IN THE WAITANGI TRIBUNAL

WAI 2490
WAI 2442

IN THE MATTER OF	The Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	the Ngapuhi Mandate Inquiry
AND	
IN THE MATTER OF	a claim by Frank Rawiri and Bobby Newson on behalf of themselves and Nga Tauira Tawhito o Hato Petera

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CLOSING SUBMISSIONS FOR NGA TAUIRA TAWHITO O HATO PETERA

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Introduction

1. This claim is brought on behalf of Francis (Frank) Rawiri, the named co-claimant Bobby Newson, and Nga Tauira Tawhito o Hato Petera ("Ngā Tauira" or "the Claimants"). Ngā Tauira's Wai 1385 historical Treaty claim is currently being heard by the Te Paparahi ā Te Raki Inquiry.

2. Ngā Tauira do not wish to be represented by Tūhoronuku, and will be prejudiced by the Crown's settlement with Tūhoronuku.

3. Ngā Tauira wishes to have their claims heard by the Waitangi Tribunal and reported on. They will seek binding recommendations from the Waitangi Tribunal in relation to certain State-owned education lands and so holdings by the Wai 1040 Tribunal that their Wai 1385 Treaty claim is well-founded are essential. Ngā Tauira further believes that due to its unique claim situation as a pan-tribal entity, the Crown must settle their grievances independently of Tūhoronuku and of any settlement entity other than themselves.

4. The submissions below address the following issue in the Tribunal Statement of Issues:

   10.3 In its application of the settlement process, has the Crown actively protected the rights and interests of those who have filed claims.

5. With regard to representation, the Claimants' evidence is that they represent the 1200 members of Nga Tauira Tawhito o Hato Petera.[1]

Tuhoronuku claimant group definition is Ngāpuhi

5. By way of the Tūhoronuku Deed of Mandate Addendum ("Tūhoronuku Addendum"), Tūhoronuku purport to represent the descendants of Rāhiri

[1] Wai 2341, #A24, para 4.

and all of Ngāpuhi in settlement negotiations with the Crown.[2] In breach of the Treaty principles of active protection, reasonableness and good faith, the Crown's approval of the Tūhoronuku Deed of Mandate ("Tūhoronuku Mandate") will result in the settlement of Ngā Tauira's historical Treaty claims by Tūhoronuku in circumstances where Ngā Tauira do not whakapapa to Rāhiri and in circumstances where Ngā Tauira are cross-claimants with Ngāpuhi.

6. The Tūhoronuku Mandate is explicit with regards to the group whom it purports to represent. It states that the settlement group are the people of Ngāpuhi[3] who derive their whakapapa from the one ancestor – Rāhiri.[4] The Tūhoronuku Mandate further states that the negotiations process will seek a comprehensive settlement of *"all historical Ngāpuhi claims".*[5] The implication being that any settlement will cover only Ngāpuhi claims or phrased another way, any claims that relate to the Crown's actions against Ngāpuhi hapū or whanau.

7. The witnesses for Tūhoronuku emphasised the fact that the Tūhoronuku Mandate was for Ngāpuhi. In his Brief of Evidence, Mr Tau states that "*I am Chairperson of the Tūhoronuku IMA, the body mandated by Ngāpuhi to represent all Ngāpuhi in the settlement of Ngāpuhi's historical Te Tiriti o Waitangi claims…"*[6] From page 4 to page 10 of Mr Tau's Brief of Evidence, he briefly describes the history of Ngāpuhi and the settlement situation that Ngāpuhi currently finds itself in.

8. This limitation of the Tūhoronuku mandate was also stressed by the interested parties in support of Tūhoronuku. Sam Napia states that "…this urgent hearing will achieve nothing but delay of the **Ngāpuhi settlement** to the detriment of all **hapū and Ngāpuhi** as a whole."[7] (Emphasis added).

[2] Index and Exhibits to the Affidavit of Raniera Tau, Wai 2341 #A25(a), Te Rōpū o Tuhoronuku Deed of Mandate, at clause 3.1, page 12.
[3] Index and Exhibits to the Affidavit of Raniera Tau, Wai 2341 #A25(a), Te Rōpū o Tuhoronuku Deed of Mandate, at page 11.
[4] Index and Exhibits to the Affidavit of Raniera Tau, Wai 2341 #A25(a), Te Rōpū o Tuhoronuku Deed of Mandate, at page 11, para 2.
[5] Index and Exhibits to the Affidavit of Raniera Tau, Wai 2341 #A25(a), Te Rōpū o Tuhoronuku Deed of Mandate, at para 6.
[6] Brief of Evidence of Sonny Tau, Wai 2490 #A98, para 1.1.
[7] Brief of Evidence of Sam Napia, Wai 2490 #A90(b), para 30.

9. In his Brief of Evidence Te Hurangā Hohaia makes a number of statements that underscore this point. He states that *"…we of Ngāti Rehia are proudly Ngāpuhi*…"[8] At paragraph 30 he states that "*Ngāti Rehia commitment to the unity of Ngāpuhi is an enduring one*".[9] Lastly, at paragraph 32 he states that Tūhoronuku will be *"…able to serve not only the interests of Ngāti Rehia but of all Ngāpuhi hapū."*[10]

Ngā Tauira are cross-claimants

10. Ngā Tauira's Wai 1385 claim was not referred to at all in the Tūhoronuku Mandate advertised in 2012. However, the Wai 1385 claim was listed as one of the Wai Claims to be settled in the Tūhoronuku Addendum of 2013.[11] The Wai 1385 claim was also included in the advertisements sent out between 6 July 2013 and 18 August 2013 by the OTS which sought submissions on the Tūhoronuku Deed of Mandate.[12] This was the first indication that Ngā Tauira's claim would be settled by Tūhoronuku.

11. Ngā Tauira is a pan iwi organisation made up of affiliated Catholic Māori and other Māori from around the country who share an allegiance to Hato Petera College. Ngā Tauira formed and registered the Ngā Tauira Tawhito o Hato Petera Trust Board as a charitable trust on 2 September 2002 for the purpose of acting on behalf of and advocating for the education of Ngā Tauira. Its members number approximately 1200.[13]

12. The Wai 1385 claim before the Te Paparahi o Te Raki Inquiry Tribunal is not a mana whenua claim.[14] The members of Ngā Tauira have a multitude of iwi affiliations as would be expected from a pan-iwi organisation. Ngā Tauira is a unique group that does not have any common ancestry. The iwi affiliations of the members of Ngā Tauira have no relevance to the 1385 claim. They do not claim that their interests derive from their whakapapa. Ngā Tauira is not a "hapū" in the traditional sense of the word. Instead, it is

[8] Brief of Evidence of Te Huranga Hohaia, Wai 2490 #A92, para 28.
[9] Brief of Evidence of Te Huranga Hohaia, Wai 2490 #A92, para 30.
[10] Brief of Evidence of Te Huranga Hohaia, Wai 2490 #A92, para 32.
[11] Index and Exhibits to the Affidavit of Raniera Tau, Wai 2341 #A25(a), Tuhoronuku Deed of Mandate Addendum, at Appendix 3, page 37.
[12] Appendix to Affidavit of Maureen Hickey, Wai 2341 #A026 (a), MCH41, page 427.
[13] Brief of Evidence of Frank Rawiri, Wai 2341 #A24, at para 4.
[14] Brief of Evidence of Frank Rawiri, Wai 2341 #A24, at para 5.

a group associated with a particular purpose, in this case the education of the students of Ngā Tauira.

13. Ngā Tauira does, however, have claim interests in land within the Te Paparahi o Te Raki inquiry district. As stated by Frank Rawiri in his brief of evidence:

> *Our Treaty claim concerns the 376 acres awarded in trust by way of a Crown grant to the Catholic Church in 1850, and the subsequent maladministration of that land.*[15]

14. This area of land is included in the Tūhoronuku "Te Rohe Potae Whakatau" outlined in the Tūhoronuku Mandate.[16]

15. The Crown has stated that "*[a]n overlapping claim exists where two or more claimant groups make claims over the same area of land that is the subject of historical Treaty claims. Such situations are also known as "cross claims.*"[17] However there is no clear definition of what "claimant group" means in the Red Book:

> *[t]he claimant group definition is a description of those people whose claims would be settled by the settlement that results from the proposed negotiations"*.[18]

This is an inherently tautological definition: the Crown determines the group and the claims that could be formed together as a "claimant group" on the basis of who it is willing to negotiate with. This is a limiting approach because it means that if claimants aren't in settlement negotiations with the Crown, they are not a "claimant group".

16. We would propose the following. Ngā Tauira are a "claimant group" because they are a number of people who are grouped together and who have a registered Treaty claim against the Crown.

[15] Brief of Evidence of Frank Rawiri, Wai 2341 #A24, at para 5.
[16] Index and Exhibits to the Affidavit of Raniera Tau, Wai 2341 #A25(a), Te Rōpū o Tuhoronuku Deed of Mandate, at para 4 and Brief of Evidence of Frank Rawiri, Wai 2341 #A24, at para 9.
[17] *Ka tika a muri, ka tika a mua – Healing the past, Building a future,* page 58.
[18] *Ka tika a muri, ka tika a mua – Healing the past, Building a future,* page 38.

17. Ngā Tauira is not a hapū that whakapapa's to Rāhiri, which is a necessary factor for inclusion in the Ngāpuhi "claimant group". Therefore, Ngā Tauira and Ngāpuhi are separate claimant groups. However, both groups have claim interests within the same settlement area. So, according to the Crown's definition, Ngā Tauira are cross-claimants.

The Crown Policy

18. Given that there is no whakapapa link between Ngā Tauira and Ngāpuhi, it was thought that Ngā Tauira's 1385 claim was included in the Tūhoronuku Mandate in error. It was thought that as Ngā Tauira was a pan-iwi group with no common ancestry, it was incomprehensible that the Crown would consider it appropriate for their claim to be settled by Tūhoronuku. However, recent correspondence from the Crown set out why the Wai 1385 claim was included:

> *Wai 1385 will be settled only insofar as members of Ngā Tauira Tawhito o Hato Petera are Ngāpuhi. It is the Crown's preference to settle historical claims through settlements with large natural groupings as outlined in the publication Healing the Past, Building the Future, and on the Office of Treaty settlements website.*
>
> *…*
>
> *For this reason, Wai 1385 is settled through Treaty settlements with large natural groups insofar as members of Ngā Tauira Tawhito o Hato Petera are members of those large natural groups, whether or not it is explicitly listed among the historical claims in a Deed of Settlement. Wai 1385 will not be settled in its entirety…*[19]
>
> ("the first letter")

19. We contacted the Office of Treaty Settlements to clarify the Crown Policy regarding this issue. This led to the Crown confirming its policy by email:

> *1. Settlements of historical Treaty claims are comprehensive settlements.*

[19] Index and Appendices to Brief of Evidence of Frank Rawiri, Wai 2490, #A116(a), page 1.

2. They include all historical claims of the settling group.

…

What this means is that, in the case of a claim whose claimant community includes people from a number of iwi and hapū, the claim is settled incrementally with each Treaty settlement, insofar as members of said claimant community are also part of the settling Large Natural Group. This happens whether or not the wai claim is listed in the definition of historical claims. This is the case with Wai 1385.[20]

("the second letter")

20. We came to understand that for members of Ngā Tauira who affiliated to iwi whose historical claims had already been settled, the Crown position was that those members' "portion" of the Wai 1385 claim had been included in that settlement, regardless of the fact that the claim was based in Northland alone, regardless of whether the members, the settling entity, or indeed the Crown itself were aware of the fact of this 'incremental settlement', regardless of whether the members had been consulted in respect of the settlement of claim, or had had any input into the mandating or settling process, and regardless of whether the claim was in any way reflected or recorded in the deed of settlement or in the settlement legislation. For ease of reference throughout this submission, we will refer to this as the "Crown Policy" or the "Crown's Ngā Tauira Policy".

21. The Claimants understood the Crown Policy in this way:

From what I can gather from her letter, Ms Hickey is saying that Ngā Tauira Tawhito are not partaking in the Wai 1040 hearings as affiliates of Hato Petera, even though that is how we are described as claimants. Instead, we are partaking as affiliates of our respective iwi even though there is no representation–related reference to our iwi affiliations in our evidence or in the amended statement of claim. This means that the Ngāpuhi members are

[20] Index and Appendices to Brief of Evidence of Frank Rawiri, Wai 2490, #A116(a), page 3.

> *involved in the Wai 1040 inquiry as Ngāpuhi and not as Ngā Tauira Tawhito. The same goes for our Te Rarawa members, our Ngāti Porou members and our Maniapoto members. Without any consultation with us, the Crown has unilaterally changed who we are. I find this degrading and unfair. Our membership of Ngā Tauira Tawhito and our past associations with the kura are what binds us. Of course, our iwi affiliations are important to us but not in the context of the Wai 1385 claim. We are being railroaded into a representative capacity so that we fit the Crown's settlement policy.*[21]

22. We acknowledge the importance of the settlement of historical grievances. However, any such settlement must be meaningful and it must be conducted transparently and in good faith. A Crown policy that purports to have settled a portion of Ngā Tauira's claims where that settlement was by stealth cannot be Treaty compliant.

Lack of Consultation

23. It is submitted that if the Tribunal finds that Ngā Tauira are cross-claimants, the Crown has breached the Treaty principles by failing to consult with Ngā Tauira, including the members of Nga Tauira who, according to the Crown, have had their claim interests settled by legislation already.

24. Past Tribunals in urgency hearings have made a number of findings regarding the Crown's duties in relation to cross-claimants. In the Tamaki Makaurau Settlement Process Report, the Tribunal stated that the Crown's level of interaction with overlapping claimants was too limited to comply with Treaty principles. The Crown was required to be fully informed before it made any decisions which could have an effect on Māori.[22]

25. The Tribunal has stated that:

> *We consider that the Crown should not be satisfied that cross-claims have been addressed until really no stone has been left*

[21] Brief of Evidence of Frank Rawiri, Wai 2490, #A116, paragraph 9.
[22] Waitangi Tribunal, *Tamaki Makaurau Settlement Process Report* (Wai 1362 2007), page 100.

unturned. The Crown has a duty in this regard, flowing from the principles of partnership and good faith under the Treaty of Waitangi.[23]

26. In the Te Arawa Report, the Tribunal stated that the Crown breached the Treaty when there was a reliance on written correspondence and a failure to engage face-face with overlapping claimant groups, as well as a failure to respond meaningfully to the information provided by claimants and their concerns over the proposed redress, delays in communicating with some groups, and a failure to provide full and clear information to over-lapping claimant groups about the Crown's expectations and processes in assessing their interests.[24]

27. Regarding Ngā Tauira's situation, the Crown has stated that the OTS has written to each and every Wai claimant whose claim was to be included in the list of Wai numbers that are to be settled by Tūhoronuku.[25] Further, the Crown stated that OTS has asked for claimants' feedback regarding their inclusion in the Tūhoronuku Mandate.[26]

28. The Crown has also stated that in the Crown's experience, the difficult issues that arise in relation to things such as overlapping claimants are more readily resolved when "*all parties are at the table together*".[27] The Redbook states: *"In areas where there are overlapping claims, the Crown encourages claimant groups to discuss their interests with neighbouring groups at an early stage in the negotiation process…"*[28]

29. However, this did not occur in the case of Ngā Tauira. As stated above, the Crown has been made aware on numerous occasions that Ngā Tauira is a cross-claimant. However, the Crown did not seek to meet with Ngā Tauira to consult with them regarding their land interests in the area and how they could potentially settle any conflicts. Furthermore, the Crown did not require Tūhoronuku to meet with Ngā Tauira and consult them regarding how any overlapping claim issues could be settled between the parties.

[23] Waitangi Tribunal, *Ngati Awa Settlement Cross-Claims Report* (Wai 958, 2002), page 88.
[24] Waitangi Tribunal, *Te Arawa Mandate Report* (Wai 1150, 2004), page 255.
[25] Wai 2341 – Ngapuhi Urgency, Wai 2490 #4.1.1, page 167.
[26] Wai 2341 – Ngapuhi Urgency, Wai 2490 #4.1.1, page 168.
[27] Affidavit of Maureen Hickey, Wai 2341 #A026, para 30.1.
[28] *Ka tika a muri, ka tika a mua – Healing the past, Building a Future,* page 59.

30. Ngā Tauira were never sent any correspondence regarding their inclusion in the Tūhoronuku Mandate. Ngā Tauira is not a hapū of Ngāpuhi so it was unable to take part in the mandate vote for Tūhoronuku. The Wai 1385 claim was not included in the Tuhoronuku Mandate. It was only included in the Tuhoronuku Addendum. Therefore, by the time that Ngā Tauira could reasonably have been expected to be aware that their Wai claim would be settled by Tūhoronuku, the process was too far down the track for it to make any difference.

31. In the East Coast Inquiry Settlement Report, the Tribunal stated "…if *a list of Wai numbers likely to be extinguished as a result of settlement had been available before the information hui, then the debates about which claims would be settled would be avoided*."[29] It also stated that "*In addition, those whose mandate is being sought should be provided with as much relevant information as possible, well in advance of the mandate vote. At a minimum this should include the actual claims (including the Wai numbers) that will be included in the proposed settlement…There would then be more certainty as to exactly who, and what claims, would be covered by the proposed settlement*".[30]

32. In this case, a list of Wai numbers was included at any early stage. However, the Wai 1385 claim was not included in the list until much later. It is submitted that the Crown has not complied with the suggestions made by the East Coast Inquiry Settlement Tribunal.

33. As previously mentioned, the Crown Policy in relation to the Wai 2442 claim is that:

> *"There is no evidence (at all) that the Crown ever sought to exclude anyone from being involved in the mandate process. Rather, the evidence is that the Crown sought to slow the process so that facilitation could occur, which resulted in changes to Tūhoronuku's deed of mandate. In addition, the Crown sought submissions from all* ***Ngāpuhi*** *on Turhonuku's proposed mandate*

[29] Waitangi Tribunal, *East Coast Settlement Report* (Wai 2190, 2010), page 36.
[30] Waitangi Tribunal, *East Coast Settlement Report* (Wai 2190, 2010), page 57-58.

strategy and on its amended deed of mandate".[31] (Emphasis added).

34. Although we now accept that the Crown did not seek to actively exclude Ngā Tauira from the mandating process, it was still excluded. As stated above, Ngā Tauira is a pan tribal organisation and so many of the group are not Ngāpuhi. They were therefore unable to take part in any of the mandating processes.

35. Furthermore, there is a distinct lack of clarity about the Crown Policy. We elaborate on this below. Suffice to say for now that because the Crown Policy is obscure, the Claimants did not think that the Tuhoronuku mandate application affected them. Accordingly there was on compunction on their part to monitor and/or get involved with the mandating process.

The Crown Policy Breaches the Bill of Rights

36. The New Zealand Bill of Rights Act 1990 ("BORA") affirms the rights and freedoms it contains (section 2), and applies to acts of the New Zealand Government or individuals or bodies in their performance of public functions, powers or duties (section 3).

37. We submit that the Crown's settlement policy breaches two of the rights and freedoms affirmed in BORA where the Crown attempts to settle Ngā Tauira's claims in circumstances where they have not been heard and reported on by the Tribunal, and/or have not been fully addressed in settlement negotiations with the Crown. These are the rights and freedoms contained in sections 19 (freedom from discrimination) and 27(3) (right to bring civil proceedings against the Crown).

Section 19 - freedom from discrimination

38. Section 19(1) BORA protects *"the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993."* Subsection (2) excludes from the definition of *"discrimination"* acts undertaken for the purposes of affirmative action. The prohibited grounds of discrimination

[31] Index to Memorandum of the Crown, Wai 2341 #3.1.107(a), page 66.

include, in section 21(l)(iv) of the Human Rights Act, *"family status, which means* [inter alia] *… being a relative of a particular person."* Section 2 defines *relative* as *"in relation to any person … any other person who (a) is related to the person by blood, marriage, civil union, de facto relationship, affinity, or adoption"*.

39. Where the Crown attempts to settle claims that have not been heard and reported on and/or fully addressed in settlement negotiations with the Crown, with the claim being deemed settled on the basis solely of the claimant or claimants being descended from a particular tupuna, that claimant is suffering the material disadvantage of being denied, without their consent, their right to have their claim heard and adjudicated on, and this restriction on their rights is based solely on their being a relative of a particular person, that being the tupuna in question. This constitutes differential treatment leading to material disadvantage, and our understanding of the Crown Policy is that it would purport to have this precise effect, in breach of section 19 BORA.

40. Determining the presence of discrimination under section 19 is a two-stage process involving, firstly, the identification of an appropriate comparator group to determine whether there is in fact differential treatment on one of the prohibited grounds, and, secondly, an assessment as to whether this differential treatment causes a material disadvantage or has a discriminatory impact.[32] As stated, the prohibited ground identified here is family status on the basis of being related to a particular person. Discrimination on this ground was also found in *Atkinson*, where the discrimination took the form of not receiving pay to provide care services to disabled family members while carers who were not family members were paid for providing the same services. It is important to note that there was nothing in particular about the nature of the family relationship that required a finding of discrimination in *Atkinson*, and it is clearly established that prejudice on the part of the discriminator, or historical disadvantage on the part of the discriminated, are not required for a finding of discrimination on this basis.[33] In other words, discrimination may be found in this context without reference to motive or malice, or to the existence of any systemic

[32] *Ministry of Health v Atkinson and Ors.* [2012] NZCA 184, para 55.
[33] *Ministry of Health v Atkinson and Ors.* [2012] NZCA 184, para 111-121.

or historical discrimination: the discrimination, then, is not required to be based on any particular prejudice towards the family members in question. Rather, what is required is differential treatment leading to material disadvantage on the arbitrary basis of a family relationship. That is what we have described above in respect of the deemed settlement of Ngā Tauira's claims, on the basis of the ancestry of its members, that have not been inquired into and reported on and/or fully addressed in settlement negotiations with the Crown.

41. In the case of a member of Ngā Tauira's claim that is purported to be or likely to be settled under the Crown Policy without having been heard and reported on and/or fully addressed in settlement negotiations with the Crown, the appropriate comparator group would be other members of Ngā Tauira who are not subject to such purported settlement. The submission would then be that the differential treatment in question is that the Crown Policy treats the first claimant differently from the second on the basis of ancestry, in particular descent from an identified tupuna.[34]

42. The material disadvantage caused by this differential treatment is the loss by the Ngā Tauira member of their legal right to have his or her claim heard and to seek redress. The alienation of the right to pursue an action at law is a fundamental infringement on basic civil liberties and easily constitutes material disadvantage relative to a comparator group who does not suffer this loss. Where this differential treatment is grounded solely in one's family relationships, it is arbitrary discrimination on a prohibited ground and therefore a breach of section 19 BORA.

Section 27(3) - Right to Bring a Civil Action

43. Section 27(3) BORA affirms the right:

> *to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard,*

[34] It may be noted that while the formulae may vary from Act to Act, generally the definition of the relevant iwi/hapu's historical claims includes, by way of various sections and definitions being read together, claims brought by an individual who is descended from a particular person.

> *according to law, in the same way as civil proceedings between individuals.*

44. On the plain meaning of this provision, it would seem clear that to have one's claim "settled" by Crown Policy, without one's knowledge, consultation or consent, would be in breach of the inscribed right. This is the possible effect of the Crown Policy and so in that case the legislation would therefore appear to breach section 27(3) BORA.

45. Nonetheless, the leading case on the section, *Westco Lagan*, does distinguish between procedural and substantive rights and determines that the section only protects the former, reserving to the Crown the ability to determine the substantive rights that it enjoys.[35] The question of this distinction is somewhat academic for our purposes here, because we would submit that it is clear that the settlement of claims via the Crown Policy is a matter of procedure and not one of the Crown's substantive rights; however, any disputation in respect of that question highlights the potential difficulty raised by such distinctions. In fact, the White Paper introducing the Bill that was eventually to become BORA noted the need to preserve the substantive rights of the State and even observed parenthetically that such rights "*may run over into some aspects of the procedure*", yet the clause following this affirms that:

> *the provision declares the right of the individual to take legal disputes with the Crown to court and to have the case dealt with in terms of the process to be followed essentially in the same way as in private litigation.*[36]

46. It is clear that the purpose of the provision is to affirm both the right to take the dispute to litigation, and the right to fair procedure in the hearing of that dispute. Dispossession of either right by Act of Parliament is an important matter and a prima facie breach of the section.

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[35] *Westco Lagan Limited v Attorney-General* [2001] 1 NZLR 40, para 63.
[36] G Palmer (1985), *A Bill of Rights for New Zealand: A White Paper*, Government Printer, Wellington, available at http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/domestic-human-rights-protection/about-the-new-zealand-bill-of-rights-act/A_Bill_of_Rights_for_NZ_A_White_Paper.pdf

47. This is supported by the Crown's own interpretation of section 27(3). In a Report made by the Attorney General under section 7 of BORA, the Crown was dealing with a clause in a Bill that attempted to limit the Crown's liability to pay damages in Court proceedings. The Crown stated in that report that section 27 (3) does not preclude alterations to the substantive law, which may affect the prospects of success for any proceeding provided that the proceedings themselves or the procedures applying to the conduct of those proceedings remain unaffected.[37] The Crown further stated that:

> *In consideration whether proposed new section 27A(4) constitutes a limit on the right conferred by section 27(3) of the New Zealand Bill of Rights Act, I have noted that the clause does not preclude applicants to whom the moratorium applies from bringing proceedings against the Crown. However, by precluding the possibility of "costs, compensation and damages", the proposed section 27A(4) limits the remedies available to any litigant in any proceedings. This in turn must affect the pleadings and the overall conduct of the litigation. In other words the clause will affect the procedures to be adopted in the conduct of any proceedings and not solely the substantive law. While an applicant may bring proceedings against the Crown it cannot be said in the light of proposed new section 27A(4), that the proceedings can be brought and heard "in the same way as civil proceedings between individuals". For these reasons I conclude that proposed new section 27A (4) constitutes a limit on the right conferred by section 27 (3) of the New Zealand Bill of Rights Act.*[38]

48. Our understanding of the Crown Policy in this report is that the term "substantive law" has been interpreted as meaning anything that may affect the chance of the Claimant succeeding in a claim against the Crown. For example, the Crown could amend the law to give the right for all Police Officers to shoot any person it sees fit, if it is in the course of their duty.[39] If this law was clear and had no exceptions, a person who is then shot by a

[37] Report of the Attorney-General on the Casino Control (Moratorium) Amendment Bill.
[38] Report of the Attorney-General on the Casino Control (Moratorium) Amendment Bill.
[39] Obviously this sort of substantive law change may be contrary to the Bill of Rights and that would bring problems of its own, but for the purpose of this illustration please ignore that glaring concern.

Police Officer in the course of their duty would be unlikely to succeed in any sort of proceedings against the Crown for the actions of its agent. However, that person would still be able to bring a claim in some form and ask for remedies.

49. Furthermore, as noted in the Ministry of Justice Guidelines to the Bill of Rights, *"Provisions that restrict the ability of a person to bring proceedings against the Crown are problematic in terms of compliance with section 27(3)."*[40] The Guidelines also acknowledge that *"It is also not clear yet in New Zealand whether the legislative removal of a cause of action against the Crown that occurs after proceedings are instituted breaches section 27(3)."* We would submit that it does. While there is debate as to the Crown's right in terms of section 27(3) to remove any basis for Crown liability (and hence render the bringing of proceedings redundant if not in fact impossible) and whether this constitutes a procedural or substantive issue, and similar debate as to the State's ability to legislatively reverse a court decision unfavourable to it,[41] our submission is that the unilateral removal of a cause of action by its deemed "settlement" through the Crown Policy is without question a breach of the right inscribed by section 27(3). The European Court of Human Rights held in *Kutic*[42] that legislative removal of a cause of action against the Crown that occurs after proceedings are instituted violates Article 6 (the right to a fair trial) of the European Convention on Human Rights. The Court stated at paragraph 25 that:

> *[T]his right of access to a court [for the determination of civil disputes] does not only include the right to institute proceedings, but also the right to obtain a "determination" of the dispute by a court. It would be illusory if a Contracting State's domestic legal system allowed an individual to bring a civil action before a court without securing that the case would be determined by a final decision in the judicial proceedings. It would be inconceivable that Article 6(1) should describe in detail procedural guarantees*

[40] Ministry of Justice, *Guidelines on the New Zealand Bill of Rights Act 1990*, available at http://www.justice.govt.nz/publications/publications-archived/2004/guidelines-on-the-new-zealand-bill-of-rights-act.
[41] We note in this regard that the Attorney-General's position on the Foreshore and Seabed Bill was that in respect of section 27(3) such a move did not breach the section, although the dissenting views on this question of such luminaries as Sir Geoffrey Palmer and Professor Michael Taggart were acknowledged.
[42] *Kutic v Croatia* ECHR Application No 48778/99 1 June 2002.

> *afforded to litigants – proceedings that are fair, public and expeditious – without guaranteeing the parties to have their civil disputes finally determined.*[43]

50. The importance of the right to have a claim fully inquired into and reported on was examined in *Harongā*, where the Supreme Court confirmed that there is a mandatory obligation on the Tribunal to inquire into claims:

> *It is the principal function of the Waitangi Tribunal to inquire into and make recommendations on claims submitted to it under s 6 of the Treaty of Waitangi Act. With limited exceptions, the Tribunal is obliged to inquire into every claim.*[44]

51. In addition, the *"Stage One Report on the National Freshwater and Geothermal Resources Claim"* ("the Water Urgency") confirmed claimants' right, under BORA, to be heard: *"Māori have a right under the Bill of Rights to be heard".* [45]

52. Where the Crown Policy purports to settle Ngā Tauira's claim on the basis solely of the members' whakapapa, without that claim having been heard and reported on and/or fully addressed in settlement negotiations with the Crown, and without the members' knowledge or consent, that purported action substantively constitutes legislative removal of the cause of action. Such would, in our submission without any doubt, amount to a breach of section 27(3) BORA.

The Consequences of a Breach of BORA

53. The provisions of BORA do not set out the consequences resulting from a breach of an affirmed right contained therein. However, the Courts have dealt with this issue previously.

54. In the well-known *Baigents Case*[46] Cooke J as he was then stated:

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[43] *Kutic v Croatia* ECHR Application No 48778/99 1 June 2002, para 25.
[44] [2011] NZSC 53, [80].
[45] Wai 2358, Wai Stage One Report, National Freshwater and Geothermal Resources Claim, p.204.
[46] *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 (CA).

> *First, although the New Zealand Act contains no express provision about remedies, this is probably not of much consequence. Subject to ss 4 and 5, the rights and freedoms in Part II have been affirmed as part of the fabric of New Zealand law. The ordinary range of remedies will be available for their enforcement and protection. Secondly, the Long Title shows that, in affirming the rights and freedoms contained in the Bill of Rights, the Act requires development of the law when necessary.*[47]

55. Cooke J also referred to how the remedies granted for the breaches of BORA are discretionary. He stated that breaches of BORA could result in the exclusion of evidence, compensation, injunctions, specific orders and declarations.[48]

56. In Counsel's view, it is arguable that the Crown Policy could be brought the subject of civil proceedings and result in the Court finding that it is in breach of BORA. If this was the case, more than likely, the Court would order that the Crown Policy be modified or discarded to avoid further breaches of BORA. Accordingly the Crown cannot argue that a breach of BORA is not also a breach of the principles of active protection and good faith. With respect, it is submitted that if the Tribunal finds that the Crown Policy is in breach of section 19 or section 27(3) of BORA, the Tribunal should find that the Crown Policy is in breach of Te Tiriti. As such, it should result in a recommendation that the Crown modify or discard its policy to avoid further breaches of BORA.

The Hats Approach

57. In the submissions above, Counsel has attempted to show that the Crown Policy is in breach of Te Tiriti and as such it should be discarded. However, even if this position is not accepted by the Tribunal, it is submitted that there is relevant precedent which suggests that this is not a barrier to Ngā Tauira's claim remaining entirely on foot following any Ngāpuhi settlement.

[47] *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 (CA).
[48] *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 (CA), paragraph 57.

58. It is clear from the words of the Tūhoronuku Mandate as well as the comments of the Chairperson of Tūhoronuku, Sonny Tau, and the other witnesses who presented evidence to the Tribunal, that the Tūhoronuku Mandate will only cover historical Ngāpuhi claims. The Ngā Tauira claim is not a historical Ngāpuhi claim and therefore the Crown cannot argue that it, or any part of the claim, will be settled through Tūhoronuku.

59. It is accepted that some of the members of Ngā Tauira are of Ngāpuhi descent. However, in the case of *Ngāti Apa ki Te Waipounamu Trust v The Queen*, the Court was asked to look at whether the Tribunal still had jurisdiction to hear a claim involving land that had already been included as part of settlement legislation. The Court held that it was a matter of statutory interpretation. However, basic rights such as the right to bring a claim in accordance with the law cannot be extinguished by general or ambiguous words.[49]

60. Furthermore, in the Te Rohe Potae Inquiry, the Tribunal was asked to determine whether certain hapū were barred from having their raupatu claims heard on the basis that these hapū were included in the Waikato-Tainui settlement legislation. It was argued that hapū that had their raupatu claims settled by the Waikato-Tainui settlement were not prevented from bringing raupatu claims if they could show ancestry to an iwi other than Tainui. The Tribunal formulated its argument in this way:

> *It seems that those hapū assert that they can wear their Waikato "hat", take the benefit of the Waikato-Tainui settlement, then put on their Ngāti Maniapoto "hat" and bring a claim in relation to the same events.*

61. The Tribunal stated that "*it is common for the definition of 'historical claims' to exclude claims of the same nature by an individual etc who claims by reason of descent from an ancestor who is not an ancestor of the settling iwi or hapū*".[50] In the end, the Tribunal concluded that the Crown accepted

[49] *Ngati Apa ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659.
[50] Memorandum-Directions of Judge DJ Ambler, Wai 898 #2.5.021, para 7.11.

the proposition put forward by the claimants and therefore it was not required to make any decision on the matter.[51]

62. Applying the logic to this case, it is submitted that the Ngā Tauira claim cannot be included in the Tūhoronuku Mandate. The unambiguous scope of the Tūhoronuku Mandate includes "historical Ngāpuhi" claims only. As a group, Ngā Tauira are not Ngāpuhi and therefore cannot be settled by Tūhoronuku. Furthermore, any Ngā Tauira members that may have Ngāpuhi descent are not covered by the Tūhoronuku Mandate because those individuals, for this particular claim, are wearing their Ngā Tauira "hat" and not their Ngāpuhi "hat".

63. We accept that this approach has generally only been applied in situations where an individual has affiliation to different iwi. Nevertheless, we would argue for a broader and more relevant application of the "hats" approach, whereby it is recognised that claimants may identify according to factors other than whakapapa in appropriate circumstances. In that sense, we would see members of Ngā Tauira who have made a claim in the Wai 1040 Inquiry District wearing their Ngā Tauira hat and not as individuals from their respective iwi.

The Absurdity of the Crown Policy

64. Although it is not really a Treaty based reason for removing the Crown Policy, it is important to note that the application of the Crown Policy results in a number of absurd outcomes. For example, the Crown Policy is that Ngā Tauira has a number of members who have had their Wai 1385 claim settled by the Crown.[52] This includes Malcolm Peri who is Te Rarawa.[53] According to the Crown Policy and the Crown Policy, Malcolm Peri should approach Te Rarawa's post governance settlement entity regarding redress for the settlement of his portion of the Ngā Tauira claim. It would be expected that if Mr Peri was to make this approach to the post governance settlement entity of Te Rarawa, his request would be rejected outright. This would be on the basis that they have probably never heard of

[51] Memorandum-Directions of Judge DJ Ambler, Wai 898 #2.5.021, para 7.5.
[52] Brief of Evidence of Frank Rawiri, Wai 2490, #A116, paragraph 11.
[53] Brief of Evidence of Frank Rawiri, Wai 2490, #A116, paragraph 11.

Ngā Tauira's claim and on the basis that the settling entity did not understand that they were settling Mr Peri's Ngā Tauira claim when it settled with the Crown.

65. As stated by the Claimant:

> *I believe that the Crown's settlement policy with regard to the settlement of a pan-tribal claim like ours gives rise to some strange outcomes for our members. This means the Crown Policy can't be right. For instance, some members of our group had their component of their Wai 1385 claim settled before the Wai 1385 claim was even filed. This would include our Tainui, Ngāi Tahu and our Ngāti Awa members. I don't know how you the Crown can hold a straight face when explaining this kind of settlement outcome. For these members to our group, the Wai 1385 claim was settled before it even existed.*[54]

66. It is in breach of good faith and fairness that the Crown is standing by this policy when it leads to such absurd conclusions and outcomes. As described by Judge Reeves at the December hearing week:

> *It's indeed a strange situation that you describe a pan tribal historic claim which is gradually being settled as each district inquiry is settled.*[55]
>
> *…*
>
> *It is an odd set of circumstances.*[56]

67. Furthermore, the Crown states that the role of the Tribunal is to "*make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty*". The relevant yardstick is the Treaty principles.[57]

68. The Crown Policy on Ngā Tauira is utterly impractical. The splitting of Ngā Tauira's claim into "portions" of claims associated with the individual members of the claims provides absurd results as set out above. It is our

[54] Brief of Evidence of Frank Rawiri, Wai 2490, #A116, paragraph 12.
[55] Hearing Transcript, Wai 2490, #4.1.2, page 495.
[56] Hearing Transcript, Wai 2490, #4.1.2, page 496.
[57] Opening Submissions of the Crown, Wai 2490, #3.3.14, paragraph 9.

submission that if the Crown Policy results in such absurdity, a practical application of the Treaty should see to the protection of Ngā Tauira's claim from this sort of Crown contrivance.

69. Moreover, the Court and the Tribunal have found that if there is a breach of the duties outlined in Te Tiriti, there is an obligation on the Crown to provide redress.[58] As specified above, the Crown Policy results in the situation where the individual members of Ngā Tauira are not provided with any redress for the breaches outlined in the Ngā Tauira claim. It is submitted that the Crown Policy is thus inconsistent with the principles of Te Tiriti. Accordingly the Tribunal should apply Te Tiriti practically and recommend that the Crown Policy be overlooked.

70. The Crown also states that:

> *A practical application of the Treaty calls for practical solutions. In the event that the Tribunal considers that the Crown's action is inconsistent with the principles of the Treaty, practical recommendations are required.*[59]

71. Counsel respectfully submits that the Crown's statement can be given another meaning. Even if the Tribunal finds that the Crown Policy and the Crown Policy are not in breach of Te Tiriti, practical recommendations are required to ensure that any of Ngā Tauira's well-founded claims result in relief being made available to them.

No settlement if not contemplated

72. It is submitted that the Crown cannot and should not attempt to enforce, comply with and/or interpret its settlement policies in a way that is anathema to Te Tiriti and its principles. The Crown Policy is not Treaty compliant as it purports to settle individuals' claims without those individuals' knowledge, input or consent. Accordingly the Tribunal should make two relevant findings regarding the Crown Policy. The first finding is that the portions of Ngā Tauira's claim which the Crown suggest have

[58] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR (CA) at 651, President Cooke and Waitangi Tribunal, *Ngawha Geothermal Resource Report,* 1193, Wai 304, at para 5.1.5.
[59] Opening Submissions of the Crown, Wai 2490, #3.3.14, paragraph 12.

already been settled incrementally through settlement with other iwi/hapū cannot have been settled unless the Ngā Tauira claimants were actively and meaningfully consulted with during the settlement processes. The second and more relevant finding to this particular inquiry is that the Crown cannot settle the Ngāpuhi portion of the Ngā Tauira claim unless the Nga Puhi members of Ngā Tauira *and* Nga Tauira have been actively engaged with and meaningfully consulted with during the settlement process, which includes the mandating process, in a way that is both transparent and in good faith.

73. We acknowledge the purpose and reasoning behind the Crown Policy. We acknowledge that this goes some way to achieving the settlement of historical claims. We accept that to the extent that such claims are tied or directly related to the matters inquired into an inquiry district (which preceded a settlement), such a broad-brush approach may be appropriate to achieve certainty and to help achieve this goal. However, when it comes to claims that are not grounded in whakapapa or regional identity, and which bear no relation to iwi or hapū affiliation, the purported effect of this policy is an over-reach. We go so far as to say that the Crown Policy was probably not in the Crown's contemplation when its settlement policies were first developed.

74. The Crown Policy should be read in line with the context in which it was developed. The policy was created with Waitangi Tribunal district inquiries in mind. The Crown was attempting to develop a policy whereby it could settle all of the historical claims of a "claimant group", normally an iwi, within a particular settlement area. To ensure that settlements were durable, it created the policy of "comprehensive settlements" so that all of the claims of the members of that iwi or hapū were settled at once.

75. It is submitted that given this context, it is not reasonable for the Crown to purport to settle claims via settlements with large natural groups where the ancestry and the iwi/hapū affiliations of an individual are only relevant to the extent that they have standing to bring a claim to the Tribunal under section 6 of the Treaty of Waitangi Act 1992. Ngā Tauira's claims are unrelated to whakapapa and/or mana whenua and have nothing to do with

its members' respective iwi/hapū. It is unreasonable in these circumstances for the Crown Policy to apply.

76. The *"large natural group"* and *"comprehensive settlement"* policies tend to treat historical claims within a particular land area and affecting particular groups of people as appropriately falling within a single framework for negotiation and settlement. The common claim issues are familiar to the Tribunal and generally relate specifically to the land and its people – public works takings, Native land legislation, Crown purchasing, land title reform and so forth. While it is possible for any number of other claims that do not relate to the whenua or to iwi affiliation to be fully addressed in a settlement negotiations package, where they have not, they cannot, without explicit statutory reference, reasonably be said to have been settled on the basis alone of the whakapapa of the respective claimants.

77. The nexus between the subject matter of settlement legislation and regionally-based and hapū- or iwi-focused redress necessarily limits the scope of claims that have been settled by that legislation. This limitation restricts the extent of the intended settlement to such claims as could be reasonably contemplated in that context – as relating to the land itself, to events that took place within the settlement area or impacted on the settlement area, or to collective groups of people within the settlement area. It does not include non-regionally-based and non-whakapapa-based claims such as Ngā Tauira's claim except to the extent that an intention to settle such claims is clearly demonstrated by the words of the respective settlement statute, or in the Deed of Mandate developed by the settling entity. This is the necessary result of reading words of general release as subject to matters in the informed contemplation of the parties with reference to the background facts.

78. The Crown Policy also flies in the face of the law. It is an established principle in our law that Parliament must speak clearly if it intends to extinguish fundamental rights, such as a statutory right to bring a claim against the Crown for breaches of Te Tiriti.[60] The Crown is attempting to remove such rights by way of a vagary from its own settlement policy book.

[60] *Ngati Apa ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659.

The Crown confirmed that the basis for this interpretation was a statement made at page 44 of the Red Book which refers to "comprehensive negotiations".[61] The Crown also confirmed that there was no pan-iwi explicit statement of policy.[62] It should also be noted that the Crown confirmed that it expected that the members of Ngā Tauira should have understood that this one sentence reference to comprehensive negotiations at page 44 of the Red Book should have made them aware of the fact that portions of its Ngā Tauira claim were being settled bit by bit as more and more iwi settled with the Crown.[63]

79. It is submitted that it was not a reasonable assumption for the Crown to make in circumstances where we have the attempted removal of a significant right by way of a side wind. If the Crown wished to remove the rights of certain members of Ngā Tauira to bring their claim to the Tribunal, and to have their claims heard and reported on, it should have made this explicitly clear via its policies as well as in its settling legislation.

A recently contrived policy

80. It is evident that the Crown Policy has been developed quite recently. In Ngā Tauira's Application for Urgency, dated 3 June 2014, we described that Ngā Tauira were cross-claimants and that they should not be included in the Tūhoronuku Mandate.[64] Counsel also stated:

> *The Crown has actively sought to exclude the Claimants from involvement in the mandating process until it was too late to have any effect on the Deed of Mandate and consequently on the settlement of their own Treaty claims. By so doing, the Crown has failed to recognise the mana and separate identity of Ngā Tauira.*[65]

[61] Hearing Transcript, Wai 2490, #4.1.2, page 1019.
[62] Hearing Transcript, Wai 2490, #4.1.2, page 1019.
[63] Hearing Transcript, Wai 2490, #4.1.2, page 1019.
[64] Wai 2442, #3.1.1, paragraph 15-21.
[65] Wai 2442, #3.1.1, paragraph 20.

81. We will discuss the issue regarding the Crown's lack of consultation with Ngā Tauira later on in these submissions. However, for current purposes, we note the Crown's reply to the Wai 2442 claim in its specific responses:

> *There is no evidence (at all) that the Crown ever sought to exclude anyone from being involved in the mandate process. Rather, the evidence is that the Crown sought to slow the process so that facilitation could occur, which resulted in changes to Tūhoronuku's deed of mandate. In addition, the Crown sought submissions from all Ngāpuhi on Tūhoronuku's proposed mandate strategy and on its amended deed of mandate.*[66]

82. Of all the matters raised in the Wai 2442 claim, the Crown responded to just one particular aspect – whether or not it had actively sought to exclude the Wai 2442 claimants from the mandating process. Importantly, the Crown did not make any statement with regard to the Crown Policy and its effect on the Claimants' claim.

83. On numerous occasions previously, the Crown was made aware by the following documentation and activities that Ngā Tauira are cross-claimants and that it is a pan-iwi group:

(a) Ngā Tauira's Amended Statement of Claim in the Wai 1040 inquiry, dated 9 September 2011;[67]
(b) Submissions filed during hearing week 7 in the Wai 1040 inquiry dated 27 February 2014;[68]
(c) The presentation of Nga Tauira's evidence at hearing week 7, during which Crown counsel cross-examined Mr Rawiri;
(d) Ngā Tauira's Brief of Evidence for the urgency application, dated 3 June 2014;[69]
(e) The Wai 2442 Application for Urgent Hearing, dated 3 June 2014;[70]

[66] Wai 2341, #3.1.107(a), page 66.
[67] Wai 1385 Amended Statement of Claim, Wai 1040 #3.1.045, paragraph 19.
[68] Opening Submissions for Wai 1385, Wai 1040 #3.3.81.
[69] Brief of Evidence of Frank Rawiri, Wai 2341 #A24, at para 4 and 5.
[70] Memorandum of Counsel in support of application for Urgency, Wai 2341 #3.1.80.

(f) The submissions made by counsel on behalf of Nga Tauira at the Judicial Conference, dated 18 June 2013;[71] and

(g) The Wai 2442 Submissions of Counsel in Reply, dated 16 June 2014.[72]

84. Despite this long-held awareness of Ngā Tauira's position and the potential for cross-claim status, it took until 13 November 2014 for the Crown to respond to Ngā Tauira with the allegation that "*Wai 1385 will be settled insofar as members of Ngā Tauira Tawhito o Hato Petera are Ngāpuhi*."

85. It is submitted that it took this long for the Crown to make its allegation because the Crown formulated its view regarding Ngā Tauira just shortly before it sent the second letter. This is evidenced through a number of OIA documents released by the Crown to Counsel in November 2014. For example, in an OTS email dated 7 October 2014 in response to a request from Ms Hickey to look into the Wai 2442 urgency application, the following is stated:

> *...it does seem as if Wai 1385 was included in the Tūhoronuku deed of mandate in error*.[73]
>
> ("the October email")

86. Since Ms Hickey is asking for information about the Wai 2442 claim, it cannot be said that she has considered the Crown Policy, let alone formed a view about it. The author of the October email believes that Wai 1385 was erroneously included in the Tūhoronuku Mandate and this is illuminating because of the Crown purport that the Crown's settlement policy is clear regarding its "comprehensive negotiations" approach. However, given that a Crown official has not interpreted the relevant Crown's policies in this way, it begs the question as to whether this policy is clear at all.

87. On 8 October 2014, the author of the October email sent a second email to Ms Hickey. The author stated that Ngā Tauira "*is likely to include Māori*

[71] Wai 2341 – Ngapuhi Urgency, Wai 2490 #4.1.1, page 80.
[72] Submissions of Counsel in Reply, Wai 2341 #3.1.112, para 21.
[73] Index and Appendix "B" to the Second Brief of Evidence of Frank Rawiri, Wai 2490, #A116, page 1.

from a wide range of iwi and hapū whose grievances have been partially settled through comprehensive settlements with LNGs, including Ngāpuhi. It is therefore appropriate to include Wai 1385 in the Ngāpuhi claimant definition as partially settled insofar as it relates to Ngāpuhi".[74]

88. Interestingly, the author goes on:

> *Arguably, none of Wai 1385 relates to Ngāpuhi. Usually, we use the "partially settled" line when a wai claim names more than one iwi or hapū, or is brought on behalf of all Māori (wai 262 is an example of this). In the case of wai 1385, no iwi or hapū is named, and instead the claimants argue that they are beneficiaries of a Crown grant. Because the claim isn't bought on behalf of tangata whenua, it is possible to argue that the fact that some of the claimants are Ngāpuhi is incidental to the claim. If the operative part of the claimant definition is an ancestor and area of interest, and the wai claim doesn't depend on ancestry or an area of interest, there may be no reason to think that the claim pertains in any way to Ngāpuhi as described in the claimant definition*.[75]
>
> ("the first email")

89. On 17 October 2014, an unknown author wrote to an unknown source regarding Ngā Tauira:

> *I still need to talk with CLO about what they think of this view – I think they'll say that people who are Ngāpuhi will have this claim settled. I don't think that's right though. So yea.*[76]
>
> ("the second email").

90. The OTS position that is set out in the first email is very similar to the Claimants' Wai 2442 claim position. We submit that the author's view set

[74] Index and Appendix "B" to the Second Brief of Evidence of Frank Rawiri, Wai 2490, #A116, page 2.
[75] Index and Appendix "B" to the Second Brief of Evidence of Frank Rawiri, Wai 2490, #A116, page 2.
[76] Index and Appendix "B" to the Second Brief of Evidence of Frank Rawiri, Wai 2490, #A116, page 3.

out at paragraph 47 here is the correct approach to take with the Wai 1385 claim.

91. The first email and the second email are also interesting in the sense that the authors appear unsure about where the Crown stands on the matter. The tenor of the first email shows that it is a new situation for the OTS. The statement in the second email – *"I still need to talk with CLO about what they think of this view"* – also suggests that the situation is new. If that is the case, then the Crown Policy is new, or, in the least, that the Crown's settlement policy regarding the Claimants' situation is not clear.

92. The statement in the second email – *"I think they'll say that people who are Ngapuhi will have this claim settled. I don't think that's right though."* – is illuminating because that is what the Crown Law Office came back with, but clearly, the author of the second email doesn't agree with the Crown Law Office's position. Ultimately however, the fact that Crown Law are being consulted with about Nga Tauira's settlement situation and the obvious lack of clarity about it on the part of the OTS officials involved means that the Crown Policy is a recent development.

93. There is also another important point to note. The Wai 1385 claim is being heard in the Te Paparahi o Te Raki District Inquiry. When this claim was filed with the Tribunal, no jurisdictional issues arose. The Tribunal did not advise any of the 1200 members of Nga Tauira that their particular component of the Wai 1385 claim had been settled by their respective iwi/hapū. The Tribunal did not advise those members whose iwi/hapū had settled that the Tribunal had no jurisdiction to consider their component of the Wai 1385 claim. If the Crown Policy was so apparent, as the Crown suggests, the Tribunal would have taken steps to ensure jurisdictional compliance but that did not occur.

94. Moreover, if the Crown was aware of the Crown Policy, the Crown would have objected to the filing of the Wai 1385 claim on jurisdictional grounds, in relation to the claim interests of those Nga Tauira members whose iwi/hapu had settled with the Crown. But that did not occur. One would have thought that the Crown would have raised this jurisdictional issue when the Wai 1385 claim was presented to the Wai 1040 Tribunal in

February 2014. But neither did that occur. The Crown may say that they did not raise this jurisdictional issue as they believed that at least some of the members of Nga Tauira had not had their claims settled and a portion of the claim could still be heard by the Tribunal. However, there was no indication in the Wai 1385 of the iwi/hapū links of any of the members of Nga Tauira. For all the Crown knew, all of the members of Nga Tauira could have been from iwi/hapū groups that had already settled with the Crown. Therefore, we submit that the Crown was not actually aware of its own policy.

95. The Crown purports to settle the Ngāpuhi portion of the Ngā Tauira claim by way of a settlement policy that is not even clear to OTS officials. Furthermore, the settlement policy appears to be a recent contrivance. In these circumstances, the settlement of the Ngā Tauira claim by way of its inclusion in the Tūhoronuku mandate is a breach of the Crown's duties of active protection and good faith, and it is contrary to the case law referenced above.

The Right of Resumption

96. Section 8A of the Treaty of Waitangi Act 1975 gives the Tribunal the power to make orders that bind the Crown. This has been labelled as the right of resumption. Under section 8A(1)(b) the lands of some educational institutions can be subject to the Tribunal's resumption provisions. Much of the land that Ngā Tauira have claim interests in are currently where the Auckland University of Technology North Shore campus is located ("the education lands"). It was submitted in the Te Paparahi o Te Raki Inquiry that this land falls under the definition of educational institution.[77] Therefore, if the Te Paparahi o Te Raki Tribunal ("the Wai 1040 Tribunal") should hold that the Treaty claims of Ngā Tauira are well-founded, it is open to a subsequent Tribunal to issue a binding recommendation for the return of this land to Ngā Tauira. Important however is the Wai 1040 Tribunal's holding of well-foundedness before a subsequent Tribunal can consider an application for binding recommendations.[78] Accordingly a

[77] Opening Submissions for Wai 1385, Wai 1040, #3.3.81, paragraph 27.
[78] Treaty of Waitangi Act 1975, section 2(a)(i).

(favourable) Wai 1040 Tribunal report on the Ngā Tauira claims is necessary before such application can be made.

97. The availability of the education lands presents an invaluable opportunity to Ngā Tauira for the Tribunal to make binding recommendations under the Treaty of Waitangi Act. However if the Crown Policy should prevail, Ngā Tauira will lose their opportunity. By the time the Wai 1040 Tribunal issues its report, Tūhoronuku will have settled all claims in the inquiry, including the Wai 1385 claim component of the Ngāpuhi members of Ngā Tauira.

98. Although the Crown has proposed preserving legislation to save the jurisdiction of the Wai 1040 Tribunal to issue its report in circumstances where Tūhoronuku has already settled,[79] this does not assist. When, having received the Wai 1040 Tribunal's report, the Ngāpuhi members of Ngā Tauira go to make their application for a binding recommendation, the Crown Policy means that their claim component of the Wai 1385 claim will have been settled by Tūhoronuku.

99. Clearly the preserving legislation will not assist non-Ngāpuhi members of Ngā Tauira whose respective iwi have settled by the time the Wai 1040 Tribunal issues its report. Once their respective iwi settle, the opportunity for a binding recommendation will have passed.

100. The Tribunal has stated that when dealing with one group, the Crown needs to ensure that it preserves its capacity to provide similar redress to others who demonstrate comparable interest in the future. The Crown needs to avoid dealing conclusively with important sites, when the interests of others are not as well understood.[80] If there are uncertainties regarding who has a dominant interest over land, a precautionary approach should be employed by the Crown so that it retains the capacity to do justice to all.

[79] Waitangi Tribunal hearing transcript for judicial conference held 18-19 June 2014, Wai 2341, #4.1.1, page138, lines 45-48, page 139, lines 1-17, per Andrew Irwin, Crown counsel. Mr Irwin's submissions are based on a letter from Ministers Finlayson and Sharples to both Te Kotahitanga and Tuhoronuku dated 28 November 2012, at page 6, and **attached** as exhibit 28 to the Affidavit of Maureen Cecelia Hickey dated June 2014 (Wai 2341, #A26(a), at page 328). In a question put to Mr Irwin soon after Mr Irwin's aforementioned submissions, Panel Member Castle observes how the preserving "legislation is premised upon the proposition that at that stage a comprehensive negotiated deal of Treaty settlement has been negotiated". We note that in his reply Mr Irwin does not deny that this will be the procedural order i.e that a settlement will have been negotiated by the time the Wai 1040 Tribunal issues its report (Waitangi Tribunal hearing transcript for judicial conference held 18-19 June 2014, Wai 2341, #4.1.1, page140, lines 34-45, page 141, lines 1-6, per Andrew Irwin, Crown counsel).
[80] Waitangi Tribunal, *Tamaki Makaurau Settlement Process Report* (Wai 1362 2007), page 9.

The Crown must ensure that it remains in a position to do for the cross-claimants what it has done in good faith in the other settlement process for redress.[81]

101. During questioning in the December hearing, Ms Sykes confirmed that both Ngāti Rongo o Mahurangi and Ngā Uri o Pomare have potential claims to the land that the Auckland University of Technology North Shore campus sits on.[82] They are both hapū of Ngāpuhi. In the event that Ms Sykes' claimants succeed in obtaining holdings of well-foundedness from the Wai 1040 Tribunal for their respective Treaty claims, the course will be open to them to make application for the Tribunal's binding jurisdiction as well. Should that occur, there is likely to be a contest for the education lands between Ngā Tauira and Ms Sykes' clients and the relevant legislation makes provision for such an eventuality.[83] There is every likelihood that other Ngāpuhi claimant groups will join the contest for the education lands as well. However, given the likelihood that Tūhoronuku has now been alerted to the prospect of the inclusion of the valuable education lands in their pending settlement with the Crown, and because it is arguable that Ngāpuhi have mana whenua based interests in the education lands, there is every reason for the Claimants to be concerned that the education lands will not be available for settlement by the time the Wai 1040 Tribunal issues its report. This is because the education lands have been included, without the need for recourse to the Tribunal's binding jurisdiction, in the Tūhoronuku settlement in the meantime.

102. Accordingly there is a strong likelihood that the education lands may have already been included in the Tūhoronuku settlement by the time that the Tribunal's findings in relation to the Wai 1385 claim are made. This would render any application for binding recommendations nugatory.

Tūhoronuku's Mandate is Hapū Based

103. According to the Crown, the Tūhoronuku Mandate will give effect to the needs and wants of Ngāpuhi hapū. In Nigel Fyfe's Brief of Evidence he

[81] Waitangi Tribunal, *Ngati Awa Settlement Cross-Claims Report* (Wai 958, 2002), page 80.
[82] December hearing Transcript, page 489.
[83] Section 8A(2)(a)(ii) Treaty of Waitangi Act 1975 includes provision for the Tribunal to "identify the Māori or group of Māori" that the education lands should be returned to.

states that "*[a] single Ngāpuhi settlement process offers benefits in terms of achieving a timely settlement that addresses shared interests among Ngāpuhi hapū*."[84] He further states that "*[a] single iwi-wide negotiation process for Ngāpuhi would mean that overlaps between hapū can be resolved internally within Ngāpuhi*".[85]

104. Given that Ngā Tauira is not a Ngāpuhi hapū, it is difficult to see how it would fit within this Ngāpuhi-wide settlement negotiation. Ngā Tauira would not have any bargaining power and would be lost amongst the wide-ranging and connected Ngāpuhi hapū.

105. As stated by the Claimant:

> *But for Ngā Tauira this will not be the case. Ngā Tauira is a pan tribal group. We are made up of old boys of Hato Petera from around the country. Therefore, it is not a hapū of Ngāpuhi and so there is no possibility of the devolution of redress to Ngā Tauira as a group.*[86]

106. The Crown Policy, as stated above, is that Ngā Tauira's claim will be settled by Tūhoronuku in so far as any of the individuals of Ngā Tauira are Ngāpuhi. This places Ngā Tauira in a precarious position as those individuals of Ngāpuhi decent will have no bargaining power during the negotiations in relation to the Ngā Tauira interests. The bargaining power will be with the hapū and the hapū kaikorero on the Tūhoronuku governance structure.

107. This in complete contradiction to another portion of the Red Book. The Crown states:

> *A key objective of negotiations for Treaty settlements is to help set right the grievances that claimant groups have about historical Crown actions. It is in the interests of both the Crown and claimant groups for this to be done as effectively and efficiently as possible.*

[84] Brief of Evidence of Nigel Fyfe, Wai 2490 #A103, para 16.
[85] Brief of Evidence of Nigel Fyfe, Wai 2490 #A103, para 27.
[86] Brief of Evidence of Frank Rawiri, paragraph 9.

> *It therefore makes sense for settlement to be comprehensive, providing redress for all the wrongs done to a claimant group. Settlements made "bit by bit" over a long time-span would risk leaving a sense of wrong to linger, and might never achieve a sense of final resolution.*[87]

108. If Ngā Tauira's claim is included in the Tūhoronuku settlement, extreme prejudice will result. The Crown will be unable to ensure that it provides fair redress to Ngā Tauira as a cross claimant. The only way to prevent this prejudice is to have Ngā Tauira's claim removed from the Tūhoronuku mandate and allow Ngā Tauira to negotiate its own settlement with the Crown.

109. As stated by the Claimant:

> *But if we are made to settle in this piece-meal fashion, the Crown will not be held to properly account for the wrongs that have been done to Ngā Tauira Tawhito o Hato Petera. The incremental settlements that Mr Pollock refers to will negate any chance we have of a comprehensive settlement that will restore our mana and our ability to keep the kura's doors open.*[88]

PREDETERMINATION AND BIAS

110. We adopt the Wai 2443 submission on predetermination and bias in so far as it relates to Nga Tauira.

DENIAL OF THE RIGHT TO BE HEARD

111. We adopt the Wai 2443 submission on the right to be heard in so far as it relates to Nga Tauira.

[87] *Ka tika a muri, ka tika a mua – Healing the past, Building a future,* page 44.
[88] Brief of Evidence of Frank Rawiri, Wai 2490, #A116, paragraph 18.

PREJUDICE

112. Nga Tauira have been prejudiced and will continue to be prejudiced by the Crown's actions in the following ways:

a. Under Te Tiriti o Waitangi, they were guaranteed Tino Rangatiratanga by the Crown. By refusing to deal with Nga Tauira as a pan-iwi group in its own right, the Crown is trampling on this guarantee.

b. Nga Tauira is being included in the Tuhoronuku without any consultation and without any regard to their specific historical Treaty claims.

c. Tuhoronuku will negotiate the settlement of Nga Tauira's historical Treaty grievances in circumstances where Nga Tauira is a cross-claimant with Ngapuhi.

d. Nga Tauira will never be given full and appropriate redress for the Crown's breach of Nga Tauira's Treaty rights.

e. Their right to a full and fair hearing, including having a Tribunal report inform any settlement of their claim, is under threat by the Crown's actions.

f. They will lose their right to seek their own independent remedies from the Crown on the basis of findings from the Waitangi Tribunal.

RELIEF

113. We adopt the Wai 2443 submission on the relief sought from the Tribunal in so far as it relates to Nga Tauira.

114. In addition we seek:

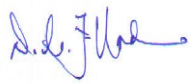
a. A finding that this claim is well founded;

b. A recommendation that the Crown formally recognise the tino rangatiratanga of Nga Tauira to make decisions and represent themselves in respect of any litigation or dealings with the Crown;

c. That the Tribunal hear and report on the claims of Nga Tauira without further interference from the Crown; and

d. Any other recommendations, findings and further redress that the Tribunal considers appropriate in the circumstances.

DATED at Auckland this 25th day of March 2015



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