is required’.¹²³

The draft report went on to note that less than half of the hapū listed in the deed of mandate had appointed hapū kaikōrero, suggesting the ‘further work needed to be done to bring more hapū within the mandate’.¹²⁴ It also noted, however, that elections for the 22-member board of the Tūhoronuku IMA had been completed and independently verified and that there was ‘no specific mandate condition relating to the number of hapū involved in Tūhoronuku’.¹²⁵ In other words the Crown’s conditional recognition of the Tūhoronuku IMA’s mandate did not require that entity to show any particular level of hapū support. This posed a dilemma for the Crown because, the draft report noted, ‘the level of hapū kaikōrero, and therefore hapū representation is a key indicator of how representative Tūhoronuku is of the Ngāpuhi claimant community’.¹²⁶

The solutions suggested in the draft report included that the Crown and the Tūhoronuku IMA should advance to the preliminaries of the negotiation phase, allowing the Tūhoronuku IMA to appoint negotiators and develop a communications and negotiation plan, before embarking on a process to engage with hapū.¹²⁷ Subsequent events have followed this suggested approach. We conclude from this that the Crown has accepted that, to some degree, the level of hapū participation in the Tūhoronuku IMA is unsatisfactory and raises serious doubts about its ability to represent the Ngāpuhi claimant community. Nonetheless, the Crown has continued to engage with the Tūhoronuku IMA and work actively with it to boost hapū support, and both parties intend to enter settlement negotiations very soon, having already signed terms of negotiations.

121. Document A142, pp 46, 48

122. *Ibid*, pp 39, 41

123. *Ibid*, p 8

124. *Ibid*, p 9

125. *Ibid*, p 10

126. *Ibid*

127. *Ibid*, pp 12–13

4.3.5 The provisions for withdrawal of mandate from the Tūhoronuku IMA

As the Te Arawa Tribunal noted in its *Te Arawa Settlement Process Report*, an operative withdrawal mechanism adds to the accountability of any mandated entity. The context in which the Tribunal reached that conclusion was not dissimilar to our own, for a number of claimants complained that their hapū were trapped within the structure of a mandated entity they did not support. The Te Arawa Tribunal highlighted the importance of hapū being able to decide these matters for themselves through the utilisation of hui-ā-hapū and in accordance with their tikanga for decision-making. On this issue the report states:

The promotion of hui or mediation and the time needed for consensus decision-making are all mechanisms that can be used to finally determine and put to bed issues of mandate. Such issues are usually easily solved by the iwi or hapu themselves, given time and space. In accordance with tikanga, Maori accept such decisions, even though they may not like them.¹²⁸

It went on to state that an accurate gauge of the support within hapū for the mandated entity could be obtained by allowing claimants to put their opposition to that entity to the vote at a hui-ā-hapū. Further, the Tribunal noted that allowing such a vote to occur would enhance the robustness of the mandate. Nor was it a foregone conclusion that, given the chance, hapū would choose to withdraw.¹²⁹

The process for withdrawing the mandate secured by the Tūhoronuku IMA demands that those seeking the withdrawal follow the same general process that the Tūhoronuku IMA adopted when seeking it.¹³⁰ This requirement also applies to any hapū or group that wishes to withdraw from the scope of the mandate. In practical terms this means that those seeking the withdrawal, either of the mandate as a whole or of their hapū from the scope of that mandate, must hold a series of well-publicised hui throughout the country and (perhaps) in Australia before holding a vote on the issue open to all Ngāpuhi.¹³¹

The Crown viewed the existing withdrawal provisions as fair and providing for the desire to achieve a Ngāpuhi-wide settlement. It submitted that a withdrawal mechanism for hapū would totally undermine the mandate that the Tūhoronuku IMA had secured from all of Ngāpuhi and affect the ability of all Ngāpuhi to enter negotiations.¹³² Claimants submitted that the withdrawal clause in the Tūhoronuku IMA's deed of mandate (and its addendum) highlights the fundamental problem with the whole mandate: hapū are effectively prevented from withdrawing from the scope of the mandate because they were never asked to support it.¹³³

The costs involved – for a single hapū, a number of hapū, or even the whole of the Ngāpuhi claimant community – militate against any group utilising the existing

128. Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, p 189

129. *Ibid*, p 189

130. Document A25(a), p [265]

131. Transcript, 4.1.2, pp 828–831

132. Submission 3.3.30, pp 172–174

133. Submission 3.3.32, pp 5–6; submission 3.3.33, pp 5–6; submission 3.3.38, p 8–9; submission 3.3.43, pp 47–48

withdrawal provisions. It became clear during our inquiry that the mandating process had cost the Rūnanga in the vicinity of \$3 million. Some of these costs can be attributed to the length of time the process took but we estimate with some confidence that the costs of a comparable withdrawal-of-mandating process would be many hundreds of thousands of dollars. For example, the Rūnanga spent \$248,572 on the first stage of its consultation process in April and May 2009, which involved 13 hui throughout New Zealand and Australia. It spent a further \$275,591 on its second stage in October of that year, which involved 14 hui in New Zealand and Australia.¹³⁴ Some 20 hui were held in New Zealand and Australia during the mandating process proper – that is, the process through which Te Rōpū o Tūhoronuku (as it was then) discussed its proposed mandate in the run-up to the mandate vote.¹³⁵ These were supported by a comprehensive communications campaign in local and national print, radio, and television media.¹³⁶

Without the financial support of the Rūnanga, the Tūhoronuku IMA, or the Crown, it is unlikely that any Ngāpuhi group could bear the cost of the process necessary to secure either the withdrawal of the Tūhoronuku IMA mandate or the withdrawal of their hapū from the scope of that mandate. In March 2014 OTS wrote to Mr Tipene (of Ngāti Hine) advising that ‘The Office of Treaty Settlements is not authorised to provide funding to groups seeking to withdraw from a mandate.’¹³⁷ This lack of funding negates the effect of the withdrawal provisions of the Tūhoronuku IMA’s deed of mandate. Ms Hickey acknowledged the difficulties facing any group seeking to utilise the provisions. She indicated that the Crown was seeking to address the issue of funding for such groups but indicated that ‘it is likely that it will still require certain thresholds to be met before funding could be advanced.’¹³⁸

Te Kotahitanga considers that there are other viable options available in relation to withdrawal clauses. In May 2013, it wrote to the Ministers regarding the lack of a provision in the deed of mandate that would allow hapū to withdraw from Tūhoronuku. Te Kotahitanga compared unfavourably the withdrawal clause in Tūhoronuku’s amended deed of mandate with those found in deeds of mandate for entities representing three other iwi – Ngāti Hauā, Ngāti Rangitihi, and Ngāti Tūwharetoa.¹³⁹

The deeds of mandate for the Ngāti Hauā Trust Board (for Ngāti Hauā) and Te Mana o Ngāti Rangitihi Trust (for Ngāti Rangitihi) do not include hapū-specific withdrawal clauses. They do, however, include clear descriptions of the procedures by which their respective mandates can be withdrawn by their claimant communities. Their respective withdrawal of mandating processes are similar and, in short, require those seeking a withdrawal of the mandate to:

- ▶ inform the mandated entity in writing of their intention to seek the withdrawal of mandate. This written notification is to be co-signed by (in the case

134. Submission 3.3.30, p 158

135. Ibid, p 27

136. Document A98, p 11

137. Document A108(a), p 541

138. Document A108, p 92

139. Document A26(a), pp 396, 400

of Ngāti Hauā) the chair of each marae and the hui-a-iwi or (in the case of Ngāti Rangitīhi) by 150 registered adult members of the iwi;

- ▶ meet with the mandated entity in an effort to resolve the matters which led to the effort to withdraw the mandate;
- ▶ if the matter is not resolved, organise a series of publicly notified hui at which the proposal to withdraw the mandate will be discussed (in relation to these hui, at least 21 days' notice must be given in national and regional print media; advertisements must outline the kaupapa of the hui, provide background to the concerns raised, and state the resolution to be put to the hui); and
- ▶ in both cases, an observer from Te Puni Kōkiri is invited to attend and observe and OTS will be informed of the result of the hui.¹⁴⁰

These withdrawal processes do not offer hapū the ability to withdraw from the respective mandates. They do, however, clearly articulate the specific process that any group seeking to withdraw the respective mandates must follow. This level of detail and specificity is clearly missing from the withdrawal provision in the Tūhoronuku IMA's amended deed of mandate. We consider that a clearly specified withdrawal process of this kind should have been required by the Crown. As we have stated, the generally worded non-specific nature of the current withdrawal provision contemplates a process that no group can realistically undertake. The inclusion of an unusable withdrawal provision is essentially the same as including no withdrawal provision at all.

The Ngāti Tūwharetoa Hapū Forum Trust (the Hapū Forum) is the mandated entity for Ngāti Tūwharetoa. Its deed of mandate contains a withdrawal clause allowing individual hapū to withdraw and setting out the process that a hapū is required to go through to achieve withdrawal. Briefly, this would involve a series of publicly notified hui-a-hapū to discuss the proposal to withdraw and hui between the hapū seeking withdrawal and the Hapū Forum to discuss the matter. Explanation of the consequences of withdrawal must be given in the text advertising each hui and prior to putting any motion to withdraw. This must include a description of the Crown's large natural groups policy and the likelihood that individual hapū are unlikely to qualify as a large natural group and thus be unable to enter settlement negotiations.¹⁴¹

The hapū-specific withdrawal provisions of the Hapū Forum's deed of mandate confirm for us two important matters. Firstly, provisions allowing for the withdrawal of individual hapū can be included in a deed of mandate. Secondly, provisions of this kind emerge from mandating processes that recognise both the importance of hapū consent to a proposed mandate and the importance of maintaining hapū support. The Crown, in relation to the Tūhoronuku IMA's mandate,

140. Ngāti Hauā Trust Board, 'Ngāti Hauā Trust Board deed of mandate proposal', November 2012, p 37, <http://www.nz01.2day.terabyte.co.nz/ots/documentlibrary%5CNg%C3%A2tiHau%C3%A2trustboarddeedofmandate.pdf>; Te Mana o Ngāti Rangitīhi Trust, 'Deed of Mandate', p 17 <http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CngatiRangitihidom.pdf>

141. Ngāti Tūwharetoa Hapū Forum Trust, 'Deed reconfirming mandate to negotiate the comprehensive Treaty of Waitangi historical claims of Ngāti Tūwharetoa', 15 July 2011, pp 21–22 <http://www.nz01.2day.terabyte.co.nz/ots/documentlibrary%5Cngatitwharetoadeedofmandate.pdf>

submitted that ‘hapū had not given a mandate such that a mandate could be withdrawn by hapū.’¹⁴² We have already concluded that in the context of Ngāpuhi, with its large number of highly autonomous hapū, the fact that ‘hapū had not given a mandate’ is a crucial failing. The Crown, knowing what it did of Ngāpuhi and the importance of hapū rangatiratanga, should have considered evidence of support from hapū for the Tūhoronuku IMA as critical to its consideration of the mandate. Requiring a process by which Ngāpuhi hapū are able to withdraw from the mandate would serve as one means of confirming whether or not the Tūhoronuku IMA does have the support of Ngāpuhi hapū.

Ms Hickey, when asked about the withdrawal provisions in other deeds of mandate, confirmed that the withdrawal provisions affecting the Hapū Forum allowed individual hapū to withdraw. She advised that this reflected the fact that the Hapū Forum had secured its mandate from Ngāti Tūwharetoa on a hapū-by-hapū basis.¹⁴³ She went on to note that the Tūhoronuku IMA’s choice not to include a similar withdrawal clause in its deed of mandate reflected the fact that it had sought a mandate from the whole of Ngāpuhi rather than from Ngāpuhi hapū.¹⁴⁴

Ms Hickey’s remarks suggest that Tūhoronuku was able to exercise choice as to the inclusion of a hapū withdrawal clause. Yet, on 29 January 2013, OTS officials suggested to the Ministers that the inclusion of a hapū withdrawal clause should not be supported by the Crown. They considered that the inclusion of such a clause would fundamentally destabilise a mandate (if recognised) and put negotiations at risk.¹⁴⁵ The Ministers communicated this to the chairs of Tūhoronuku and Te Kotahitanga in a letter of 31 January 2013, stating:

we consider the inclusion of a mechanism to allow certain hapū or groupings who do not wish to be included in the deed of mandate to withdraw at any stage in the process would fundamentally destabilise Ngāpuhi’s mandate authority and settlement negotiations. We all need certainty that if we embark on a negotiation that it will be for a comprehensive settlement of all Ngāpuhi claims. The settlement itself must strengthen the ties that bind the hapū of Ngāpuhi. Allowing hapū to withdraw from negotiations is contrary to these goals.

For these reasons, we consider it unacceptable for a Ngāpuhi deed of mandate to include a mechanism that enables withdrawal of individual hapū or groupings.¹⁴⁶

The Crown’s perspective on the inclusion of a hapū withdrawal clause in the Tūhoronuku IMA’s deed of mandate is clear. It was unacceptable and both Tūhoronuku (as it was then) and Te Kotahitanga were advised as such. To represent the non-inclusion of a hapū withdrawal clause as a choice made by Tūhoronuku is disingenuous. We do not know if Tūhoronuku would have proposed such a clause but had it done so the Crown would not have allowed it.

142. Submission 3.3.30, p 42

143. Transcript 4.1.2, pp 821–822; see also doc A108, pp 88–89

144. Transcript 4.1.2, p 823

145. Document A108(a), pp 525–526

146. Ibid, pp 535–536

4.3.6 The Crown's mandate conditions

We outlined earlier in this chapter the conditions imposed by the Crown when it decided to recognise the Tūhoronuku IMA's mandate. To summarise, the conditions relevant to Ngāpuhi require the Tūhoronuku IMA to:

- ▶ develop detailed communication and negotiation plans that recognise specific hapū interests to be included in the Terms of Negotiation to be signed with the Crown;
- ▶ provide detailed three-monthly mandate maintenance reports;
- ▶ explore options for the PSGE early in the negotiation process; and
- ▶ allow votes for elected members only.

The Crown's conditions assume that the Tūhoronuku IMA is representative of and accountable to Ngāpuhi and are targeted at ensuring that this remains the case. Our analysis has revealed that assumption to be false. As a result, we do not need to examine these conditions.

We do, however, reiterate our concern that the conditions imposed by the Crown do not include any requirement for the Tūhoronuku IMA to show any particular level of hapū support. This is despite the acknowledged importance of hapū engagement (said in OTS's September 2014 draft report to be shown by the number of hapū kaikōrero appointed) as a key indicator of how representative the Tūhoronuku IMA is of Ngāpuhi. During questioning by the Tribunal at the March 2015 hearing, Ms Hickey confirmed that the level of hapū support was a factor that Ministers would consider when assessing the Tūhoronuku IMA's maintenance of its mandate. She confirmed the number of hapū engaged was less than half the number listed in the deed of mandate. She could not say, however, that any particular level of hapū support would be required. Moreover, she confirmed that while the Crown was assessing the support enjoyed by the Tūhoronuku IMA it was also working with the Tūhoronuku IMA to bolster that support.¹⁴⁷ It is unclear to us, from the Crown's mandate maintenance conditions and its evidence, whether the Tūhoronuku IMA could ever fail to maintain its mandate.

4.4 CONCLUSION

The Crown has recognised the mandate secured by the Tūhoronuku IMA to settle all the historical claims of Ngāpuhi, including those of Ngāpuhi hapū. Yet in doing so, it did not ensure that the Tūhoronuku IMA has the support of those hapū. Hapū were not provided with the means, in accordance with their tikanga through hui-ā-hapū, to discuss, debate, and decide whether or not to support the Tūhoronuku IMA.

The Crown submitted that regardless of any failure of the Tūhoronuku IMA to secure hapū support, hapū have the ability to exercise autonomy throughout the negotiation process by engaging with the mandated entity. This includes the ability of hapū to appoint their hapū kaikōrero and the ability of those kaikōrero to appoint

147. Transcript 4.1.3, pp 225–227

the majority of the Tūhoronuku IMA board. We have established that the processes for appointing and replacing hapū kaikōrero are deeply flawed. The will of hapū as decided through processes that accord with tikanga can be undermined by individual hapū members. Hapū who are opposed to the Tūhoronuku IMA nonetheless find that they are represented by it. Other hapū have chosen to fill their kaikōrero role purely for fear that, should they not do so, individuals may do so without their knowledge, and against their will. There can be no hapū rangatiratanga in a process where the will of hapū is so easily ignored. It is not surprising that some claimants have characterised the Tūhoronuku IMA as a hīnaki (eel trap) or rore kiore (rat trap), something they were unwilling to enter and from which they now find they cannot escape.¹⁴⁸

The Tūhoronuku IMA board's hapū representatives cannot be considered representative of and accountable to hapū while the process for appointing and replacing hapū kaikōrero remains fundamentally unsound. Nor can they be said to speak for Ngāpuhi hapū when only a minority of hapū included in the mandate choose to be represented by the Tūhoronuku IMA. It is our conclusion that, without some mechanism, compliant with tikanga, to ensure that the Tūhoronuku IMA enjoys the broad support of hapū, it cannot be considered an appropriate entity to enter negotiations with the Crown.

The existence of an operable withdrawal mechanism would provide assurance that hapū included in the mandated entity do in fact support it. As it stands, the withdrawal provision in the Tūhoronuku IMA deed of mandate is so onerous as to be impossible for any Ngāpuhi group or groups to utilise. This, together with the defects, identified earlier, in the processes for appointing hapū kaikōrero and the Tūhoronuku IMA board members, allows the Tūhoronuku IMA to enter, and continue, settlement negotiations with the Crown without being able or required to show that it has the support of those it purports to represent.

148. Transcript 4.1.3, p 248

CHAPTER 5

FINDINGS AND RECOMMENDATIONS

5.1 INTRODUCTION

Ngāpuhi is distinct in size and the extent to which the iwi is made up of strong and autonomous hapū. That tradition of hapū independence is expressed in their most famous whakatauaki and their institutions of leadership, and it has informed many ‘Ngāpuhi’ actions in the past, including the signing of Te Tiriti. Of course, there have been many instances of cooperation between hapū, but in circumstances of their own choosing, and until recently, the right to stand aside, when called upon to join a particular take, has been respected.

Ngāpuhi are also renowned for their diversity. Many people derive common ancestry from the tupuna Rāhiri, but there is no single ancestral waka, no single maunga, no sacred awa common to all. Many Ngāpuhi members also choose to identify and organise as hapū from more particular lines of ancestry. They exercise ahi kā in their local places, bound not so much to all other Ngāpuhi hapū as to their closest whanaunga – those with whom they share whakapapa, resource use, historical experience and, in many instances, Treaty claims.

It is central to the tikanga of these hapū that decisions are ventilated at hui on the home marae, where the support for the rangatira themselves, and the causes and actions they advocate, are also tested. There is a long tradition of these practices and they remain relevant to the exercise of authority among Ngāpuhi today, despite the dispersal of their home communities. In our view, the importance of decision making in congress on the whenua and in the presence of generations past, present, and future, is all the greater in the context of matters pertaining to the Treaty claims of hapū.

These are the dynamics and traditions, some general, some distinctive to Ngāpuhi, of which the Crown must be aware when it comes to recognising the mandate of any entity purporting to speak on behalf of the whole, or any section of the iwi.

5.2 THE TREATY DUTY OF ACTIVE PROTECTION

As we set out in chapter 2, the Crown has a duty to respect and protect actively the rangatiratanga of Māori communities. How it goes about doing so, including how it protects the rangatiratanga of groups with different aspirations, depends upon

the particular circumstances of the community involved. In the Ngāpuhi context, where the issue concerns the right to represent hapū in negotiations to settle their Treaty claims, the Crown's primary duty is to protect actively the right of hapū to determine how and by whom they will be represented. We consider that the Crown, when making the decision to recognise a mandate, must adhere to the following minimum standards:

- ▶ ensure it is dealing with the right Māori group or groups having regard to the circumstances specific to that claimant community so as to protect its intra-tribal relationships;
- ▶ practically and flexibly apply the large natural groups policy according to the rangatiratanga and tikanga of affected groups;
- ▶ allow for an appropriate weighing of interests of groups in any recognised mandated entity, one that takes into account factors including the number and size of hapū, the strength of affected hapū, and the size and location of the population;
- ▶ recognise that the structure of the mandated entity must allow for hapū interests to be tested and heard; and
- ▶ on the basis of this assessment, protect actively the rangatiratanga and tikanga of those hapū who are opposed to their claims being negotiated by the mandated entity, and weigh this protection of hapū with that of non-hapū interests in the modern context.

We now explain how the Crown, in recognising the mandate of the Tūhoronuku IMA to represent all Ngāpuhi, failed to protect the rangatiratanga of Ngāpuhi hapū.

5.2.1 Hapū rangatiratanga is not actively protected in the Tūhoronuku IMA

While the Crown has only gone as far as acknowledging its role of 'honest broker', it has been made aware of the importance of hapū to the exercise of authority among Ngāpuhi and their long tradition of honouring hapū diversity and autonomy. It has recognised that importance at various times and engaged with hapū leadership on that basis. The Crown has also seen it as appropriate to require the Tūhoronuku IMA to make changes to its original structure, although these amendments have not gone as far as the claimants might have wished. Nor have these changes been endorsed by the individual Ngāpuhi voters who approved the mandate in the first place and, with it, a structure which the Crown later required to be changed to address the concerns of those who judged it to be incapable of representing hapū. The Crown considers that the changes made by the Tūhoronuku IMA to its structure and processes, including an increase in the number of hapū representatives to comprise a majority of its board, adequately protects hapū rangatiratanga and its future exercise.

We disagree. As outlined in chapter 4, in our view hapū rangatiratanga is not supported in the Tūhoronuku IMA in the following ways.

(1) *The definition of Ngāpuhi privileges the individual over the hapū*

Ngāpuhi are defined in the deed of mandate as the descendants of Rāhiri. The definition does not include hapū, although they are listed in the appendix to the deed. This omission reflects and entrenches the way in which the mandate was sought – from individuals with no especial reference to hapū. Nonetheless, the Tūhoronuku IMA purports to represent hapū, as well as groups who do not fit easily into the category of Ngāpuhi. The Tūhoronuku IMA will speak for all their historical claims in negotiations with the Crown, even though such groups were never asked whether they wished to be represented in this fashion. Hapū were not enabled to make a decision to stand outside the structure and carry their claims forward by the leadership they approve. This is not a process that is consistent with their tikanga and, if allowed to stand, will mean they have no choice but to join an entity they do not willingly endorse. Potentially, to mention but one of many possible examples, the descendants of Kawiti will have any breaches of the Treaty that occurred during the Northern Wars settled without their consent, by the Crown in negotiation with a party whom they have not authorised and have specifically rejected. Such an outcome is surely unthinkable.

(2) *Selection of hapū kaikōrero does not ensure hapū control*

The hapū are required to select kaikōrero to represent them if they want any say in the negotiations. Compounding the situation is that there is no requirement for these representatives to be approved at a hui-a-hapū. Although that option is open to hapū, representatives can be selected by a single nomination, one individual nominating another, and by postal ballot against the clearly expressed wishes of the hapū. We heard evidence of a number of instances of this happening. In contrast, the process of removing a kaikōrero is onerous and, in any event, does not result in a hapū being able to stand outside the structure. The Crown considers that the voting process introduced by the Tūhoronuku IMA directly addressed the concerns raised by Te Kotahitanga. This is not the case. Although Te Kotahitanga wished for more transparency in the selection of hapū kaikōrero, including a vote where needed, the system it outlined to the Crown was one in which the nomination process remained firmly within the control of the hapū.

The Crown has also made much of the fact that, in some instances, those voting for a hapū kaikōrero have outnumbered the attendees at hui at which hapū determined to remain outside the structure was reached. On the face of it, this may seem a telling point, but it is not one that has been made in an even-handed manner. Essentially the Crown relies on principles of ‘democracy’, yet does not invoke them in other cases, where there has been no opportunity to vote at all because, unknown to the hapū, a single nomination was in place. Further, in Treaty terms, tikanga processes which empower the hapū may need to prevail over the choice of individuals. The damage that has been inflicted in the past by supplanting a system based on decisions made in congress according to customary preferences with one based on the majority will of individuals should be well known to all parties in this inquiry. The Crown has been often condemned by the Waitangi Tribunal in other

contexts, most notably with regard to New Zealand law's replacement of communal responsibility for Māori land with its ownership by a number of named individuals. Nor have hapū been offered assistance to ensure that members living outside the rohe can connect with, and participate in, the mandating process in a manner compliant with their tikanga.

(3) *The Tūhoronuku IMA has been empowered to proceed without adequate hapū participation*

Our view of the Crown's compliance with its duty of active protection is also informed by its decision to approve, albeit conditionally, a structure that was not yet populated. This seems an unusual and questionable way of proceeding, contrary not only to tikanga but to democratic principles as well. We refer here to the Crown's requirement that fresh elections for hapū kaikōrero and the Tūhoronuku IMA board be held once it had recognised the amended deed of mandate. As far as we are aware, this is far from standard practice. In general, the Crown will recognise a mandate for a group whose membership is already known and which has provided clear evidence of how those members became representatives for their community. Moreover, the Crown will recognise a mandate after it has assessed that evidence to assure itself that the group's members have attained their positions in an open and transparent manner. To recognise the mandate of a body prior to the appointment of its membership and the necessary assessment of that appointment process is entirely different. It appears to us that a more sensible approach would have been to make the Crown's recognition of the Tūhoronuku IMA's mandate conditional upon an assessment of the success of the appointment process. And on that matter, we are most concerned that all 15 hapū representative positions on the board of the Tūhoronuku IMA had been filled, and negotiations able to proceed, in the absence of a full complement of hapū kaikōrero. Indeed, only a minority of hapū had made their selection of hapū kaikōrero at the time the 15 hapū representatives were appointed. This leaves little doubt that the claims of some hapū will be the subject of negotiation without their representation, input, or consent.

(4) *Active protection of hapū rangatiratanga secondary to policy imperatives*

We are left in little doubt that the Crown's duty of active protection of hapū rangatiratanga has come a poor second to its desire for Ngāpuhi to settle as a single entity. The Tribunal has endorsed the Crown's large natural groups policy on numerous occasions, but never in like circumstances – of such a large iwi with such a sizeable and sustained opposition to the body whose mandate has been approved. The Tribunal's endorsement has generally been given in instances when small break-away groups, with questionable backing from their own hapū, have asked for a halt to mandate or settlement proceedings. The Tribunal has also indicated that its approval is not absolute, or intended to apply to all situations. The Te Arawa Tribunal in its 2005 report reminded the Crown that it

should not pursue its nationwide Treaty settlement targets at the expense of some of its Treaty partners. Where the particular circumstances of a group or groups warrant a more flexible approach the Crown must be prepared to apply its policies in a flexible, practical and natural manner.¹

We agree and have earlier identified as a key element in the Crown's duty of active protection the need for flexibility in the application of its preferred policy in order to accommodate tikanga and hapū rangatiratanga.

A number of claimants in this inquiry have argued there is little that is 'natural' in requiring them to mandate a single supra-regional entity to negotiate the settlement of their numerous Treaty claims. Their claims belong to their hapū, not to the whole iwi. Natural groups already exist, they say, centred on the five harbours within Te Whare Tapu o Ngāpuhi and supported by close whanaunga relationships. They observed that the Crown has taken a more flexible approach to negotiations and settlements with other iwi. For example, the claims of both Te Arawa and Ngāti Kahungunu have (and will be) settled, in each case, through negotiations with a number of large natural groups.

There are potentially a number of large natural groups within Ngāpuhi that could be mandated to settle with the Crown. This is reflected, to an extent, in the regional structure adopted by the Tūhoronuku IMA. The Crown has also acknowledged that Ngāti Hine could be considered a large natural group in its own right.

There are, however, actual and potential advantages for both the Crown and the claimants in a comprehensive negotiation and settlement of all Ngāpuhi historical claims. It will be cheaper for the Crown and faster for the claimants. For the Crown there is the advantage of a single set of negotiations reaching agreement on the overall quantum, without the delays caused by disputes about boundaries and interests among the hapū represented by the mandated entity. The Crown's policy of dealing with large natural groups is also one way of ensuring that negotiations with the different claimant groups proceed together, and that groups who are better prepared are not advantaged over others who are potentially affected by a settlement. For the claimants, there is transparency and the benefits of pooling skills and expertise for the common good. There is also the possibility of greater leverage on the crucial question of quantum. The Turanganui a Kiwa Tribunal commented that '[d]isputes over dividing the pie can be resolved more easily by using collective efforts to enlarge it in the first place.'² That has been relied on by some parties appearing in support of the Crown. Some claimants suggest, however, that the contrary is true; that there are examples when settlements have been enhanced by undertaking separate but parallel negotiations.

Be that as it may, the essential point is that the principle of active protection of rangatiratanga in the circumstances of Ngāpuhi demands that hapū are given the opportunity to collectivise in the natural group of their own choosing. To deny

1. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 72

2. Waitangi Tribunal, *Turanga Tangata Turanga Whenua* (Wellington: Legislation Direct, 2004), p 741

them that right, even for their own supposed good, by forcing all into the largest “natural” group possible, is a breach of that principle. The claimants, for their part should be aware, as they say they are, that hapū-by-hapū negotiation and settlement is not a realistic expectation. For smaller groups who decide to go it alone, should that opportunity be given, there is a very real possibility that they will not secure the specific redress they desire and that the settlement of their claims will be long delayed.

For our part, and subject to the recommendations we make below, we strongly encourage claimant groups to proceed together. This may involve them negotiating with the Crown as one entity, or in parallel but with a unified and coordinated approach, and in either case with the knowledge that several settlement packages can be created.

(5) Loss of opportunity for binding recommendations

By recognising the mandate of the Tūhoronuku IMA to negotiate the settlement of all Ngāpuhi historical claims, the Crown has effectively removed the capacity for hapū to seek binding recommendations from the Waitangi Tribunal. Given the determination of both Crown and the Tūhoronuku IMA to settle as soon as possible, the many complex issues in the Te Papanahi o Te Raki district inquiry, and a hearing schedule which currently extends well into 2016, it is highly unlikely that the Tribunal will be able to report in full before a settlement is reached. Although the Crown has promised to preserve the Tribunal’s jurisdiction to report once a settlement is in place, this will not protect its power to make recommendations, including binding recommendations. If Crown-licensed forest lands are claimed by particular hapū (as the traditional owners) to remedy Treaty breaches they have suffered, but those lands are included in the Crown’s settlement with a larger tribal entity, the particular hapū will have lost the opportunity to have the land returned through binding recommendations, even should the Tribunal determine their claims to be well-founded. The land’s return directly to the hapū concerned will depend entirely on negotiations and the agreement of those who may have no customary interest in those lands at all.

The opportunity to seek binding recommendations is a valuable one. We consider that its likely loss, as a result of the decision to recognise the mandate of the Tūhoronuku IMA to negotiate the settlement of all Ngāpuhi claims, means, at the least, that the Crown should have assured itself that the hapū concerned had come to a decision, in a manner compliant with their tikanga, to sacrifice that opportunity for the benefits of an all-in process. It is not enough for the Crown to say that the majority of Ngāpuhi who voted in the 2011 election supported that mandate. At the same time, we repeat our general caution to claimants, should they be allowed to withdraw in order to stay with the Tribunal process (as we recommend they should be able to do provided proper procedures are followed): there is no guarantee they will receive favourable findings which would support binding recommendations. Nor is there any guarantee that the lands sought as specific redress

by way of binding recommendations from the Tribunal will not already have been included in the Treaty settlement of others' claims.

(6) Failure to provide a workable withdrawal mechanism

The abovementioned failures to actively, or evenly adequately, protect hapū rangatiranga are compounded by the lack of clarity about the current withdrawal mechanism. There was considerable confusion even at the time of our hearing about whether hapū could withdraw from the scope of the mandate and, if so, how. As we noted in chapter 4, the Tūhoronuku IMA and the Crown have confirmed that hapū can withdraw but they must follow a process as 'robust' as that undertaken by the Tūhoronuku IMA in securing the mandate. Potentially this means that those seeking withdrawal must conduct multiple hui throughout the country (and perhaps in Australia) before holding a vote open to all Ngāpuhi. Ultimately it is the Crown who would decide whether a hapū could extract their claims from the negotiation for settlement, since the Crown retains the power to assess the impact on the mandate as a whole.

We are satisfied, in light of the 'robust' process for withdrawal, coupled with the Crown's clear preference for a Ngāpuhi-wide settlement, that it remains virtually impossible for hapū to extricate themselves formally from the Tūhoronuku IMA. There is a bitter irony in this for those hapū who have never approved the mandate according to their customary processes.

A number of claimant counsel drew our attention to the Supreme Court decision in *Haronga v Waitangi Tribunal* (2012)³ that when an individual claimant (as in that case) whose Treaty claim has been upheld applies to the Tribunal for binding recommendations, the authority to negotiate the settlement of that claim is thereby withdrawn from the body previously mandated to conduct such negotiations, without the need for any more formal act or process of mandate withdrawal.⁴ It was argued that this ruling automatically applies to the circumstances before us, but we do not agree. To date there has been no finding of a well-founded claim that could trigger an application for binding recommendations, which is the application that the Supreme Court decided would be inconsistent with the claimant continuing to give a mandate to another body to settle the claim. We observe, however, that the Supreme Court's statement of the law about Treaty claimants' withdrawal of mandate might support an argument that the present claimants, having made this application for an urgent hearing, should not now be treated by the Crown as continuing to give their mandate to settle their Treaty claims to the Tūhoronuku IMA. This, however, would be a matter for the courts to decide.

It is clear to us that the non-inclusion of a specific hapū withdrawal of mandate mechanism has been a 'bottom-line' for the Crown, intended to maintain the mandate of the Tūhoronuku IMA and bolster the single settlement model.⁵ This has been freely acknowledged by Crown officials and counsel, who have argued that

3. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC)

4. Submission 3.3.15, pp 32–34; 3.3.23, p 28; 3.3.25, pp 21–22

5. Document A108(a), p 526, 528; see also transcript 4.1.2, pp 1080–1081; transcript 4.1.2, pp 791–793

this outcome is the wish of the Tūhoronuku IMA and the majority of Ngāpuhi as well. As we discussed in the preceding section, we accept that the single settlement model may well be more efficient and will help deal with overlapping interests. We also accept that the Crown (and many Ngāpuhi) genuinely believe it will enhance Ngāpuhi's position, post-settlement, if they come together in one negotiating entity. We tend to agree. Our major concern is that pragmatic considerations have prevailed at the expense of hapū autonomy which is fundamental to Ngāpuhi tikanga and to Treaty guarantees. As we noted earlier, the Crown's duties must extend to hapū who hold a dissenting position and do not want their claims to be negotiated by a body with no direct interest in or connection to them. We are led to the inescapable conclusion that the failure to include a workable withdrawal mechanism in the deed of mandate, despite the wishes of the claimants, is a breach of the Treaty principle of partnership and the duty of active protection. Crown convenience and the assertions of those who support the Tūhoronuku IMA about what will be best for all Ngāpuhi cannot trump the opposing views of hapū expressed in properly convened and conducted hui-a-hapū.

The support of hapū should have been formally tested as part of the process leading up to the Crown's decision. We do not consider the dispersal of hapū populations to be an insurmountable problem in these very important circumstances where the hapū look to redress the injuries of the past and position themselves, and their mokopuna, to go forward. Nor do we see the requirement that such a crucial decision be made by hapū coming together to be unreasonable in this context, where the question is how their claims against the Crown are to be settled. We have no doubt that those who are interested will come home to their marae to make their opinion known if they are at all able, and that provision can be made for those who cannot. We heard evidence about how this is being done already with the use of video conferencing or other live technology or social media.

Further, a workable withdrawal mechanism is crucial to real accountability. As the Te Arawa Tribunal considered in a comparable situation, allowing claimants to put their support of, or opposition to, a mandated entity to the vote, at a hui-a-hapū, would provide a proper gauge of the opinion within the hapū. We are assured by both Crown and the Tūhoronuku IMA that the mandate is strong yet we are also told that the capacity of hapū to withdraw would undermine it and somehow constitute a veto on the intention of other hapū who wish to proceed directly to negotiation. We do not accept this argument. Should a hapū or a handful of hapū withdraw to take their chances of negotiating a separate settlement of their own, via their own leadership, or of receiving a binding recommendation from the Tribunal, that is their Treaty-protected right. It does not necessarily prevent others from pursuing their chosen course via the body already in place, although changes are needed to the Tūhoronuku IMA's processes so that Treaty principles will be observed (as outlined below).

Strength comes from choice, not from lack of it. Giving hapū the right to withdraw from the scope of a mandate does not necessarily mean they will choose to

exercise it. As noted in chapter 4, there is a precedent for the inclusion of such a clause in a deed of mandate.⁶ It is our view that mandate maintenance, which the Crown has undertaken to monitor, requires issues to be resolved in a transparent manner, not the complete suppression of internal challenges. We endorse the views of the Te Arawa Tribunal in this respect: that allowing a vote at hui-a-hapū, as it recommended, in order to assess support for the mandated entity would not mean ‘a foregone conclusion that these hapū will vote to withdraw [. . .] no one really knows how the numbers within each hapū stack up. Hapū will not necessarily vote to withdraw.’⁷ We consider this will be all the more true in the present context once the structure of the Tūhoronuku IMA is revised and/or confirmed in the manner we recommend.

5.2.2 The Crown’s actions

Ngāpuhi have the right to decide themselves how they will be represented in settlement negotiations. The Crown has the right to decide who it will negotiate with and the responsibility of ensuring that it is dealing with a body that has been properly authorised by those whom it claims to represent. In the context of negotiating the settlement of historical claims, that authorisation must come primarily from the hapū who have borne the brunt of Crown actions in breach of the Treaty and on whose behalf most of the claims are made. Yet the authorisation of the Tūhoronuku IMA was neither sought from nor given by Ngāpuhi hapū.

The Crown has recognised the mandate of the Tūhoronuku IMA secured by a process (of individual votes) that did not provide sufficiently for the exercise of hapū rangatiratanga. Nor will that entity operating under its current rules allow for the sufficient exercise of hapū rangatiratanga in the working of its accountability mechanisms. The Crown’s endorsement was given despite its awareness of the importance of hapū authority among Ngāpuhi, and its prior acknowledgement that hapū would need to be sufficiently recognised and supported in the process of settlement negotiations. The Crown had also been made aware of claimant concerns and of its obligations to hapū, in particular, in engaging with Ngāpuhi in the lead-up to making its decision.

To its credit, the Crown required changes to be made to the originally proposed structure of the Tūhoronuku IMA, in an attempt to satisfy certain of the criticisms of opponents. However, it did not go far enough in ensuring that hapū rangatiratanga would be protected either in the choice of leadership or the pathways to settlement of their claims. In particular, it was deemed to be unacceptable that the deed of mandate contain a withdrawal mechanism when, in our view, this would offer hapū a last, crucial, protection, should their concerns not be resolved, by providing the right to pursue settlement or redress by other means, despite the risks of doing so.

6. Transcript 4.1.2, pp 821–822; transcript 4.1.3, pp 34–35

7. Waitangi Tribunal, *The Te Arawa Settlement Process Reports* (Wellington: Legislation Direct, 2007), p 189

5.3 OUR FINDINGS

The Crown concedes that there were some problems in the process leading up to its decision to recognise, conditionally, the mandate of the Tūhoronuku IMA, but sees these as inconsequential because the outcome – the current structure of the Tūhoronuku IMA – is sound. We have found, however, that the constitution of the Tūhoronuku IMA is not tika because it does not sufficiently support hapū rangatiratanga.

The Crown also considers that any remaining problems are insignificant because there is still time to make changes. All hapū need to do is to get on board and any outstanding issues can be resolved in the process of negotiation. It is clear to us, however, that the Crown's recognition of the Tūhoronuku IMA's mandate is a decisive step – a significant action that locks in some hapū, against their will, in breach of their Treaty right to choose their leadership according to their tikanga and their cultural preferences. It is equally clear to us that the Tūhoronuku IMA cannot be considered an appropriate entity in its present form to negotiate with the Crown because it does not protect hapū rangatiratanga in the following ways:

- ▶ The omission of hapū from the definition of Ngāpuhi privileges the individual over the hapū. The Tūhoronuku IMA will speak for all the historical claims of hapū in negotiations with the Crown, even though hapū have never been asked if they wanted to settle in this way.
- ▶ The process for selection of hapū kaikōrero does not ensure that hapū control who will represent them in negotiations. Hapū kaikōrero can be and have been appointed on the basis of single nominations, in circumstances where hui-a-hapū have resolved not to appoint a hapū kaikōrero.
- ▶ The Crown recognised the mandate of an empty structure. Subsequent appointments of Board members and negotiators proceeded despite only a minority of hapū having selected hapū kaikōrero.
- ▶ The Crown's insistence that Ngāpuhi settle as a single entity has overridden any opportunity for hapū to collectivise in natural groups of their own choice and, in our view, the Crown has not applied its large natural groups policy in either a natural or a practical and flexible way.
- ▶ The intended settlement timeframe is such that hapū will very likely lose the opportunity to seek binding recommendations from the Tribunal, in circumstances where the Crown has not asked the hapū concerned for their consent to that outcome.
- ▶ There is no workable withdrawal mechanism when the clear ability to withdraw would, we consider, give hapū currently opposing the Tūhoronuku IMA the confidence to become involved, knowing they are not trapped if they lose faith in their mandated representatives.

As we set out in chapter 2, our jurisdiction under section 6 of the Treaty of Waitangi Act 1975 is to inquire into claims submitted by Māori and to determine whether they are well-founded. We must determine whether the Crown acts or omissions complained of are inconsistent with the principles of the Treaty, and if so

whether they have caused or are likely to cause prejudice. Where the Tribunal finds a claim to be well-founded it may recommend to the Crown that action be taken to remove the prejudice, or to prevent other persons from being similarly affected in the future. Those recommendations may be in general or specific terms, and should be practical.⁸

The findings we have set out above show that the Crown has erred in its recognition of the Tūhoronuku IMA as an appropriate entity to represent Ngāpuhi in negotiations with the Crown. We conclude that the Crown has breached the Treaty principle of partnership and the duty of active protection of rangatiratanga by failing to ensure that the structure of the Tūhoronuku IMA sufficiently protects hapū rangatiratanga.

5.3.1 The prejudice

In assessing the actual and future prejudice to claimants from the Crown's actions in breach of Treaty principle, we have focused on what the Crown maintained was the Treaty-consistent outcome of the mandating process: the structure and processes of the mandated body. By taking that approach, we neither uphold nor dismiss the genuine concerns raised by claimants about aspects of the mandating process itself. However, as we explained in chapter 1, a high standard of proof must be satisfied to establish the claimants' primary allegation about that process – of pre-determination by the Crown. In our assessment, the evidence does not meet that threshold. Even if it did, however, that finding would not complete our inquiry. We would still need to examine the structure and processes of the mandated entity, as we have done, and we would still need to assess any prejudice to claimants that has resulted or is likely to result from the Crown's breaches of Treaty principle. We turn to that task now.

The claimants alleged they have or will suffer prejudice arising from the Crown's breach of Treaty principles in a number of respects:

- ▶ Ngāpuhi hapū will be represented in settlement negotiations with the Crown by an entity they did not mandate and do not support;
- ▶ Ngāpuhi hapū will lose their right to have their claims inquired into and reported on by the Tribunal by a settlement completed prior to a Tribunal report into their claims;
- ▶ negotiations between the Tūhoronuku IMA and the Crown will deprive Ngāpuhi of the right to achieve a fair, robust and enduring settlement of their claims;
- ▶ as a result of the mandating process Ngāpuhi doubt their ability to establish any positive and long-lasting relationship with the Crown; and
- ▶ their relationships with whanaunga have deteriorated, and there is no obvious means of restoring the ties that bind (see chapter 3).

The Crown responded that its decision to recognise the mandate was not in breach of the Treaty and does not cause prejudice to the claimants. In its closing

8. See the preamble and section 6(4) of the Treaty of Waitangi Act 1975.

submissions the Crown said that the claims and claimant rights were not affected because settlement negotiations (at that time) were yet to commence and the Tūhoronuku IMA structure allowed adequate representation and accountability for all Ngāpuhi.⁹

The Crown and other parties in opposition have also urged us to bear in mind that if we find the present claims to be well-founded, prejudice could be created for hapū and individuals who support the Tūhoronuku IMA and who wish to move forward with settlement negotiations. We were told that recommendations leading to revocation of the mandate, or cessation and/or pausing of negotiations would cause significant prejudice to these interests because of further delays, extra costs, lost opportunities and uncertainty.¹⁰ We acknowledge these risks exist but consider the Treaty breaches we have found and the resulting prejudice that we identify (below) are of such gravity that they must be remedied if Ngāpuhi are to move forward together and achieve a just and enduring settlement.

The principal prejudice to claimants arises from the Crown's failure to actively protect hapū rangatiratanga in its decision to recognise the mandate of the Tūhoronuku IMA. Instead of supporting and empowering hapū to decide who will represent them in negotiations with the Crown, the Crown's actions have undermined the authority of hapū in this process.

The Crown's recognition of the mandate of the Tūhoronuku IMA was a decisive step and we consider the claimants are already prejudiced because:

- ▶ their hapū tikanga and leadership has been disregarded and diminished;
- ▶ they are represented in negotiations with the Crown by an entity they have not endorsed and by people whose authority to act on their behalf they do not recognise;
- ▶ there is every possibility that their Treaty claims will be negotiated, settled, and extinguished without their consent, resulting in further significant and irreversible prejudice;
- ▶ those hapū who claim Crown forest assets will be denied their right to seek binding recommendations from the Waitangi Tribunal should their claims currently under inquiry be adjudged well-founded;
- ▶ there is no coherent or consistent policy or strategy for engaging with groups who do not fit neatly or naturally into the large natural group rubric, leaving these groups in limbo with no say in how their claims will be settled;
- ▶ the Treaty relationship has been damaged because hapū have lost confidence in the Crown, believing that the Crown prefers not to engage with them and chooses instead to engage with an entity that hapū have not authorised to speak on their behalf; and
- ▶ there has been serious damage caused to their whanaungatanga relationships with other Ngāpuhi hapū and individuals.

We also consider there is potential for further prejudice if the Crown does not address the existing prejudice in the manner we recommend. There is a serious risk

9. Submission 3.3.30, p 8, 10

10. Submission 3.3.31, pp 5 – 6

that a settlement which marginalises many hapū is unlikely to be final and durable and will obstruct the restoration of their relationship with the Crown. There is also the risk of further division and dissension within Ngāpuhi, further damage to hapū mana, leadership, and ability to self-manage, and remedies not being allocated, or being accessible, to the right groups.

5.3.2 Our recommendations

The Tribunal has grappled with the complexity of the situation presented in this inquiry. Ngāpuhi is New Zealand's largest and most dispersed iwi and also one of its poorest. That there is a desire for settlement of historical grievances as well as an urgent need is generally agreed. We have found that the role of hapū is fundamental to Ngāpuhi tikanga, and hapū must play a decisive role in determining how and by whom the settlement of their historical Treaty claims will be negotiated. We have concluded that the Crown's decision to recognise the Tūhoronuku IMA is in breach of its Treaty duty of active protection because that entity, as it is presently structured, is incapable of properly representing the interests and aspirations of hapū in negotiations with the Crown. We find the claims to be well-founded.

Having reached this conclusion, the Tribunal has several options as to the recommendations we could make. We could recommend that the Crown withdraw its recognition of the mandate, and that the mandating process be re-run. Although this was urged on us by some claimants, we consider that this would be neither a practical nor a constructive outcome. We recognise there is broad support for settlement within Ngāpuhi, and momentum towards settlement should not be stopped dead in its tracks. Although we consider the flaws we have identified in the Tūhoronuku IMA structure to be fundamental, we also consider they can be remedied without restarting the entire mandating process. Once remedied, the Tūhoronuku IMA will be capable of leading a negotiation on behalf of hapū. There are seven key remedial actions that need to take place.

First, the Crown must halt its negotiations with the Tūhoronuku IMA to give Ngāpuhi necessary breathing space to work through the issues that have been identified.

Secondly, hapū must be able to determine with their members whether they wish to be represented by the Tūhoronuku IMA.

Thirdly, those hapū that wish to be represented by the Tūhoronuku IMA must be able to review and confirm or otherwise the selection of their hapū kaikōrero and hapū representatives, so that each hapū kaikōrero has the support of their hapū.

Fourthly, Ngāpuhi hapū should have further discussions on the appropriate level of hapū representation on the board of the Tūhoronuku IMA.

Fifthly, the Crown should require as a condition of continued mandate recognition that a clear majority of hapū kaikōrero remain involved in the Tūhoronuku IMA.

Sixthly, there must be a workable withdrawal mechanism for hapū who do not wish to continue to be represented by the Tūhoronuku IMA.

Finally, if they exercise their choice to withdraw, hapū must be given the opportunity and support to form their own large natural groups.

We have weighed this approach against likely prejudice to those individuals and hapū who presently support the Tūhoronuku IMA and want the current negotiations to continue without pause. We acknowledge that the process we recommend will take time and could potentially delay settlement. We also acknowledge there is a risk that some groups will choose to leave the mandated structure, but we consider it is crucial that the Crown and Ngāpuhi take the opportunity now to resolve the fundamental issues we have identified, before negotiations proceed further. Leaving those issues unresolved will continue to have a corrosive effect on relationships both within Ngāpuhi and with the Crown. Hapū who are included in the mandate must want to be there and not feel they have been coerced or trapped. While the Crown submitted that a withdrawal mechanism would undermine the existing mandate, it also assured us there is significant support for the Tūhoronuku IMA among hapū. If this is indeed the case, then there should not be many groups who might choose to withdraw from the mandate. But enabling the mandate to be tested in this way may well encourage more hapū to participate actively and have input into the negotiations process, resulting in a stronger mandate and ultimately a settlement which is more likely to be robust, fair and enduring.

We recommend that the Crown's negotiations with the Tūhoronuku IMA must now be put on hold until such time as the Crown can be satisfied of the following matters, which we discuss below:

- ▶ that Ngāpuhi hapū have been given the opportunity to discuss and confirm or otherwise whether they wish to be represented by the Tūhoronuku IMA in the negotiation of their historical Treaty claims;
- ▶ that hapū who wish to be represented by the Tūhoronuku IMA have been given the opportunity to confirm or otherwise their hapū kaikōrero and the hapū representatives on the Tūhoronuku IMA board;
- ▶ that Ngāpuhi hapū have been given the opportunity to discuss and confirm or otherwise whether they consider there is an appropriate level of hapū representation on the Tūhoronuku IMA Board;
- ▶ that the Tūhoronuku IMA deed of mandate has been amended to include a workable withdrawal mechanism for any hapū which does not wish to continue to be represented by the Tūhoronuku IMA; and
- ▶ in addition, the Crown should require as a condition of continued mandate recognition that a clear majority of hapū kaikōrero remain involved in the Tūhoronuku IMA.

Finally, we recommend that the Crown support hapū which withdraw from the Tūhoronuku IMA to enter into negotiations with the Crown to settle their Treaty claims as soon as possible and preferably at the same time as other Ngāpuhi negotiations. This will involve the Crown supporting and encouraging hapū, through the provision of information and financial support, to form into large natural group(s), and to obtain mandate(s) from their members.

5.3.3 A way forward

In making these recommendations we recognise that the active protection of hapū rangatiratanga in 2015 requires agreement on how hapū members, wherever they may be located, should participate in discussions and decisions on matters of vital importance to the hapū. We considered whether we should give further guidance about what should be entailed in giving hapū the opportunity to discuss and confirm or otherwise the issues identified above, but believe that is a matter for hapū and the Crown to agree. However, the matters we have identified will necessarily require support from the Crown (whether financial or through the provision of facilities, information and other means) to assist hapū to engage with their members at hui a hapū at home marae, and also remotely through use of video conferencing or other live technology or social media, or even hui a hapū outside the rohe where appropriate. We recognise that as part of the process of discussion and confirmation or otherwise of the issues we have identified, hapū will want to know from the Crown and the Tūhoronuku IMA what is proposed regarding confirmation of representation and withdrawal provisions. It is also likely that hapū will want to have a clear view of what is proposed for post-settlement governance. We suggest that discussions on the make-up and structure of the PSGE(s) should begin as early as possible, or at the least be open and transparent, as this is also likely to give hapū further confidence to join the Tūhoronuku IMA.

In relation to our recommendation concerning hapū kaikōrero, we propose that nominations for hapū kaikōrero be decided on home marae and, if more than one nomination is received, that a voting process open to all hapū members, wherever located, be held. We also consider that (following the confirmation process we have recommended) the Crown's continued recognition of the mandate be conditional upon a clear majority of hapū kaikōrero remaining involved in the Tūhoronuku IMA. Our expectation is that a minimum of 65 per cent of the total number of hapū named in the amended deed of mandate would need to continue their support of the Tūhoronuku IMA. This would set a clear threshold to be maintained for a settlement to proceed. It would also recognise that while some hapū may leave, this should not prevent those wanting to remain in the Tūhoronuku IMA from proceeding to a settlement.

Hapū should also have the opportunity to discuss and consider whether the current level of hapū representation on the board of the Tūhoronuku IMA is appropriate to support their settlement aspirations. We acknowledge that the level of representation was increased in the amended deed of mandate but also note that this was a decision made by the Tūhoronuku IMA without seeking the agreement of hapū.

The Crown should also be prepared to 'wind back' the terms of negotiation if further hapū join the Tūhoronuku IMA as a result of the process we have recommended. The Crown told us during the hearing that it could do this, and we agree it should be prepared to, as these hapū may have different views on how negotiations should proceed.

There were several groups who did not sit comfortably within the scope of the mandate either as Ngāpuhi individuals or as hapū. We refer to Ngā Taurira Tawhito Trust, which represents a group of former pupils of Hato Petera College in a claim involving land belonging to or used by the College, and the Whatitiri Reserves Trust, which claims on behalf of the reserve beneficiaries in relation to the Poroti Springs. Ngā Taurira submitted that as theirs is not essentially a Ngāpuhi claim, it should not be included in the mandate and they should be regarded instead as cross-claimants. We refer to the recent Memorandum-Directions of Chief Judge Wilson Isaac, Presiding Officer in the Veterans Inquiry (Wai 2500). He found that, with regard to claimants whose claims are linked by their shared status as military veterans: ‘The non-descent-based claims of individual Māori, whether singly or associated in groups, exist outside the ambit of the settling group, the area of interest and the customary rights as defined by the legislation.’¹¹ We agree that where the common identifying factor of a claimant group is not whakapapa, their claims are not settled through the Crown policy of settling all historical claims through whakapapa.

We agree with the Wai 2442 Ngā Taurira claimants that their claim cannot be considered to fall within the Tūhoronuku deed of mandate and should not be settled through that process. We suggest that they should be regarded as cross-claimants instead.

The Whatitiri Reserves Trust was an interested party in this inquiry. In essence their submission was the mandating and negotiations process does not provide for groups such as theirs which is a non-hapū entity. They submitted that they are disadvantaged because the Crown does not have a clear and consistent policy or strategy for engaging with the claims of groups such as theirs. Even though they have the support of the hapū from which their beneficiaries are drawn, they are reliant on the goodwill of the Crown to engage with them directly. We agree this is an obvious gap in Crown policy and we suggest that the Crown develop an appropriate policy for inclusion in the Red Book.

5.3.4 Concluding remarks

Many of the witnesses appearing in opposition to the claimants expressed frustration at the possibility of further delay before proceeding to settlement. Yet it is crucial to the ultimate success of the settlement process that the negotiating structure is robust and has the full support of those whom it claims to represent, and whose grievances it intends to put to rest. There is a real danger, if the wairua is not there, if the focus is more on economic stimulus than on healing the injuries of the past, if tikanga is pushed to one side to remove what are perceived as impediments to progress, that the opposite will happen: that further grievances will be caused. The Crown must approach the task of negotiating settlement not only in a timely fashion, but also with a spirit of generosity and, as claimant counsel argued, ‘with care, with sympathy, and . . . with humility’.¹² It is clear that, in order for the Treaty relationship to be repaired, hapū must be returned to a position of authority. For this to

11. Wai 2500 ROI, memo 2.5.15, p 15

12. Submissions, 3.3.3, p 2

happen, it is essential that hapū rangatiratanga and hapū tikanga are respected, protected and enhanced in mandating processes. In addition to our formal recommendations, we hope that all parties will build on the very real progress that has already been made and continue to strive for the restoration of Ngāpuhi's social, cultural and economic position, the Crown's honour, and the Treaty relationship itself.

Dated at *Wellington* this *4* day of *September* 2015

Sarah Reeves

Judge Sarah Reeves, presiding officer

Dr Robyn Anderson

Dr Robyn Anderson, member

Tureiti Lady Moxon

Tureiti Lady Moxon, member

Kihi Ngatai

Kihi Ngatai QSM, member



APPENDIX I

LIST OF INTERESTED PARTIES

1.1 LIST OF INTERESTED PARTIES IN SUPPORT OF THE APPLICATIONS

Counsel: G Sharrock

Interested parties: Sir Graham Latimer, Tom Kahiti Murray, Richard Nathan, and Hector Busby on behalf of Hapū of Tai Tokerau

Claim: Wai 861

Counsel: S Reeves

Interested parties: Merehora Taurua and Peter Pokai Taurua on behalf of themselves and Ngāti Rahiri, Ngāti Kawa, Ngāti Manu, Ngāti Rangī, Ngāti Rehia, Ngāti Kuri, Ueoneone, and Parawhau hapū, and Ngā Puhi iwi

Claim: Wai 2244

Interested party: Ngāti Rahiri Ki Te Tii Waitangi

Interested party: Te Tiriti o Waitangi Marae Board of Trustees

Counsel: A Warren and S-M Downs

Interested party: Riwi Hone Niha

Claim: Wai 455

Interested parties: Betty Parani Hunapo (Kopa) (deceased) and Ms Hira Hunapo on behalf of Ngaro Tirita whānau Trust

Claim: Wai 68

Interested parties: Sadie McGee on behalf of McGee family

Claim: Wai 1710

Interested parties: Garru Charles Cooper on behalf of himself, his siblings, and other whānaunga connected with the Waiomio Development Scheme

Claim: Wai 1547

Interested parties: Phillip Bristow-Winiana on behalf of himself, the Ngāti Manu Trust, and the Ngāti Manu Hapū

Claim: Wai 1440

Interested parties: Phillip Bristow-Winiana on behalf of Te Roroa Hapū

Claim: Wai 1445

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THE NGĀPUHI MANDATE INQUIRY REPORT

Interested parties: Elizabeth Boutet on behalf of Te whānau o Paki and Anamaata Cherrington

Claim: Wai 1551

Interested parties: Wati Cooper on behalf of himself and the beneficiaries of the estate of Erana Kare

Claim: Wai 1972

Interested parties: Te Rau Moetahi Hoterene (deceased), Huhana Tawhai, and Delaraine Armstrong

Claim: Wai 149

Interested parties: Lavona Hogan on behalf of the descendants of Ataiti Te Rehu Hotorene

Claim: Wai 1527

Interested parties: Lydia Karaitiana on behalf of the descendents of Kataraina Te Peha Pohe, Mohi Mohi Parore (2), Mohi Mohi Parore (1), and Ngaurupa Kingi

Claim: Wai 2368

Interested parties: Pari Peihopa on behalf of Ngai Tai Ki Ngāpuhi

Claim: Wai 565

Interested parties: Nga Hapū o te Takutai Moana (collective group of hapū from Bay of Islands)

Interested parties: Mereana Robinson, Margaret Tito, Lina Popoti, and Rachel Witana on behalf of themselves, their whānau, and their hapū Te Ihutai ki Orira

Claim: Wai 2072

Counsel: P J Andrews

Interested parties: Taipari Munro on behalf of Whatitiri Maori Reserves Trust, Te Parawhau, and Te Mahurehure ki Whatitiri Hapū

Claim: Wai 2024

Interested parties: Jane Helen Hotere on behalf of Hotere whānau

Claim: Wai 568

Interested parties: Jane Helen Hotere, Rosaria Hotere, Gill Parker, Miriama Soloman, Denis Hansen, Mereaina Pirihi, Rhoda Hohopa, and Willie Tairua on behalf of the claimants and their whānau

Claim: Wai 2425

Counsel: D Stone

Interested parties: Donna Washbrook and Warren Jeremiah Moetara on behalf of Nga Uri o Iehu Moetara Trust and descendants of Iehu Moetara

Claim: Wai 779

Interested parties: Yvette Puru (deceased) and Nonnie Puru on behalf of the descendants of Te Moananui-a-Kiwa Anaru and Te Orewai Hapū

Claim: Wai 1518

Interested parties: Pierre Lyndon on behalf of Te Orewai Hapū

Claim: Wai 1520

Interested parties: Morehu McDonald on behalf of Ngāti Ingoa

Claim: Wai 1523

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Interested parties: Louisa Collier, Hineamaru Lyndon, and Ira Norman on behalf of themselves and Pomare Kingi

Claim: Wai 1524

Interested parties: Carmen Hetaraka on behalf of the descendants of Te Kauwhata

Claim: Wai 1528

Interested parties: Paraone W Lake and Haumoana White on behalf of Te Iwi o Mokau

Claim: Wai 1529

Interested parties: Te Rina Hetaraka on behalf of the descendants of Hurikino Hetaraka and Mihi Herewini

Claim: Wai 1530

Interested parties: Otaiuru Lawrence on behalf of the descendants of Hoori Rarani and Te Orewai Hapū

Claim: Wai 1533

Interested parties: George Davia and Huhana Seve on behalf of descendants of Hairama Pita Kino

Claim: Wai 1544

Interested parties: Eru Lyndon on behalf of Nga Puhi Nui Tonu

Claim: Wai 1582

Interested parties: Huhana Seve on behalf of herself and her whānau

Claim: Wai 1677

Interested parties: Marino Mahanga on behalf of herself and the descendants of Toi Te Hua Tahī

Claim: Wai 1712

Interested party: Kaya Murphy

Claim: Wai 1720

Interested parties: Sheena Ross, Kim Isaac, Julia Mereana Makaore, and Garry Hooker on behalf of Ngāti Korokoro and Te Pouka

Claim: Wai 1857

Interested parties: Mike Pehi on behalf of himself and Te Mahurehure

Claim: Wai 1864

Interested parties: Lucy Dargaville on behalf of the descendants of Ngatau Tangihia

Claim: Wai 1917

Interested parties: Mataroria Lyndon and Louisa Collier on behalf of the whānau and hapū of Nga Puhi

Claim: Wai 1918

Interested parties: Hepi Haika, Mere Waikanae Hoani, and Vania Haika on behalf of the descendants of Rongopai Haika and Atareria Heta Te Kauwhata

Claim: Wai 1954

Interested parties: Lissa Lyndon and Huhana Seve on behalf of Sylvia Jones and her descendants

Claim: Wai 1959

Interested parties: Kapotai Tamihana on behalf of the descendants of Wiremu Taiawa Tamihana and Miria Kaupeka Piripi

Claim: Wai 1960

Interested parties: Yvette Puru on behalf of herself, Te Moananui-a-Kiwa Anaru, and their tupuna

App1

THE NGĀPUHI MANDATE INQUIRY REPORT

Claim: Wai 1969

Interested parties: Hana Tarrant and Mike Pehi on behalf of Te Mahurehure

Claim: Wai 1971

Interested parties: Joseph Tarrant on behalf of Te Mahurehure

Claim: Wai 2057

Interested parties: Timothy Edwards, Henare Edwards, Annie Clark, and Pirini Ngatote Edwards on behalf of the descendants of Ngatote Eruera Pirini and Ngawai Akuhata Eruera Pirini

Claim: Wai 2152

Interested parties: Kolaski Lawrence and Otaiuru (Kuini) Lawrence on behalf of Hoori Rarani and Te Orewai Hapū

Claim: Wai 2153

Interested parties: Kararaina Ihapera Tohu on behalf of Matiu Tohu

Claim: Wai 2182

Interested party: Marino Murphy

Claim: Wai 2240

Counsel: D Naden

Interested parties: Te Rau Aroha Josephy Reihana on behalf of Ngai Tu, Ngāti Hine, and other sub-tribes of Ngāpuhi Nui Tonu

Claim: Wai 2021

Interested parties: Chappy Harrison on behalf of himself and the Harihona whānau

Claim: Wai 2000

Interested parties: James Te Tuhi on behalf of Te Hikutu Hapū

Claim: Wai 2061

Counsel: T K Williams and R Gray

Interested parties: Matiutaera Clendon, Robert Willoughby, and Te Aroha Rewha on behalf of themselves and the hapū of Ngāti Kuta Ki Te Rawhiti and the Ngāti Kuta Te Rawhiti Charitable Trust

Claim: Wai 1307

Interested parties: Kataraina Hemara (deceased), Moka Puru, Moses Witehira, William Bristowe, and Peti Ahitapu on behalf of themselves, their whānau, and the autonomous hapū or tribe Patukeha

Claim: Wai 1140

Counsel: B D Gilling and H E Stephen

Interested party: Te Orewai Te Horo Trust

Claim: Wai 1753

Interested party: Ngāti Manui Hapū

Claim: Wai 2027

Counsel: T Afeaki

Interested parties: Moera Wairoro on behalf of Tito Kukpa and related hapū of Te Parawhau

Claim: Wai 1479

LIST OF INTERESTED PARTIES

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Interested party: Pua Howearth on behalf of himself

Claim: Wai 1521

Interested parties: Maryanne Baker on behalf of the descendants of Te Kemara uri o Makuku raua ko Hua

Claim: Wai 1536

Interested parties: Naomi Epiha on behalf of Nga Puhi

Claim: Wai 1540

Interested parties: Pereniki Tauhara on behalf of the descendants of Matiu Tauhara, Te Rina Kingi Waiaua, and Pene Te Kaitoa

Claim: Wai 1842

Interested parties: Richard Nathan on behalf of those who once resided on the Maori block settlement of Pukemiro

Claim: Wai 2071

Interested parties: Mattie Mataroria Brown on behalf of Te Kauimua hapū

Claim: Wai 2310

Interested parties: Simon Tuoro (deceased), Miriama Te Pure Solomon (née Tuoro), and Graeme Prebble Jr

Claim: Wai 985

Interested parties: Kingi Taurua on behalf of descendants of Ngāpuhi Nui Tonu

Claim: Wai 774

Counsel: J Kahukiwa and A Thomas

Interested parties: Mereana (Ngahiraka) Robinson (née Witana), Makarita (Waitohi-o-Rangi) Tito (née Witana), and others on behalf of Te Ihutai hapū and all descendants of the claimants' tupuna Witana Paapahi, Pangari, Aporo, and Toki Pangari and others

Claim: Wai 2072

Counsel: M Armstrong

Interested parties: Maudie Tupuhi, Jerry Rewha, and Mary-Anne King on behalf of Ngāti Kaharau me Ngāti Hau ki Omanaia

Claim: Wai 1354

Counsel: J Pou and A Thomas

Interested party: Te Kōtahitanga o Nga Hapū Ngāpuhi

Unrepresented

Interested parties: John Alexander Rameka, Cynthia Rameka, and Te Iwingaro Rameka on behalf of descendants of Turou, Waikato, Tuaka, and Te Wakehaunga

Claim: Wai 1247

Interested parties: Hokimate Painting on behalf of Utakura Rangatira (Te Popoto, Te Ngahengahe, Te HoniHoni, and Ngāti-Toro Hapū)

Interested parties: Te Hapū o Kohatutaka me Ngāti Kiore and others

Claim: Wai 1732

Interested parties: Whangaroa Papa Hapū

App1

THE NGĀPUHI MANDATE INQUIRY REPORT

1.2 LIST OF INTERESTED PARTIES IN OPPOSITION TO THE APPLICATIONS

Counsel: J Every-Palmer and A S Olney

Interested party: Tūhoronuku Independent Mandated Authority

Counsel: S Webster and C Manuel

Interested party: Hone Sadler on behalf of Ngāti Moerewa

Claim: Wai 1709

Interested parties: Te Huranga Hohaia; Nora Rameka and Ringa Kaha Heihei on behalf of Ngāti Rehia

Claims: Wai 492 and Wai 1341

Interested party: Sam Napia on behalf of Te Whiu

Interested party: Moana Tuwhare on behalf of Te Popoto

Interested party: Tame Te Rangī on behalf of Ngāti Te Rino

Claim: Wai 2295

Interested parties: Brian Pou, Carol Dodd, and Sonny Tau on behalf of Te Kumutu

Claim: Wai 2062

Interested party: John Klaricich on behalf of Ngāti Wahara

Interested party: Piripi Moore on behalf of Ngāti Korokoro

Interested party: Cheryl Turner on behalf of Te Pouka

Interested party: Wayne Stokes on behalf of Ngare Hauata and Te Uri Kapana

Claim: Wai 1679

Interested party: Hone Mihaka and Ngāti Hinerira and Te Uri Taniwha

Claim: Wai 1131

Interested parties: Ted Wihongi on behalf of Te Uri o Hua

Claim: Wai 1478

Unrepresented

Interested party: Hinewhare Turikatuku Ruiha Harawira

Claim: Wai 1427

APPENDIX II

SELECT RECORD OF INQUIRY

RECORD OF HEARINGS

Tribunal members

The Tribunal constituted to hear the Ngāpuhi mandate urgent claims comprised Judge Sarah Reeves (presiding), Dr Robyn Anderson, Kihī Ngatai, and Tureiti Lady Moxon.

The hearings

The hearings were held at the Copthorne Hotel, Waitangi from 1 to 5 December 2014. Two further hearing days were held at the Waitangi Tribunal's offices in Wellington on 4 and 5 March 2015.

RECORD OF PROCEEDINGS

Statements of claim

1.1.1 Rudolph Taylor, Lizzie Mataroria-Legg, and Heremoananuiakiwa Kingi, statement of claim for Wai 2341 representing themselves and a number of hapū who support Te Kōtahitanga o Nga Hapū Ngāpuhi, 22 August 2011

(a) Rudolph Taylor, Lizzie Mataroria-Legg, and Heremoananuiakiwa Kingi, amended statement of claim for Wai 2341, adding allegations in relation to the Crown's recognition of the Tūhoronuku Deed of Mandate, 30 May 2014

1.1.2 Waihoroi Shortland, statement of claim for Wai 2429 representing Te Rūnanga o Ngāti Hine, 17 April 2014

(a) Waihoroi Shortland, amended statement of claim for Wai 2429 adding Pita Tipene as a named claimant, 13 May 2014

1.1.3 Te Riwhi Whao Reti, Hau Tautari Hereora, Romana Tarau, and Edward Cook, statement of claim for Wai 2431 representing Te Kapotai, 23 April 2014

1.1.4 Pereri Mahanga, Aperahama Edwards, and Aorangi Kawiti, statement of claim for Wai 2433 representing Te Waiariki, Ngāti Korora, and Ngāti Taka Pari, 28 April 2014

1.1.5 Herb Rihari, Hugh Rihari, and Te Hurihanga Rihari, statement of claim for Wai 2434 representing Ngāti Torehina ki Matakā, 29 April 2014

1.1.6 Pouri Te Wheoki Haris, Ani Taniwha, Owen Kingi, Amelia Taniwha, and Justyne Te Tana, statement of claim for Wai 2435, 5 May 2014

(a) Pouri Te Wheoki Haris, Ani Taniwha, Owen Kingi, Amelia Taniwha, Justyne Te Tana, and Lorriane Norris, amended statement of claim for Wai 2435, adding Lorriane Norris as a named claimant, 30 May 2014

1.1.7 Gray Theodore, Pereme Porter, Deidre Nehua, and Rosaria Hotere, statement of claim for Wai 2436, 21 May 2014

(a) Gray Theodore, Pereme Porter, Deidre Nehua, and Rosaria Hotere, amended statement of claim for Wai 2436 adding additional claimants, 28 October 2014

(b) Gray Theodore, Pereme Porter, Deidre Nehua, and Rosaria Hotere, amended statement of claim for Wai 2436 adding allegations to the claim concerning the Tuhoronuku Deed of Mandate, 7 November 2014

(c) Gray Theodore, Pereme Porter, Deidre Nehua, and Rosaria Hotere, amended statement of claim for Wai 2436 adding additional claimants, 7 November 2014

1.1.8 Arapeta Hamilton, Joyce Baker, and Deon Baker, statement of claim for Wai 2437 representing Ngāti Manu, 16 May 2014

1.1.9 Hāne Kingi, Waimarie Bruce-Kingi, Sandra Rihari, and Hare Pepene, statement of claim for Wai 2438 representing the whānau and hapū of Ngāti Kahu o Torongare me Parawhau, 21 May 2014

1.1.11 Frank Rawiri and Bobby Newson, statement of claim for Wai 2442 representing themselves and Ngā Taurira Tawhiti o Hato Petera, 3 June 2014

(a) Frank Rawiri and Bobby Newson, amended statement of claim for Wai 2442 adding an allegation, 11 June 2014

1.1.12 Te Enga Harris, Wiremu Reihana, Reuben Porter, Denise Egen, and James Te Tuhi, statement of claim for Wai 2443 representing Te Enga Harris on behalf of Wiremu Hemi Harris and Meri Otene whānau, and Ngati Rangi, Ngati Here, Ngati Tupoto, Ngati Hohaitoko, Ngati Kopuru, Te Rarawa, and Ngati Uenuku; Wiremu Reihana on behalf of Ngāti Tautahi ki Te Iringa hapū; Reuben Porter on behalf of himself, his whānau, Kaitangata, Nga Tahawai, and Whanau Pani; Denise Egen on behalf of herself, her whānau, and Te Mahurehure; and James Te Tuhi on behalf of himself, his whānau and Te Hikutu, 11 June 2014

1.1.13 Matutaera Te Nana Clendon, Robert Sydney Willoughby, Te Aroha Rewha, Moka Kaenga Maata Puru, Moses Richard Witehira, Peti Pukepuke Ahitapu, and Shirley Louise Hakaraia, statement of claim for Wai 2483 representing Ngati Kuta and Patukeha, 22 September 2014

1.1.14 Paki Pirihi and Ngawaka Pirihi, statement of claim for Wai 2489 representing Patuharakeke, 16 October 2014

1.1.15 Natalie Kay Baker, Ani Martin, Diane Ruawhare, Sidney Kingi, Maureen Napia, and Bonny Craven, statement of claim for Wai 2488 on behalf of the Waimate Taiamai ki Kaikohe claim committees, 16 October 2014

1.1.16 Ben Morunga and Anania Wikaira, statement of claim for Wai 2487 representing ngā hapu o Te Hikutu, 16 October 2014

Tribunal memoranda and directions

2.5.3 Judge Stephanie Milroy, memorandum of the deputy chairperson seeking applicant reply and further information from parties, 30 September 2011

2.5.6 Chief Judge Wilson Isaac, memorandum of the chairperson delegating to Judge Sarah Reeves the task of determining the urgency application, 17 March 2013

2.5.7 Judge Sarah Reeves, memorandum of the presiding officer granting leave for the applicants to revive their application for urgency, 21 March 2014

2.5.30 Chief Judge Wilson Isaac, memorandum of the chairperson granting a new record of inquiry and appointing a new Tribunal panel member to the Ngāpuhi Mandate Inquiry, 2 October 2014

2.5.38 Chief Judge Wilson Isaac, memorandum of the chairperson concerning the Panel membership of Tim Castle, 4 November 2014

2.5.49 Judge Sarah Reeves, memorandum of the presiding officer addressing the withdrawal of Wai 2440, the Ngāti Taimanawaiti Tūhoronuku Deed of Mandate claim, from Wai 2490, the Ngāpuhi Mandate Inquiry, 26 November 2014

Submissions and memoranda of parties

3.1.47 Jason Pou for Wai 2341, memorandum notifying the Tribunal and the Crown that instructions have been received to recommence application for urgency, 5 March 2014

3.4.62 Tony Shepherd for Wai 2487, memorandum notifying the Tribunal that counsel and claimants are no longer active participants in this urgency inquiry, 1 April 2015

Opening submissions

3.3.10 Aidan Warren and Season-Mary Downs, opening submissions for Wai 2431 and Wai 2429, 28 November 2014

Closing submissions

3.3.15 Linda Thornton and Bryce Lyall, closing submissions for Wai 2435 and Wai 2488, 23 March 2015

3.3.17 Peter Andrew and Rebekah Jordan, closing submissions for Wai 568, 2024 and Wai 2425, 24 March 2015

- 3.3.18** Te Kani Williams and Robyn Gray, closing submissions for Wai 2483, 25 March 2015
- 3.3.19** Kelly Dixon and Alisha Castle, closing submissions for Wai 2489, 25 March 2015
- 3.3.20** Aidan Warren, Season-Mary Downs and Renika Siciliano, closing submissions for Wai 2429 and Wai 2431, 25 March 2015
- 3.3.21** Darrell Naden and Anmol Shankar, redacted closing submissions for Wai 2442, 25 March 2015
- 3.3.22** Darrell Naden and Creon Upton, closing submissions for Wai 2443, 25 March 2015
- 3.3.23** John Kahukiwa, closing submissions for Wai 2433, 25 March 2015
- 3.3.24** John Kahukiwa and Julia Harper-Hinton, closing submissions for Wai 2434, 26 March 2015
- 3.3.25** Annette Sykes, closing submissions for Wai 354 and Wai 1535, 26 March 2015
- 3.3.26** Tavake Afeaki, closing submissions for Wai 2438, 26 March 2015
- 3.3.27** Tony Sinclair, closing submissions for Wai 2436, 30 March 2015
- 3.3.28** Jason Pou and Alana Thomas, closing submissions for Wai 2341, 30 March 2015
- 3.3.29** James Every-Palmer, Adrian Olney, and Sam Weavers, closing submissions for the Tūhoronuku Independent Mandated Authority, 7 April 2015
- 3.3.30** Colin Carruthers and Andrew Irwin, closing submissions for the Crown, 14 April 2015
- 3.3.31** Spencer Webster and Carey Manuel, closing submissions for interested parties in opposition, 9 April 2015
- 3.3.32** John Kahukiwa, closing submissions in reply for Wai 2434, 24 April 2015
- 3.3.33** John Kahukiwa, closing submissions in reply for Wai 2433, 24 April 2015
- 3.3.34** Te Kani Williams and Robyn Gray, closing submissions in reply for Wai 2483, 24 April 2015
- 3.3.37** Kelly Dixon and Alisha Castle, closing submissions in reply for Wai 2489, 24 April 2015
- 3.3.38** Linda Thornton and Bryce Lyall, closing submissions in reply for Wai 2435 and Wai 2488, 24 April 2015

3.3.41 Annette Sykes, closing submissions in reply for Wai 354 and Wai 1535, 28 April 2015

3.3.43 Aidan Warren, Season-Mary Downs and Renika Siciliano, closing submissions in reply for Wai 2431 and Wai 2429, 28 April 2015

3.3.44 Jason Pou and Alana Thomas, closing submissions in reply for Wai 2341, 29 April 2015

Transcripts

4.1.1 National Transcription Service, draft transcript of judicial conference, Copthorne Hotel, Waitangi, 18–19 June 2014

4.1.2 National Transcription Service, draft transcript of hearing week one, Copthorne Hotel, Waitangi, 1–5 December 2014

4.1.3 National Transcription Service, draft transcript of hearing week two, Waitangi Tribunal Offices, Wellington, 4–5 March 2015

RECORD OF DOCUMENTS

A10 Herb Vincent Rihari, brief of evidence, 8 May 2014

(a) Index and exhibits to the affidavit of Herb Vincent Rihari, 8 May 2014

A11 Willow-Jean Prime, brief of evidence, 9 May 2014

A17 Shirley Hakaraia, brief of evidence, 15 May 2014

(b) Shirley Hakaraia, amended brief of evidence, 4 June 2014

A25 Raniera (Sonny) Tau, brief of evidence, 5 June 2014

(a) Index and exhibits to the affidavit of Raniera (Sonny) Tau, 5 June 2014

A26 Maureen Hickey, brief of evidence, 6 June 2014

(a) Index and exhibits to the affidavit of Maureen Hickey, 6 June 2014

A36 Willow-Jean Prime, brief of evidence in reply (unsworn), 13 June 2014

A39 Dallas Williams, brief of evidence, 18 June 2014

A59 Shirley Louise Hakaraia, second brief of evidence, 7 November 2014

A63 Waihoroi Shortland, brief of evidence, 13 November 2014

A64 Erima Henare, brief of evidence, 7 November 2014

A67 Whakatau Kopa, brief of evidence, 18 November 2014

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- A68** Hinerangi Cooper-Puru, brief of evidence, 18 November 2014
- A77** Arapeta Wikito Hamilton, brief of evidence, 10 November 2014
- A78** Willow-Jean Prime, brief of evidence, 12 November 2014
- A81** Waimarie Bruce Kingi, brief of evidence, 14 November 2014
- A89** Annette June Kaipo, brief of evidence, 14 November 2014
- A90**
(b) Sam Napia, amended brief of evidence, 18 November 2014
- A92** Te Huranga Hohaia, brief of evidence, 14 November 2014
- A93** Tame Te Rangi, brief of evidence, 17 November 2014
- A98** Raniera (Sonny) Tau, brief of evidence, 18 November 2014
(a) Index and appendices to the brief of evidence of Raniera (Sonny) Tau, 18 November 2014
- A104** Shane Jones, brief of evidence, 19 November 2014
- A108** Maureen Hickey, brief of evidence, 20 November 2014
(a) Index and appendices to the brief of evidence of Maureen Hickey, 20 November 2014
- A117** Shirley Louise Hakaraia, brief of evidence in reply, 25 November 2014
- A130** Willow-Jean Prime, brief of evidence in reply, 27 November 2014
- A142** Official Information Act documents, released 26 November 2014
- A144** Official Information Act documents, released 23 December 2014
- A146** Official Information Act documents, released 30 January 2015