IN THE WAITANGI TRIBUNAL
OF NEW ZEALAND

WAI 2490
WAI 2431
WAI 2429

IN THE MATTER OF	The Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	The Ngapuhi Mandate Inquiry (Wai 2490) and the claims concerning the Crown's recognition of the Tuhoronuku Deed of Mandate Wai 2341, Wai 2429, Wai 2431, Wai 2433, Wai 2434, Wai 2435, Wai 2436, Wai 2437, Wai 2438, Wai 2440, Wai 2442, Wai 2442, Wai 2483
AND	
IN THE MATTER OF	An application by Te Riwhi Whao Reti, Hau Tautari Hereora, Romana Tarau, and Edward Henry Cook for Te Kapotai and Ngati Pare, for an urgent inquiry into the Tuhoronuku Deed of Mandate (Wai 2431)
AND	
IN THE MATTER OF	An application by Waihoroi Shortland and Pita Tipene on behalf of Ngati Hine for an urgent inquiry into the Tuhoronuku Deed of Mandate (Wai 2429)

CLOSING SUBMISSIONS ON BEHALF OF NGATI HINE AND TE KAPOTAI IN RESPECT OF THE NGAPUHI MANDATE INQUIRY

25 March 2015

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MAY IT PLEASE THE TRIBUNAL:

> *The Crown evidence places politics and economics before our cultural order and social wellbeing. I maintain that one cannot trump the other. The Crown does not have a right to undermine our rangatiratanga for supposed political and economic benefits which it unilaterally and paternalistically deems superior…Ngati Hine will not abide by the decision of the Crown to recognise the Tuhoronuku Deed of Mandate and enter negotiations with Tuhoronuku.*[1]
>
> *(Waihoroi Shortland)*

> *The essential point to note is that the Crown and Tuhoronuku do not have a mandate or the consent or agreement from Te Kapotai or Ngati Hine to settle our Te Tiriti o Waitangi claims. Any action taken by the Crown and Tuhoronuku toward reaching a single settlement for Ngapuhi is an action which undermines the mana and rangatiratanga of our hapu.*[2]
>
> *(Willow-Jean Prime)*

Introduction

1. Having now tested the evidence, we submit – as we did at the outset of this Inquiry - that the Tribunal will find that the Minister's decision to recognise the Tuhoronuku Deed of Mandate in February 2014 was a very poor one.

2. On the one hand the Crown promotes that the mandating of claimant representatives to negotiate historical Te Tiriti settlements is one of the most important stages in the settlement process.[3] Yet clearly, on the other hand, the Crown made a decision to recognise the Tuhoronuku

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1 Wai 2490, #A063, *Brief of Evidence of Waihoroi Shortland* [13 November 2014], para 19.

2 Wai 2490, #A130, *Brief of Evidence in reply of Willow-Jean Prime* [27 November 2014], para 478.

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), p 44.

mandate in the face of strong opposition by a number of hapu, including Ngati Hine and Te Kapotai. This is despite the Minister himself confirming that he did not want a situation where a mandate was presented to him with outstanding issues in Ngapuhi.[4]

3. In simple terms, these submissions seek to address the consistent position of Ngati Hine and Te Kapotai that the Minister's decision to recognise the Tuhoronuku mandate on 14 February 2014 was not only a bad one, but in fact a very poor one.

4. By way of introduction, we outline a few general points that underpin the closing arguments advanced by Ngati Hine and Te Kapotai:

   (a) The Crown has acknowledged that there are hapu before the Tribunal progressing claims under urgency and not just individuals purporting to represent entire hapu;[5]

   (b) These claims are made with the full support of the leadership of Ngati Hine and Te Kapotai who have spoken consistently in opposition of the Crown processes leading to the recognition of the Tuhoronuku mandate. The Crown has acknowledged this;[6]

   (c) The refusal by the Crown to pause its engagement with Tuhoronuku and instead proceed directly to entering Terms of Negotiation confirms what the hapu have been arguing for some time - that the Crown was never seriously interested in those in opposition. It is the Crown that wanted a single settlement and, save for strong recommendations by this Tribunal, it will get one; and

   (d) The behaviour of Tuhoronuku, which we submit was unreasonable and in fact exacerbated tensions and issues, needs to be assessed. More importantly, we urge the Tribunal to assess

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4 Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], p 111.

5 Wai 2490, #2.5.027, *Decision of the Tribunal on the Applications of Urgency* [12 September 2014], para 118.

6 Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 814.

the Crown's responses to the behaviour of Tuhoronuku and ask whether it really shows an even-handed Crown, or rather one determined to recognise a mandate that suited their desired single settlement outcome.

Structure of Submissions

5. To ensure consistency of approach, it has been decided that the closing submissions on behalf of Ngati Hine and Te Kapotai will be filed together, although both hapu have filed separate applications for urgency and maintain the independence of their claims.

6. Again, for consistency with previous submissions and ease of reference, we have used the following definitions within these submissions:

   (a) "Tuhoronuku" in reference to Tuhoronuku Independent Mandated Authority and Te Roopu o Tuhoronuku, interchangeably;

   (b) "TRAION" in reference to Te Runanga-a-Iwi o Ngapuhi; and

   (c) "Te Kotahitanga" in reference to Te Kotahitanga o Nga Hapu Ngapuhi.

7. Further, the structure of these submissions is consistent with the key themes outlined in the submissions in support of the application for an urgent hearing dated 16 June 2014, and the opening submissions of counsel dated 28 November 2014.[7] We have not taken the approach of specifically answering all issues in the revised Tribunal Statement of Issues. That said, we have cross-referenced the submissions to the relevant issues, outlined in the revised Tribunal Statement of Issues, which are very helpful.

8. As the Tribunal has already identified, there is a large volume of material currently before the Tribunal. It is just not possible in the time available, given the urgent nature of the Inquiry, to be able to address in these

[7] Wai 2490, #3.3.010, *Opening Submissions on behalf of Ngati Hine and Te Kapotai in respect of the Ngapuhi Mandate Inquiry* [28 November 2014].

submissions every possible example available that supports the allegations made by Ngati Hine and Te Kapotai against the Crown. We have taken the approach of including the most important examples to ensure that the Tribunal understands the key arguments being advanced by Ngati Hine and Te Kapotai, however we maintain that there are many other significant examples and important contextual information before the Tribunal.

Disclosure of Crown Documentation

9. Ngati Hine and Te Kapotai wish to record their dissatisfaction with the Crown's performance regarding the disclosure of material throughout this Inquiry.

10. Much of the material originally withheld or redacted was highly relevant to the issues before this Tribunal. The timely prosecution of the urgent claims has been delayed by the Crown's late disclosure of material. The hapu are now faced with the real possibility that Terms of Negotiation will be entered into in March 2015 allowing substantive negotiations to commence.[8] Tuhoronuku have already advised that they will be appointing negotiators shortly.[9]

11. Ngati Hine and Te Kapotai reconfirm their view that they have been prejudiced by the Crown's performance and would like that recorded in the Tribunal's decision. We also support the Tribunal providing any directions on how we can avoid this type of procedural prejudice in future urgency claims.

Overview of the Ngati Hine and Te Kapotai Case

12. As the Tribunal identified in its decision granting urgency, "[a]t the heart of the applications for urgency is the issue of hapū rangatiratanga."[10] For

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8 Wai 2490, #3.1.320, *Crown Memorandum providing the Tribunal with an update on terms of negotiation, confirming the purpose of the hearing, clarifying cross examination documents and responding to funding request* [2 March 2015], para 2.

9 Wai 2490, #3.1.049, *Memorandum of Counsel for Tuhoronuku updating the Tribunal regarding negotiations* [9 March 2015].

10 Wai 2490, #2.5.027, *Decision of the Tribunal on the Applications of Urgency* [12 September 2014], para 157.

Ngati Hine and Te Kapotai, their entire claim for urgency against the Crown and the basis of their opposition stems from the protection of their tikanga, mana and rangatiratanga.

13. In Te Tiriti terms, we submit that the Crown has misapplied tikanga, erred in its processes, and at times made irrational decisions in its pursuit of one large settlement. This has in turn impacted on hapu mana and rangatiratanga. The key examples that form the basis of these submissions include:

(a) The failure of the Crown to consider an alternative settlement model, other than the one Ngapuhi settlement model;[11]

(b) The failure to respect and give effect to the tikanga based decisions of the hapu to oppose the Tuhoronuku mandate, in circumstances where the hapu have significant support and the Crown knew that;[12]

(c) The Crown recognition of the Tuhoronuku mandate, where the process to achieve that mandate was poor, pre-determined, policies changed to suit and the vote inadequate. The Crown's substantial funding of the Tuhoronuku mandating process, against all Crown policies, was particularly poor and detrimental to hapu such as Ngati Hine and Te Kapotai;[13]

(d) The process employed to address the concerns raised by opposing hapu about the mandating process and decisions made by the Crown were either ignored, undermined or did not address the fundamental concerns raised by Ngati Hine and Te Kapotai;[14]

(e) The failure of the Crown to provide a clear and reasonable mechanism for hapu to withdraw from the Deed of Mandate, which has effectively locked Ngati Hine and Te Kapotai into a

[11] Wai 2490, #1.4.002, *Revised Statement of Issues* [11 March 2015], issue 6.1.
[12] Wai 2490, #1.4.002, *Revised Statement of Issues* [11 March 2015], issues 5.2-5.3.
[13] Wai 2490, #1.4.002, *Revised Statement of Issues* [11 March 2015], issues 1.1, 7.1, 8.1.
[14] Wai 2490, #1.4.002, *Revised Statement of Issues* [11 March 2015], issues 5.3, 5.4, 10.3.

process that they have not supported and do not consent to;[15] and

(f) The Crown has created turmoil amongst the hapu of Ngapuhi and has seriously destroyed inter and intra hapu relationships.[16]

Understanding Hapu Mana and Rangatiratanga

14. These claims put into issue the Crown's Te Tiriti duties to hapu in the modern Treaty settlement context, and therefore it is important for the Tribunal to understand the key elements of Ngati Hine and Te Kapotai hapu rangatiratanga and mana before addressing the specific issues outlined above.

15. As Erima Henare put it, "In considering this issue the Tribunal must ask itself: What is the nature of hapu rangatiratanga; of Ngati Hine mana and rangatiratanga?"[17] He provides one answer to this question by stating that, "The concepts of mana and rangatiratanga are bound to the land and this is echoed in the writings of our tupuna Maihi Kawiti."[18]

16. We submit that this statement provides an important rationale for the robust opposition against the Crown, which is well documented in evidence before this Tribunal. We submit that it is abhorrent to their tikanga that their claims to the land, bound by the concepts of mana and rangatiratanga, are to be negotiated and settled through a model and by a group that it did not support and that does not provide for sufficient hapu autonomy.

17. Mr Henare provides unchallenged evidence that decision making was always at a hapu level. He stated that:[19]

> *In our history, on every occasion where a decision was made without our consent, agreement or support there was resistance,*

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15 Wai 2490, #1.4.002, *Revised Statement of Issues* [11 March 2015], issue 9.1.
16 Wai 2490, #1.4.002, *Revised Statement of Issues* [11 March 2015], issue 11.2.
17 Wai 2490, #A064, *Brief of Evidence of Erima Henare* [7 November 2014], para 11. Mr Henare outlines, for the benefit of the Tribunal, specific extracts that address the question of Ngati Hine mana and rangatiratanga at pp 6-7.
18 Wai 2490, #A064, *Brief of Evidence of Erima Henare* [7 November 2014], para 13.
19 Wai 2490, #A064, *Brief of Evidence of Erima Henare* [7 November 2014], para 17.

opposition and often conflict. The decision of Kawiti and Ngati Hine to go to war against the Crown in 1845 following successive attempts of the Crown to undermine Ngati Hine rangatiratanga is an example of that.

18. Mr Henare places this history into the current context when he stated:[20]

It is for these reasons that it is incomprehensible that the Crown and Tuhoronuku together have determined how Ngati Hine will settle our Te Tiriti o Waitangi claims. If the contrary were true, we would not be here today and we would not have been embroiled in years of opposition to the Crown and Tuhoronuku.

19. The evidence of Mr Henare and others is captured by the Tribunal in the *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o te Raki Inquiry* ("Stage 1 Report") that records some important concepts in understanding the nature of hapu rangatiratanga and mana for Ngapuhi:[21]

…the fundamental unit of economic and political organisation was the hapū.

Hapū were not simply large whānau but political and economic groupings based on a combination of common descent and interest.

But it was the hapū that held the rights in land. It was also hapū who held rights over other resources such as fishing grounds and shellfish beds, and over significant assets such as whare tūpuna (meeting houses), large waka, fishing weirs, nets and pā, all of which were products of community labour.

20. We encourage the Tribunal to keep these concepts at the forefront as it assesses each of the major allegations advanced in these submissions. We submit that these concepts are not romanticised notions frozen in a

[20] Wai 2490, #A064, *Brief of Evidence of Erima Henare* [7 November 2014], para 18.

[21] 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* (14 November 2014), pp 30-31.

time when they mattered, but rather living concepts, as alive as they were when Ngati Hine and Te Kapotai tupuna put their mark on Te Tiriti to protect the very things now under enquiry – mana and rangatiratanga.

21. These are matters where the Crown is not expert. History shows that the Crown has a propensity to usurp them at will to meet its end.

Te Tiriti – Jurisdiction

> *Kawiti, his sons and other rangatira who signed Te Tiriti did so because they believed the assurances of the missionaries and others that they would not come under the authority of the Governor. Their 'perfect independence' would be preserved. The Governor would have no power in relation to the authority of the Chiefs over their people and lands. That was the message conveyed to them and they signed because they trusted the word of the officials and missionaries who delivered the message.*[22]

22. Against the overarching issue of the usurpation of hapu, mana and rangatiratanga, it is fundamental that we first look closely at Te Tiriti and its principles in order to understand the Crown duties which arise from Te Tiriti, and which must be at the forefront of this Inquiry, and any findings or recommendations that the Tribunal may make. In considering the claims under urgency, the Tribunal's jurisdiction is such that it can assess, inter alia, whether an act or omission was/is consistent with the principles of Te Tiriti.[23]

23. As the Tribunal will be well aware, previous Tribunals have discussed and considered a number of key principles of Te Tiriti. The key principles from those previous Tribunal Inquiries are outlined in the opening submissions for Ngati Hine and Te Kapotai for this Inquiry,[24] but are noted again below in summary for current purposes.

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[22] 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* (14 November 2014), p 489.

[23] Treaty of Waitangi Act 1975, s 6.

[24] Wai 2490, #3.3.010, *Opening Submissions on behalf of Ngati Hine and Te Kapotai in respect of the Ngapuhi Mandate Inquiry* [28 November 2014], pp 3-12.

24. Before looking at those key principles, including the principle of partnership, principle of reciprocity, principle of options and the principle of equity and equal treatment, it is important to look at the Tribunal findings from the Stage 1 Report, which fundamentally concluded that the hapu of Ngapuhi did not cede their sovereignty in signing Te Tiriti in 1840.[25] This finding is not only important in itself, because it confirms what the hapu of Ngapuhi has believed to be the case since 1840, but because the hapu of Ngapuhi were arguing this fundamental constitutional issue, at the same time as the Crown were usurping and undermining their mana and rangatiratanga through the Tuhoronuku mandating process.

25. Significantly the report confirmed, what we noted earlier - that the fundamental unit of economic and political organisation was the hapu.[26] The evidence suggests that within Ngapuhi, this remains the position, which is important in that the Te Tiriti relationship is between hapu and the Crown. The Crown's duties are to hapu.

26. The Tribunal concluded that, in its view, "…rangatira did not agree to any transfer of authority from hapū to a supreme decision-making body."[27]

27. The Report goes onto say that He Whakaputanga "was a declaration by rangatira in response to a perceived foreign threat to their authority, in which they emphatically declared the reality that rangatiratanga, kingitanga, and mana in relation to their territories rested only with them on behalf of their hapū."[28]

28. The Tribunal's conclusions regarding He Whakaputanga, and in particular the conclusion that there can be no doubt that He Whakaputanga

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[25] 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* (14 November 2014), pp 526-257.

[26] 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* (14 November 2014), p 30.

[27] 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* (14 November 2014), p 501.

[28] 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* (14 November 2014), p 502.

amounted to a declaration of sovereignty and independence,[29] was an important part of its thinking when it determined that sovereignty was not ceded by the rangatira just five years later when Te Tiriti was signed.

29. In addition to the fundamental conclusion that there was no cession of sovereignty under Te Tiriti, the Report lists a series of other bold conclusions about the agreement reached between Maori and the Crown under Te Tiriti, including:[30]

- *The rangatira agreed to share power and authority with Britain. They agreed to the Governor having authority to control British subjects in New Zealand, and thereby keep the peace and protect Māori interests;*
- *The rangatira consented to the treaty on the basis that they and the Governor were to be equals, though they were to have different roles and different spheres of influence. The details of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case by case basis.*
- *The rangatira agreed to enter land transactions with the Crown, and the Crown promised to investigate pre-treaty land transactions and to return any land that had not been properly acquired from Māori;*
- *The rangatira appear to have agreed that the Crown would protect them from foreign threats and represent them in international affairs, where that was necessary.*

30. The Tribunal confirms that the Report concerns the meaning and effect of Te Tiriti in February 1840 and it does not make conclusions about the sovereignty the Crown exercises today, nor does it comment about how the Treaty relationship should operate in a modern context.

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[29] 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* (14 November 2014), p 501.

[30] 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* (14 November 2014), p xxi.

31. This Tribunal must contrast the above findings and comments with the issues raised throughout the mandating process for Tuhoronuku. The objections raised consistently with the Crown simply reflect their exercise and protection of hapu autonomy and rangatiratanga for Ngati Hine and Te Kapotai.

Principle of Partnership

32. In the Te Arawa Mandate Inquiry, the Tribunal made the comment that:[31]

> *In order to ensure that their future relationship is mutually beneficial, the Crown should not pursue its nationwide Treaty Settlement targets at the expense of some of its Treaty partners. Where the particular circumstances of a group or groups warrant a more flexible approach, the Crown must be prepared to apply its policies in a more flexible, practical and natural manner.*

33. As will be outlined further in these closing submissions, we submit that the particular circumstances here for Ngapuhi necessitated a more flexible approach by the Crown to ensure that Ngati Hine and Te Kapotai are not disadvantaged by the Crown pursuit of such Treaty Settlement targets as part of a "single settlement" mantra for Ngapuhi.

34. The principle of partnership includes an obligation for each Treaty partner to act towards each other with the utmost good faith, based on the reciprocal obligations of each partner to the other.[32]

35. In the Te Arawa instance, the Tribunal noted that the Crown risked "significantly curtailing its ability to forge such a renewed partnership with some Te Arawa, if they are left too far behind in the settlement process."[33]

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[31] Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 72, para 5.3.2.

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

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

Principle of Equity and Equal Treatment

36. Again, in the Te Arawa Mandate Inquiry, the Tribunal was of the view that the Crown has an obligation to deal fairly with all claimant groups without allowing one group an unfair advantage over another. The key here is that tino rangatiratanga must be respected, and the Crown must ensure that it does "all in its power not to create (or exacerbate) divisions and damage relationships."[34]

37. We submit that the issue of equity and equal treatment is fundamental here in a situation where Ngati Hine and Te Kapotai believe that Crown processes are trampling their hapu autonomy, and usurping their mana and rangatiratanga guaranteed by Te Tiriti. The idea of hapu rangatiratanga and autonomy is not only outlined in the Stage 1 Report, but also by the Tribunal in its *Māori Development Corporation Report* which stated that the "guarantee of rangatiratanga … would be guaranteed to all of the iwi, not to a selected number."[35]

38. The Tribunal there said that, fundamentally, a fiduciary must act fairly between beneficiaries rather than allowing one group to be favoured over the other as a result of Crown actions.[36]

Principle of Reciprocity

39. The Tribunal's comments with regards to the principle of reciprocity in its *Te Arawa Mandate Report: Te Wahanga Tuarua*, noted that "[s]uch reciprocity is the key to durable Treaty settlements."[37]

40. In essence, the principle of reciprocity requires consultation and negotiations on the Crown's part in order to ensure that tino rangatiratanga for Maori is exercised with regards to the settlement of their claims. As with other key principles of Te Tiriti, the principle of

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[34] Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 73, para 5.3.4.

[35] Waitangi Tribunal, *Māori Development Corporation Report* (Wellington: Brookers' Limited, 1993), chapter 6.2.

[36] Waitangi Tribunal, *Māori Development Corporation Report* (Wellington: Brookers' Limited, 1993), pp 31-32.

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

reciprocity requires the Crown to consider Treaty obligations to any particular group where the circumstances for an alternative approach to standard government negotiation policy or processes – "there must be consultation and negotiation in practice as well as in name, and flexibility in the application of policies were shown to be strictly necessary."[38]

41. Also relevant in the circumstances are the comments of the Tribunal in the *Ko Aotearoa Tēnei Report,* where it reflected on the requirement for Treaty partners to be open to a range of possibilities in the context of any negotiations to decide which possibility best applies given the duties of good faith, co-operation, and reasonable ^ that the two parties owe one another.[39]

42. The Tribunal commented that:[40]

> *There will also be occasions in which the Māori Treaty interest is so central and compelling that engagement should go beyond consultation to negotiation aimed at achieving consensus, acquiescence or consent…*

Principle of Options

43. As will be very clear throughout these closing submissions, and has been outlined in the considerable evidence put before the Tribunal from Ngati Hine and Te Kapotai, one of the key issues here is the lack of genuine consideration for various options in the settlement process. With that in mind, it is fundamental to highlight the principle of options that is being discussed by various Tribunals, outlining that a genuine application of the principle of options by the Crown will involve choice, and moreover the power of decision.[41]

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

[39] Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 237, para 8.3.2.

[40] Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 217, para 8.3.2.

[41] Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims, Volume 1* (Wellington: Legislation Direct, 2008), p 325; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wellington:

Principles relating to mandating

44. As outlined in the opening submissions on behalf of Ngati Hine and Te Kapotai, the Tribunal has previously considered a number of urgency applications relating to mandating issues. We acknowledge that Treaty settlement negotiations are of a political nature, and at times the Tribunal is reluctant to interfere where claims relate to internal disputes amongst claimant groups.

45. However, the Tribunal will intervene in cases of error in process, misapplication of tikanga or apparent irrationality.[42] We submit that this unique circumstance demands such Tribunal intervention for the reasons that follow in these submissions.

46. There are, however, some key themes which we submit ought to be taken from the decisions of previous Tribunals and when considering the principles of Te Tiriti in the context of the mandating phase of the settlement process. These include:

    (a) The need for the Crown to remain flexible when applying Treaty Settlement policies;

    (b) The need, at times, for the Crown to go beyond consultation to achieve consensus or consent;

    (c) Respect for tino rangatiratanga, not just for the wider iwi but for all Maori and all groups within the rohe which the Crown is dealing with;

    (d) The Crown's actions must not damage internal relationships amongst Maori;

    (e) Although the large natural grouping ("LNG") policy has been acknowledged by the Tribunal, the Crown should not consider this

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Government Printing Office, 1989), p 195; and Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington, Legislation Direct, 2004), pp 24-25.

[42] Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), pp 55-57.

as free passage to breach its responsibilities under Te Tiriti and/or the tikanga of hapu/iwi;

(f) The level of support for those opposing a mandate or challenging its validity is important, particularly where this will lead to the extinguishment of rights or a potential loss of mana/rangatiratanga; and

(g) The Crown ought to take a "bottom up" approach to mandating where marae, hapu and, we submit, claimants are the focus.

47. We note in particular, with regards to the issue of support for any opposition to a mandate, and in the context of the Crown's LNG policy, the Tribunal in the *East Coast Settlement Report* made comment that:[43]

> *We endorse previous Tribunal support for the Crown settling with large natural groups. However, our support for the Large Natural Grouping policy is not unqualified. As was noted in the Te Arawa Settlement Process Reports, consultation with affected claimants should be a minimum requisite. The December 2009, Court of Appeal decision in* Attorney General v Te Kenehi Mair *makes it clear that the amount of wider support for a claim is a material factor in determining the significance of any prejudice caused by extinguishing claims in these circumstances.*

48. The Tribunal, in the Report, also commented that: [44]

> *… the extent of support is relevant both to the issues of prejudice and to assessing the amount of attention it is reasonable to expect OTS to have given to this opposed to the TRONP mandate.*

49. It has been accepted by the Crown that those appearing for the Tribunal for Ngati Hine and Te Kapotai do speak on behalf of the wider hapu.[45]

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[43] Waitangi Tribunal, *East Coast Settlement Report* (Wellington: Legislation Direct, 2010), p 57.

[44] Waitangi Tribunal, *East Coast Settlement Report* (Wellington: Legislation Direct, 2010), pp 32-33.

[45] Wai 2490, #2.5.027, *Decision of the Tribunal on Application for Urgency* [12 September 2014], para 157.

Accordingly, we submit that greater prejudice will arise should their claims be settled with the Crown via a Tuhoronuku mandate, which they have opposed at every turn.

50. We submit that the single settlement model, supported by the Crown with Tuhoronuku, goes against the "bottom up" approach which has been supported by previous Tribunals, whereby the focus is on hapu and marae. The Tribunal in the Pakakohi and Tangahoe Settlement Claims Inquiry considered that "as a general principle … a conjoint marae and hapu approach to mandating as adopted by the working party for its particular circumstances is fundamentally sound."[46]

51. We submit therefore, that the Crown's obligation was not just to engage or consult at a basic level, but to start with hapu engagement and, in particular, fully consider and address the Ngati Hine and Te Kapotai opposition to the Tuhoronuku mandate, given its significant support. Knowing all that the Crown knew about Ngati Hine, Te Kapotai and the wider Ngapuhi rohe, we submit that the Crown ought to have gone beyond mere consultation to ensure the protection of hapu mana and rangatiratanga.

KEY ISSUES

52. With those Te Tiriti principles in mind, and with the issue of hapu rangatiratanga at the forefront, we now address the key claim issues for Ngati Hine and Te Kapotai below.

A. The failure to consider alternative settlement models

53. We submit that the first misapplication of tikanga and error in process by the Crown - and the first example of the usurpation of Ngati Hine and Te Kapotai mana and rangatiratanga - was the failure of the Crown to consider and explore alternative models other than the single Ngapuhi settlement model.

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[46] Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p 65. We also note that the "bottom up" approach is referenced by the Crown in 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), p 45.

54. We submit that the Crown had a duty deriving from the Te Tiriti principles of partnership and the principle of options to engage with the hapu of Ngapuhi about the settlement model that would be implemented in order to negotiate and settle their historical Te Tiriti claims.

55. We submit that the Crown has breached its Te Tiriti duties to Ngati Hine and Te Kapotai by failing to explore and consider alternatives to the single settlement model when it had a number of opportunities to do so including:

(a) At the outset of the Crown's engagement with TRAION;

(b) At the time when the opposition grew to a significant level, and the Crown had available to it different Ngapuhi generated options outlined in the Te Roopu Whaiti Report; and

(c) Just prior to the Crown recognising the Tuhoronuku Deed of Mandate, the Crown was exploring a number of models and options, without the knowledge of hapu and without their input.

56. Throughout this Inquiry, the Crown has maintained its position that it was for the people of Ngapuhi to decide who would hold the mandate and how it came to the Crown for the purposes of negotiating the historical Te Tiriti claims of Ngapuhi.[47] It painted a picture that the Crown's role was simply to ensure that any model and/or processes employed to seek a Ngapuhi mandate aligned with basic Crown policy.[48] We submit that the evidence paints a very different picture.

57. We submit that for the reasons that follow, the evidence put before this Tribunal both by the claimants and the Crown (in particular the documents disclosed as part of the Official Information Act request) paints a very clear picture that the Crown has been actively involved in

[47] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 857, 1082; Wai 2490, #A130, *Brief of Evidence in reply of Willow-Jean Prime* [27 November 2014], para 188; Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 12, 41-47.

[48] 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), pp 12-19; Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 41-48.

the mandating process. In fact it has been driving a single settlement model for Ngapuhi from the outset and has remained steadfast to its single settlement model and showed little or no flexibility.[49] In our submission, the Crown was not simply following the recommendations of the East Coast Tribunal, but rather actively engineering its engagement to ensure it achieved a single settlement.

58. We submit that the LNG policy does not mean one comprehensive settlement. This cannot be the case when there are many examples across the country where large iwi groups are negotiating multiple settlements and yet are still considered large natural groups.[50]

The failure to consider alternative settlement models at the outset of its engagement with TRAION

59. We submit that the Crown failed to properly consider the available models to negotiate and settle the historical Te Tiriti claims of the hapu of Ngapuhi at the outset of its engagement with members of TRAION in early 2009.

60. We submit that the Crown had knowledge of key factors, which would have suggested that exploring a range of options for the negotiation and settlement of the Ngapuhi historical Te Tiriti claims would have been the reasonable thing to do. These factors include:

    (a) From the outset, as early as September 2008, the Crown was aware that Ngapuhi was marae and hapu-led and importantly that some groups did not want TRAION to run the process;[51]

    (b) The Crown was aware that Ngapuhi is the country's largest iwi and that TRAION, being the mandated iwi organisation in the

[49] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 21, 23-24, 28, 39-40.

[50] Wai 2490, #A130, *Brief of Evidence in reply of Willow-Jean Prime* [27 November 2014], para 423; Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 115, 721-724, 872-876.

[51] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 17.

Maori Fisheries Act 2004, represented over 80 hapu within eight takiwa in relation to fisheries matters only;[52]

(c) Prior to the first meeting between the Minister in charge of Treaty of Waitangi Negotiations and Mr Tau on 13 March 2009, the Minister was made aware of many of the above facts with advice that Ngapuhi have a strong focus on preserving and exercising hapu autonomy within the wider iwi structure;[53]

(d) Whilst the Minister in Charge of Treaty of Waitangi Negotiations (Dr Cullen) was advised in September 2008 that groups did not want TRAION to run the settlement negotiation process, there is no reference to that issue in the aide memoire given to the new Minister in preparation for the 13 March 2009 meeting with Mr Tau, the chair of TRAION.[54]

61. We submit that during this early phase of engagement with TRAION and consideration of the Ngapuhi situation the Crown was on notice that hapu autonomy was going to be a significant factor in any model to negotiate and settle their historical Te Tiriti claims.

62. With knowledge of the above factors, what then was the Crown response?

(a) Right from the outset the Crown indicated that it was interested in the possibility of the comprehensive Ngapuhi settlement negotiation;[55]

(b) By letter dated 20 April 2009, the Minister confirmed the Crown was keen to make rapid progress towards a comprehensive Ngapuhi settlement;[56]

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52 Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014], "MCH2", para 11.

53 Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014], "MCH2", para 12.

54 Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 851-853.

55 Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 21.

56 Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 25.

(c) Three days earlier on 17 April 2009, OTS confirmed the Crown's preference was to negotiate with large groups of tribal interests rather than individual hapu, whanau or Waitangi Tribunal claimants;[57]

(d) At a meeting with Mr Tau on 11 September 2009, the Minister expressed the Crown's preference for a single Ngapuhi settlement;[58]

(e) At a meeting with the Minister and Mr Tau on 26 January 2010, Paul James, then director of OTS, confirms that the Crown wants a single settlement process and that is why the Crown was so enthusiastic about the TRAION initiative to lead a dialogue within Ngapuhi.[59]

63. At the TRAION October 2008 AGM, the issue of negotiating and settling the outstanding Ngapuhi Te Tiriti claims was discussed. Arising out of that was the establishment of a working group/sub-committee that became known as Te Roopu o Tuhoronuku. Claimant evidence supports that the mandate for Tuhoronuku was to explore options for settlement.[60] We submit that at no stage did TRAION, or anybody for that matter, have the authority or mandate to confirm with the Crown that the hapu, and therefore Ngapuhi, position was a comprehensive single settlement model. That seemed to be the preference of Mr Tau.[61]

64. There is no reference in the relevant resolutions from the meeting with kaumatua and kuia on 25 July 2009, or at the 2009 TRAION AGM, that gave Tuhoronuku the ability to confirm with the Crown that they would accept a single settlement model.[62]

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57 Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 26.
58 Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 39.
59 Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], p 13.
60 Wai 2490, #A130, *Brief of Evidence in Reply of Willow-Jean Prime* [27 November 2014], para 118-135.
61 Wai 2490, #A098, *Brief of Evidence of Raniera (Sonny) Teitinga Tau* [18 November 2014], para 7.6-7.16.
62 Wai 2490, #A098, *Brief of Evidence of Raniera (Sonny) Teitinga Tau* [18 November 2014], paras 4.4-4.5.

65. We submit that the evidence reflects that during the first round of the Tuhoronuku roadshow hui there was no detailed discussion, advice or consideration of the various settlement models other than a single settlement model.[63]

66. There was also no evidence produced that the second round of roadshow hui traversed the various options available to the hapu of Ngapuhi to negotiate and settle their claims, other than the single settlement model. We also know that Minister Finlayson and the Prime Minister voiced their preference for a single settlement model after the first round of Tuhoronuku roadshow hui and prior to the second round.[64]

67. During this early phase of engagement, there is significant evidence of Ngati Hine and Te Kapotai communicating their concerns with, and opposition to, the process undertaken by Tuhoronuku, as well as the information that was being proposed by Tuhoronuku. This included opposition to TRAION leading the discussions on behalf of the hapu of Ngapuhi towards a comprehensive settlement.[65]

68. Although Ngati Hine and Te Kapotai both in principle support the concept of a comprehensive settlement for Ngapuhi, this did not mean that they supported a single settlement model.[66] The models developed as part of the Te Roopu Whaiti process are evidence that regional or taiwhenua based negotiations and settlement were being considered and in fact supported by Ngati Hine and Te Kapotai.[67] These are "comprehensive" in the sense of moving forward together, but did not mean one mandating body, one settlement package and/or one post settlement governance

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63 Wai 2490, #A011, *Affidavit of Willow-Jean Prime* [23 April 2014], p 7, para 25; p 34, para 110-111.

64 Wai 2490, #A130, *Brief of Evidence in reply of Willow-Jean Prime* [27 November 2014], para 400; Wai 2490, #108, *Brief of evidence of Maureen Hickey* [20 November 2014], para 39.

65 Wai 2490, #A007, *Affidavit of Willow-Jean Prime* [19 October 2011], attachment A(a), A(b), A(c); Wai 2490, #A004, *Affidavit of Waihoroi Shortland* [19 September 2011], annexure F; Wai 2490, #A005(a), *Affidavit of Pita Tipene* [19 September 2011], attachments C and D.

66 Wai 2490, #A130, *Brief of Evidence in Reply of Willow-Jean Prime* [27 November 2014], para 335.

67 Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 223.

entity.[68] Any model for the hapu of Ngapuhi required the consent/mandate of the hapu in order to ensure that hapu mana and rangatiratanga were being protected and enforced throughout the settlement process.[69]

69. We have found no example during this early phase of engagement, of the Crown exploring alternative models that could give effect to hapu autonomy and the concerns raised by the hapu leadership. It seems that it was only just prior to the February 2014 recognition of the Tuhoronuku Deed of Mandate that the Crown started to do any real internal work on considering other models and options to give effect to the hapu autonomy that the Crown knew was fundamental to any settlement negotiation model from early 2009.[70] We submit that increasing the number of hapu kaikorero on Tuhoronuku from seven to 15[71] was not a fundamental shift in the model to a hapu based one.

70. Rather than engage with the hapu on looking at the various options at this early phase, the Crown and Tuhoronuku (supported financially by the Crown), proceeded to prepare and present a mandate strategy on the basis of a single settlement for Ngapuhi.

71. It is acknowledged that the Crown is entitled to have a preference for a settlement model, as are groups that approach the Crown to enter into settlement negotiations. However, we submit that the Crown must pursue its "preferences" reasonably and in good faith, and, in line with the principle of partnership, ought to adopt a flexible approach.

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[68] Wai 2490, #A130, *Brief of Evidence in Reply of Willow-Jean Prime* [27 November 2014], para 335.

[69] Wai 2490, #A130, *Brief of Evidence in Reply of Willow-Jean Prime* [27 November 2014], para 478.

[70] For example refer to the email exchange amongst officials in December 2013 of a possibility of "distinct mechanisms", Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], pp 628-634.

[71] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 214-215; Wai 2490, #A098, *Brief of Evidence of Raniera (Sonny) Teitinga Tau* [18 November 2014], paras 5.10-5.12.

72. The Crown must be prepared to apply its policies in a flexible, practical and natural manner.[72] It must also, at times, go beyond consultation to achieve consensus or consent.[73]

73. We submit that the Crown had an inflexible position and worked closely with Tuhoronuku to ensure that it's single settlement model was ultimately the one that was voted on and included in the Deed of Mandate. This submission is supported by the following examples:

(a) In late 2010, the Crown identified that there was a risk that hapu, or a small collective of hapu, would seek their own individual settlements, and that invitations to meet with hapu clusters and the leadership of Te Kotahitanga presented opportunities to influence the discussion;[74]

(b) The Crown brought forward the pre-negotiation phase to see the mandate achieved in 2011 rather than 2012 in order to try and keep the Ngapuhi negotiations from splitting into several settlements. The Crown could, and did, change its processes to suit the outcome it sought;[75]

(c) The Crown was also considering engaging a facilitator to help Ngapuhi hapu to come together and support the Tuhoronuku mandate.[76] Would it not have been better to engage someone to review and address the fundamental concerns being raised by those hapu in opposition, and to assess whether the model being advanced was the right one? We submit this approach would have been more in line with the principle of partnership;

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[72] Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), para 5.3.2.

[73] Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 217, para 8.3.2.

[74] Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], pp 85-86.

[75] Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], pp 85-86.

[76] Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], p 87.

(d) The Crown identified that there was a risk that hapu collectives would seek to withdraw or exclude their hapu from a single Ngapuhi settlement, and that this risk would lead to multiple Ngapuhi settlements.[77]

74. Contrast this list to the evidence of Ms Hickey who confirmed consistently that the model that suited Ngapuhi was something for Ngapuhi to decide rather than for the Crown to decide.[78]

75. We submit that the Crown's inflexible attitude towards a single settlement model from the outset came to light in early 2013:[79]

> ***The Crown's strategy has been to encourage a single Ngāpuhi settlement process*** *as this is more efficient and helps deal with overlapping interests …*
>
> *Because of the benefits of a single Ngāpuhi settlement process the Crown has looked at a number of ways of assisting the parties to reach agreement on mandate issues. That included Ministers making a commitment to consider assisting Ngāpuhi with funding if agreement was reached between the Crown, Tūhoronuku and Kōtahitanga on a way forward…*
>
> ***The distinct characteristics of Ngāpuhi necessitate providing all possible means for a single settlement process to progress*** *…*
>
> *OTS officials acknowledge that due to the nature of Northland negotiations and particular complexities involved in the Ngāpuhi settlement process,* ***total agreement between parties will unlikely ever be reached, however as parties are in discussion we***

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77 Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], p 87.

78 Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 857, 1082; Wai 2490, #A130, *Brief of Evidence in reply of Willow-Jean Prime* [27 November 2014], para 188.

79 Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], pp 323-324. The critical paragraphs of this internal memorandum were originally redacted pursuant to the Official Information Act process.

propose that this is the most favourable conditions we have for ever achieving a single settlement. [emphasis added]

76. Why has the Crown's strategy been to encourage a single settlement when Ms Hickey consistently advised that the model is for Ngapuhi to decide? The short answer is that the Crown never intended the model to be a Ngapuhi decision. We submit that the evidence supports this conclusion and therein lies a key Te Tiriti breach.

77. When did the Crown sit down with Ngati Hine and Te Kapotai and other hapu to discuss the distinct characteristics of Ngapuhi that meant all possible means should be pursued to allow a single settlement to progress? What are these characteristics, and were they agreed to by these hapu? The short answer is that the Crown did not sit down with these hapu, it simply found in Tuhoronuku someone who agreed with their preference for a single settlement model, the blinkers went up and with it any real ability to revisit the model.

78. How was it considered the "most favourable conditions" for ever achieving a single settlement in 2013 when the evidence paints a very clear picture that there was significant opposition,[80] that other settlement models were being developed, and support for the hapu in opposition was solidifying? In our submission, the circumstances suited one Te Tiriti partner and for the Crown, that seemed good enough.

79. Not surprisingly Ms Hickey, on behalf of the Crown, could not confirm at what point in time the Crown made the decision that it was going to proceed with a single settlement model:[81]

AIDAN WARREN:

When did the Crown decide that that was the preference? In that letter that – what processes did you go through to make that decision?

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[80] Wai 2490, #A078(a), *Index and appendices to the brief of evidence of Willow-Jean Prime*, [12 November 2014], Exhibit A, pp 3-4, 7-9; Wai 2490, #A063(a), *Index and appendices to the brief of evidence of Waihoroi Shortland* [13 November 2014], Exhibits B, C, F and H.

[81] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 856.

MAUREEN HICKEY:

I think that it was probably a good – a bit of a gradual process. Generally when we're looking at groups coming to us for settlement the largest natural group is probably the Crown's preference for a whole range of reasons. You know, otherwise we get accused of splitting up iwi

AIDAN WARREN:

Yes.

MAUREEN HICKEY:

- and of making those decisions for people. It's very hard to go from small up to large so generally interested in testing –

AIDAN WARREN:

So when you say it was a gradual process -

MAUREEN HICKEY:

- at a large level.

AIDAN WARREN:

- there would have been OTS officials looking at what best suited Ngā Puhi?

MAUREEN HICKEY:

Yes.

80. The Tribunal should contrast what Ms Hickey was saying under cross-examination with what Crown officials were saying in key internal memos identified above. We submit that they show that the Crown was fixated on a single settlement model and was aligning its resource and strategies to ensure that the single settlement model was ultimately implemented for Ngapuhi.

81. There was no gradual process towards the single settlement model. We submit that the only gradual thing about it, was the gradual increase in exploring strategies to keep Ngapuhi on the single settlement track.

82. We submit that the failure to explore other options, in the face of clear opposition to the single settlement model, was a breach of the Crown duty to act reasonably and in good faith. Not only that but it was a clear error in process and ultimately a misapplication of tikanga.

Other models were available to the Crown and the hapu of Ngapuhi

83. As covered above, the Crown is entitled to have a settlement model preference. Yet it cannot push that preference onto a settling group until it has reasonably explored other models available and after engaging with those groups that are affected by the models and that are ultimately approving/mandating any final model.

84. This submission begs the obvious question as to whether there were in fact other reasonable settlement negotiation models to explore in light of the Ngapuhi reality. A Te Tiriti partner should not be required to do something that is unreasonable, or be forced into something as a result of being presented with no other options.

85. We submit that there were clearly options available that the Crown would have been aware of at the outset of its engagement with Ngapuhi and during the processes to address issues raised by the hapu in opposition.

Te Roopu Whaiti Process

86. The Te Roopu Whaiti process was agreed to by Te Kotahitanga and Tuhoronuku and supported by the Crown. We submit that the Te Roopu Whaiti process provided an essential tool for all parties to explore and determine the appropriate model for settlement, something that should have been done properly from early 2009.

87. The Te Roopu Whaiti Terms of Reference states that Tuhoronuku and Te Kotahitanga agreed to establish the working group to develop a process "that enables Ngapuhi to facilitate a settlement on behalf of Ngapuhi and enables claimants in Te Paparahi o Te Raki Inquiry to have their issues heard before the Waitangi Tribunal."[82] The Terms of Reference also state

[82] Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014],"MCH20", para 3.

that Te Roopu Whaiti will provide options and recommendations, with reasons for any such options.[83]

88. The Crown therefore knew that the Te Roopu Whaiti process was going to consider and recommend alternative settlement models. That, with respect, is very clear in the Terms of Reference.

89. Ms Prime confirms that the hapu that engaged in the Te Roopu Whaiti effort put in a huge amount of work with the focus on developing alternative models for a comprehensive settlement.[84]

90. It is not sustainable for the Crown to argue that some groups, including Ngati Hine, were at times in favour of a single Ngapuhi settlement with Tuhoronuku.[85] Ngati Hine and Te Kapotai put in significant effort to develop alternative models but for what end if, as the Crown argues, they were supportive of a single settlement model?

91. Under cross-examination Ms Prime did not accept that the models outlined in the Te Roopu Whaiti Report mirrored the model currently being progressed by Tuhoronuku, stating that the multi-lateral approach went a lot further than the one that is currently in place via Tuhoronuku.[86]

92. As Ms Prime states, the hapu were engaged in the Te Roopu Whaiti process to find solutions to three outstanding issues - the sequencing of Waitangi Tribunal hearings and settlement, hapu representation in settlement negotiations and the role of TRAION in settlement negotiations.[87] Ms Prime notes:[88]

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83 Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014],"MCH20", para 8.

84 Wai 2490, #A078, *Brief of Evidence of Willow-Jean Prime*, [12 November 2014], para 169.

85 Wai 2490, #A130, *Brief of Evidence in reply of Willow-Jean Prime* [27 November 2014], para 335.

86 Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 173.

87 Wai 2490, #A130, *Brief of Evidence in Reply of Willow-Jean Prime* [27 November 2014], para 163.

88 Wai 2490, #A130, *Brief of Evidence in Reply of Willow-Jean Prime* [27 November 2014], para 178.

> *…after we had done all that work in Te Roopu Whaiti (and I stress that it was a very significant amount of work), that the Minister tells us he is infact not interested in starting the process again, and that he only wants us to focus on the Tuhoronuku structure. So we have effectively been strung along for a year or more in facilitation processes. We were given the impression that we were there to look at options to resolve three key issues, when infact what the Crown really wanted for us to do was to focus on the Tuhoronuku structure and not start again, or make substantive changes. This is a fixed position and I ask where is the good faith in that?*

93. There is little argument that Tuhoronuku refused to take the alternative models to the people of Ngapuhi for consideration. The Te Roopu Whaiti Report was presented to the Minister in March 2012, shortly before the Tuhoronuku Deed of Mandate was presented at the end of March 2012.

94. The Crown did not require Tuhoronuku to take the Te Roopu Whaiti Report, and in particular the alternative settlement models, to the people of Ngapuhi or make it a condition of progressing towards a recognising the Deed of Mandate. This, we submit, was a significant failure on the part of the Crown. It is important to recall that at no stage leading up to this point, had the people of Ngapuhi had the opportunity to engage on models, other than the single settlement model.

95. As Ms Prime says the Crown simply moved onto the next phase, that being the Mr Morgan facilitation.[89]

96. A key failure on behalf of the Crown is its failure to allow the hapu of Ngapuhi to be presented with alternative models and to determine, as Ms Hickey consistently said was not the Crown's decision, what model would best suit Ngapuhi. This, of course, is in the context of the Crown knowing that hapu autonomy was going to be a key issue in these settlement negotiations right from the outset of their engagement with Ngapuhi in 2009.

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[89] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 162-164.

97. Ms Prime addresses this issue in response to a series of questions from the Tribunal:[90]

> *Yes that's something I have a view on. The fundamental thing is that ultimately it should be for the hapū of Ngā Puhi, you know, to decide what that model is. In my opinion there are a number of models, which I've put in my evidence, which I believe Ngā Puhi should have – should be able to consider. They could be workable. Kahungungu is one that I mentioned; Te Hiku is another, although Ms Hickey has some views on that too; Ngā Hapū o Ngāti Ranginui is another one that Ngā Hapū o Te Takutai Moana (who are my hapū, a part of) has looked very closely at and we believe that those models would be more appropriate for us that Tūhoronuku.*

98. We submit that it is not for this Tribunal to determine what may well have been, or should be, the **best** model for Ngapuhi. The issue is that the Crown did not allow the very people that will be ultimately affected by settlement to explore the model as part of the mandating process.

99. Any argument that it was unreasonable for the Crown to change the settlement model midstream, i.e. after the mandating vote, needs to be contrasted against the following:

    (a) There were a number of other models the Crown had agreed to in other parts of the country that, on the face of it, may have suited Ngapuhi.[91] These could have been explored before the mandate vote, but were not;

    (b) What was the point of the Te Roopu Whaiti process, if the Crown was never going to change its model? Perhaps the point was, as we argue later in these submissions, a tick the box exercise to fend off adverse findings by the Tribunal;

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[90] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 223.

[91] Wai 2490, #A130, *Brief of Evidence in Reply of Willow-Jean Prime* [27 November 2014], p 19, para 70; Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 535-538, 568-569.

(c) If Ngapuhi agreed to change the model via a consultative process as envisaged by the Te Roopu Whaiti Terms of Reference, that would have been consistent with the Crown's position, that it was for Ngapuhi to determine the model for settlement and who held that mandate. The reality is that Ngapuhi were not given that opportunity; and

(d) Mr Morgan, an independent facilitator, subsequent to the Te Roopu Whaiti process recommended a "fresh start".[92]

100. The hearing transcripts of cross examination and questions by the Tribunal reflect a strong sense of the hapu feeling aggrieved and angered by not having any real say in the settlement model.[93] On the one hand the Crown argues strongly that Ngapuhi is unique, the largest iwi group in the country and perhaps in line to receive the largest settlement. Yet on the other hand, many other hapu and iwi across the country have developed their own regional/hapu based models that suited their unique circumstances. Ngapuhi have not been given the opportunity to explore those models, or any new ones, before the Crown recognised the mandate of Tuhoronuku.

101. We submit that the Crown missed a significant opportunity to address this fundamental concern raised by, among others, Ngati Hine and Te Kapotai about the settlement model. This is something that Ms Hickey begrudgingly accepted:[94]

> ***AIDAN WARREN:***
>
> *You don't think there was a missed opportunity there for the Crown when the opposition started to grow and there was a push for other models to allow Ngā Puhi to explore those models?*
>
> ***MAUREEN HICKEY:***
>
> *I think looking back, you know, in what we've heard in this forum*

[92] Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014], "MCH23", p 8.

[93] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 223-224.

[94] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 861.

is a lot of discussion of different models and that's been doing on I think throughout this, this process. What we were wanting out of Te Rōpū Whaiti was agreement between the parties on what the next step would be and we didn't have that.

AIDAN WARREN:

So a missed opportunity?

MAUREEN HICKEY:

Potentially.

An opportunity to add conditions

102. We submit that the Crown had a further opportunity to address concerns about the single settlement model and engage on alternative models in the months leading up to the decision to recognise the Tuhoronuku Deed of Mandate on 14 February 2014.

103. The evidence reflects that in early December 2013, Crown officials discussed and debated the merits of a number of mechanisms to address the key concerns expressed about the single settlement model, and more specifically, about giving effect to hapu and claimant autonomy.[95]

104. Under cross-examination Ms Hickey painted a picture that the exploration of these mechanisms was not about looking to change the settlement model, but was more about exploring what was possible during negotiations and through the post settlement arrangements.[96]

105. We submit that this explanation is not consistent with the internal OTS email communications:[97]

While devolution of settlement assets to hapu is mentioned, ***the majority of concerns are more about who will run and control***

[95] Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], pp 628-634.

[96] Wai 2490, #4.1.003, *Transcript – Hearing Week Two from 4-5 March 2015 at Waitangi Tribunal Office, Wellington* [13 March 2015], pp 19-24.

[97] Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], pp 630-631.

the negotiations, rather than how the settlement assets will be held post-settlement

…

In addition to these conditions, the Crown could communicate, when recognising the mandate, that it is open to exploring:

- *options for how the settlement package is structured (i.e. collective redress and separate packages for cultural redress based around hapu regions); and*
- *mechanisms for the devolution of redress to hapu (either pre or post settlement) if this is what Ngapuhi wish to do.* [emphasis added]

106. The Minister was specifically asking for officials to "give some thought to a distinctive model or mechanism for the Ngapuhi settlement that might include different redress 'layers' at iwi-wide and sub-group/hapu level."[98] There is reference to the Minister having in mind the Tamaki "approach"[99] where there are separate settlements for each Tamaki iwi/hapu, but also a number of collective redress arrangements. Mr Geeves goes onto say that a brief would be provided setting out a possible model as suggested by the Minister.[100]

107. We make the following submissions based on the above statements:

(a) OTS is correct that there were serious concerns about who would run and control the negotiations, and not a significant focus on the post settlement arrangements. We submit that hapu autonomy cannot be focused solely on the outcome, that the Crown in fact has an obligation to ensure that hapu are directly involved in the process to achieve the outcome. A fundamental point is that Tuhoronuku and their "appointed" representatives

[98] Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], pp 630-631.

[99] We assume here that the Minister is referring to the Tamaki Makaurau model.

[100] Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], p 634.

do not have the mandate on behalf of Ngati Hine and Te Kapotai, and therefore cannot negotiate any redress arrangements for them during the negotiations proper;

(b) None of the suggestions being made by the Crown about separate redress or distinct mechanisms were being discussed with Ngati Hine or Te Kapotai. In a sense there seems nothing wrong in principle with the Crown internally exploring various options to address issues, but here they are doing it two months out from recognising the Tuhoronuku mandate, after:

(i) the mandate vote has taken place;

(ii) significant Crown resources have been expended on the process;

(iii) the hapu with key concerns are not involved; and

(iv) ultimately, none of these ideas formed part of the conditions imposed by the Minister when recognising the mandate on 14 February 2014.

108. Whilst it may be possible, under certain circumstances, for redress mechanisms and post settlement arrangements (referred to in these December 2013 internal OTS emails) to be negotiated during the negotiations themselves, we submit that these are clearly not such circumstances given the hapu experiences with Tuhoronuku and the Crown to date.

109. We ask the Tribunal to assess how reasonable it will be for hapu who have stood outside of the process to date and have spent the last five years opposing Tuhoronuku and the Crown, to expect that their interests will be protected? We submit that there is a serious risk to hapu that any moves to pursue redress at a hapu or regional level within the current Tuhoronuku structure may well be opposed by existing members of Tuhoronuku - hapu are simply outvoted. There are no guarantees under a one person, one vote structure for the hapu to have any confidence to trust the process.

110. The simple point is that the ideas discussed in December 2013 about other models, layers of redress and distinctive mechanisms remain just that – ideas. They were not included in the final Deed of Mandate. The conditions imposed by the Crown on the mandate do not adequately address the substantive claimant concerns, despite the other matters that were being suggested by the Minister and officials.[101]

111. In our submission, the Te Tiriti compliant approach was for the Crown to allow the hapu of Ngapuhi to review all reasonable models at the outset. This would have enabled everyone to be clear on what the negotiations would look like and how, in general terms, the post settlement arrangements may well develop.

B. Failure to respect the decisions of Ngati Hine and Te Kapotai

> *As this Tribunal will well know, the law has long since gained supremacy in matters that were once considered the domain of tikanga as it pertained to the collective ethos of the people/hapu. This estrangement from tikanga and collective decision making process that was tino rangatiratanga at work, has today left so many dislocated from both personal and cultural identity. Out of sight of that hegemony, Ngati Hine try to keep to the principles of what may be considered our cultural mores and practices, many of which have proven to be the best means of expressing our personal and collective responsibilities to one another.*[102]

112. We submit that the second misapplication of tikanga by the Crown was its failure to respect the decisions and collective decision-making processes of Ngati Hine and Te Kapotai. That is, the Crown ultimately ignored the decisions of the hapu leadership and recognised a mandate that included Ngati Hine and Te Kapotai without their consent and support.

113. This issue is underpinned by the following points:

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[101] Wai 2490, #A130, *Brief of Evidence in Reply of Willow-Jean Prime* [27 November 2014], para 113; Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], pp 628-635.

[102] Wai 2490, #A063, *Brief of Evidence of Waihoroi Shortland* [13 November 2014], para 15.

(a) One of the fundamental guarantees of Te Tiriti is that the Crown must protect the rangatiratanga of hapu;

(b) The evidence presented by Ngati Hine and Te Kapotai includes many examples of historical and contemporary exercise of rangatiratanga and how that rangatiratanga is expressed through bodies such as runanga and marae committees;[103]

(c) The Crown did not question the ability of Ngati Hine and Te Kapotai through their various bodies, to make decisions on behalf of the people they represent. In fact, the evidence is very clear that the Crown identified the leadership of Ngati Hine as particularly representative of the hapu, given the myriad of examples throughout the evidence of the Crown seeking to engage with the Ngati Hine leadership. The Tribunal will also be aware that Te Kapotai were well represented by Ms Prime during the critical phases of engagement through Te Kotahitanga and directly as the Te Kapotai hapu representative, together with Karen Herbert;

(d) We reiterate again the concession by the Crown that there were in fact hapu before the Tribunal advancing applications for urgency;[104]

(e) The Crown, or any other party to this Inquiry, did not directly challenge or test whether the leadership of Ngati Hine, in particular those that were engaging with the Crown, had the support of their hapu members.

(f) This, we submit, is not a situation akin to the East Coast context where Crown officials were not convinced that the opponents to the Ngati Porou settlement enjoyed significant support.[105]

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[103] Wai 2490, #A004, *Affidavit of Waihoroi Shortland* [19 September 2011], para 1-5, annexure A; Wai 2490, #A011, *Affidavit of Willow-Jean Prime* [23 April 2014], para 14-15; Wai 2490, #A014, *Affidavit of Johnson Erima Henare* [14 May 2014], para 11; Wai 2490, #A034, *Affidavit of Waihoroi Shortland in reply* [13 June 2014], para 7-8.

[104] Wai 2490, #3.1.144, *Reply Submissions on behalf of Ngati Hine and Te Kapotai* [4 July 2014], para 18-19; Wai 2490, #2.5.019, *Decision of the Tribunal on the Applications of Urgency* [12 September 2014], para 118.

114. Ngati Hine and Te Kapotai provided the Tribunal with a significant number of examples that confirm their collective and consistent opposition to the Crown's settlement process involving Tuhoronuku.[106] The correspondence was not only clear about the nature of the opposition to the Tuhoronuku mandating process, but also made it clear about the processes that Ngati Hine and Te Kapotai went through for their leadership/representative bodies to confirm their opposition. These include formal resolutions made at AGMs and other hui.[107]

115. The contemporary duties under the Te Tiriti principle of partnership include that the partners should make reasonable decisions during the settlement process[108] and that tino rangatiratanga must be respected.

116. We submit that there is no evidence to suggest that Ngati Hine and Te Kapotai were being unreasonable Te Tiriti partners by opposing the Tuhoronuku process. They were simply following their tikanga.

117. If Te Tiriti was truly about partnership and the protection of rangatiratanga, on what basis are Ngati Hine and Te Kapotai compelled to agree to any Crown process for the settlement of their historical Te Tiriti claims? We submit that this was not a situation of these hapu simply saying no for the sake of it, because as the evidence bears out, the leadership of Ngati Hine and Te Kapotai were actively involved in the engagements with the Crown and Tuhoronuku to see whether their fundamental concerns could be addressed. We submit that they were not adequately addressed.

118. On many occasions, the hapu leadership formally sought their hapu names to be removed from the Tuhoronuku mandating process including the Deed of Mandate because they had been included without their consent, and yet despite those requests their hapu names remained. If,

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[105] Waitangi Tribunal, *East Coast Settlement Report* (Wellington: Legislation Direct, 2010), p 35.

[106] Wai 2490, #3.1.126, *Submissions in support of the application by Ngati Hine and Te Kapotai for an Urgent Inquiry by the Waitangi Tribunal* [16 June 2014] para 68-75.

[107] Wai 2490, #3.1.126, *Submissions in support of the application by Ngati Hine and Te Kapotai for an Urgent Inquiry by the Waitangi Tribunal* [16 June 2014] para 73-74.

[108] Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), para 5.3.2.

as the Crown suggests, it was dealing with the leadership of these hapu what reasonable basis was there for the Crown to allow Tuhoronuku to include their hapu names in Deed of Mandate?

119. Ngati Hine and Te Kapotai maintain that Tuhoronuku agreed in February 2011 that those hapu who opposed the Tuhoronuku process were no longer part of Tuhoronuku.[109] This was subsequently denied by Tuhoronuku, and never acknowledged by the Crown.

Hapu Kaikorero

120. The election of hapu kaikorero was a direct undermining of Ngati Hine and Te Kapotai rangatiratanga. It was also another example of hapu decisions being ignored by the Crown.

121. There is no basis to the Crown's argument that these hapu are represented by those hapu kaikorero "elected" through the Tuhoronuku process, particularly when one considers the evidence before the Tribunal:

(a) Those hapu kaikorero purporting to represent Ngati Hine and Te Kapotai have been rejected by their representative bodies;[110]

(b) Ngati Hine and Te Kapotai marae and hapu bodies filed petitions seeking to remove the hapu kaikorero as well as representative submissions opposing the Deed of Mandate.[111]

(c) Mr Shortland confirmed that at every public forum on the issue of Ms Manu's claim to be the mandated hapu kaikorero for Te Kau i Mua she had little or no support.[112] Ms Prime responds to Mr George's affidavit and the process by which he was elected to

[109] Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], para 3.19; Wai 2490, #A130, *Brief of Evidence in Reply of Willow-Jean Prime* [27 November 2014], para 142; Wai 2490, #A011, *Affidavit of Willow-Jean Prime* [2 April 2014], p 542; Wai 2490, #A004, *Affidavit of Waihoroi Paraone Shortland* [19 September 2011], para 23.

[110] Wai 2490, #A130, *Brief of Evidence in Reply of Willow-Jean Prime* [27 November 2014], pp 3-25.

[111] Wai 2490, #A130, *Brief of Evidence in Reply of Willow-Jean Prime* [27 November 2014], para 243-244, 343.

[112] Wai 2490, #A120, *Brief of Evidence of Waihoroi Shortland* [25 November 2014], p 27.

become the hapu kaikorero, and provides a number of examples of hapu meetings where Mrs George's election had been opposed and rejected by the hapu.[113]

122. If the Crown had such confidence that the hapu kaikorero for Ngati Hine and Te Kapotai had the support of the people, why would it consistently and continually engage with Mr Shortland, Mr Tipene, Mr Henare, Ms Prime and others to seek their buy in and support? Those hapu kaikorero for Ngati Hine and Te Kapotai "elected" via the Tuhoronuku process do not have the support of the hapu, and in the case of the Ngati Hine hapu kaikorero over 1,000 individuals have signed a petition opposing their appointments.[114] This is only approximately 500 less than those who formally voted against the Tuhoronuku mandate in 2011.

123. Mr Shortland notes:[115]

> *We now have three individuals who claim they are "Mandated Kaikorero" for Ngati Hine on Tuhoronuku. They are not. I remind the Tribunal, Tuhoronuku and the Crown that their claim to representation is only on the basis that a flawed process put them there. They now all stand opposed by Ngati Hine, because this mandate ascribes the right to represent the interests of Ngati Hine to them all.*
>
> *…*
>
> *For Ngati Hine, it confirms that the Crown and Tuhoronuku have, from the beginning, set out on a course designed to undermine and usurp the sovereign rights of hapu guaranteed by Te Tiriti o Waitangi.*

124. We submit that the hapu kaikorero were appointed without the support of the hapu leadership and many hapu members who support the leadership.

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[113] Wai 2490, #A130, *Brief of Evidence in Reply of Willow-Jean Prime* [27 November 2014], pp 14-77.

[114] Wai 2490, #A063(a), *Index and appendices to the brief of evidence of Waihoroi Shortland* [13 November 2014], Exhibit K.

[115] Wai 2490, #A063, *Brief of Evidence of Waihoroi Shortland* [13 November 2014], para 17-18.

C. Flawed Mandating Process

> *Having considered all of the events and issues raised in this evidence, and my evidence already on the Record of Inquiry, I have come to the view that the mandate process as a whole cannot be said to be open, fair and transparent enough to produce an enduring settlement...*[116]

125. We submit that the mandating process for Tuhoronuku was flawed and that the Crown's decision to recognise the Tuhoronuku mandate was pre-determined. We submit that the Crown's focus on picking a winner, which could give it the single settlement model it wanted, was a poor decision in the circumstances, and one that ultimately breached its Te Tiriti duties.

126. The evidence before the Tribunal is that the mandating hui were inadequate, not transparent and simply sought to drive the Crown's intended "single settlement" outcome. The Crown effectively changed the rules to suit its own end and loosely applied Crown policy throughout the mandating process, including with the funding of that process and the formal recognition of the mandate.

Crown Mandating Policy

127. The OTS *Red Book* refers to the mandating of claimant representatives for Te Tiriti negotiations as "one of the most important stages in the Treaty settlement process".[117]

> *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 all 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.*

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[116] Wai 2490, #A078, *Brief of Evidence of Willow-Jean Prime*, [12 November 2014], para 243.

[117] 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), p 44.

> *Mandated representatives need to demonstrate that they represent the claimant group, and the claimant group needs to feel assured that the representatives legitimately gained the right to represent them. This can be achieved through a process that is fair and open.*

128. The *Red Book* also references the *Pakakohi and Tangahoe Settlement Claims Report* and the bottom-up approach endorsed by that Tribunal in relation to mandating.[118]

129. In line with that, the *Red Book* indicates that Crown policy is for the claimant group to decide who is to represent it and to that end the Crown does not wish to interfere in matters of tikanga.[119]

130. Ms Hickey acknowledged in her evidence that the Crown generally considers its role as an advisory one during the mandate phase, but has taken a more proactive role at an earlier stage in the mandate process as a result of the Tribunal's recommendations in the *East Coast Settlement Report*, seeking feedback on the mandate strategy document also.[120]

131. The Crown evidence also suggests that considerable importance was placed on the Tribunal's recommendations in the *East Coast Settlement Report*, informing the Crown's actions throughout the mandating process for Tuhoronuku.[121] We summarise the Tribunal's recommendations from the *East Coast Settlement Report* as follows:

    (a) That OTS call for submissions at the point that a proposed mandating strategy is submitted, as well as after a Deed of Mandate is received;

    (b) OTS should write to all Wai numbered claimants at an early stage;

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[118] 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), p 45.

[119] 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), p 45.

[120] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 44.

[121] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 74, 373; Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 39, 1075.

(c) The Crown should adopt a more proactive role in monitoring developments during the mandate strategy process;

(d) The Crown has a responsibility to ensure that all interested parties in a negotiations settlement have access to unhindered participation at every stage of the mandating process, ensuring that settlements are conducted in a fair and open manner; and

(e) That OTS update its policy guide to reflect changes that have arisen out of that Inquiry and others.

132. We submit that, in making the changes to standard Crown policy and approach, in line with the *East Coast Settlement Report* recommendations, the Crown embarked on a "tick the box" exercise in order to ensure that the Tuhoronuku mandate was successful and that a single settlement would be achieved. In our submission, something more was required given the unique Ngapuhi circumstances and the level of opposition raised at every turn.

Endorsing the Mandate Strategy

133. The Crown received a draft mandate strategy from Tuhoronuku on 30 November 2010. At this point, the Crown was already aware of the opposition forming towards Tuhoronuku, particularly from Te Kotahitanga, including Ngati Hine and Te Kapotai.[122]

134. Whilst the Crown notes that, in endorsing the mandate strategy in January 2011:[123]

135. it was open-minded as to whether Te Roopu o Tūhoronuku or any other group would be able to obtain a mandate to enter Treaty settlement negotiations the Crown applies criteria in assessing a mandate and would assess, in good faith, any mandate that is put forward to it.

136. Ms Hickey goes onto say that:[124]

[122] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], pp 19-20.
[123] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 70.3.
[124] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 71.

> *The Crown noted that while it was open-minded it did have a preference for a unified Ngāpuhi settlement process because it would benefit both Ngāpuhi and the Crown in terms of minimising overlapping claims, allowing for a more timely settlement and reducing costs. It stated that for those reasons it was interested in Te Roopu o Tūhoronuku's attempts to pull Ngāpuhi together in a single mandate.*

137. It is submitted that the Crown in fact did not have an open mind and was already invested, at such an early stage, in ensuring that Tuhoronuku would achieve the mandate for a Ngapuhi-wide settlement that Sonny Tau and others had proposed. Of course, by this stage, the Crown had provided significant early funding to TRAION and Tuhoronuku even prior to a mandate strategy being received and/or endorsed. Ms Prime notes, in her evidence, her concern that "because the Crown had invested so much taxpayer's money, they were determined for Tuhoronuku to get a mandate."[125]

138. As acknowledged by this Tribunal in its decision on the original applications for an urgent hearing, the early funding contribution from the Crown went towards phase 1 and 2 of the mandating process for Tuhoronuku, which included two rounds of hui – 14 in April and a further 14 in September.[126]

139. According to claimant evidence, the first round in April was intended to consult Ngapuhi on options for settlement and how they wished to be represented in settlement negotiations.[127] However, the question that was put to the hui was whether Tuhoronuku should seek a mandate to enter direction negotiations with the Crown, and, as mentioned above, there was no consultation on options for settlement. The mandate strategy records the "overwhelming response" to be yes.[128] This is

[125] Wai 2490, #A078, *Brief of Evidence of Willow-Jean Prime* [12 November 2014], para 140.
[126] Wai 2490, #2.5.027, Waitangi Tribunal, *Decision of the Tribunal on the applications for urgency* [12 September 2014], para 7.
[127] Wai 2490, #A035, *Affidavit of Pita Tipene in reply* [13 June 2014], para 2-7.
[128] Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014],"MCH3", para 8.2.

strongly disputed by Ngati Hine and Te Kapotai, particularly given the strong and consistent opposition to the decision to enter into settlement negotiations on behalf of those major hapu. That opposition, following the first round, was communicated to the Crown very clearly,[129] yet still the Minister confirmed his preference for a single settlement shortly thereafter and approved the second round of hui.[130]

140. A second round of hui was then held to decide upon a representative body with the apparent response that Tuhoronuku ought to be the body to seek a mandate but also that hapu were to lead the process. We submit that the process to reach those decisions, at both sets of roadshows, was incomplete and was wholly focussed on achieving a Tuhoronuku mandate for a single settlement as already decided on by Tuhoronuku and the Crown. We query the basis on which the Crown assessed what discussions took place and the view of the people "consulted" at those hui in order to support the continuation of the mandating process.[131]

141. Despite continued concerns and issues being raised by Ngati Hine, Te Kapotai and others, the Crown persisted in supporting Tuhoronuku to achieve a mandate, in assisting it through the mandate process and in funding. Fourteen information hui were then held between June and August 2010 regarding a representation model and structure for Tuhoronuku. Ms Prime notes in her evidence that:[132]

> *What I believe is that in the Crown and TRAION/Tuhoronuku's eagerness to accelerate the Ngapuhi settlement process, it conflated the level of support for direct negotiations with TRAION/Tuhoronuku from very early on and failed to make necessary inquiries into the process when it should have. As a Te Tiriti partner and financial contributor to those hui it had an interest in the actual level of support, the wishes of the people and*

[129] Wai 2490, #A011(a), *Index and exhibits to the affidavit of Willow-Jean Prime* [9 May 2014], p 529.
[130] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 39.
[131] Wai 2490, #A011, *Affidavit of Willow-Jean Prime* [9 May 2014], para 71.
[132] Wai 2490, #A078, *Brief of Evidence of Willow-Jean Prime* [12 November 2014], para 72.

how those hui were managed. The failure to do so and this early manipulation of information is just one example of how the process lacked integrity, fairness and transparency. Hapu were unaware of the intentions of the Crown and TRAION/Tuhoronuku, and the extent to which they were working together to pursue a particular strategy for settlement.

142. The Crown had provided TRAION with a contribution of $260,000 worth of funding towards the information and consultation process being carried out. We submit this was merely the tip of the iceberg for the "exceptions" to the Crown's policy on funding for mandating.[133] Ms Hickey notes in her evidence that "[w]ithout funding no progress could have realistically been made".[134]

143. We submit that this goes to the core of what Ngati Hine and Te Kapotai are saying, in that the Crown was a key factor in ensuring that the Tuhoronuku proposed mandate for a single settlement could continue contrary to Crown policy, where funding is not available in advance for mandating processes as it could be seen as "taking sides before the claimant group has made a decision on who is to represent them in negotiations with the Crown".[135] But in this case, that is exactly what happened, to the detriment of Ngati Hine and Te Kapotai.

Mandating

144. Following the two rounds of information hui held in 2009, phase 3 of the mandating process then proposed 20 mandating hui to formally obtain a mandate for Tuhoronuku. Those hui were held in August and September 2011, some two years following the initial discussions with the iwi in those two rounds of information hui. The mandate hui came following

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[133] 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), p 52; and Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014], "MCH1", p 52.

[134] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 321.

[135] 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), p 52; and Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014], "MCH1", p 52.

the Crown's endorsement of the Tuhoronuku Deed of Mandate Strategy on 5 January 2011. Despite the significant opposition and rising tensions within Ngapuhi and, we submit, a clear lack of hapu support for the proposed mandate, the Crown allowed a flawed mandating process to roll out.[136]

145. The Crown took no steps to properly examine complaints or genuinely determine the level of support beyond what Tuhoronuku advised.[137] In doing so, the Crown failed to respect hapu autonomy in its pursuit of a single settlement with Tuhoronuku.

146. We submit that, despite being fully aware of the conflict building within Ngapuhi as a result of Tuhoronuku seeking the mandate, the Crown remained steadfast to its intent for a single settlement via Tuhoronuku. It not only allowed the mandate hui to proceed, but provided substantial financial assistance, even knowing that many individuals and hapu may not participate in the mandating process as a result of their staunch opposition to that process. Ngati Hine wrote to the Crown on 29 September 2011, following those mandate hui, noting specific issues regarding the mandate process itself including:

(a) The transparency and accountability of Tuhoronuku;

(b) The conduct of mandate hui;

(c) Common statements from Tuhoronuku regarding settlement, direct negotiations, the Waitangi Tribunal and a parallel process;

(d) Inconsistencies in the presentation of information and the Deed of Mandate Strategy; and

(e) Issues with the voting process.[138]

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[136] Wai 2490, #A011(a), *Index and exhibits to the affidavit of Willow-Jean Prime* [9 May 2014], Appendix E, para 27.

[137] Wai 2490, #A078, *Brief of Evidence of Willow-Jean Prime* [12 November 2014], p 24, para 68-69.

[138] Wai 2490, #A011(a), *Index and exhibits to the affidavit of Willow-Jean Prime* [9 May 2014], Appendix E, para 32.

147. The Deed of Mandate Strategy notes specifically that the mandate hui shall "provide the opportunity for attendees to discuss and debate the mandate and negotiations proposal and vote on it. The process undertaken shall be fair, open and transparent."[139] We submit that this is a fundamental aspect of any mandating process, and one which the Crown should have at the forefront of its mind when recognising any mandate for Treaty settlement negotiations.

148. Mr Tipene has provided evidence on the mandating hui saying:[140]

> *In my opinion Tuhoronuku misrepresented the level of opposition by the people of Ngapuhi at these road show hui, saying that it was only a small disaffected group of people who opposed Tuhoronuku. As part of our delegation I could see that our people were confused by both the material presented to them and the style of facilitation used in these hui. Our attendance was also met with opposition from members Tuhoronuku including the facilitators of each hui. Our alternative proposals were shut down and we were told that if we wanted to present our various points then we needed to hold our own hui.*

149. In the current situation, we submit that the process carried out by Tuhoronuku to achieve a Crown recognised mandate was not fair and open. The submission that there is no valid mandate is not only supported by the flawed process, but amplified by what followed in terms of submissions and overall opposition.

150. The Crown may argue that, as noted in the Tuhoronuku Deed of Mandate, the process undertaken to obtain a mandate for Tuhoronuku was in line with general Crown policy and requirements regarding mandate hui. However, the evidence from Ngati Hine and Te Kapotai, and others, indicates that such a representation is misleading and is not supported by any transcript, audio recording or video recording of those mandate hui.

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[139] Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014],"MCH3", para 8.6.1.

[140] Wai 2490, #A013, *Affidavit of Pita Tipene* [12 May 2014], para 11.

151. In the case of Tuhoronuku, what was proposed under the mandate strategy did not eventuate and the mandate hui were presented in such a way as to purely promote the Tuhoronuku mandate without allowing for discussion or consideration of any alternative views, therefore preventing any "debate" on the mandate and negotiations proposal and, we submit, resulting in a mandate vote which was ill-informed. Not only was the manner in which those mandate hui conducted unfair and biased towards achieving a Tuhoronuku mandate, in the face of significant opposition, the rescheduling of hui in the Bay of Islands and Kaeo regions with insufficient notice and/or communications meant that many from Ngati Hine and Te Kapotai were unable to attend mandate hui and/or have their say in public.[141]

152. In that regard, there are a number of statements made throughout the mandate hui which further misinformed those present as to the negotiations, with the aim of promoting a single settlement and Tuhoronuku as the only option available to Ngapuhi for a settlement with the Crown. When coupled with the conduct of the hui, which did not allow alternative views to be put and/or debate to be had, despite the well-known level of opposition to the Tuhoronuku mandate, this further shows that a fair and open process was not carried out. We submit that the Crown should therefore have never recognised that mandate and/or accepted the results of the mandate vote.

Submissions, Support and Opposition

153. The Tuhoronuku Deed of Mandate was submitted to the Crown on 31 March 2012, following OTS consideration of that Deed of Mandate. It was not until July 2013 that the Crown called for submissions on the Tuhoronuku Deed of Mandate over a six week period. By this stage, it is over four years since the initial round of roadshow hui in April 2009 where the question was asked whether Ngapuhi wished to enter into settlement negotiations, during which time, we submit the opposition to the Tuhoronuku proposed mandate only strengthened.

[141] Wai 2490, #A011(a), *Index and exhibits to the affidavit of Willow-Jean Prime* [9 May 2014], Appendix E, para 53.

154. The estimated population of Ngapuhi is over 125,000.[142] The numbers involved in the mandate process, including with submissions to the Crown, were very low:[143]

(a) 29,389 people were sent voting packs. 77% of those people sent packs did not vote at all;

(b) 5,210 voted in favour of the mandate – that is 76% of those who voted, but only 18% of those who were sent voting packs and only 4% of the overall Ngapuhi population;

(c) 1,584 voted against the mandate and a further 2,221 submissions were received in opposition to Tuhoronuku, including many on behalf of representative entities such as hapu and marae; and

(d) 1,779 other submissions were received by the Crown during the public submission process.

155. It is of particular concern to Ngati Hine and Te Kapotai that the Crown considered such low numbers to be sufficient to recognise a mandate for Tuhoronuku that recognition failed to adequately consider the following:

(a) There was no provision or process for a hapu or marae vote within the mandate process and the mandate vote therefore undermined the rangatiratanga of Ngati Hine and Te Kapotai;

(b) The level of representative submissions made by groups such as Ngati Hine and Te Kapotai;[144]

(c) On an individual basis, the participation rate was extremely low and the vote in favour was one of the lowest four recognised mandates in Treaty settlement negotiations;

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[142] Wai 2490, #A26, *Affidavit of Maureen Hickey,* [6 June 2014], para 26.

[143] Wai 2490, #A011, *Affidavit of Willow-Jean Prime*, [9 May 2014], para 82.

[144] Wai 2429, #2.5.11, Waitangi Tribunal, *Decision on Application for Urgency*, para 118; Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 1187-1189.

(d) There was considerable misinformation delivered regarding the mandate, the Tuhoronuku structure and the existing level of support for Tuhoronuku;

(e) There were concerns with the voting itself, including eligibility to vote, distribution of voting packs and receipt of postal votes;

(f) The Crown failed to engage prior to the Minister's decision to recognise the mandate despite Crown officials acknowledging that best practice in such situations is to engage with those submitters in opposition; and

(g) Those who opposed Tuhoronuku had no financial support from the Crown so as to gather such support and/or participate in the mandating process (e.g. travel, etc.);

(h) Tuhoronuku could not demonstrate or confirm how many of that vote were from Ngati Hine or Te Kapotai.

156. All of the above goes to support the Ngati Hine and Te Kapotai submission that the Crown was focussed on ensuring that Tuhoronuku achieves a mandate at any cost. Whilst the Crown submits that the delays and extra steps added to the mandating process only go to make that mandate and process more robust, we submit that the lack of support, and significant opposition for the mandate following all of those Crown-encouraged processes only go to show that there is not a robust Tuhoronuku mandate and that the Crown erred in recognising that mandate.

157. We submit that the Crown simply rolled the dice because it felt that it would be challenged either way.[145]

158. The Crown picked when and what would suit it in terms of process and following Crown policy. It may have required facilitation and engagement but certainly did not require contact with submitters, contrary to Crown

[145] Wai 2490, #3.1.105, *Memorandum of the Crown response to applications for urgency* [5 June 2014], para 1.

policy and practice.[146] In fact, the specific advice to the Minister was not to engage with submitters.[147]

159. In fact, we submit, that had there been a sufficiently robust mandate and level of support for Tuhoronuku, the Crown would have recognised the mandate much sooner. Instead, the Crown recognised the genuine risk of challenge to the mandate given the lack of support and level of opposition, so set out to tick further boxes – all the while, knowing that very little could be done to address key hapu concerns given the Crown position that major amendment to the proposed mandate would require a further vote.[148]

160. We submit that the significant errors in process and apparent irrationality shown by the Crown's recognition of the Tuhoronuku mandate justify further Tribunal intervention in this instance. Furthermore, we submit that such intervention is justified given the level of opposition to the Tuhoronuku mandate and the Crown's failure to properly consider that opposition once it had its sights fixed on Tuhoronuku. We submit that this is a breach of the Crown's requirement to act fairly and impartially to all Maori, particularly in order to preserve Tribal relations.[149]

161. Knowing what the Crown did regarding the level of opposition and the representative nature of that opposition, the Crown's decision not to engage with submitters prior to recognising the Deed of Mandate on 14 February 2014, simply goes to show the Crown's focus on achieving a Tuhoronuku mandate.[150] This is further supported by the unprecedented

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[146] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 843-844.

[147] Wai 2490, #4.1.003, *Transcript – Hearing Week Two from 4-5 March 2015 at Waitangi Tribunal Office, Wellington* [13 March 2015], pp 40-41; Wai 2490, #A108(a), *Index and appendices to the brief of evidence of Maureen Hickey* [20 November 2014], "MCH42", para 163.

[148] For example, Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], p 624.

[149] Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua*, (Wellington: Legislation Direct, 2005), para 5.3.4.

[150] Wai 2490, #4.1.003, *Transcript – Hearing Week Two from 4-5 March 2015 at Waitangi Tribunal Office, Wellington* [13 March 2015], p 40.

level of Crown funding for Tuhoronuku to undertake a flawed mandating process:[151]

> *From the outset there existed a massive inequity in the resources of the groups. Because of this, the Crown should have supported others through the consultation phase in 2009 to ensure proper consultation took place. As TRAION/Tuhoronuku was more resourced than any other hapu or group, the Crown should have resourced others to create a more even playing field. Instead, the Crown had a preference and had already picked the 'winner' and in my view it tried to remove any possible competition.*

162. As Ms Prime comments, "[t]he mandate process has been purely driven by the Crown and TRAION/Tuhoronuku towards a single comprehensive settlement. The process has never been open, fair and transparent."[152]

163. Following recognition of the mandate, the Crown carried out regular health checks on the mandate for internal purposes. Those health checks showed concern from the Crown as to the strength of the Tuhoronuku mandate thanks to growing opposition and diminishing support. Health checks in May and June 2014 noted:[153]

> *OTS is concerned that the election process has not (at this stage) demonstrated wide support for the Tuhoronuku mandate. However, the election process is ongoing and we will work with Tuhoronuku to develop other strategies to support the mandate.*

164. It included reference to risks/issues such as:[154]

> *Election process challenging for mandate of Tuhoronuku – not wide support*
>
> *…*

[151] Wai 2490, #A078, *Brief of Evidence of Willow-Jean Prime* [12 November 2014], para 129.
[152] Wai 2490, #A078, *Brief of Evidence of Willow-Jean Prime* [12 November 2014], para 54.
[153] Wai 2490, #A139, *Official Information Act Documents #8, 26* [26 November 2014], #26, pp 39-51.
[154] Wai 2490, #A139, *Official Information Act Documents #8, 26* [26 November 2014], #26, pp 39-51.

Insufficient hapu elect hapu kaikorero meaning Crown cannot move to next step of beginning negotiations (could defeat mandate)

165. So rather than acting as an even-handed, honest broker, the Crown was instead focussed on assisting its 'winner' to mend any weakenesses in the mandate. We submit that this is a clear breach of the principle of equity and equal treatment by the Crown. The Crown's actions in continually picking one group over another has only added to the damage to inter and intra hapu relationships and has come at the expense of Ngati Hine and Te Kapotai. It is important to note that these health checks took place only a few months following the Minister's recognition of the mandate, ie after the Crown was satisfied that Tuhoronuku had sufficient support from the hapu.

D. Failure to address concerns

To the Crown, I ask for an open and fair engagement that we can look back on with pride, carry forward with dignity and hang on to honestly without fear of contradiction.[155]

166. The Te Tiriti principle of options considered by a number of Tribunals has two elements:

(a) The opportunity for Maori to consider options and provide feedback; and

(b) A genuine choice as to a way forward that is not dictated by the Crown.

(c) We note that the Tribunal in its decision granting urgency had considered at that point that it seemed that either element was not present in respect of the events they had evidence on.[156]

167. In its revised statement of issues, the Tribunal asks:

[155] Wai 2490, #A063, *Brief of evidence of Waihoroi Shortland* [13 November 2014], para 83.

[156] Wai 2490, #2.5.027, Waitangi Tribunal, *Decision of the Tribunal on the applications for urgency* [12 September 2014], para 192.

(a) What did the Crown do to facilitate or mediate competing views within Ngapuhi; and

(b) How did the Crown respond to the outcomes, facilitation and/or mediation.[157]

168. We have already addressed above the issue of the Crown failing in our submission to consider viable alternative options for mandate and settlement other than Tuhoronuku and the single settlement model. We have also touched upon the failure of the Crown to seriously consider and allow the hapu of Ngapuhi to explore the options outlined in the Te Roopu Whaiti Report which set out four alternative options to the Tuhoronuku representative model.

169. The facilitation/mediation that the Crown funded and supported to address the competing views within Ngapuhi about the future of Treaty Settlements within the region included:

(a) The Bolger facilitation process – July 2011;

(b) Te Roopu Whaiti process – September 2011-March 2012;

(c) The Morgan facilitation process – July 2012-September 2012.

170. The Crown contends that it "pursued facilitation in good faith and on an understanding that parties were willing to engage in good faith"[158] and that "Ministers were willing to delay the mandate process and put substantial resources in to facilitation".[159] To the contrary, we submit that the Crown failed to genuinely facilitate and/or mediate any competing views within Ngapuhi. Instead it saw these steps as part of a tick the box exercise aimed at mitigating the risk of a successful Tribunal challenge to the Tuhoronuku mandate and Crown actions in that regard.[160]

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[157] Wai 2490, #1.4.002, *Revised Statement of Issues* [11 March 2015], issues 6.3-6.4.
[158] Wai 2490, #3.3.14, *Opening Submissions of the Crown* [1 December 2014], para 22.4.
[159] Wai 2490, #3.3.14, *Opening Submissions of the Crown* [1 December 2014], para 22.3.
[160] Wai 2490, #A130, *Brief of Evidence in reply of Willow-Jean Prime* [27 November 2014], para 102, 208, 388, 453.

Bolger Facilitation Process

171. Following concerns raised by Te Kotahitanga, representatives from both Te Kotahitanga and Tuhoronuku met with the Minister on 24 May 2011. This led to facilitated discussions between the two groups with Mr Bolger on 10 June and 27 June 2011. A public hui was then held on 21 July 2011 at Whitiora Marae with Mr Bolger in attendance. That hui was attended by approximately 300 people with the aim of facilitating discussions between Tuhoronuku and Te Kotahitanga on a united approach to resolving the Ngapuhi Te Tiriti grievances.[161]

172. Ms Prime's view of Mr Bolger was that he: [162]

> *…seemed to understand the goal of the Crown very clearly … it felt like he was trying to convince us to give up on the Tribunal hearings because they were a waste of time and money to join Tuhoronuku. He suggested we just have an airing of grievances or some kind of special fast track hearing.*
>
> *…*
>
> *There was an expectation that we would engage in these facilitation processes and meanwhile allow Tuhoronuku to continue to run their process. We took issue with this and refused because it made no sense at all. We were engaged in discussions where we were supposed to reach agreements that would have required changes to be made to the process/structure, and at the same time they were trying to get a mandate from Ngapuhi. We said that we would participate in working groups, only if TRAION/Tuhoronuku did not seek a mandate. TRAION/Tuhoronuku would not commit…*

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[161] Wai 2490, #A011, *Affidavit of Willow-Jean Prime*, [23 April 2014], p 33; Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], p 30; .Wai 2490, #A108(a), *Index and appendicies to the brief of evidence of Maureen Hickey*, [20 November 2014], Exhibit "MCH(2)", p 15.

[162] Wai 2490, #A078, *Brief of Evidence of Willow-Jean Prime*, [12 November 2014], pp 61-62, para 178, 180.

173. Mr Bolger's disregard for the Ngati Hine and Te Kapotai position is evident in his treatment of Ms Prime and his placement of blame squarely on her as a result of her speaking at the hui to present issues on behalf the hapu.[163] We submit that these are not the actions of an 'independent' facilitator with the genuine intent of finding a united approach to the Ngapuhi Te Tiriti grievances.[164]

174. Under cross-examination Mr Bolger made comment that he was at the facilitation, "not with any particular mandate from the Minister with written instructions or guidance, but to try and help the process forward, that's what I sought to do."[165]

175. We submit that the focus on helping the "process" forward was just that, a focus on helping Tuhoronuku move forward with the advertising of their mandate hui – and that is exactly what happened.

176. The fact that Tuhoronuku proceeded to advertise its mandate the day after the public hui with Jim Bolger calls into question whether the facilitation process was in fact genuine and intended to reach any resolution other than the continuation of the mandating process. Mr Tau acknowledged for Tuhoronuku that the adverts had been placed in advance of the meeting but that the newspapers assured Tuhoronuku that they could be "pulled".[166] Even if this was the case, we submit that this shows the extent to which the Bolger facilitation was simply a "tick the box" process and an endeavour to progress the Tuhoronuku mandate.

177. Therefore, despite the Minister's letter to the Tuhoronuku and Te Kotahitanga noting that facilitation works best when conducted in good faith, on a non-binding basis, with open minds rather than fixed positional

[163] Wai 2490, #A110, *Brief of Evidence of Rt Hon. James Brendan Bolger* [20 November 2014], para 11.
[164] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 625.
[165] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 593.
[166] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 1194-1197.

stances,[167] we submit that the suggestion of a Bolger facilitation was never reflective of a genuine desire on the Crown's part to address any issues raised by Te Kotahitanga. Instead it was simply a further attempt to garner support for Tuhoronuku or, at the very least, be seen to be open and engaging with the hapu.[168]

Te Roopu Whaiti Process

178. Following the unsuccessful Bolger facilitation process, the Te Roopu Whaiti technical working group was set up in September 2011 with terms of reference to try and reach an agreement on the way forward in terms of the sequencing of Stage 2 Tribunal hearings, the role of hapu in the settlement process and the role of TRAION. This was a further attempt, at least on the part of Te Kotahitanga on behalf of hapu, to enter into genuine discussions to find a way forward which would be of benefit for the hapu of Ngapuhi.

179. Ms Hickey notes in her evidence for the Crown that, following the mandate hui and the mandate vote result in September 2011:[169]

> *Ministers were concerned that the Crown was being asked to make decisions between groups with a strong likelihood of litigation ensuing from whatever decision was made. They were reluctant to do that and instead were attempting to encourage the parties to work together to agree a path to settlement*.

180. Included in the Terms of Reference for Te Roopu Whaiti was a requirement to report back to Tuhoronuku and Te Kotahitanga jointly on the recommendations of the working group and "by agreement both organisations will report back to Ngapuhi through a joint presentation".[170]

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[167] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], p 30, para 98(c).

[168] Wai 2490, #A078, *Brief of Evidence of Willow-Jean Prime*, [12 November 2014], para 183.

[169] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], pp 47-48, para 183.

[170] Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014], "MCH21", p 1.

181. As noted above, a great deal of work was put into developing alternative models for settlement. This was the purpose of the Te Roopu Whaiti working group as encouraged and supported by the Crown as a prerequisite to the Minister considering the results of the mandate vote. So whilst considerable work was done in this regard and alternative options were developed, Tuhoronuku refused to take those alternative models to for Ngapuhi to consider. The Crown also failed to take up any number of those alternative models for consideration or further discussion with the hapu. As Ms Hickey notes for the Crown:[171]

> *OTS provided advice to the Minister on the report, which included an assessment of whether taking the options presented in the report up to wider Ngāpuhi would be useful. The advice noted the report was incomplete (which I understand to mean that the options presented in the report were not fully developed) and it could nullify previous work Te Roopu o Tūhoronuku had done on its deed of mandate.*

182. The Crown may argue that it is not for the Crown to put those options to Ngapuhi itself; however, we submit that the Crown has the ability to place conditions on any mandate in order for it to be approved and could have also required amendments to the Tuhoronuku Deed of Mandate if it did not consider it robust enough. We submit that the evidence before the Crown sufficiently demonstrated that a robust mandate had not been given to Tuhoronuku. Nonetheless, the Crown chose to ignore that and instead continued to carry out a tick the box exercise of facilitation processes that were not genuine, and in fact were undermined by the Crown, TRAION and Tuhoronuku throughout.[172]

Morgan Facilitation Process

183. A third series of facilitation hui were held with Tukoroirangi Morgan the following year once a Deed of Mandate had been submitted to the Crown by Tuhoronuku. This facilitation process took place between July and

[171] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 138.
[172] Wai 2490, #A078, *Brief of Evidence of Willow-Jean Prime*, [12 November 2014], para 177.

September 2012. The result of the facilitation process was an independent report from Mr Morgan entitled *He Ara Hou: A Proposed Strategy and Pathway to Settlement*.[173]

184. In the background to *He Ara Hou*, Mr Morgan notes the voting statistics for the mandating process already carried out by that time. He noted that, "24 per cent voted against a mandate being granted. The Crown's belief was that this was too high for it to proceed, given the inevitability of court challenges."[174]

185. Importantly, he also noted in those introductory comments:[175]

> *A new mandating process will give the Government confidence that there is broad-based support for settlement negotiations.*
>
> *…*
>
> *What is required is a new start, a clean slate, and a fresh process to build a consensus and broad-based support. A revised electoral process, with hapu grouped, and bound, by whakapapa and history represent such a way forward.*

186. As the Tribunal noted in its decision on the application for urgency, one of Mr Morgan's recommendations from that report was that there be a fresh start to the mandating process. Ms Hickey questions the suggestion for a fresh start in her evidence.[176] Mr Morgan stated in cross-examination that:[177]

(a) The Tuhoronuku structure was not an appropriate structure and was fatally flawed;

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[173] Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014], "MCH23".

[174] Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014], "MCH23", p 7.

[175] Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014], "MCH23", p 8.

[176] Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], pp 47-48, para 162-166.

[177] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 530-532.

(b) That the Tuhoronuku structure was incapable of delivering unity of purpose for a number of reasons, including that it didn't go far enough to be inclusive or to include everyone in all sectors of the Ngapuhi community; and

(c) That a fresh start would absolutely be a way to restore the necessary wairua which doesn't exist within Ngapuhi, in order for them to move forward together.

187. Again, Tuhoronuku sought to undermine this process, publicly rejecting the report as an "amateurish attempt" and essentially rendering the facilitation unsuccessful.[178]

188. With clear recommendations from Mr Morgan before the Crown, ones which enjoyed the support of the hapu, but also with Tuhoronuku's vehement objections to the recommendations, the Crown selected those parts of Mr Morgan's report it wished to implement and, we submit, which its considered would least upset the Tuhoronuku mandating process to date.

189. In our submission, the Crown's refusal to genuinely consider or give effect to the recommendations within *Te Ara Hou* and/or the earlier facilitation processes was a failure on the Crown's part to take a bottom up approach to mandating, focussing on hapu and marae. Not only that, but we submit it was a Te Tiriti breach in failing to act fairly between the various hapu/groups, favouring Tuhoronuku above others.

190. In our submission, the Crown was only prepared to go so far in hearing and responding to the concerns raised by Ngati Hine and Te Kapotai so as to manage litigation risk for itself related to the Tuhoronuku mandate. The Crown continued its focus on a single settlement model for Ngapuhi with Tuhoronuku and it was only prepared to put funding into processes which would either assist Tuhoronuku in achieving a mandate and/or protect the Crown from potential challenge.

[178] Wai 2490, #A011, *Affidavit of Willow-Jean Prime* [23 April 2014] para 102.

Amendments to Mandate

191. We submit that, just as the Crown saw the facilitation processes as tick the box exercises to mitigate its risk, the amendments made to the Deed of Mandate were in the same category. Rather than recognise hapu rangatiratanga, a consistent theme in the significant and consistent opposition to the Tuhoronuku mandate, the Crown simply paid lip service to those concerns by selecting the least onerous conditions to be placed on Tuhoronuku under the mandate, again simply to tick the box in saying that it had responded to hapu concerns. In reality, the Crown was only willing to make some changes around the fringes and resisted any moves for a "fresh start" as recommended by Mr Morgan, who we must add was an independent Crown-appointed facilitator.

192. Post the mandate hui, and prior to the Minister's recognition, Tuhoronuku (in conjunction with the Crown) made amendments to the mandate. In essence, those amendments and/or adjustments covered:

(a) The increase in the number of hapu kaikorero;

(b) Decrease in the number of TRAION seats (although one TRAION seat remains, despite the legal separation between TRAION and Tuhoronuku);

(c) Confirmation that the the Stage 2 hearings could proceed before the Waitangi Tribunal at the same time as negotiations progressed with the Crown.

193. Those amendments and changes to the overall mandating process and Tuhoronuku structure recognised some of the concerns raised by Ngati Hine and Te Kapotai across a mountain of correspondence and engagement with the Crown and Tuhoronuku. They did not however address the fundamental issue raised by Ngati Hine and Te Kapotai since well prior to the mandate hui which was that settlement negotiations should be hapu-led, rather than something created by either TRAION or Tuhoronuku.[179] The importance of hapu autonomy was consistently

[179] Wai 2490, #A005, *Affidavit of Peter William Tipene* [19 September 2011], Appendix C.

reiterated to the Crown yet any steps taken were merely paying lip service to the Ngati Hine and Te Kapotai concerns in this regard.

194. The Minister then placed the following conditions on the Tuhoronuku mandate, when recognising it,

(a) A requirement that Tuhoronuku include in Terms of Negotiation, a detailed communication and negotiation plan outlining communications with the Ngapuhi claimant community during negotiations;

(b) A requirement for three-monthly mandate maintenance reports for the Crown regarding the implementation of the communication and negotiation plan;

(c) A requirement to undertake consultation with Ngapuhi on post settlement governance entity options during the Agreement in Principle stage in negotiations;

(d) Deed of Mandate to be amended to ensure only elected members can vote, not proxy representatives; and

(e) The technical terms of the claimant definition must be agreed with the Crown for Terms of Negotiation, based on descent from Rahiri and the area of interest for Te Whare Tapu o Ngapuhi, including the hapu listed in the amended Deed of Mandate. Consultation is to take place with Te Aupouri, Te Roroa and Ngati Whatua o Kaipara regarding overlapping issues.

195. The Crown suggests that the process leading towards the Crown recognition of the mandate was fair and reasonable, partly because of the facilitation that lead to changes to the Tuhoronuku proposed structure.[180] We have already canvassed the considerable issues with the facilitation processes carried out but submit that the changes to the Tuhoronuku proposed structure are nothing more than generic requirements included

[180] Wai 2490, #3.3.014, *Opening Submissions of the Crown* [1 December 2014], para 6.1.

in numerous other Deeds of Mandate, including mandate maintenance reports and the inclusion of hapu in the negotiations process.

196. We submit that the only non-standard condition placed on the mandate was the requirement to consult early on post settlement governance entities. Even then, we submit that this is something which is becoming more common at an early stage of negotiations and was not considered the key change from the Crown's perspective as noted in the internal OTS communications:[181]

> *While devolution of settlement assets to hapu is mentioned, the majority of concerns are more about who will run and control the negotiations, rather than how the settlement assets will be held post-settlement.*

197. Of further concern for Ngati Hine and Te Kapotai is that, in their experience, the concept of Crown/Tuhoronuku consultation is that it is merely a tick the box exercise on the way to a pre-determined outcome.

198. Fundamentally, the conditions placed on the mandate in no way address the major concerns raised by Ngati Hine and Te Kapotai regarding the protection of their hapu autonomy and rangatiratanga as part of any Treaty settlement negotiations. Nor do they adequately respond to the major flaws in the Tuhoronuku mandate process accepted by the Crown and which led to, we submit, far inadequate support for the Tuhoronuku mandate. There is no provision in the Deed of Mandate outlining the consequences of a breach of any of those conditions placed on Tuhoronuku. So even if those conditions were to address the hapu issues, what certainty is there that they will be enforced? The evidence before this Tribunal indicates that the Crown can pick and choose when to enforce Crown policy when it suits.

199. Again, much has been made by the Crown of the steps taken to amend the mandate in response to various issues raised by hapu and claimants, and also their steps prior to that. It is clear, in our submission, that the

[181] Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], pp 630.

Crown was really only ever prepared to tinker with the Deed of Mandate rather than make any significant changes that might genuinely address hapu concerns which the Crown had been aware of for at least half a decade.[182]

> *Whatever changes were made to the process, whatever tweaks were made to the Deed of Mandate, whatever conditions were attached to the Deed of Mandate, they were never mutually agreed. The Crown and Tuhoronuku just picked and chose and that was it. They would pick issues that suited them, and typically not the ones that would resolve our concerns…*

E. Withdrawal Provisions

> *How do we withdraw our hapu from the Tuhoronuku Deed of Mandate? The simple answer is that without the assistance of this Tribunal, we cannot. We are being forced into this mandate, and our claims will be settled and extinguished without our mandate or consent.*[183]

200. Despite the ongoing and consistent opposition to the inclusion of Ngati Hine and Te Kapotai in the Deed of Mandate for Tuhoronuku the Crown formally recognised that mandate without any clear process for hapu to withdraw. In its decision granting urgency, the Tribunal agreed that the process for withdrawal included in the Tuhoronuku Deed of Mandate, recognised by the Crown, is likely to be unfair, resulting in significant prejudice to the claimants.[184]

201. We have decided to address this issue separately, even though it is part of the overall claims relating to the flaws in the mandating process, because it is in our submission the a specific example of how the Crown has usurped hapu rangatiratanga and mana. It also highlights in our submissions, the Crown's true intention of ensuring that a single

[182] Wai 2490, #A078, *Brief of Evidence of Willow-Jean Prime*, [12 November 2014], para 173-174, 184.
[183] Wai 2490, #A130, *Brief of Evidence in Reply of Willow-Jean Prime* [27 November 2014], para 75.
[184] Wai 2490, #2.5.027, Waitangi Tribunal, *Decision of the Tribunal on the applications for urgency* [12 September 2014], para 184.

settlement model was always its only option and it was never a true hapu model that the Crown and Tuhoronuku represent it is.[185]

202. The Crown conditionally recognised the Tuhoronuku Deed of Mandate on 14 February 2014. No hapu withdrawal provisions or specific provisions as to a general amendment to mandate were included in the Deed of Mandate. We submit that the Crown decision effectively imprisoned Ngati Hine and Te Kapotai within the Tuhoronuku mandate they had strongly opposed since the outset.

203. Ms Hickey acknowledges in her evidence for the Crown that a number of parties sought clarification regarding the provisions for withdrawal of mandate.[186]

204. With nothing specifically recorded in the Deed of Mandate, in order for a group to withdraw from the Tuhoronuku mandate, the Crown would require a sufficiently robust process requiring detailed notification and engagement with the entire Ngapuhi claimant community.[187] Even then, with such a process being followed, the Crown would need to assess the impact of any such process on the mandate given that:[188]

> *Tūhoronuku sought a mandate from the Ngāpuhi claimant community as a whole, rather than on a hapū by hapū basis…any withdrawal from the mandate will have an impact on all Ngāpuhi and if that process is not sufficiently consultative it could prompt criticism by Ngāpuhi members on the basis that it is fracturing the iwi.*

205. Despite the significant opposition to the mandate that was evident throughout the mandating process, including the voting and submission process, the Crown maintains its position that Tuhoronuku was/is

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185 Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], paras 199.1-199.2, and para 215.

186 Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], p 86, para 286; Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 817.

187 Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 828-829.

188 Wai 2490, #A108, *Brief of Evidence of Maureen Hickey* [20 November 2014], para 287.

supported by "a sufficient majority of the Ngapuhi claimant community".[189] Ms Hickey acknowledged that there was no detail confirmed by the Crown around what a "sufficiently robust process" might look like and accepted that, on the face of it, one interpretation was to go through a process akin to what Tuhoronuku did to achieve the mandate.[190] Under cross-examination, Ms Hickey also acknowledged that such a process would likely require a number of hui, potentially 20, including hui outside of the Ngapuhi takiwa and in Australia – all sufficiently advertised.[191]

206. We submit that this approach is unreasonable, irrational and a clear misapplication of tikanga by removing hapu autonomy all together in terms of the mandating process. What adds to the Crown's failure to protect the hapu autonomy and act fairly towards Ngati Hine and Te Kapotai, is the Crown's lack of commitment to fund any such "sufficiently robust process" for withdrawal.[192]

207. In circumstances where the Crown will not make a commitment to negotiate separately with Ngati Hine or Te Kapotai, should they seek to formally withdraw from the mandate, they are further imprisoned. Under cross-examination, Ms Hickey acknowledged for the Crown the level of support required, even beyond the original mandate hui process for Tuhoronuku:[193]

> ***AIDAN WARREN:***
>
> *If the hapū of Te Takutai Moana, for example, or those that approached the Crown with a deed of mandate or mandate strategy to consider decided to withdraw, you'd expect them to have a hui to discuss withdraw within their rohe wouldn't you?*

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[189] Wai 2490, #A026(a), *Index and exhibits to the affidavit of Maureen Cecelia Hickey* [6 June 2014], "MCH42", p 432.

[190] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 828-829.

[191] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 831.

[192] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 832-834.

[193] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 832.

MAUREEN HICKEY:

Yes.

AIDAN WARREN:

But we know of course there wasn't even a mandating hui within their rohe, do you accept that?

MAUREEN HICKEY:

Accept that, yes with the planned mandate hui in their rohe was cancelled.

208. We submit that, once the Crown had found its 'winner' in Tuhoronuku that could offer its preference for a single settlement, it was never open to alternatives which involved genuine discussions with hapu on another structure. So whilst the Crown's position is that any hapu withdrawal process would undermine the mandate recognised by the people, it is not a "simple veto on the intention of the wider iwi".[194] In this regard there are two key points to make:

(a) The Crown suggestion that the removal of a hapu such as Ngati Hine and/or Te Kapotai would be a "veto on the intention of the wider iwi" seems strange where the Crown has acknowledged that hapu are before the Tribunal here with Ngati Hine and Te Kapotai, not simply individuals,[195] and the numbers of those who voted in support of the mandate are but a small minority of the total population of Ngapuhi; and

(b) A hapu withdrawal clause would not therefore have the effect of removing any Tuhoronuku mandate, but rather removing hapu who have been clear since the outset of negotiation discussions that this is not the way in which they seek to have their Te Tiriti claims settled.

[194] Wai 2490, #4.1.002, T*ranscript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 835.

[195] Wai 2429, #2.5.11, Waitangi Tribunal, *Decision on Application for Urgency*, para 118.

209. It is accepted by Ms Hickey for the Crown that a mandate is about support.[196] We submit that the level of support for the Tuhoronuku mandate is not sufficient to justify the Crown's continued engagement with Tuhoronuku on behalf of all Ngapuhi, particularly when considered against the significant level of opposition to that mandate.

210. We know from the Official Information Act requests that the Crown's position on a hapu withdrawing from the mandate was essentially that a bottom line be established that a Ngapuhi mandate cannot allow for hapu to withdraw as it would fundamentally destabilise the mandate for Tuhoronuku and any settlement negotiations.[197] We submit that the real destabilising factor in this process is the Crown's unwavering commitment to achieving a single settlement for Ngapuhi and assisting Tuhoronuku to gather support, in the face of clear and significant opposition from hapu and Ngapuhi individuals.

211. The Crown has acknowledged that it would not have seen a hapu withdrawal mechanism as being appropriate in this mandate but Ms Hickey insists that this was not something which the Crown "led the charge on". We, however, submit that, the option was open to the Crown to include a hapu withdrawal mechanism and/or required that Tuhoronuku include this in their Deed of Mandate given the significant level of opposition from hapu and the considerable number of submissions received on this point. In fact, Ms Hickey acknowledged this under cross-examination, that a hapu withdrawal clause is possible and has previously been used for Tuwharetoa.[198]

212. We further submit that there was ample opportunity for this to happen given these discussions throughout and the consistent message from hapu such as Ngati Hine and Te Kapotai to be removed from the mandate. This included opportunity at the hapu kaikorero hui held on 18 February 2011 where Tuhoronuku expressly agreed that those hapu who tabled

[196] Wai 2490, #4.1.002, T*ranscript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 834.
[197] Wai 2490, #A011(a), *Index and exhibits to the affidavit of Willow-Jean Prime* [9 May 2014], p 2953.
[198] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 821-822.

letters seeking to be removed from the Deed of Mandate would no longer be included in the mandate strategy for Tuhoronuku.[199] We submit that the Crown knew that the hapu looking to withdraw, would be successful, they were significant hapu and their newly recognised mandate would look very shaky. That is why there was no clear withdraw mechanism in the Tuhoronuku Deed of Mandate. Ms Hickey argued that this issue was only raised late in the process. It could only ever be raised once Ngati Hine and Te Kapotai had the Deed of Mandate available.

213. The Crown emphasises, as it suits, that it is a Tuhoronuku Deed of Mandate and that a hapu by hapu clause would not have therefore been imposed by the Crown.[200] We submit however that the Crown could have, and should have, at the very least, put that option to the hapu of Ngapuhi in accordance with the principle of options, to address issues known to the Crown regarding hapu autonomy. To the contrary, Crown officials considered such a clause inappropriate and were recommending to the Minister a bottom line that a withdrawal clause would be unacceptable here.[201]

214. The failure to include a hapu withdrawal clause effectively means that the only way out for hapu who oppose their inclusion in the Deed of Mandate is to remove the mandate altogether. Even then, and regardless of how a hapu might fund such a 'robust' withdrawal process, the Crown has the ultimate decision-making power to recognise the results of such a withdrawal process. In our submission, such a process is plainly irrational and a complete misapplication of tikanga.

E. Relationships

> *The Crown in its actions of refusing to step back from and stop this process, has caused division, suspicion, bitterness, embarrassment, hatred and mistrust amongst the people and*

[199] Wai 2490, #A011(a), *Index and exhibits to the affidavit of Willow-Jean Prime* [9 May 2014], Annexure A(g).
[200] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 1080.
[201] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 1080-1081.

> *tribes of Ngapuhi. Without the assistance of this Tribunal I cannot really see an end to these issues we have raised and the prejudice that we are suffering.*[202]

215. In its decision granting urgency, the Tribunal did not accept that the level of dissention within Ngapuhi, as highlighted by the evidence, that the Tribunal had available to the Tribunal at the time, was necessarily the outcome of a fair but hard-fought mandate contest, as argued by the Crown.[203]

216. The Tribunal went on to say that:[204]

> *We agree that the level of dissension and conflict within Ngāpuhi reflects poorly on the Crown's management of its relationships with and between iwi and hapū groups before, during and after the mandating process, and is likely to have caused the claimants serious and irreversible prejudice.*

217. Ngati Hine and Te Kapotai argued consistently throughout the Inquiry that the most significant and irreversible prejudice caused by the Crown's performance here has been the relationship issues created by conflict in the mandating process and by the recognition of the Tuhoronuku Deed of Mandate.[205]

218. The Crown acknowledges the dissention within Ngapuhi, but argues that the best opportunity to resolve the issues that currently divide Ngapuhi is for all parties to work together towards a unified settlement within the Deed of Mandate process.[206] We ask the Tribunal to assess how reasonable this statement is in light of the evidence placed before it. Ngati Hine and Te Kapotai have no issue working together with other

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[202] Wai 2490, #A061, *Brief of evidence of Rowena Tana* [13 November 2014], para 11.
[203] Wai 2490, #2.5.027, *Decision of the Tribunal on the Applications for Urgency* [12 September 2014], para 198 -199.
[204] Wai 2490, #2.5.027, *Decision of the Tribunal on the Applications forUrgency* [12 September 2014], para 201.
[205] Wai 2490, #3.1.126, *Submissions in support of the application by Ngati Hine and Te Kapotai for an Urgent Inquiry by the Waitangi Tribunal* [16 June 2014], para 104-110.
[206] Wai 2490, #2.5.027, *Decision of the Tribunal on the Applications for Urgency* [12 September 2014], para 198.

hapu, they have done this for centuries. But they do so when they decide to following consideration of the issues, options and desired outcomes.

219. We submit that the concept of Ngapuhi as a collective, where hapu are 'obliged' to join has been overstated and used here to support the single settlement approach.[207] Mr Shortland provides the Ngati Hine perspective on this point:[208]

> *… in our historical encounters with the Crown, we have long and abiding alliances with hapu from within our own auspices, which have always been determined by hapu and between hapu. At other times, some alliances have been consensul by nature but not always obligatory. Ngapuhi under such circumstances is at best, a flag of convenience. While Tuhoronuku and the Crown wave the Ngapuhi flag as if it was a rallying symbol, it is one that hapu like Ngati Hine has chosen not to answer.*

220. The Tribunal has asked in its statement of issues - to what extent is the Crown culpable for any negative impact on relationships.[209] We submit that there can be no doubt that there already has been a significant impact on inter and intra hapu relationships as a result of the Tuhoronuku mandating process. The only remaining issue then for this Tribunal to determine is the extent of that impact and how much can be attributed to the Crown's performance.

221. It is important for the Tribunal to assess the extent of any negative impact within a Maori paradigm that takes into account concepts such as mana, tikanga, and wairua:[210]

> *The nature and extent of prejudices described in the Tribunal's Practie Note is unrestricted in ambit and certainly not confined only to financial or tangible detriment;*

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[207] Wai 2490, #A098, *Brief of Evidence of Raniera (Sonny) Teitinga Tau* [19 November 2014] para 3.10-3.29.
[208] Wai 2490, #A012, *Affidavit of Waihoroi Shortland* [12 May 2014], para 35.
[209] Wai 2490, #1.4.002, *Tribunal Statement of Issues* [11 March 2015], issue 11.2.
[210] Wai 2421, #2.5.008, *Decision of the Tribunal on Application for Urgency in the Muaupoko Urgency Inquiry* [10 June 2014], pp 12-13.

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

222. We submit that the evidence is littered with examples of how inter and intra hapu relationships have been seriously impacted upon, directly by Crown actions and/or omissions.

223. The decision to work with TRAION when the Crown had evidence as early as September 2008 that groups did not want TRAION to run the settlement negotiation process was a bad start. It remains abhorrent to Ngati Hine and Te Kapotai that TRAION continues to have a seat on TMI for no apparent reason. What value does TRAION add and which hapu does it represent, if this truly is a hapu based model as advocated by the Crown and Tuhoronuku?

224. The Crown's focus on one group, and on a single settlement model created a "winner and loser" dynamic which the Tribunal identified led to the breakdown of relationships within Ngapuhi.[211]

225. As the Tribunal has already noted, this is a very serious matter and a number of Tribunals have previously commented on the importance of the Crown maintaining relationships between Māori by acting in a fair and even-handed manner.[212]

226. Having picked its "winner" the Crown, in our submission, further entrenched the winner and loser dynamic and in turn exacerbated the tension between the parties, by effectively allowing and/or not adequately addressing the way in which Tuhoronuku behaved throughout the process.

227. Some important examples include:

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[211] Wai 2490, #2.5.019, *Decision of the Tribunal on the Applications of Urgency* [12 September 2014], para 199.

[212] Wai 2490, #2.5.019, *Memorandum-Directions of the Chairperson concerning the appointment of the Tribunal Panel and the unavailability of Miriama Evans* [9 June 2014], p 35, para 200.

(a) TRAION and Tuhoronuku representatives and supporters representing to the iwi that "Ngati Hine wants to divide Ngapuhi to go it alone and take half of the fish asset".[213] The ability of Ngati Hine to withdraw from TRAION is a statutory right.

(b) Tuhoronuku continued to include Mr Henare's name and photograph in the Tuhoronuku promotional material following Mr Henare's resignation from any further involvement with the Tuhoronuku proposal;[214]

(c) Pita Tipene was suspended from parts of the TRAION Board discussions regarding Tuhoronuku on the basis of some alleged conflict of interest.[215] This had the effect of keeping Ngati Hine outside of the process from the outset.

(d) Tuhoronuku did not hold mandating hui in the Bay of Islands sub-region or Te Rohe Whenua o Ngati Hine.[216] Yet the Minister still felt that the process was good enough to recognise the mandate.

(e) Tuhoronuku did not push for the recommendations in the Te Roopu Whaiti Report to be discussed by the hapu of Ngapuhi. Ngati Hine and Te Kapotai argue that this may have resolved some of the major issues;[217]

(f) There is ample evidence throughout the affidavits filed by Ngati Hine and Te Kapotai that Tuhoronuku was manipulating the information it provided to Ngapuhi to attain votes in favour of its proposal. For example, there is an allegation that Tuhoronuku failed to accurately record or provide minutes from the mandating hui;[218]

(g) Ms Prime gave evidence that Tuhoronuku had removed comments that were in opposition to the mandate process from

[213] Wai 2490, #A014, *Affidavit of Johnson Erima Henare* [14 May 2014], para 10.
[214] Wai 2490, #A014, *Affidavit of Johnson Erima Henare* [14 May 2014], para 14.
[215] Wai 2490, #A013, *Affidavit of Pita Tipene* [10 May 2014], para 4-7.
[216] Wai 2490, #A013, *Affidavit of Pita Tipene* [10 May 2014], para 14-15.
[217] Wai 2490, #A013, *Affidavit of Pita Tipene* [10 May 2014], para 31.
[218] Wai 2490, #A011, *Affidavit of Willow-Jean Prime* [23 April 2014], para 36(e), 61-65.

its Facebook page and then removed the ability of people to post their opinions on the Tuhoronuku Facebook page;[219]

(h) People who attended the mandating hui were asked not to engage or communicate with the Crown observers, yet as Ms Prime confirms members of the Tuhoronuku sub-committee were in communication with the various Crown observers throughout the entire series of hui.[220]

228. In contrast, we submit that the evidence reflects that Ngati Hine and Te Kapotai sought to actively engage with Tuhoronuku and the Crown to ascertain whether the hapu could join and support Tuhoronuku.[221] This, we submit, was consistent with their tikanga and showed honest attempts to resolve their issues directly with the Crown and Tuhoronuku.

229. The Tribunal will also be well aware of the attitude shown by Mr Tau in particular, who:

(a) Publicly criticised *He Ara Hou*.[222] In cross-examination Mr Tau responded to this issue by saying "I slammed him". Although it is acknowledged that Mr Tau is not Tuhoronuku, he did accept under cross-examination that his views expressed in the media about Mr Morgan's report was the position of Tuhoronuku;[223]

(b) Disregarded directions from the Tribunal by making public statements criticising the Tribunal;

(c) Was accused on a number of occasions by Ngati Hine and Te Kapotai witnesses of giving misinformation at important mandating hui.[224]

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[219] Wai 2490, #A011, *Affidavit of Willow-Jean Prime* [23 April 2014], para 36(e), 70.
[220] Wai 2490, #A011, *Affidavit of Willow-Jean Prime* [23 April 2014], para 36(e), 69.
[221] Wai 2490, #A011, *Affidavit of Willow-Jean Prime* [23 April 2014], para 36.
[222] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 1199, para 10.
[223] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], p 1199, para 15.
[224] Wai 2490, #A11, *Brief of Evidence of Willow-Jean Prime* [23 April 2014], pp 554-562; Wai 2490, #A78, *Brief of Evidence of Willow-Jean Prime* [12 November 2014], para 59,

230. We submit that the Crown was well aware of the behaviour of Tuhoronuku and more specifically some of the incorrect messages being conveyed by Tuhoronuku which were concerning.[225] We submit that the Crown did very little to address these issues.

231. We submit that the Tribunal is entitled to look at the performance of Tuhoronuku and its leadership, and then ask the important question what, if anything, did the Crown do to ensure that relationships between and amongst the hapu were not being destroyed?

232. We submit that the Crown had lost its impartiality and its ability to be fair and even handed and therefore was in breach of the principle of partnership. The hapu in opposition could see clearly that they were being treated differently , they did not have the ear of the Crown because they had differing views on how the settlement negotiations should be progressed. This placed the hapu into immediate conflict.

233. Crown officials knew for some time that there was a significant level of opposition that grew and arguably solidified by February 2014 when the Deed of Mandate was recognised.[226]

234. If, as the Tamaki Makaurau Tribunal found, Te Tiriti is about relationships and they lie at its very core, how can it be said that the Crown-driven process has maintained or improved the relationships between the hapu of Ngapuhi and within the hapu themselves?

235. The Tamaki Makauarau Tribunal found that Te Tiriti confirms rangatiratanga and being a rangatira is about relationships too; between the rangatira and his people and between different hapu and iwi. If that is right, then how can it be said that the Crown-sponsored Tuhoronuku mandating process promoted any sense of rangatiratanga between hapu?

68-69, 93, 96; Wai 2490, #A61, *Brief of Evidence of Rowena Tana* [13 November 2014] p 3, para 7, 13-14.

[225] Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], p 129.

[226] Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], pp 629-635.

236. We submit that the Tribunal should find, as it did in its decision granting urgency, that the level of dissention and conflict within Ngapuhi reflects poorly on the Crown's management of its relations with and between iwi/hapu groups before, during and after the mandating process.[227]

237. Mr Shortland puts the same sentiments into a Maori context when he stated that, "[t]he Tuhoronuku mandate had divided what remains of the sacred house of Ngapuhi like nothing else in our recent history…"[228]

Recommendations Sought

238. We have no doubt that the Tribunal will find fault with the Crown's performance in the current circumstances amounting to breaches of Te Tiriti principles. The focus then shifts to what the solutions and options are to remedy the faults, and to remove the significant prejudice to Ngati Hine and Te Kapotai, and all others who oppose this mandate.

239. Before addressing the recommendations sought, we seek to dispel some myths about Te Tiriti settlement aspirations of Ngati Hine and Te Kapotai.

240. Despite representations to the contrary, these hapu have never sought to negotiate and settle their historical Te Tiriti claims by themselves. We submit that Tuhoronuku, and to some extent the Crown, have unfairly singled out Ngati Hine as a group agitating for separate consideration. The statutory right of Ngati Hine to withdraw its fisheries assets from TRAION has been manipulated to show that Ngati Hine somehow wanted the same treatment for the land claims. That has never been the case and is vehemently rejected by Ngati Hine.

241. Both hapu are of course, part of Te Takutai Moana collective, who collectively sought to engage with the Crown for separate consideration as a mandated body. This was rejected by the Crown when it stated that Crown policy is not to engage with other groups while another group within the rohe is in the mandating process.

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[227] Wai 2490, #2.5.019, *Decision of the Tribunal on the Applications of Urgency* [12 September 2014], para 201.

[228] Wai 2490, #A012, *Affidavit of Waihoroi Shortland* [12 May 2014], p 9.

242. Why then - if there is no evidence that Ngati Hine sought separate consideration - was the Crown preparing a quantum assessment for Ngati Hine behind the scenes following Crown recognition of the Tuhoronuku Deed of Mandate? Mr Fyfe could not adequately explain why the Crown was doing that:[229]

> ***AIDAN WARREN:***
>
> *Just over the page at page 49 you'll see halfway down there's a box there under the heading "Factor", "Quantum status". You see that?*
>
> ***NIGEL FYFE:***
>
> *Yes.*
>
> ***AIDAN WARREN:***
>
> *Down the bottom it says, "Seeking quantum forecast for Ngāti Hine."*
>
> ***NIGEL FYFE:***
>
> *Yes.*
>
> ***AIDAN WARREN:***
>
> *Is that something Ngāti Hine asked the Crown to review, assess?*
>
> ***NIGEL FYFE:***
>
> *Not that I'm aware of, but I don't know –*
>
> ***AIDAN WARREN:***
>
> *What does that mean?*
>
> ***NIGEL FYFE:***
>
> *It means, "Seeking quantum forecast for Ngāti Hine."*
>
> ***AIDAN WARREN:***
>
> *Why is that?*
>
> ***NIGEL FYFE:***

[229] Wai 2490, #4.1.002, *Transcript – Hearing Week One from 1-5 December 2014 at Copthorne Hotel, Waitangi* [3 February 2015], pp 706-708.

I imagine we were interested in what a quantum forecast for Ngāti Hine might be.

AIDAN WARREN:

For what end?

NIGEL FYFE:

Because it might be interesting.

AIDAN WARREN:

Was it interesting?

NIGEL FYFE:

I wish I could answer that, but actually I don't think we've received a quantum forecast for Ngāti Hine.

AIDAN WARREN:

When you do…

NIGEL FYFE:

You'll be the first.

243. If the Minister was satisfied that Ngati Hine members sufficiently supported Tuhoronuku, we submit that there ought to have been no need to look at separate quantum assessments?[230]

244. We submit that the more reasonable answer as to why the Crown was closely looking at the Ngati Hine position after the mandate was recognised was, as the Health Check documents confirmed, that Tuhoronuku did not have the support of Ngati Hine. The Crown knew that it needed Ngati Hine on board, as a large Ngapuhi hapu with strong leadership, to get the settlement negotiations moving.

245. For the avoidance of doubt, Ngati Hine has never asked for the Crown to treat them separately and whilst there may well be aspirations for separate redress at a certain level, they are, as are Te Kapotai, committed to Te Takutai Moana collective for the purposes of settlement negotiations.

[230] Wai 2490, #4.1.003, T*ranscript – Hearing Week Two from 4-5 March 2015 at Waitangi Tribunal Office, Wellington* [13 March 2015], pp 27-29.

246. In opening submissions, we submitted that Ngati Hine and Te Kapotai sought recommendations which urge in the strongest possible terms that the Crown:

(a) End all negotiations with Tuhoronuku and revoke its "mandate"; and

(b) Immediately engage with the hapu of Ngapuhi to establish a meaningful framework for the settlement of hapu historical Te Tiriti claims, that protects hapu autonomy and their right to complete their claims before the Tribunal; or, alternatively

(c) Withdraw Ngati Hine and Te Kapotai (and any others who seek to be withdrawn) from the Tuhoronuku Deed of Mandate.[231]

247. That position has not changed and has in fact strengthened in light of the Crown and Tuhoronuku decision to proceed to enter into Terms of Negotiation before the Tribunal has issued its report.

248. We submit that the recommendations sought above are reasonable in the circumstances, when the Tribunal takes into account the following factors:

(a) The Crown has been the master of its own demise. It changed the rules to suit and clearly identified for itself the risks of doing so, particularly around funding policies. The Crown is already alive to the reality that separate settlements may well eventuate, stating that funding allocations would need to be reviewed if the single settlement model becomes untenable and there is a split into multiple settlement negotiations.[232] Reconsideration of the settlement negotiations model is needed and it is an issue that Ngapuhi needs to engage on collectively;

(b) Further tweaks to the Tuhoronuku Deed of Mandate itself are, in our submission, not going to provide a sustainable solution.

[231] Wai 2490, #3.3.010, *Opening Submissions on behalf of Ngati Hine and Te Kapotai in respect of the Ngapuhi Mandate Inquiry*, [28 November 2014], para 76.

[232] Wai 2490, #A151, *Common bundle of documents for hearing held on 4th and 5th March 2015* [27 February 2015], pp 322-325.

Tweaking the Deed of Mandate does not address fundamental concerns about the model, hapu rangatiratanga and representation, and the role of TRAION. With respect, any recommendations to simply tweak the existing Deed of Mandate will not work, because we know that this has not worked to date. We submit that something different is required:

(c) Ms Hickey confirmed for the Crown that no other hapu have elected hapu kaikorero since the fresh elections in June/July 2014. It is of course now well over a year since the Minister conditionally recognised the Tuhoronuku Deed of Mandate. There must be real concerns that Tuhoronuku does not have enough support to enter into negotiations. The Tribunal in the *Te Arawa Mandate Report* found that for negotiations to proceed with just over half of Te Arawa, leaving the other groups waiting (for an unspecified time) for an opportunity to negotiate and settle their claims, would be inconsistent with Te Tiriti principles. Although a slightly different context, the simple point is the same - how can Tuhoronuku enter into formal negotiations when there is so much opposition, insufficient hapu kaikorero and significant hapu groups including Ngati Hine and Te Kapotai standing outside of the mandate?

249. The Tamaki Makaurau Tribunal strongly recommended that the draft settlement for Ngati Whatua Orakei had to be stopped it its tracks so to allow other hapu/iwi to basically catch up as they were nowhere near the negotiation table.[233]

250. In making this recommendation, the Tribunal found that although the Crown LNG policy has a sensible underpinning, its implementation on the ground in Tamaki Makaurau was not sensible. It found that a more considered and rational approach was required to identify the best grouping for negotiations in Tamaki Makaurau. Identifying such a

[233] Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 108.

grouping should always involve talking to all tangata whenua groups who will be affected by a settlement in their area.[234]

251. This type of engagement was missing at the outset with respect to the right model for that hapu of Ngapuhi. This engagement still needs to occur before any negotiations commence. The Tamaki Makaurau Tribunal was prepared to recommend the complete halt to negotiations, where an agreement in principle (a draft settlement) had already been negotiated. In this context no redress has been agreed (we hope), and because the mandate is so important as confirmed in the *Red Book*,[235] halting the process now is far less problematic. This is not like *East Coast Inquiry* where the mandated group was on the cusp of a full and final settlement, they are at the starting gate. We submit that getting it right at the outset is fundamental. The relationships will not mend if the parties are allowed to box on. The hapu will continue to fight and challenge at every milestone.

252. The suggestion that the Crown engage with the hapu to explore a meaningful framework for the settlement of their claims is one consistent with their tikanga, and their approach up until the mandate was recognised. It is one that the Tribunal in the Tamaki Makaurau context said was missing. Ngati Hine and Te Kapotai do not wish to prescribe what the facilitation or engagement process might look like. That is for the hapu, in consultation with the Crown, to determine. That said, there are some key bottom lines:

(a) All hapu should be invited to be involved;

(b) There is no need for TRAION to be involved;

(c) There must be a discussion on all relevant models for settlement negotiations; and

(d) The Crown should fund the engagement process.

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[234] Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007).

[235] 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), p 44.

253. Overall, we submit that Mr Morgan's statement that there needs to be a "fresh start" was correct at the time and remains so today. The Crown's *Red Book* is appropriately titled *Ka Tika a Muri, ka tika a mua/Healing the past, building the future* because that must be the aim of Treaty settlements. This mandate will not heal the past, it has in fact created a further environment for grievance and pain. It will not build the future for the hapu of Ngapuhi.

> *Ngati Hine have always anticipated that achieving a settlement of our historic grievances would be a quintessential moment in restoring our Te Tiriti o Waitangi relationship with the Crown. Settlement is an affirmative act of the above metaphor. What we never foresaw is that the Crown would attempt to fully and finally settle our Te Tiriti o Waitangi claims with a group that we have never endorsed and the situation that we find ourselves in today, is that Ngati Hine are not hand in hand, nor side by side with the Crown on the matter of settlement.*[236]

Dated this 25th day of March 2015

Aidan Warren / Season-Mary Downs / Renika Siciliano
Counsel for Ngati Hine and Te Kapotai

[236] Wai 2490, #A033, *Affidavit of Erima Henare in reply* [13 June 2014], para 5-6.