KEI MUA TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

Wai 2490

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF The Ngāpuhi Mandate Inquiry

CLOSING SUBMISSIONS FOR THE TŪHORONUKU INDEPENDENT MANDATED AUTHORITY
7 APRIL 2015

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MAY IT PLEASE THE TRIBUNAL

PART A: INTRODUCTION

1. INTRODUCTION

A Ngāpuhi-led mandate which provides a robust and transparent platform for settlement

1.1 The claimants proceed as if the Tūhoronuku Independent Mandated Authority ("**Tūhoronuku IMA**") was created by the Crown, sidelines the hapū of Ngāpuhi and excludes regional or hapū-based settlement.

1.2 This is far from the truth, but the claimants seek to exaggerate differences and turn an internal debate about the "who and how" of settlement into a claim against the Crown. A minority seek to use the Tribunal to trump the mandate secured by Tūhoronuku IMA.

1.3 Accordingly, we start these submissions by stressing fundamental points about Tūhoronuku IMA's mandate:

(a) Mandate led by Ngāpuhi, not by the Crown: Tūhoronuku conducted an extensive consultation process and asked Ngāpuhi in 2009/10 how and when it wished to proceed to settlement. The resounding answer was to have a single Ngāpuhi-wide mandate and to move to settlement now. This reflects the will of Ngāpuhi and is not a Crown-imposed construct or a convenient coincidence. This was a "bottom up" process, not a Crown-driven one. There was no pre-conceived plan; rather, Tūhoronuku sought the direction of Ngāpuhi. It is patronising to all those who participated in this process, and in particular the 5,210 who voted for the mandate after two years of discussion within Ngāpuhi, to suggest otherwise.

(b) A single mandate is widely supported by Ngāpuhi: While Ngāpuhi has many strong hapū, there is a shared Ngāpuhi identity.[1] Throughout the mandate process, the key players supported a single unified approach to settlement.[2] This model does not prevent regional representation or regionally devolved post-settlement governance. What it does mean is that everyone is at the table, decision-making is collective and individual hapū cannot opt in and out. It is a mandate from Ngāpuhi katoa and can only be withdrawn by Ngāpuhi katoa.

(c) Concerns raised by opponents have been accommodated: Throughout the mandating process, Tūhoronuku has listened and accommodated concerns. Many changes have been made since Tūhoronuku published its mandate strategy in 2010, including:

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1 We reject the provocative suggestion of Ērima Hēnare that Ngāpuhi might not even exist: see Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 127-129. Ngāti Hine, for example, has always considered itself a hapū of Ngāpuhi: see Document 12 of March Hearing Common Bundle (Wai 2490 #A151), "Email to Maureen Hickey 'Ngāpuhi meeting'", 9 December 2010 at p 78.

2 See paragraph 2.25 below.

(i) increasing the Tūhoronuku IMA board membership from 15 to 22, with increased hapū representation (hapū representatives forming 15 of the 22 (68 percent), instead of the initial seven of 15 (46 percent));

(ii) providing for hapū representatives to be elected on a regional basis;

(iii) making the election process more transparent (including using an independent returning officer);

(iv) separating Tūhoronuku from Te Rūnanga-Ā-Iwi o Ngāpuhi ("**Rūnanga**") by establishing the Tūhoronuku IMA as an independent charitable trust;

(v) reducing the Rūnanga's representatives from two to one;

(vi) introducing police vetting;

(vii) prohibiting Tūhoronuku IMA Trustees from being negotiators; and

(viii) conducting a fresh round of elections upon recognition of mandate.

By the end of 2012, all the major concerns raised had been addressed and there was very little disagreement between the key players in terms of the structure for the mandated body.[3] It was certainly not contended at that time that a mandate should be secured hapū-by-hapū. As a result of the changes made, many former opponents have become supporters of Tūhoronuku IMA. Furthermore, as was made clear by Sonny Tau, Tūhoronuku IMA wants everyone to be at the table and it would look at further accommodations to help that happen.[4]

(d) Tūhoronuku IMA refreshed following recognition: The original members of Tūhoronuku IMA put unity ahead of self interest and decided, given the existence of strong views during the mandate process, to step down if mandate was recognised so that Ngāpuhi could choose afresh who would steer the settlement waka. Accordingly, following the recognition of mandate, Ngāpuhi has chosen its Tūhoronuku IMA representatives through a fair and transparent election process that allowed everyone to participate (regardless of whether they previously opposed or supported). We are not aware of any other mandates where the people who have sought mandate have stepped down for fresh elections following recognition.

(e) Tūhoronuku IMA is hapū led and hapū representation is based on a regional or rohe-based model: To say that 15 of the 22 Tūhoronuku IMA Trustees are hapū representatives is correct, but understates the role of hapū since the other seven trustees also belong to hapū (but are elected/appointed on a different basis). In that sense, all 22 Trustees speak for hapū. The

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3 See our discussion of this at paragraph 3.27.

4 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 1139.

representation structure includes mandated hapū kaikōrero ("**MHK**") for each hapū and then regional representatives who sit on the Tūhoronuku IMA Board (that Board representing Ngāpuhi as a whole). Essentially, this is a rohe-based model (also known as a "taiwhenua" model) for representation. While other parties may use the term "taiwhenua", it is a concept alien to Ngāpuhi.[5] In any event, this regional model makes Tūhoronuku IMA's model very similar to that proposed in the Morgan Report.[6] Tūhoronuku IMA currently has a strong level of hapū support and continues to look at ways to improve involvement.

(f) The negotiation process is flexible, but will be hapū-centric: Decisions on the direction and nature of settlement negotiations will be made over time. The draft Engagement Plan (required as a condition on the recognition of mandate) provides for hapū profiles, regional settlement working groups, direct contact with negotiators, direct contact with the Crown through telling the stories hui, and the possibility of devolved or hapū specific settlement.[7] Given the representation structure of Tūhoronuku IMA, the negotiation process will reflect the wishes of hapū.

(g) Decisions about post-settlement governance have not been made, but there is no inconsistency between a single mandate and settlement on a regional basis: Decisions about post-settlement governance have not yet been made. The form of a settlement for Ngāpuhi will depend on the wishes of the people and hapū of Ngāpuhi. Tūhoronuku IMA does not have a direction or agenda outside of the wishes of its stakeholders; it is a neutral platform through which individuals and hapū can exercise rangatiratanga. That might mean regional (rohe-based) settlements or one consolidated economic settlement with layered cultural redress.

(h) Wai 2490 claims are an intra-iwi dispute: The claims before the Tribunal represent an internal dispute where a minority take a different view about the "who and how" of Ngāpuhi settlement. While the 1,600 who opposed the mandate is not an insignificant number, they were outnumbered three to one by supporters of the mandate. There is no reliable evidence that the level of opposition has grown. Nor is there reliable evidence as to the views within claimant groups who assert that they represent the views of entire hapū. In contrast, 7,434 votes were cast in the elections that followed mandate recognition. Although framed as a claim against the Crown, a vocal minority simply seek to have their vision of settlement imposed on Ngāpuhi katoa.

1.4 In summary, Tūhoronuku IMA provides an open, transparent structure through which all hapū can exercise their rangatiratanga in a co-ordinated matter to achieve the best possible settlement for Ngāpuhi katoa.

1.5 The amended Tūhoronuku model is flexible and robust, and is hapū centric. Hapū are given the strongest voice. Choices as to the manner in which hapū claims are prosecuted, and whether there is a layered or

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5 As discussed by Shane Jones under cross-examination: see Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 1101. However, it maps to the regional structure of representation adopted by Tūhoronuku IMA.

6 See paragraph 3.21 below.

7 See paragraphs 14.10 - 14.21 below.

rohe-based post-settlement governance entity ("**PSGE**") structure, are choices that will be made by Ngāpuhi, including hapū. Those decisions are yet to be made. Importantly, fresh elections were held once mandate was recognised. Today, those who have taken positions on Tūhoronuku IMA have done so because Ngāpuhi put them there.

1.6 Matters of "who and how" are commonly disputed in mandating situations.[8] However, the Crown's role in relation to a Deed of Mandate submitted to it is to determine whether to recognise the mandate or not. It is not up to the Crown to resolve Ngāpuhi's differences:[9]

> ...Embroiling the Crown in an internal Ngāpuhi wrangle does not necessarily make them responsible for the stalemate. Rangatiratanga demands Ngāpuhi take responsibility for these issues themselves. Recourse to the Tribunal is no substitute.
>
> The political choice between an array of hapū initiatives or a single Iwi settlement is a matter for Ngāpuhi members. A process has been carried out. The Crown has intervened several times to seek improvements. The result is not totally accepted but it is time to move on and catch the tide.

1.7 Ngāpuhi's internal differences do not raise questions of the Crown's compliance with Te Tiriti o Waitangi ("**Te Tiriti**"). The opponents cannot use Te Tiriti to force minority views on the rest of Ngāpuhi.

Crown has played an appropriate role

Crown's obligations

1.8 The Crown has a number of obligations to Ngāpuhi arising from its responsibility as a Te Tiriti partner. These include a duty to act in good faith,[10] a duty to consult,[11] and a duty to actively protect the interests of Māori.[12]

1.9 The Crown also has a backward-looking obligation to provide redress for its past breaches of the Te Tiriti.[13] That is to be pursued through active and positive steps.[14] Accordingly, the Crown has an obligation to meet with groups who wish to settle their Te Tiriti grievances, and to discuss potential avenues for redress in a timely manner.

1.10 In situations where there is dispute within an iwi, that proactive duty requires the Crown to "exercise an 'honest broker' role as best it can to

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8 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 835; Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.3), 4-5 March 2015 at pp 68 and 71.

9 Brief of evidence of Shane Jones (Wai 2490, #A104), dated 19 November 2014 at [22] - [23].

10 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (*Lands Case*) per Cooke P at p 664.

11 In relation to matters on which a responsible Te Tiriti partner would do so. See *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98 (HC).

12 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (*Lands Case*) per Cooke P at p 664.

13 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (*Lands Case*) per Cooke P at pp 664 - 665 and Richardson J at p 674; *New Zealand Maori Council v Attorney General* [1992] 2 NZLR 576 (CA) at p 583.

14 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (*Lands Case*) per Richardson J at p 674; *New Zealand Maori Council v Attorney General* [1992] 2 NZLR 576 (CA) at p 583.

effect reconciliation, and to build bridges wherever and whenever the opportunity arises".[15]

Crown acted consistently with its Te Tiriti obligations

1.11 From Tūhoronuku IMA's perspective, the Crown's role has been appropriate and consistent with its Te Tiriti obligations:

(a) The Crown met with Ngāpuhi claimants to discuss possibilities for starting the process towards settlement.

(b) However, the Crown left Ngāpuhi to exercise its rangatiratanga and determine its desired process and structure for settlement.

(c) Throughout its engagement with Ngāpuhi, the Crown did not rush into its decisions - on several occasions the Crown instead delayed matters to seek facilitation between Tūhoronuku and Te Kotahitanga o Ngā Hapū Ngāpuhi ("**Te Kotahitanga**").

(d) The Crown actively sought to bring the parties together and narrow the issues between them through facilitation. It is significant that by the end of 2012 few serious issues appeared to remain and substantial changes had been made to the structure of Tūhoronuku. Those changes also reflected the Crown's concern to ensure that hapū rangatiratanga was appropriate and preserved within the structure.

(e) Throughout the process the Crown engaged with all parties in good faith and maintained dialogue. In doing so, it sought to reduce conflict between groups in Ngāpuhi and ensure that information was shared fairly.

(f) The Crown proactively monitored events through such dialogue and observation of the mandating process (for example, through independent Te Puni Kōkiri observers at mandating hui).

1.12 Before the Crown recognised Tūhoronuku IMA's mandate, it carefully considered the options available and satisfied itself that, with a vote in favour by 76 percent and significant changes having been made to address claimant concerns, Tūhoronuku IMA had sufficient support. Any remaining concerns could be addressed through robust conditions for the maintenance of the mandate. Moreover, the Ministers rightly satisfied themselves that a range of options - including a rohe-based (or "taiwhenua" in some people's language) settlement model - remain available under the Tūhoronuku IMA mandate.

1.13 Claimants frame their key allegation with respect to the Crown's decision to recognise Tūhoronuku IMA's mandate as pre-determined, but there is no evidence to support this. In fact, the evidence shows the Crown carefully considered the matter over many years and maintained an open mind. As it has turned out, the Crown's attempts to broker a common view were unsuccessful (although conversations continue) and Tūhoronuku IMA's mandate was ultimately recognised despite strongly expressed opposition. In essence, the claimants' true complaint is a simple one: they do not like the "who and how" of Tūhoronuku IMA. That

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15 Waitangi Tribunal *Ngāti Awa Settlement Cross-Claims Report* (Wai 958, 2002) at p 88.

does not, however, make the Crown's decision pre-determined or mean that the Crown acted in bad faith.

No safe basis for Tribunal to intervene

Appropriate role of the Tribunal

1.14 The Tribunal accepts that it should "tread very carefully" in relation to proceedings challenging the recognition of mandate where, as here, the dispute is in reality between groups within the iwi, rather than between the Crown and claimants.[16]

1.15 In doing so, the Tribunal:[17]

(a) must focus on the decisions of the Crown;

(b) is not to substitute its own view of matters for that arrived at by the Crown and the mandated entity; and

(c) should adopt the principle of extreme caution, bearing in mind the political nature of mandating decisions.

1.16 In the *East Coast Settlement Report,* the question before the Tribunal was not whether the Crown could have done better or differently, but whether the Crown had "failed to follow its own processes and policies in recognising" mandate.[18] In that report, errors in the Crown's processes did not amount to a breach of Te Tiriti principles.[19] Again, in the *Ngāti Awa Settlement Cross-Claims Report,* the Tribunal affirmed that the question is not what its preferences might be, but whether the Crown's conduct was "so wanting in good judgment and good faith" for the Tribunal to be minded to intervene.[20]

Claims relate to matters of preference and judgement, not bad faith

1.17 As with many other iwi, the mandating journey has been difficult and controversial.[21] Different people hold different views as to the appropriate structure, representation and leadership. But, these are not things that the Tribunal can fix or that would disappear with a different mandate structure: whatever choices are made, some groups will be unhappy.

1.18 The issues raised by the claimants are all matters of preference or judgment. That is, they are matters where choices are available and different people will have a different view as to which option is best. The following table looks at some of the key issues raised by the claimants and illustrates this point by noting where claimant views have changed

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16 Waitangi Tribunal *The Pakakohi and Tangahoe Settlement Claims Report* (Wai 142, Wai 758, 2000) at pp 55-57; see also Waitangi Tribunal *East Coast Settlement Report* (Wai 2190, 2010) at p 44.

17 Waitangi Tribunal *The Pakakohi and Tangahoe Settlement Claims Report* (Wai 142, Wai 758, 2000) at p 56.

18 Waitangi Tribunal *East Coast Settlement Report* (Wai 2190, 2010) at p 54.

19 Waitangi Tribunal *East Coast Settlement Report* (Wai 2190, 2010) at p 60.

20 Waitangi Tribunal *Ngāti Awa Settlement Cross-Claims Report* (Wai 958, 2002) at p 79.

21 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.3), 4-5 March 2015 at pp 68 and 71. The Tribunal has previously recognised that following mandate, it is not uncommon for parties to file urgency applications and "not being happy with an authorised mandated body does not necessarily give rise to significant and irreversible prejudice". See Wai 532 (#2.49, 10 August 2010) per Judge Coxhead at [20].

over time and how people could reasonably object if the Crown had done as the claimants propose:

Issue	Claimants say the Crown …	Why there is no right / wrong answer
Pre-mandate funding	Should not have funded Tūhoronuku IMA before mandate was recognised	• The first tranche of pre-mandate funding was to raise awareness of mandate issues generally. Arguably the Crown had a duty to facilitate this. • The second tranche of funding was for delays Tūhoronuku agreed to in order to help resolve differences with Te Kotahitanga. Arguably the Crown had a duty to do this. • The third tranche of funding was a partial reimbursement of costs incurred relating to the legal separation of Tūhoronuku from the Rūnanga. Claimants sought for this funding to be provided by the Crown to ensure Tūhoronuku's separation from the Rūnanga. • At any rate, not providing funding would not have had any effect (other than making Tūhoronuku less likely to delay, engage in facilitation and separate from the Rūnanga).
Ngāpuhi as a large natural grouping ("**LNG**"), hapū rangatiratanga and claimant consent	Should have required a hapū-by-hapū or rohe-based approach	• Te Kotahitanga supported a single mandate approach for a significant period of time. • 76 percent of those Ngāpuhi who voted supported a single settlement mandate. • The evidence shows different views as to whether hapū rangatiratanga is best exercised through a hapū-by-hapū approach or by collective participation in a Ngāpuhi-wide mandate. • Hapū based settlement could complicate the availability of redress, become mired in cross-claims, and lead to some groups settling many years before their neighbours and whānau. • There is no evidence before the Tribunal that could justify a finding that mandate must be hapū-by-hapū and cannot be iwi-wide. A handful of personal opinions (which are contested) cannot be sufficient. • Arguably forcing the splintering of Ngāpuhi through multiple mandates would have been a Te Tiriti breach. • At any rate, hapū still set the direction for Tūhoronuku IMA.
Timing	Should not proceed to negotiations until after the Stage Two hearings are complete	• Other iwi have settled without a written report. • 76 percent of those Ngāpuhi who voted that Ngāpuhi should move to settlement negotiations now. • The precise timing of the negotiation

Issue	Claimants say the Crown …	Why there is no right / wrong answer
		process and the relationship with the Stage 2 report is still to be finalised. The pace of the negotiations will be decided through the members of Tūhoronuku IMA. • Arguably it would have been a Te Tiriti breach to delay negotiations given the support for Tūhoronuku.
Recognition of mandate	Should not have recognised Tūhoronuku IMA's mandate	• Tūhoronuku IMA had engaged in an extensive consultation process and had 76 percent support. It had also made numerous accommodations and changes. • Arguably it would have been a Te Tiriti breach not to recognise mandate.
Election processes	Should have required hapū representatives to be elected by hui-a-hapū rather than online and postal voting	• Tūhoronuku IMA has an open and transparent model that was introduced due to Te Kotahitanga concerns about leaving each hapū to determine its own process. Further, the Morgan report supported online and postal voting. • To require election by hui-a-hapū without providing for participation by dispersed Ngāpuhi (approximately 80 percent of the Ngāpuhi population live outside the rohe) would arguably be a Te Tiriti breach.
MHK replacement threshold	Should have required Tūhoronuku IMA to include a lower MHK replacement threshold	• The question of whether the threshold should be 90 people or lower does not engage questions of Te Tiriti breaches. • This is Tūhoronuku's model, not the Crown's. The Tribunal should support the autonomy of Ngāpuhi to determine its own processes.

1.19 The point is that these issues are complex and contestable. Te Tiriti does not provide a yardstick for determining which view is right or wrong. They all fall within the realm of judgement, preference and discretion. The Tribunal may have preferred a different approach, but that does not mean that the approach taken was in breach of Te Tiriti principles.

1.20 Furthermore, these issues are ubiquitous in mandate contests. Any finding of breach would call into question other settlement processes which have not been considered by the Inquiry. As such, findings in the Ngāpuhi context cannot be premised on misgivings about the Crown's broader policies given the process followed.

The mandate process is flexible and will continue to evolve

1.21 As noted above, the details of the negotiation process and the form of post-settlement governance are yet to be determined. They will be set by the hapū and people of Ngāpuhi and not by any other agenda.

1.22 In particular:

(a) We expect the number of MHKs to grow over time.

(b) Key players continue to discuss coming on board.

(c) The negotiation and communication plans (which will be key to how settlement is pursued) are still being finalised.

(d) The structure of the eventual settlement will be discussed and determined by Ngāpuhi and may involve elements of regional and/or hapū redress.

1.23 In our submission, even if the Tribunal has concerns, a finding of "breach" or "prejudice" at this stage would amount to a crystal ball prediction that Ngāpuhi has no chance to satisfactorily resolve these matters for itself.

The Tribunal's role risks strategic gaming by claimants

1.24 By taking a non-interventionist approach, the Tribunal encourages groups with different views to reach their own accommodations and compromises.

1.25 Conversely, if the Tribunal is willing to enter into debates about representation structures, election process, timing and funding, the incentives change. That is, a group with a different view has a strong incentive to disengage and become oppositional. There are a number of examples of this occurring in relation to Ngāpuhi:

(a) Oppositional approach: The claimants seek to portray positions as diametrically opposed, even though the structural differences between Te Kotahitanga and Tūhoronuku were very small at key points. Te Kotahitanga was committed to a unified Ngāpuhi settlement, and was the proponent of aspects of the Tūhoronuku model that it now criticises.

(b) Disengagement regarding elections: Ngāti Hine, at its AGM, debated whether to participate in the elections and try to populate Tūhoronuku IMA with like-minded members. It decided not to because participation did not guarantee the results it wanted, so it decided to litigate as a risk-minimisation strategy.[22] That is, it was a boycott for strategic rather than substantive reasons. Ngāti Hine consciously chose the Tribunal rather than engagement.

(c) Refusal to meet after December 2014 Tribunal hearing: At the December hearing there was a real sense that progress could be made by the key parties sitting down to talk. The claimants have advised that they refuse to take part while Tūhoronuku IMA continues.[23] There is no basis for such pronouncements other than to put pressure on the Tribunal to act.

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22 See *The Northern Advocate* "Settlement rift widens as hapū withdraws" (4 March 2014), introduced into evidence during the cross-examination of Waihoroi Shortland in the Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 and referred to at pp 230 - 233 and 252 - 253.

23 See the evidence of Nigel Fyfe under cross-examination in the Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.3), 4-5 March 2015 at pp 266 - 267; see also joint memorandum of counsel on behalf of claimants opposing Tūhoronuku mandate, dated 9 December 2014 at [7]; and joint memorandum of counsel on behalf of claimants opposing Tūhoronuku mandate (Wai 2490, #3.4.7), dated 10 December 2014 at [13] - [15].

1.26 To engage in the detail of the issues and to find the Crown in breach because it could have done better, or because the Tribunal would have done things differently, invites parties to treat the Tribunal as referee whenever Māori disagree amongst themselves about engagement with the Crown.

Conclusion

1.27 During the last six years, Tūhoronuku IMA has engaged openly and extensively with Ngāpuhi. In August and September 2011, it tested its mandate with the people of Ngāpuhi and received a 76 percent vote in support. It then sought and received Crown recognition of its mandate.

1.28 The Crown has accepted Tūhoronuku's mandate following a thorough process in which significant changes were made to accommodate claimants. That was without question a reasonable basis for the Crown to conclude Tūhoronuku IMA has sufficient support and to recognise its mandate, especially on a conditional basis. While there are dissenting voices, they are clearly in the minority. There has been a clear expression of Ngāpuhi's desire to move forward with a unified mandate.

1.29 The differences of view within Ngāpuhi are not caused or exacerbated by the Crown, and there would still be disagreement even if the Crown had acted differently.

1.30 Ngāpuhi is now ready to commence settlement negotiations. Ngāpuhi has an historic opportunity to assert its rangatiratanga and enjoy the economic, social, and cultural benefits of settlement. If the opportunity is not seized now, there is no knowing how much longer Ngāpuhi will be forced to wait.[24] The actions of the Crown since 1840 have left Ngāpuhi without the land and resources it once had. The settlement of Ngāpuhi's grievances is crucial to its economic, social, and cultural revitalisation. Any further delay because of Tribunal recommendations would severely prejudice Ngāpuhi katoa.

1.31 There is nothing presented by the claimants that is a breach of Te Tiriti principles or that otherwise requires the last seven years' work to be undone and settlement delayed indefinitely.

1.32 The will of Ngāpuhi to proceed to settlement negotiations through Tūhoronuku IMA has been clearly expressed. Many of the claimants are well known to the Tribunal through their work on Te Paparahi o Te Raki, but that does not put them in a privileged position to determine the path to settlement. The Tribunal should support the wishes of Ngāpuhi.

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[24] Brief of evidence of James Brendan Bolger (Wai 2490, #A110), dated 24 November 2014 at [15]; brief of evidence of Shane Jones (Wai 2490, #A104), dated 19 November 2014 at [14], [17]-[18] and [20]; and Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 537 - 538 (Tukoroirangi Morgan), 594 - 595, 623 (James Bolger), and 1095, 1108 (Shane Jones).

PART B: SUMMARISING THE HISTORY

2. FROM 2005 UNTIL THE MANDATE VOTE

The early days

2.1 Tūhoronuku IMA's origins go back to December 2005 and the recommendation of then Chief Judge Joe Williams to establish the Ngāpuhi process design group.[25]

2.2 The original focus of that group was the organisation of claims before the Waitangi Tribunal. People involved did not have a pre-conceived settlement plan, and rather sought to find out what Ngāpuhi wanted.[26]

2.3 In 2008 this mahi was taken up by the Rūnanga, with the 2008 AGM directing the Rūnanga to lead Ngāpuhi in progressing its Te Tiriti claims.[27] This initiative was not in any way at the Crown's direction; it was a Ngāpuhi decision.[28]

2.4 The Rūnanga created an independent sub-committee known as Te Rōpū o Tūhoronuku.

2.5 This group did not have a pre-conceived plan; rather it sought to inform Ngāpuhi and seek direction.[29] During 2009, Te Rōpū o Tūhoronuku held 27 hui throughout New Zealand and Australia. The feedback was that:

(a) Ngāpuhi wanted to settle its Te Tiriti o Waitangi claims;

(b) Tūhoronuku should seek mandate;

(c) it should be a hapū-led process; and

(d) mandate should not be sought until the initial Tribunal hearings on He Whakaputanga and Te Tiriti o Waitangi had been concluded.[30]

2.6 As a result of this feedback, Tūhoronuku decided to test whether it had the mandate of the people once the Stage One Tribunal hearings were complete. Anyone else in Ngāpuhi was free to do the same.

Mandate strategy

2.7 During 2010, Tūhoronuku consulted with Ngāpuhi on a proposed mandate strategy and representation structure.[31] It held 14 hui that were

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25 Brief of evidence of Titewhai Harawira (Wai 2490, #A102), dated 20 November 2014 at [39].

26 Brief of evidence of Titewhai Harawira (Wai 2490, #A102), dated 20 November 2014 at [41] - [42].

27 See Exhibit RT-6 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014, p 6.

28 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.2].

29 Brief of evidence of Titewhai Harawira (Wai 2490, #A102), dated 20 November 2014 at [40] - [41]; and brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.1].

30 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.20].

open to all Ngāpuhi, these hui being advertised on the internet, radio, television, and newspapers. At these hui, Tūhoronuku emphasised that Ngāpuhi is a large iwi (and so should not rush the process), and that its model was not set in concrete and would be shaped by feedback. Tūhoronuku also emphasised the model had come from Ngāpuhi's processes up until that point.[32]

2.8 In March 2010, Ngāti Hine's concerns were that it:[33]

(a) was committed to Stage One Tribunal hearings;

(b) wanted a Ngāpuhi-wide settlement but had concerns at the speed with which Tūhoronuku was progressing matters; and

(c) considered the structure had inadequate provision for hapū representation, and was interested in working through hapū clusters.

2.9 In November 2010, Tūhoronuku submitted its Deed of Mandate Strategy to the Crown. The Deed of Mandate Strategy was based on the information gathered over the course of 2009 and 2010, where Ngāpuhi had stated their wish to move towards settlement. The model incorporated feedback from hui that had been held, and provided for an urban voice and for hapū to have seven of the 15 seats on the body.[34]

2.10 The Crown evidence is that usually the decision of whether or not to endorse a mandate strategy is dealt with at the officials' level, but that the significance and complexity of the Ngāpuhi settlement meant that Ministerial involvement was appropriate.[35] Ministers were aware that there would be limited opportunities to pull Ngāpuhi together.[36]

2.11 It was in this context that the Minister met with Tūhoronuku on 9 December 2010. At this meeting, Tūhoronuku expressed support for Tribunal hearings continuing, seeking Crown support for a parallel hearing and settlement process.[37]

2.12 On 16 December 2010, when the Crown updated the Waitangi Tribunal (and claimants) on the work Tūhoronuku had undertaken, the Crown stressed that:[38]

(a) no timeframes were set in stone;

(b) it had made no decisions to recognise any mandate in relation to Ngāpuhi claims; and

(c) it was open-minded as to whether Tūhoronuku, or any other group, would be able to obtain a mandate.

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31 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.21].
32 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [57].
33 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [59] - [60].
34 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.22].
35 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [66].
36 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [68].
37 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [69].
38 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [70].

2.13 The Crown also noted that it was open-minded as to the nature of settlement, but that it had a preference for a unified Ngāpuhi settlement process because it would benefit both Ngāpuhi and the Crown. For those reasons, the Crown was interested in Tūhoronuku's attempts to unify Ngāpuhi under a single mandate model.[39]

2.14 Then, in January 2011, the Crown endorsed Tūhoronuku's Deed of Mandate Strategy. Endorsing a mandate strategy did not guarantee the Crown would recognise a mandate, and this was communicated to Tūhoronuku.[40]

Moving towards mandating hui

2.15 From January to March 2011, the Deed of Mandate Strategy was advertised for six weeks on the Office of Treaty Settlements ("**OTS**"), Te Puni Kōkiri and Tūhoronuku websites with the facility for public feedback.[41] The purpose of seeking feedback was to identify any concerns at an early stage.[42] Only 31 feedback letters were received in this process.[43]

2.16 The key issues of concern for opponents were:[44]

(a) the sequencing of Stage Two hearings;

(b) the connection between Tūhoronuku and the Rūnanga;

(c) insufficient hapū representation;

(d) criticism of the tikanga-based hapū kaikōrero elections process;

(e) the pace of progress; and

(f) the quality of information provided on claimant definition up to that point.

2.17 These issues were all addressed by Tūhoronuku in the process that followed.

2.18 Around this time, the Crown was also engaging directly with Te Kotahitanga. On 12 March 2011, the Crown met with Te Kotahitanga to hear their concerns, those being:[45]

(a) the desire to progress to Stage Two Tribunal hearings;

(b) Tūhoronuku could not be trusted to lead a parallel hearings and settlement process;

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39 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [71].
40 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [68] and [72]; and brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.25].
41 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [74].
42 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [74].
43 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [75].
44 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [76].
45 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [82].

(c) the haukāinga could be swamped in Tūhoronuku's processes, when mandate should in fact be built on people who align with Te Kotahitanga; and

(d) Tūhoronuku's connection to the Rūnanga was problematic because of diminishing support for the Rūnanga.

2.19 We note that Te Kotahitanga was positive about a single Ngāpuhi settlement.[46] Further, no issues were raised with the single mandate model in the 31 submissions received on the Deed of Mandate Strategy.[47] There was certainly no view that hapū rangatiratanga required mandate to be secured hapū-by-hapū.

2.20 On the same day (12 March 2011), OTS and Te Puni Kōkiri also met with Tūhoronuku to discuss the Tūhoronuku mandate proposal and the different positions that were emerging.[48]

2.21 On 23 March 2011, Ngāti Hine (who were participating in Te Kotahitanga) confirmed their continued support for a single Ngāpuhi settlement. Their concern was rather that Tūhoronuku was controlled by the Rūnanga and its model did not provide adequately for hapū representation.[49]

2.22 Paul James of OTS soon after wrote to Te Kotahitanga, noting that they seemed to want the Crown to stop Tūhoronuku's process. Mr James made it clear that the Crown was not in a position to make mandate decisions for Ngāpuhi, and it could not prevent an entity going out and testing its support in the claimant community.[50] He noted that Tūhoronuku and Te Kotahitanga shared a vision of a single Ngāpuhi settlement and that conciliation between them would be the ideal result.[51]

2.23 Conciliation was a priority for Tūhoronuku.[52] Tūhoronuku had originally intended to seek a mandate in March or April 2011. However, because of the concerns that had been expressed by Te Kotahitanga, Tūhoronuku agreed to extend its timeframes by three or four months to allow discussions with Te Kotahitanga.[53] This was done in response to Crown's requests that facilitation be undertaken to see if emerging differences could be addressed.[54]

2.24 It took nearly three months to bring the parties to the point of agreeing a facilitation process, so Tūhoronuku again extended the start of its mandate hui from 1 July to 31 July.[55]

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46 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014, at [82.5].

47 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014, at [76].

48 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014, at [83]; and Exhibit MCH8 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014.

49 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [82] and [85].

50 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [86].

51 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [86].

52 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [88]; and Exhibit MCH11 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014.

53 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.26]-[4.27].

54 Exhibit MCH9 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014, at p 147.

55 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [96].

2.25 Throughout this period, both Te Kotahitanga and Tūhoronuku shared the vision of a single Ngāpuhi settlement,[56] and saw Ngāpuhi as the relevant LNG.[57] For example, in May 2011 Waihoroi Shortland wrote the following to the Minister for Treaty of Waitangi Negotiations:[58]

> **We do not take issue with the fact that Ngāpuhi is a large natural group**, but we do take issues with the idea that Tūhoronuku is the appropriate structure to represent Ngāpuhi, and more particularly Ngāti Hine ... Ngāti Hine has made a commitment to other hapū to **work collaboratively towards a Ngāpuhi wide settlement**.
>
> [Emphasis added.]

Bolger facilitation

2.26 Following a suggestion from Rudy Taylor and Kelvin Davis that the Rt Hon James Bolger could be a facilitator, the Crown engaged Mr Bolger to facilitate discussions between Tūhoronuku and Te Kotahitanga over the course of June and July 2011.[59] A public hui was held at Whitiora marae on 27 July 2011 to outline each party's approach to an audience of Ngāpuhi members.[60]

2.27 At this hui, Tūhoronuku:

(a) offered Te Kotahitanga four seats on Tūhoronuku (which at that point had 15 seats);[61] and

(b) announced that existing members would stand down and fresh elections would be held if mandate was recognised.[62]

2.28 Those opposing Tūhoronuku assert that Tūhoronuku was not genuinely interested in finding resolution at the Whitiora hui because it advertised its mandate hui the day after the hui.[63] However, that misrepresents the fact that Tūhoronuku had agreed to work towards a compromise in spite of the delays this meant for the path to settlement. In the end, as Sonny Tau stated in evidence:[64]

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56 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.73(d) - (g)]; and brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [95].

57 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.73].

58 Exhibit N to brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098(a)), dated 18 November 2014.

59 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [94] and [99].

60 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [100].

61 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098(a)), dated 18 November 2014, at [4.29]. At this stage, there were three hapū kaikōrero on the board of Tūhoronuku IMA. These kaikōrero were elected in accordance with the process outlined in the Deed of Mandate Strategy at a hui at Mid North Motor Inn in Kaikohe on 18 February 2011 from the wider group of hapū kaikōrero. That is, there were more hapū kaikōrero than those three on the Board of Tūhoronuku. Minutes of that hui taken by Wackrow Williams and Davies were released in additional disclosure after the December hearing. In those minutes, it is alleged that Tūhoronuku representatives agreed that opposing hapū would not be covered by the mandate, and/or that such hapū could withdraw from the mandate. Tūhoronuku IMA challenges the accuracy of those minutes.

62 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [103].

63 Closing submissions for Wai 2431 and 2429 (Ngāti Hine and Te Kapotai) (Wai 2490, #3.3.20) dated 25 March 2015 at [176].

64 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014, at p 1141.

> Tūhoronuku went out and sought mandate after the Bolger process because we felt that Te Kotahitanga merely wanted to delay Tūhoronuku and wasn't interested in serious engagement on the issue. Tūhoronuku had long intended to advertise the deed of mandate and go out and hold hui. That had been scheduled for earlier in 2011 but had been delayed multiple times. It wasn't that we decided to advertise just after... Mr Bolger's process, we had always intended to do that. We just stopped delaying.
>
> **The date was set well in advance of the organisation of the Whitiora hui, the advertisement just happened to end up being on that particular day**. If there was a resolution to that meeting, it would've been quite easy to cancel those ads.
>
> [Emphasis added.]

2.29 At this stage, Tūhoronuku's process had already been underway for two years. Tūhoronuku were, having received the direction of Ngāpuhi as to how to proceed,[65] anxious to keep moving forward. Tūhoronuku clearly wanted to find compromises, and offered additional places on the Tūhoronuku Board for Te Kotahitanga members, as well as fresh elections upon any mandate recognition.

2.30 However, in the absence of any progress at the Whitiora hui (due to Te Kotahitanga's refusal to compromise), Tūhoronuku felt it had no basis on which to *not* keep moving forward. Tūhoronuku had agreed to a short delay and now five months had passed, and it seemed that all Te Kotahitanga wanted to do was delay.

2.31 The course of that hui is described by the Rt Hon James Bolger:[66]

> ...It was significant, in my view, that Tūhoronuku representatives indicated that they were open to making a number of refinements to the mandating circumstances as had been implemented at that point. These changes included allowing for additional places on the Tūhoronuku board for Te Kotahitanga members, and having Tūhoronuku members stand down and seek re-election following a fresh mandate process.
>
> ...Unfortunately after lunch a young lawyer resisting the Tūhoronuku mandate gave the first presentation and spoke out against the proposition that the two parties would work together... **The nuanced progress we were making at that public hui then faltered and no resolution was able to be put to the hui as I had contemplated might be possible**...
>
> [Emphasis added]

Mandating hui and voting

2.32 During August and September 2011, Tūhoronuku held 20 mandate hui in New Zealand and Australia and put its mandate to the test.[67] These hui were an opportunity for Tūhoronuku to present its proposed way forward

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65 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.17] - [4.25].

66 Brief of evidence of James Brendan Bolger (Wai 2490, #A110), dated 24 November 2014 at [10] - [11].

67 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.30].

(derived from its extensive processes up to that point), and to have Ngāpuhi say yes or no to that proposal.

2.33 The opportunity to vote was provided to all Ngāpuhi 18 years and over, wherever they resided.

2.34 The resolution voted on was as follows:[68]

> That Te Rōpū o Tūhoronuku is mandated to represent Ngāpuhi in negotiations with the Crown for the comprehensive settlement of all Ngāpuhi historical claims and Crown breaches against Te Tiriti o Waitangi / The Treaty of Waitangi.

2.35 Voting could be done at hui, by post, free fax, or online, and people did not have to be registered with the Rūnanga to vote.[69] 29,289 Ngāpuhi were sent voting packs. Votes were cast by 6,794, with 76.4 percent (5,210) voting in favour of Tūhoronuku progressing a Ngāpuhi-wide settlement. 1,584 voted against the resolution. The number of people who voted was 23 percent of those sent voting packs. This participation rate is higher than the participation rate seen in Ngāti Porou's mandating vote in 2007.[70] This vote showed that Ngāpuhi overwhelmingly wanted to move to settlement on the terms put forward by Tūhoronuku.

2.36 Tūhoronuku IMA agrees with OTS's characterisation of its mandate process as open, robust, and suitably tailored to the size and geographic spread of Ngāpuhi's population.[71] It was a significant undertaking to inform, kōrero with, and seek the support of, Ngāpuhi katoa.

Robust process followed

2.37 Throughout this process, Tūhoronuku communicated openly and fully with Ngāpuhi in Te Whare Tapu o Ngāpuhi, Aotearoa more broadly, and Australia.[72] This included:[73]

(a) 60 hui throughout the three year mandating period;

(b) establishment of the www.tuhoronuku.com website, which was the primary store of information about the proposed Ngāpuhi settlement;

(c) advertising on TVNZ, Māori Television, and the Iwi Radio network;

(d) mail drops throughout Northland;

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68 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014, at [4.44].

69 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [119]; and Tūhoronuku Deed of Mandate, Exhibit RT-3 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(a)), dated 4 June 2014 at pp 26-27.

70 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.45].

71 See brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [122].

72 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.8] - [4.16]; and brief of evidence of Susan Mary Huria (Wai 2490, #A094), dated 17 November 2014 at [3].

73 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.8] - [4.16] and [4.21].

(e) "Open Letter" advertisements across seven metropolitan and eight regional newspapers;

(f) Tūhoronuku press releases;

(g) YouTube and Facebook activity; and

(h) distribution of Open Letters and media statements through Ngāpuhi networks.

2.38 The purpose of this awareness-raising was to let people know about the Tūhoronuku model so that they could make an informed vote during mandate voting. That was successfully achieved.

2.39 After two years of discussions with Ngāpuhi, where everyone's views were fully aired, Ngāpuhi spoke through that mandate vote. Ngāpuhi said it wanted to settle through Tūhoronuku.

3. DELAY AND FACILITATION AFTER THE MANDATE VOTE

Introduction

3.1 Under normal circumstances, after a vote on a deed of mandate the next step would be for the deed of mandate to be presented to the Crown. That did not happen with Tūhoronuku's mandate. After voting on the Deed of Mandate, Ministers remained concerned about the as yet unresolved disagreements.[74] However, all parties were willing to discuss the issues in good faith.[75]

3.2 On this basis, a concerted effort at facilitation and engagement was undertaken by Te Kotahitanga and Tūhoronuku (with Crown support) in order to see if concerns could be addressed.

Te Rōpū Whaiti

3.3 In September 2011 the joint working party Te Rōpū Whaiti was established with representatives from Te Kotahitanga and Tūhoronuku, that facilitation process taking place between September 2011 and March 2012.[76]

3.4 The Terms of Reference for Te Rōpū Whaiti stated that both parties agreed that their preference was for a united Ngāpuhi settlement.[77] The group explored possible solutions to three key issues:[78]

(a) sequencing of Wai 1040 hearings with settlement negotiations;

(b) hapū representation in settlement negotiations; and

(c) the role of the Rūnanga in settlement negotiations.

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74 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [124].

75 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [123].

76 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.55] - [4.63]; and brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [127] *et seq*.

77 Exhibit MCH20 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014, p 199 at clause 3.

78 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [128].

3.5 Claimants are incorrect when they assert that Tūhoronuku was required to take the options contained in the Te Rōpū Whaiti report out to Ngāpuhi.[79]

3.6 Clause 10 of the Te Rōpū Whaiti Terms of Reference is clear that the parties would only go out to Ngāpuhi where there was agreement.[80] Further, Te Rōpū Whaiti had no delegated authority, and any options or recommendations were advisory and non-binding.[81]

3.7 Since there was no agreement, the parties did not take the report out to Ngāpuhi.

3.8 From Tūhoronuku's perspective:

(a) Its model had already been endorsed by Ngāpuhi and its supporters wanted to keep the process moving.

(b) There were some valuable insights in the Te Rōpū Whaiti report which were ultimately incorporated. For example, today, Tūhoronuku IMA has 15 hapū representatives taken from five regions. The influence of the Rūnanga was also an issue - at that time, as a subcommittee of the Rūnanga, Tūhoronuku operated within the Rūnanga's Trust Deed. Today, Tūhoronuku IMA is completely independent of the Rūnanga.

3.9 The decision to not take the report out to Ngāpuhi was reasonable, and reflected the will of the parties to not act without agreement. It would have been contrary to the Terms of Reference, and overstepping its role, for the Crown to have required Tūhoronuku to go out to Ngāpuhi.

Mandate presented and Morgan process

3.10 Tūhoronuku then presented its Deed of Mandate to the Crown on 31 March 2012.

3.11 The Minister told Tūhoronuku he would not immediately advertise the mandate (as would be usual). This was because he wanted Tūhoronuku to consider his offer of facilitation with Te Kotahitanga in order that a targeted discussion focussed on building on the existing representative structure, and on the role of the Rūnanga, could be undertaken.[82]

3.12 In April 2012, the parties agreed to enter into a facilitated discussion to establish an agreed model for hapū representation *building on Tūhoronuku's structure,* not starting all over again.[83] Tūhoronuku also agreed to look at Rūnanga representation if the Crown looked at resourcing.[84] This was another in a series of efforts by Tūhoronuku (and the Crown) to find a way forward.

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79 Brief of evidence of Willow-Jean Prime (Wai 2490, #A078), dated 12 November 2014 at [169]; and brief of evidence of Pita Tipene (Wai 2490, #A062), dated 13 November 2014 at [17(b)].

80 Exhibit MCH20 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 200, clause 10.

81 Exhibit MCH20 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 200, clause 8.

82 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [141].

83 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [143]

84 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [143].

3.13 Despite Tūhoronuku's desire to keep up the momentum,[85] it agreed to further facilitation. This took place between July and September 2012 and was mediated by Mr Tukoroirangi Morgan. This process resulted in Mr Morgan's *He Ara Hou* report.[86]

3.14 The main recommendations were that there be:[87]

(a) an independent mandated authority, separate from the Rūnanga;

(b) greater hapū representation on a regional basis, with the development of an open, transparent election process;

(c) special Tribunal hearings; and

(d) exploration of options for post-settlement governance.

3.15 In terms of hapū representation, Mr Morgan suggested 25 members made up of five elected representatives from five regions ("rohe potae"). In each region, there would be one Rūnanga representative, one Te Kotahitanga representative, a kaumātua/kuia representative, a rangatahi representative, and an urban representative.[88]

3.16 Claimants have made much of the Tūhoronuku response to Mr Morgan's report. Sonny Tau's initial response was admittedly emotive, but the process led to a better outcome overall. As stated by Mr Tau:[89]

> I responded with frustration to Mr Morgan's report because I thought it took us backwards and was inconsistent with Ngāpuhi tikanga and I'm glad that my whanaunga Hone straightened up te whare tapu o Ngāpuhi i te ata nei. It wasn't right and it wasn't generated by Ngāpuhi...
>
> I also thought he wasn't facilitating between the parties. He just wanted to be the man with the silver bullet. His bullet wasn't silver, but it had good parts, and we took those on board. His report contributed significantly to what Tūhoronuku is now...

Changes were made on basis of Morgan report

3.17 After receiving Mr Morgan's report, the Crown suggested that Tūhoronuku and Te Kotahitanga form a working party to pursue suggested amendments to the Deed of Mandate.[90] Tūhoronuku agreed to

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85 Brief of evidence of Maureen Hickey (Wai 2490, #A108 and #108(a)), dated 20 November 2014 at [151] and Exhibit MCH2(27).

86 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.64] - [4.65]; and brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [150] *et seq.*

87 Exhibit MCH23 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at [1.2.2]; and brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [159].

88 Exhibit MCH23 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 296; brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [161].

89 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at 1142 - 1143.

90 Exhibit MCH26 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014

participate in this working party, and indicated it would explore the suggested amendments. Te Kotahitanga refused to participate.[91]

3.18 Te Kotahitanga members now criticise the process by which amendments were made to the Deed of Mandate following the Morgan report. For instance, Willow-Jean Prime states:[92]

> But the changes ... ultimately came from a flawed ... process ... they weren't the changes that we were seeking, those were the changes that they were prepared to make.

3.19 However, having refused to take part in the working party, Te Kotahitanga cannot complain that changes were made without their further input.

3.20 Mr Tau has also accepted that Tūhoronuku's reaction to Mr Morgan's report was initially emotive, but that Tūhoronuku then settled down, thought about it, and decided to adopt key recommendations in order to get closer to agreement with Te Kotahitanga.[93]

3.21 In response to the recommendations of Mr Morgan outlined above at paragraph 3.14, the following changes were made:

(a) Tūhoronuku was legally separated from the Rūnanga;

(b) hapū were given greater representation (on a regional basis);

(c) a transparent, open election process was established; and

(d) a fresh elections process for Tūhoronuku members was carried out after mandate recognition.

3.22 Through the conditional mandate, Ngāpuhi will be given an early opportunity to discuss PSGE options. Further, the fact of parallel proceedings also addresses Mr Morgan's recommendation that a special hearings commission be established to hear Ngāpuhi's claims.[94]

3.23 The Morgan report's key recommendations are now reflected in the amended Deed of Mandate.

Significant structural changes made

3.24 Between the presentation of Tūhoronuku's Deed of Mandate Strategy in November 2010 and the advertisement of the amended Deed of Mandate in 2013, significant changes and accommodations were made to address the concerns held by Te Kotahitanga about the Tūhoronuku structure. As a result, Tūhoronuku IMA now looks like the sort of body that Te Kotahitanga was seeking during facilitation, and reflects key recommendations of both Te Rōpū Whaiti and the Morgan report.

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91 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.66].

92 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 197.

93 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 1200.

94 Exhibit MCH23 (*He Ara Hou: A Proposed Strategy and Pathway to Settlement*) to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 274, [7.6.2].

3.25 Compared with the initial structure reflected in the draft 2010 Deed of Mandate Dtrategy, the following changes were made:[95]

(a) the Tūhoronuku board membership was increased from 15 to 22, with increased hapū representation (hapū representatives forming 15 of the 22 (68 percent), instead of the initial seven of 15 (46 percent));

(b) hapū representatives on the Board were to be elected on a regional basis;

(c) the MHK election process was changed from being based purely on tikanga, as Te Kotahitanga held concerns about the transparency of a purely tikanga elections process,[96] to being more transparent (including using an independent returning officer);

(d) the independence of Tūhoronuku from the Rūnanga was strengthened by the establishment of Tūhoronuku as an independent charitable trust (it therefore being legally separate from the Rūnanga);

(e) the Rūnanga's two representatives on Tūhoronuku were reduced to one;

(f) police vetting was introduced in the event of an eligibility dispute arising and credible prima facie evidence being provided to show an election nominee may not meet nominee criteria;

(g) Tūhoronuku IMA Trustees were prohibited from being negotiators (in response to a Te Kotahitanga request that this be the case);[97] and

(h) a fresh round of elections was held upon recognition of mandate to appoint Tūhoronuku's trustees.

3.26 In introducing these changes, Tūhoronuku was not merely "going through the motions". On the contrary, these substantive changes largely addressed the concerns raised at the time and were an outcome of Tūhoronuku actively engaging through the facilitation processes. The fact that not every Te Kotahitanga demand was accepted does not make the changes the product of a "flawed process".[98]

3.27 It must be stressed that by the end of 2012:

(a) The major players remained committed to a Ngāpuhi-wide settlement. For example, in 31 October 2012, Pita Tipene and

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95 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.67]; and brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [199].

96 Exhibit MCH30 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 337.

97 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [186.5].

98 See, for instance, Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 195-197.

Rudy Taylor wrote to the Crown to express their concerns but finished their letter as follows:[99]

> We thank you for your time and consideration of these key issues **as we all work together and seek solutions for an enduring Ngāpuhi wide settlement**.
>
> [Emphasis added.]

(b) The only clear remaining concerns were the sequencing of Stage Two hearings, the role of hapū, and the role of the Rūnanga. It appeared that resolution of those issues would clear the way for a unified approach. Indeed, under cross-examination, Rudy Taylor was asked whether those were the three key issues.[100] He responded, "that's what we ... came to".[101] Mr Taylor was then asked if resolution of those issues would mean that Te Kotahitanga could get on board with Tūhoronuku's mandate:[102]

> If that was the satisfactory result, yes we could get on it, move on.

(c) In relation to these issues:

(i) It was conceded by Mr Taylor in the December hearing that the question of Stage Two hearings and hapū representation had been largely resolved in a satisfactory manner.[103]

(ii) As addressed below at section 9, concerns about the role of the Rūnanga are, Tūhoronuku IMA submits, wholly unfounded.

(iii) In December 2012, Te Kotahitanga stated it largely agreed with the nature of hapū representation, role and responsibilities, and appointment processes.[104] It was only in December 2012 that Te Kotahitanga first raised the prospect of a hapū withdrawal mechanism - something claimants now say is a crucial flaw in the Tūhoronuku model.[105]

3.28 In other words, the facilitation process was a success. After several years of difficult negotiations, the main groups involved were in agreement at the end of 2012 as to the appropriate structure. Any differences were over minor details of implementation. The Crown's decision to recognise mandate must be assessed in this light.

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99 Exhibit MCH27 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014.

100 This was also accepted by Pita Tipene in cross-examination. See Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 309 - 310.

101 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 75.

102 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 75.

103 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 75 - 77.

104 Exhibit MCH30 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 343.

105 Exhibit MCH30 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 338; and Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 311.

4. MANDATE RECOGNITION

4.1 The Crown advertised, and sought submissions on Tūhoronuku's amended Deed of Mandate between 6 July and 8 August 2013.[106]

4.2 The concerns raised included:[107]

(a) the representation structure not allowing for a hapū-led process and increased hapū representation being undermined by the processes for trustee nomination, election and replacement and dispute resolution;

(b) recognition of mandate undermining the ability to have grievances heard in the Waitangi Tribunal;

(c) the 76 percent figure in favour being insufficient;

(d) the provision for hapū withdrawal from the deed of mandate;

(e) a desire to seek representation by another another collective; and

(f) opposition to inclusion of a number of Wai claims in the mandate.

4.3 The Crown was faced with different views within Ngāpuhi. But those differences of opinion were not profound, nor structural. They were not based on rejection of the single mandate model *per se*, but on differences of opinion about specifics within that paradigm.

4.4 While 63 percent of submissions opposed the deed of mandate,[108] this was not a second vote on the mandate. People could provide more than one submission (indeed, at least 322 submitters did so),[109] and there was no requirement that those submitting be Ngāpuhi, or over 18 years old. There was also no process for verifying the identity of submitters. This must be borne in mind when considering that there were only 748 more opposed in the submissions process than the 2011 vote.[110] As noted below, this is to be contrasted against the increase in support shown in the numbers who participated in the MHK elections.

4.5 The Crown took a careful and considered approach to recognition of Tūhoronuku's mandate and remained mindful of its obligation to deal with the parties evenly. In summary, the Crown:

(a) had policy preferences (for example, for a single unified Ngāpuhi settlement by 2014);[111]

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106 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [204] -[205].

107 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [209].

108 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [207].

109 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [206].

110 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [208].

111 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [71] and [76.5]; and Document 108 of March Hearing Common Bundle (Wai 2490, #A151), "Regional Treaty Claims Strategy" (undated) at p 1057.

(b) respected the self-determination of groups within Ngāpuhi to work towards the settlement of Te Tiriti claims and test support in relation to the same;[112]

(c) provided information to the claimant community;[113]

(d) sought the opinions of broader Ngāpuhi at various points;[114]

(e) provided neutral observers at key hui;[115]

(f) acted as an honest broker and brought the parties together for discussions, including by providing facilitators and processes to determine possible amendments to the Deed of Mandate (the Bolger, Te Rōpū Whaiti, and Morgan processes);

(g) maintained active lines of communication with both Tūhoronuku IMA and key opponents;[116]

(h) respected that decisions were for Ngāpuhi to make;

(i) encouraged amendments to Tūhoronuku's Deed of Mandate to address opposition concerns;[117]

(j) accepted that 76 percent of Ngāpuhi who voted in relation to Tūhoronuku's mandate did so in favour of it, and that that result reflected the will of Ngāpuhi; and

(k) remained open-minded as to what the final model would look like, whether it would recognise Tūhoronuku's mandate and, if so, what conditions it would impose on that recognition (including in relation to how Ngāpuhi would organise its settlement structures going forward).

4.6 The Crown took into account a range of considerations before recognising Tūhoronuku IMA's mandate. These included:[118]

(a) the robustness of the mandate process carried out by Tūhoronuku IMA;

(b) the views of members of Ngāpuhi as expressed through the 2011 vote and issues raised in the submissions process;

(c) whether the structure of Tūhoronuku IMA would provide for all Ngāpuhi to be represented; and

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112 The Crown noted in March 2011 that it "is not in a position to make mandate decisions for Ngāpuhi, nor can the Crown prevent an entity testing its support in the claimant community". See Document 15 of March Hearing Common Bundle (Wai 2490, #A151) "Letter from OTS to P Tipene", dated 30 March 2011, p 92.

113 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [70].

114 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [74], [100], and [204].

115 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [55].

116 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [59] - [61], [78], [86], [90], [148], [185] and [186].

117 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [185].

118 Exhibit MCH44 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014, at p 498.

(d) changes made to the Deed of Mandate from feedback received from Ngāpuhi and facilitations, including:

(i) increased hapū representation on the Tūhoronuku IMA;

(ii) the separation of Tūhoronuku from the Rūnanga; and

(iii) provision for an independent process for Tūhoronuku IMA representatives.

4.7 As a robust and genuine response to the concerns raised through the submissions process,[119] the Crown imposed conditions on its recognition of mandate, including:[120]

(a) the development of detailed communication and negotiation plans;

(b) the provisions of detailed and regular mandate maintenance reports;

(c) the exploration of options for PGSEs early in negotiations;

(d) amendment to the Deed of Mandate to ensure only elected members of Tūhoronuku may vote; and

(e) that Tūhoronuku provide clarity with overlapping iwi on their claimant definition.

4.8 Those conditions were considered by the Crown to "ensure hapū have clear input into negotiations at every step of the process, and influence how settlement assets are eventually held and managed".[121]

4.9 The Crown's recognition of mandate acknowledged that a fair and transparent process had been conducted, and that sufficient support had been shown for Tūhoronuku. Delaying the decision until over two years after the mandate vote reflected the Crown's willingness to listen to both Tūhoronuku and Te Kotahitanga (who had indicated that improvements could be made to strengthen the structure), and its intention to facilitate (and be an honest broker) in line with Te Tiriti obligations.

4.10 Whether the Tribunal would have done the same is beside the point. Clearly, there was a reasonable basis for the Crown to recognise the mandate given:

(a) the long, inclusive, and careful processes Tūhoronuku IMA conducted across New Zealand and Australia;

(b) the facilitations, accommodations and amendments made;

(c) the strong support for Tūhoronuku; and

(d) the conditions imposed.

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119 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [250].

120 Exhibit MCH44 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014, at pp 500 - 501.

121 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [250].

4.11 It is not for the Crown to impose the minority view of the claimants on Ngāpuhi. Further, the decision to recognise Tūhoronuku's mandate also reflected the Crown's obligation to actively work towards the redress of Ngāpuhi's claims, and the possibility that the Crown would have been found to have committed a Te Tiriti breach by further delaying the process (as noted below at paragraph 16.20).

PART C: RESPONSE TO REVISED STATEMENT OF ISSUES

5. PREDETERMINATION

1.1 To what extent, if any, was the Crown's approval of the Tūhoronuku Deed of Mandate pre-determined?

The test for predetermination

5.1 The long-accepted test for predetermination was set out by Richardson J in *CREEDNZ Inc v Governor-General.* To establish predetermination the claimants must show that:[122]

> … in fact the minds of those concerned were not open to persuasion, and so, if they did address themselves to the particular criteria ... they simply went through the motions.

5.2 There are a number of legal principles which will be of assistance to the Tribunal:

(a) Predetermination is a high threshold: As described in *CREEDNZ,* the rule of disqualification of Crown decisions for predetermination "must be applied with utmost caution".[123] There will have been no predetermination where the evidence "fall[s] short of showing closed minds".[124]

(b) Seeking and considering advice on the issues is evidence of an open mind: As Tipping J held in *Blackadder v Minister of Forests* the "[v]arious reports and memoranda … furnished to him discussing the issues … would have been quite unnecessary if the Minister had formed a fixed intention to revoke come what may".[125]

(c) Willingness to consider other options negates predetermination: Where there is a willingness to consider other options fairly and upon their merits, that willingness negates arguments that there was predetermination.[126]

(d) Prior views do not amount to predetermination: A decision-maker is not required to have a blank mind. Indeed: [127]

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122 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at p 192 per Richardson J.
123 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at p 193.
124 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at p 179.
125 *Blackadder v Minister of Forests* HC Greymouth A22/85 (12 October 1987) at pp 24-25.
126 *Re Hutt Mana Energy Trust* [2009] NZAR 111 (HC) per Wild J at [39].
127 *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203 (CA) at p 207.

> even strong expressions of prior views do not disqualify persons on whom such a task is imposed. They may have provisional views and policies, but they must keep open minds in the sense that at the time or period of decision they must genuinely consider the issues, applying the prescribed criteria, and not merely going through the motions."

Likewise, it is not unlawful for a decision-maker to ultimately affirm an earlier provisional view:[128]

> As any Judge knows, the fact that new arguments do not persuade one to change views previously formed does not mean that one has approached the new arguments with a closed mind.

(e) Adverse decisions not evidence of predetermination: It is well accepted that a decision having been made that a party does not agree with "is not evidence that... [it was] not considered with an open mind."[129]

No evidence of a closed mind

5.3 An allegation of predetermination requires proof that the decision maker had a closed mind.

5.4 The claimants rely primarily on generalised assertions that the Crown wished to lock Ngāpuhi into a single settlement model from an early stage, and that once Tūhoronuku began its processes it could not be diverted or stopped, indeed, that the Crown "navigated" Tūhoronuku towards mandate.[130]

5.5 The only specific evidence pointed to by the claimants is that:

(a) pre-mandate funding was provided by the Crown to Tūhoronuku;[131] and

(b) the Crown had policies in relation to LNGs and an aspiration to settle by 2014.[132]

5.6 In relation to each of these, we submit that:

(a) Pre-mandate funding: The only documents referred to by claimant counsel with respect to predetermination have been documents relating to decisions to provide funding at certain stages in the mandating process. In those documents, it is clear that officials were concerned about the risk of being

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128 *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203 (CA), per Cooke P at p 208.

129 *Berryman v Solicitor-General* [2008] 2 NZLR 772 (HC) at [77].

130 Closing submissions for Wai 2443 (T Harris & Ors) (Wai 2490) dated 25 March 2015 at [138] - [141], and [151].

131 Closing submissions for Wai 2341 (Rudy Taylor & Ors) (Wai 2490) dated 30 March 2015 at [66]; closing submissions for Wai 2431 and 2429 (Ngāti Hine and Te Kapotai) (Wai 2490, #3.3.20) dated 25 March 2015 at [137] - [143]; and closing submissions for Wai 2443 (T Harris & Ors) (Wai 2490) dated 25 March 2015 at [8].

132 Closing submissions for Wai 2341 (Rudy Taylor & Ors) (Wai 2490) dated 30 March 2015 at [248]; closing submissions for Wai 2443 (T Harris & Ors) (Wai 2490) dated 25 March 2015 at [29], [30] - [32], and [122]; and closing submissions for Wai 2435 and 2488 (P Harris & Ors) (Wai 2490, #3.3.15) dated 23 March 2015 at p 35, [1] - [8].

misperceived as having "bought a mandate"; not about the risk of being "caught in the act" of actually buying a mandate.[133] Funding is discussed further in section 11 below.

(b) Policy preferences: A decision that is in line with policy preferences does not imply predetermination. The Crown is entitled to adopt settlement policies in relation to LNGs, and to have had an aspiration to settle by 2014. These policies are important to just and timely settlements being reached. They enable the complicated logistics of settlement to be addressed in a co-ordinated manner, aim to ensure that (as much as possible) like cases are treated alike, and enable the Crown to fulfil its duty to ensure redress is provided in a timely fashion. Indeed, it would be highly problematic if the Crown did not have and publicise settlement policies - claimants would not know how the Crown would approach settlement discussions. As the Tribunal is aware, these Crown policies have formed the basis of many previous recognitions of mandate and successful settlements.

5.7 Fundamentally, the crux of claimants' arguments is that they do not approve of the Crown's decision, and therefore say it was predetermined. The Crown is not predetermined when it makes a decision contrary to claimants' interests. It seems that nothing short of the Crown refusing to recognise the Tūhoronuku mandate would have satisfied the claimants that the Crown had an open mind.

Overwhelming evidence of an open mind

5.8 The facts before this Inquiry show that the Crown was clearly open to persuasion as to both:

(a) the type of mandate structure appropriate for Ngāpuhi; and

(b) whether or not it would recognise Tūhoronuku IMA's mandate.

5.9 It is Maureen Hickey's evidence that the Crown undertook a rigorous process in the lead-up to the recognition of Tūhoronuku IMA's mandate; that the Crown had an open mind.[134] Despite the high evidential threshold for a finding of predetermination, claimant counsel did not seriously challenge Ms Hickey under cross-examination on whether the Ministers had open minds at the time of mandate recognition.

5.10 The Crown's state of mind in relation to the decision to recognise the Deed of Mandate is well illustrated by the following:

(a) Facilitation exercises: The Crown actively facilitated discussions over a long period of time between opposing parties. The extensive process facilitated by the Crown is outlined at Appendix 2 to the December 2013 officials' paper.[135] The

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133 Bundle of documents for Darrell Naden cross-examination (Wai 2490, #A152) at p 216, paragraph [c]; Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.3), 4-5 March 2015 at p 125.

134 See Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [225] - [243].

135 Exhibit MCH42 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at pp 485 - 488.

Crown requested that Tūhoronuku IMA delay its processes multiple times, including:

(i) after the January 2011 recognition of Tūhoronuku's Deed of Mandate Strategy for four months, for the Bolger facilitation;

(ii) after the vote on the Deed of Mandate in September 2011, for the Te Rōpū Whaiti process; and

(iii) after presenting its Deed of Mandate in March 2012, until September 2012, to enable the Morgan process to occur.

(b) Comfort with an evolving structure and settlement models: The Crown was only ever presented with one proposed mandate by Ngāpuhi (until late in the piece (June 2013)). Despite this, it was active in ensuring Ngāpuhi addressed the possibility of other options within the paradigm of that mandate proposal (this being addressed below in section 6).

(c) Refusals to accept Tūhoronuku's requests to move more quickly: For instance, Tūhoronuku wrote to the Minister on 24 July 2012 noting it was 10 months since the mandate vote, and urging the Crown to advertise the Deed of Mandate or explain its reasons for not doing so.[136]

(d) December 2013: It is abundantly clear from the December 2013 officials' paper on the question of whether to recognise Tūhoronuku's Deed of Mandate that Ministers were presented with rigorous and impartial analysis of the options before them. In the face of this paper, it simply cannot be argued that the Ministers did not undertake a fulsome analysis of all options in deciding whether to recognise mandate.

(e) Ngāpuhi's role: The Crown was comfortable with leaving the details of hapū organisation, negotiation, and settlement structures for Ngāpuhi to determine in due course. This is, of course, appropriate.

5.11 In essence, then, the claimants' case for predetermination is that the lengthy, involved, patient and thoroughgoing involvement of the Crown was all a sham. Such a submission requires a high evidential threshold, but there is absolutely no evidence to support it.

6. CROWN ENGAGEMENT WITH TŪHORONUKU

Decision to engage

2.1 To what extent, if any, was the Crown's decision to engage with Tūhoronuku's mandate strategy, and eventually recognise their mandate, influenced by a view that the organisation and leadership of Tūhoronuku made it the most convenient party to

[136] Brief of evidence of Maureen Hickey (Wai 2490, #A108 and #108(a)), dated 20 November 2014 at [151] and Exhibit MCH2(27).

engage with?

2.2 To what extent, if any, were the Crown's decisions to engage with and support Tūhoronuku influenced by a view that Tūhoronuku were ready and willing to settle historical claims when others were less so?

6.1 These questions assume that the Crown could have decided not to engage with Tūhoronuku IMA.

6.2 However, it is submitted that given the following context:

(a) Tūhoronuku's process of consulting with Ngāpuhi over many years as to when and how Ngāpuhi's Te Tiriti claims should be settled;

(b) the support expressed for Tūhoronuku;

(c) the support for seeking a mandate following the Initial Hearings on He Whakaputanga and Te Tiriti o Waitangi;

(d) the Crown's obligation to progress settlement in a timely manner; and

(e) the Crown's settlement policies,

the Crown did not have a discretion, but was in fact obliged to engage with Tūhoronuku.

6.3 Tūhoronuku, like anyone else, was entitled to test the views of Ngāpuhi as to the settlement of their claims, and to seek their mandate to progress that settlement. On what basis could the Crown have said "we do not think that you are the right people or have the right model for Ngāpuhi to organise itself"?

6.4 With respect to Tūhoronuku being "the most convenient party to deal with", we repeat Titewhai Harawira's comment that:[137]

> I find the idea that Tūhoronuku was hand-picked by the Crown as being easy to deal with as laughable and inconsistent with the history of the NDG and Tūhoronuku.

6.5 With respect to being influenced by Tūhoronuku's views as to the timing of settlement, many Ngāpuhi see settlement as a priority, and consider that the commencement of settlement negotiations need not wait until the conclusion of the Stage Two report. This is clearly shown in the mandate vote. Such an issue is surely for Ngāpuhi to determine, not for the Tribunal or for the claimants to impose on Ngāpuhi.

6.6 The Crown rightly saw the Tūhoronuku initiative as a way of advancing the settlement process within Ngāpuhi. This did not mean that it was committed to Tūhoronuku or that it required that settlement occur through a particular model. However, it was completely appropriate to engage with Tūhoronuku and support its efforts to advance settlement dialogue within Ngāpuhi.

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137 Brief of evidence of Titewhai Harawira (Wai 2490, #A102), dated 20 November 2014 at [50].

Crown's level of involvement

2.3 Has the Crown's level of involvement working with Tūhoronuku on the mandate been appropriately proactive? At any point has the Crown intervened too much in the mandating process?

6.7 From Tūhoronuku's perspective, the Crown's level of involvement has been appropriate, proactive, and consistent with its Te Tiriti obligations. Contrary to claimant arguments,[138] the Crown clearly went beyond mere consultation and ensured protection of hapū interests.

6.8 The first interactions came when the Crown met with Ngāpuhi claimants to discuss possibilities for starting the process towards settlement. For instance, OTS met with the Ngāpuhi Design Group in 2006 (which included Ērima Hēnare, Rudy Taylor, and Patu Hohepa, as well as Sonny Tau and Titewhai Harawira).[139]

6.9 The Crown left Ngāpuhi to exercise its rangatiratanga and determine its desired process and structure for settlement. Ngāpuhi began that process in October 2008, when the Rūnanga's AGM directed the Rūnanga to take responsibility for progressing Ngāpuhi's Te Tiriti claims.[140]

6.10 From 2010 the Crown took an active role to try and broker agreement between the different views in Ngāpuhi. But it was not trying to impose its views on Ngāpuhi or impose Tūhoronuku's model on others. Rather, it was seeking to facilitate Ngāpuhi reaching its own agreement. None of the facilitative processes undertaken were compulsory - the parties agreed to participate.

6.11 The Crown encouraged the parties to work together to agree a path to settlement.[141] Those steps included:

(a) the Bolger facilitation, Te Rōpū Whaiti, and the Morgan process;

(b) a significant number of meetings with Te Kotahitanga, Ngāti Hine, and Tūhoronuku over an extended period of time; and

(c) providing pre-mandating funding in respect of awareness raising, delays for facilitation, and separation of Tūhoronuku from the Rūnanga (discussed below at section 11).

6.12 The Crown also proactively monitored events through dialogue and observation of the mandating process (for example, through independent Te Puni Kōkiri observers at mandating hui).[142] In doing so, it sought to reduce conflict between groups in Ngāpuhi and ensure that proper processes were followed.

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138 Closing submissions for Wai 2431 and 2429 (Ngāti Hine and Te Kapotai) (Wai 2490, #3.3.20) dated 25 March 2015, at [51].

139 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [13] and [15].

140 Exhibit RT-6 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014, p 6.

141 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [124].

142 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [51(b)].

6.13 The Crown also sought to address differences in view through conditions on the recognition of mandate, including:

(a) Requiring an Engagement Plan setting out how hapū interests would be promoted in negotiations.

(b) Ensuring that Ngāpuhi addresses how it wishes to govern its settlement assets at an early stage. As officials noted in their key December 2013 advice regarding mandate recognition:[143]

> It is up to Ngāpuhi to determine the most appropriate PSGE structure (and how redress should be allocated to any future structures). This could take the form of one pan-Ngāpuhi PSGE or a collective entity with iwi/hapū sub-entities. There is potential to devolve redress to iwi/hapū entities if this is sought by Ngāpuhi. Iwi/hapū could vote on whether devolution is appropriate when ratifying the settlement.

6.14 While people might have different views about what the Crown should have done and when, there is no evidence to suggest that the Crown's engagement was in bad faith or otherwise in breach of Te Tiriti principles.

Mandate maintenance and revoking recognition

2.4 How does the Crown measure Tūhoronuku's compliance with the conditions of their mandate?

2.5 What, if any, circumstances would lead to the Crown revoking the mandate? Have the Crown adequately communicated these thresholds?

6.15 There is an obligation upon Tūhoronuku to maintain its mandate. Clearly, the level of support for a mandated body has the potential to grow or lessen. If it falls to a sufficient extent, the Crown is able to revoke its recognition of mandate.

6.16 It is submitted that the Tribunal cannot reasonably be concerned about mandate maintenance to date. Tūhoronuku IMA has high and growing support, a history of extensive consultation through hui and facilitation processes, has made amendments to address concerns, and continues to seek to strengthen hapū involvement.

6.17 The Revised Statement of Issues questions when the Crown might revoke mandate. Tūhoronuku IMA has its mandate from the people of Ngāpuhi. The Crown did not confer mandate, nor can the Crown revoke mandate - that is a matter for Ngāpuhi.

6.18 In terms of the continued *recognition* of mandate, this is subject to:

(a) A general requirement that the Crown will continue to assess the level of support for Tūhoronuku IMA within the claimant community.[144] That is, the mandate must be maintained.

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143 Exhibit MCH42 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at pp 458 - 459.

144 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [248.2]; Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.3), 4-5 March 2015 at

(b) The specific conditions imposed by the Crown in its decision to recognise Tūhoronuku IMA's mandate (addressed below).

6.19 In terms of assessing ongoing support, Tūhoronuku IMA would expect that a wide variety of indicators will inform the Crown's judgement. One indicator will be the number of MHKs. A more important one will be how this changes over time.

6.20 Tūhoronuku IMA has actively sought to maintain and strengthen its mandate. It has published a draft Engagement Plan that makes it clear how central hapū will be to forthcoming negotiations (addressed below at paragraph 14.15).

6.21 Hui have been held across the country.[145] As was made clear by Sonny Tau in the December hearing:[146]

> I want to make a few things very clear. To any hapū, any whanau, any individual, any marae, any gathering of Ngāpuhi descendants I say this - if you want to meet with Tūhoronuku, you only need to but ask. **We are always ready and as a matter of fact Judge there have been arrangements made during this week to meet with various hapū who have come forward and invited us to talk with them** ... I want you at the table with Tūhoronuku... **If you want to come on board and join Tūhoronuku, we are happy to talk with you about how to make that happen and about the possibility of changes** or the tweaking of the Tūhoronuku mandate to assist you to come on board this waka.
>
> [Emphasis added]

6.22 As noted above at paragraph 4.7, the Crown's recognition of mandate was subject to specific conditions to:[147]

(a) develop detailed communication and negotiation plans;

(b) provide detailed and regular mandate maintenance reports;

(c) explore options for PGSEs early in negotiations;

(d) amend the Deed of Mandate to ensure only elected members of Tūhoronuku may vote; and

(e) provide clarity with respect to overlapping iwi and claimant definition.

6.23 Tūhoronuku IMA has been carrying out its processes professionally and diligently, in accordance with the Deed of Mandate and the conditions imposed by the Crown:[148]

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pp 226-227; and Exhibits MCH42 and 44 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at [133] - [135], and 500 (respectively).

145 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [5.42] - [5.43].

146 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 1138-1139.

147 Exhibit MCH44 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014, at pp 500 - 501.

148 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [5.4].

(a) A draft Engagement Plan has been drafted, and is in evidence in this Inquiry.[149] Tūhoronuku IMA continues to work with hapū and Ngāpuhi to ensure their interests are appropriately reflected in the communications and negotiations plans.[150] Those documents will assist and support hapū to give instructions to their MHK in order to inform negotiators and negotiations.[151] The negotiations plan will provide the detail around implementation in relation to key issues in the draft Engagement Plan, while also providing detailed milestones on negotiation and administrative matters.[152]

(b) Tūhoronuku IMA has provided regular and detailed mandate maintenance reports to the Crown, these outlining to the Crown how Tūhoronuku IMA processes are progressing.[153]

(c) Tūhoronuku IMA has begun considering how to further discussions regarding PSGE options.[154]

(d) In relation to proxy voting, the Deed of Mandate was amended in line with the Crown's conditions, and states that only Trustees of Tūhoronuku IMA may vote.[155]

(e) Tūhoronuku IMA has communicated with overlapping iwi to confirm claimant definition.[156]

6.24 In the event that the Crown were to hold concerns about the adequacy of support or about compliance with specific conditions, Tūhoronuku IMA would expect an involved discussion about any concerns the Crown might have, and the basis for those concerns.

6.25 That is, given that it would delay a Ngāpuhi settlement and undo the work done by Tūhoronuku IMA on behalf of Ngāpuhi over the past five years, Tūhoronuku IMA would expect to be consulted before the Crown made any decision to revoke recognition of mandate. The rights of Ngāpuhi katoa, and particularly their expressed desire to settle, must be given proper weight.

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149 Exhibit U to brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098(a)), dated 18 November 2014.

150 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [5.29].

151 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [5.30].

152 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [5.33].

153 Exhibits A and C to brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098(a)), dated 18 November 2014.

154 Exhibit C to brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098(a)), dated 18 November 2014 at p 67.

155 Exhibit RT-2 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(a)), dated 4 June 2014 at clause 8.2(i).

156 Exhibit C to brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098(a)), dated 18 November 2014 at p 67.

7. LNG POLICY

3.1 To what extent, if any, was the Crown's decision to engage with, and support, Tūhoronuku influenced by Tūhoronuku's likely support for the settlement of Ngāpuhi's historical claims as one "large natural grouping"?

Ngāpuhi supports a single mandate

7.1 The Crown has a long-standing policy of preferring to settle with LNGs. This policy has been approved on multiple occasions by the Tribunal, in *The East Coast Settlement Report*, *The Mohaka ki Ahuriri Report*, *The Tāmaki Makaurau Settlement Process Report*, *The Te Arawa Mandate Report*, *The Pakakohi and Tangahoe Settlement Claims Report*, and *The Whanganui River Report*.[157] The Tribunal has stated that the durability of a settlement will generally be enhanced if there is consultation with affected claimants and engagement with opponents at an early stage.[158]

7.2 Such an approach is also widely supported in Ngāpuhi. As outlined above, Tūhoronuku held hui in 2009 and the feedback was that Ngāpuhi wanted a single mandate approach led by Tūhoronuku. Ngāpuhi said that it considered itself the appropriate group to negotiate settlement.

7.3 Accordingly, Tūhoronuku presented a single mandate approach to the Crown. This single mandate approach was supported by those who now oppose Tūhoronuku IMA in this Tribunal.[159] As set out above at paragraph 6.2, in our submission the Crown was obliged to engage with Tūhoronuku in relation to its mandate strategy.

7.4 What's more, a unified pan-Ngāpuhi settlement was also supported by Te Kotahitanga and Ngāti Hine.[160]

7.5 We note that a single mandate has a number of advantages for Ngāpuhi:[161]

(a) mandates for any smaller negotiating units would need to be sought, and overlapping claims would likely be problematic when deciding who would hold the mandate;

(b) overlapping claims and interests between different groups would prevent the Crown giving exclusive redress to certain groups;

(c) a split-mandate model would only exacerbate the dissent in Ngāpuhi;

(d) such an approach better addresses the fact that 80 percent of Ngāpuhi live outside the rohe and it makes their involvement in negotiations and post-settlement matters easier;[162]

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157 Waitangi Tribunal *The East Coast Settlement Report* (Wai 2190, 2010) at pp 44-45.
158 Waitangi Tribunal *The East Coast Settlement Report* (Wai 2190, 2010) at p 57.
159 See sections 2, 3 and 4 above.
160 See also paragraph 2.25 above, noting Te Kotahitanga's agreement with a Ngāpuhi-wide settlement.
161 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [7.9] - [7.13].

(e) five separate mandates would create an environment of competitiveness, not unity;

(f) the five rohe imposed by the Waitangi Tribunal for the sake of hearings is inappropriate, and the boundaries of those rohe would be contested; and

(g) with five separate mandates, some rohe would benefit more than others (for instance, Hokianga stands to gain very little by going on their own yet possibly has the greatest need).

7.6 In these circumstances, it seems odd to suggest that the Crown ought to have been reluctant to deal with Tūhoronuku because it was proposing a single mandate for Ngāpuhi. To direct Ngāpuhi to consider alternative models would have been to usurp Ngāpuhi's rangatiratanga to determine its own settlement approach.

7.7 In the event, unified settlement was the basis on which Tūhoronuku mandate vote was held. The Crown was entitled (and perhaps required) to accept the wishes of Ngāpuhi (as expressed in that vote) to settle as an LNG together.

A single settlement mandate is not inconsistent with hapū rangatiratanga

7.8 Tūhoronuku IMA acknowledges that various claimants assert that hapū rangatiratanga means that each hapū must decide for itself whether to be part of the LNG.[163] However, this is clearly a contested view:

(a) Seeking mandate on an iwi-wide one-person one-vote basis is entirely unexceptional in mandating (for example, this was the approach taken by Te Rūnanga o Ngāti Porou).[164] This was appropriate for Ngāpuhi, given that, as stated by Titewhai Harawira:[165]

> Settlement for Ngāpuhi is an iwi wide issue. Hapū must be involved, but at the end of the day it is a matter for the collective will of Ngāpuhi. People will of course disagree, but once a fair and transparent process has been followed the collective will must prevail.

(b) Throughout the mandating and facilitation process current opponents supported the model of a single Ngāpuhi-wide settlement.[166] Key claimants (Pita Tipene, Rudy Taylor and Waihoroi Shortland) have all accepted that there should be a unified Ngāpuhi approach. For instance:

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162 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [3.35]; and brief of evidence of Dr Terrence Lomax (Wai 2490, #A84), dated 13 November at [17] - [28].

163 This is discussed further at paragraph 9.25 and following.

164 Waitangi Tribunal *East Coast Settlement Report* (Wai 2190, 2010) at p 14.

165 Brief of evidence of Titewhai Harawira (Wai 2490, #A102), dated 20 November 2014 at [51].

166 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.73]; and brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [365].

(i) Waihoroi Shortland, in May 2011, wrote to Minister Finlayson on behalf of Ngāti Hine, saying:[167]

> Ngāti Hine has made a commitment to other hapū to work collaboratively towards a Ngāpuhi wide settlement.

(ii) Rudy Taylor, in his affidavit of 1 September 2011, (the first piece of evidence filed in this inquiry) stated that:[168]

> While we might hold different views as to the process by which settlement might be achieved, I believe that unity of our people is worth more than a hundred settlements.

(iii) Pita Tipene and Rudy Taylor, for Te Kotahitanga, stated in May 2013 that:[169]

> ... a united Ngāpuhi approach has been sought and this has been at the forefront of all of our active and willing and in our view constructive participation in the various processes undertaken to date to work through the mandating issues.

(iv) At the December hearing, Rudy Taylor reiterated this:[170]

> So when I say about unity I'll be one fulla that be trying to unity as us as Ngāuhi coming together [sic]. I would not fragment them out to separate them because I know what that brings, it brings another generation of our kids having to know that their parents or their grandparents never made this effort to bring us together in unity.

(c) 76 percent of those who voted did so in favour of the single mandate model proposed by Tūhoronuku.

A single settlement mandate still allows for layered settlement

7.9 The existence of a single mandate for Ngāpuhi does not mean that negotiations will not involve hapū or claimants, or that settlement will be completely centralised.

7.10 In a briefing to the Minister on 13 December 2013, OTS advised (and Tūhoronuku IMA agrees) that:[171]

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167 Exhibit N to brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098(a)), dated 18 November 2014.

168 Affidavit of Rudolph Taylor (Wai 2490, #A1), dated 1 September 2011 at [17].

169 Exhibit MCH36 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 399.

170 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 82.

171 Brief of evidence of Maureen Hickey (Wai 2490, #A108 and #108(a)), dated 20 November 2014 at [238] and Exhibit MCH2(41).

(a) any Ngāpuhi settlement will have to recognise different layers of interest in specific redress and in any co-governance arrangements;

(b) differing interests could be recognised in a number of ways, for instance by:

(i) devolving settlement assets to hapū (either individually or to hapū clusters based on regions); or

(ii) holding assets collectively and providing for specific roles for hapū or sub groups through future iwi governance;

(c) such decisions are fundamentally decisions for Ngāpuhi to make and are likely to be informed by redress availability; and

(d) it was expected that, if mandate was recognised, Tūhoronuku IMA would consult Ngāpuhi as it developed its negotiation strategy.

7.11 This means that, for example, there may be distinct negotiations and redress mechanisms in relation to taonga such as:[172]

(a) Ngawha Springs;

(b) Poroti Springs;

(c) Lake Ōmāpere;

(d) Hokianga Harbour;

(e) Maungataniwha;

(f) Whangaroa Harbour;

(g) the Bay of Islands; and

(h) the Harbour at Whangarei.

7.12 The Crown also correctly recognised that hapū-specific (or hapū grouping-specific) mechanisms might be possible, depending on what decisions Ngāpuhi makes through the newly elected mandated authority.[173]

7.13 Within Tūhoronuku IMA's single mandate model, settlement process and structures will be determined by the people of Ngāpuhi. But for hapū to determine those processes and structures, they must be involved.

Hapū-level settlement

7.14 There are some hapū who may wish for a hapū-level mandate. We say "may" because it is unclear whether the views of certain leaders reflect the view of the members of the hapū.

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172 Document 57 of March Hearing Common Bundle (Wai 2490, #A151), "Email: 'Ngāpuhi potential mandate conditions'", 3 December 2013 at p 629.

173 Document 57 of March Hearing Common Bundle (Wai 2490, #A151), "Email: 'Ngāpuhi potential mandate conditions'", 3 December 2013 at p 629.

7.15 At any rate, this is the view of a small minority of hapū. Further, it appears to be based on a misunderstanding of the difference between a single mandate and a single settlement.

7.16 For instance, counsel for Ngāti Kuta and Patukeha was unaware that Tūhoronuku IMA's negotiation processes could include the Crown meeting hapū directly, on the marae, to discuss claims and grievances.[174] Such direct contact between hapū and the Crown is also provided for in Tūhoronuku IMA's draft Engagement Plan.[175]

7.17 For hapū that expressed their opposition to Tūhoronuku and the single mandate model at an early stage (eg, Ngāti Manu, Ngāti Kuta, Patukeha), it is important to note that they can have the direct engagement with the Crown that they wish through Tūhoronuku IMA's processes. There is nothing preventing their participation in settlement of their claims; to the contrary, hapū are given a strong voice in that process.

Summary

7.18 The Tūhoronuku IMA structure is dominated by the hapū voice, can allow for regional groupings to organise the direction of settlement in their region (as claimants say they want), and can have regional settlements of claims.

7.19 Within one mandate, Ngāpuhi are able to co-ordinate the complexities of cross-claims and availability of redress. With five separate mandates, particular groups might forge ahead while others lag behind - this would severely affect the nature of negotiations and redress.

8. TIMING

4.1 To what extent, if any, did the Crown's goal to settle all historical Treaty claims by 2014 influence their support for Tūhoronuku?

8.1 In terms of the Crown's 2014 goal, it should be noted that:

(a) this was an aspirational goal rather than a deadline;

(b) it is consistent with the Crown's obligation to pursue redress for past breaches through active and positive steps and in a timely manner;[176] and

(c) the Crown has delayed the process at a number of occasions even though this meant that the 2014 goal could not be realised.

8.2 There can be no criticism of having such a goal, in and of itself. The question is whether that goal led to the Crown being predetermined or committing a breach of Te Tiriti principles (neither of which was the case).

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174 See Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 743-744.

175 Discussed below at paragraph 14.15.

176 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (*Lands Case*) per Richardson J at p 674; *New Zealand Maori Council v Attorney General* [1992] 2 NZLR 576 (CA) at p 583.

8.3 Given that 76 percent of those Ngāpuhi who voted on the Tūhoronuku mandate supported moving towards settlement now, the Crown must recognise that wish and support Ngāpuhi in that endeavour.

8.4 In terms of sequencing, different people will, understandably, have different views as to the timing of settlement relative to the Te Paparahi o Te Raki process.

8.5 Tūhoronuku has engaged with Ngāpuhi on this issue. As outlined above:

(a) The initial feedback was that a mandate should not be sought until after the conclusion of the Stage One hearings.

(b) Ngāpuhi then expressed the view that the settlement mandate process should get underway following the completion of Stage One hearings.

(c) Tūhoronuku does not see the settlement process and the Tribunal processes as mutually exclusive. In particular it has:

(i) supported parallel hearings; and

(ii) has an open mind as to how matters will ultimately be sequenced.

8.6 While some (particularly those most directly involved as claimants) may have wished a Te Paparahi o Te Raki report to be available before mandate was even sought, timing is fundamentally a matter for Ngāpuhi to decide.

9. ENGAGEMENT WITH NGĀPUHI

5.1 What communications and meetings did the Crown have with hapū and other groups about its process with Tūhoronuku?

5.2 To what extent did the Crown consider the position of hapū and its obligation to actively protect the ability of hapū to exercise rangatiratanga?

5.3 Was the Crown's conduct towards hapū and other groups in opposition to Tūhoronuku fair and reasonable?

5.4 To what extent, if any, does the amended mandate address the concerns of the Wai 2490 claimants?

Introduction

9.1 The Crown is best placed to respond to issues 5.1 to 5.3, but from Tūhoronuku IMA's perspective, the Crown struck an appropriate balance between allowing Ngāpuhi to develop its own settlement framework while attempting to protect certain interests and bring differing views together.

9.2 In short, the Crown encouraged awareness-raising at the early stages, encouraged facilitation, encouraged different groups to move towards a middle ground and introduced conditions on the recognition of mandate

to, amongst other things, buttress the role of hapū and provide for early consultation on post-settlement governance issues.

9.3 In this section we focus on issue 5.4, and explain that all key opposition concerns were addressed by Tūhoronuku.

Points of agreement and disagreement during the mandate process

The issues at the time

9.4 As outlined above from paragraph 2.5, Tūhoronuku began by seeking direction from Ngāpuhi about settlement. As a result of hui in 2009, Tūhoronuku decided to test whether it had the mandate of the people once Stage One hearings were complete. Then, during 2010, Tūhoronuku consulted with Ngāpuhi on a proposed mandate strategy and representation structure.

9.5 As at March 2010, Ngāti Hine had made it clear that it was committed to Stage One hearings, that it wanted a Ngāpuhi-wide settlement, but that it was concerned about hapū representation and the speed at which Tūhoronuku was progressing matters.

9.6 By the time Tūhoronuku presented its Deed of Mandate Strategy in November 2010, it had received the views of Ngāpuhi as to its desired way forward over the course of two years. The model incorporated feedback from those hui.

9.7 In early 2011, the following key issues were raised by opponents with respect to the Deed of Mandate Strategy:[177]

(a) the sequencing of Stage Two hearings;

(b) the connection between Tūhoronuku and the Rūnanga;

(c) insufficient hapū representation;

(d) the position of the haukāinga and whether it could be swamped in the Tūhoronuku model;

(e) criticism of the tikanga-based hapū kaikōrero elections process;

(f) the pace of progress; and

(g) the quality of information provided with respect to claimant definition.

9.8 Importantly, both Te Kotahitanga and Ngāti Hine confirmed their support for a single Ngāpuhi settlement.[178]

9.9 Because of the different positions that were emerging within the single mandate paradigm, Tūhoronuku and Te Kotahitanga went through an extensive and time-consuming process of facilitation (with Crown backing). This began in mid-2011 and lasted until late 2012.

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177 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [76] and [85].

178 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [82] and [85].

9.10 During this period the Crown monitored events and encouraged the parties to reach agreement. Beyond its obligation to work proactively as an honest broker, it was not for the Crown to determine how Ngāpuhi should move forward; neither was it for the Crown to back minority concerns over a clear majority that supported Tūhoronuku.

The issues were addressed

9.11 Those processes led to considerable scrutiny of the Tūhoronuku model and meant delay in Tūhoronuku's path towards recognition of mandate. However, that resulted in a substantially improved model that incorporates many of Te Kotahitanga's suggestions. Sonny Tau notes:[179]

> The Tūhoronuku model was built over three years by Ngāpuhi. It was not something that was plucked out of the air by me or anyone else. The Tūhoronuku model was not imposed on Ngāpuhi, but was built from an open starting position as a result of many hui, in close consultation with kaumātua and kuia through a process review, delay after delay and revision.
>
> [...]
>
> We have made concessions and adjusted this model of representation considerably. For example, you've heard this time to time again 15 hapū representatives, five takiwā, five rohe. We decided that the better course was to work the suggested options into the model. It hugely influenced our thinking and our model reflects those options now.
>
> [...]
>
> I responded with frustration to Mr Morgan's report because I thought it took us backwards... He just wanted to be the man with the silver bullet. His bullet wasn't silver, but it had good parts and we took those onboard. His report contributed significantly to what Tūhoronuku is now and I talked about the five regions and fresh elections.

9.12 Under cross-examination in the December hearing, Pita Tipene stated that in 2011 and 2012, Te Kotahitanga was engaged in discussions with Tūhoronuku in a good faith attempt to reach common ground.[180] While Te Kotahitanga accepted the paradigm of the unified settlement, three key issues stood in the way of Te Kotahitanga accepting the Tūhoronuku structure (as stated in the evidence of Pita Tipene). These were: [181]

(a) the sequencing of Wai 1040 hearings with proposed settlement negotiations;

(b) the role of the Rūnanga relative to Tūhoronuku; and

(c) the level of hapū representation in Tūhoronuku.

9.13 With respect to the sequencing of Wai 1040 hearings, a parallel process is now funded.[182]

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179 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 1140, 1142 - 1143.

180 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 308.

181 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 309-310.

182 Exhibit V to brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098(a)), dated 18 November 2014.

9.14 And, as shown in correspondence between Te Kotahitanga and the Crown, by December 2012, broad agreement had been reached between Te Kotahitanga and Tūhoronuku on the following issues:[183]

(a) Tūhoronuku being a separate legal entity to the Rūnanga;

(b) hapū representation increasing and elections being on a regional basis;

(c) the election process for appointing hapū representatives to Tūhoronuku; and

(d) an independent returning officer overseeing the election processes for the appointment of representatives to Tūhoronuku.

9.15 At this point, there was very little difference between Te Kotahitanga and Tūhoronuku on issues of structure. Disagreement remained with respect to the dedicated Rūnanga seat on Tūhoronuku, and election processes for urban and kuia/kaumātua representatives.[184] Te Kotahitanga was also insisting on all nominees for mandated authority positions having criminal record checks.[185]

9.16 But on key issues now before the Tribunal (such as hapū representation), Te Kotahitanga was in October 2012 merely talking about further work on detail being required.[186] Indeed, Te Kotahitanga stated in December 2012 that:[187]

> We largely agree with the current hapū representation roles and responsibilities and appointment processes.

9.17 Likewise, Rudy Taylor accepted under cross-examination that changes were made in response to concerns about Tūhoronuku's structure.[188]

9.18 The Crown also saw the parties as close to reaching final agreement. As at 31 January 2013, Ministers Finlayson and Sharples noted:[189]

> We are encouraged by the fact that your written responses and discussions with officials indicate agreement on the following key areas:
>
> • the mandated body being a separate legal entity to Te Rūnanga A Iwi o Ngāpuhi;

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183 Exhibit MCH30 and MCH32 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014. Also see Document 40 of March Hearing Common Bundle (Wai 2490, #A151), "Report to MFTOWN: Ngāpuhi responses to suggested amendments to the deed of mandate", 17 December 2012 at p 320, [12].

184 Document 40 of March Hearing Common Bundle (Wai 2490, #A151), "Report to MFTOWN: Ngāpuhi responses to suggested amendments to the deed of mandate", 17 December 2012 at p 320, [13].

185 Exhibit MCH33 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 374.

186 Exhibit MCH27 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 317.

187 Exhibit MCH30 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 343.

188 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 66-67.

189 Exhibit MCH32 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 365.

- hapū representation increasing and being elected on a regional basis;
- the election process for appointing hapū representatives to the mandated entity; and
- an independent returning officer overseeing the election processes for the appointment of representatives to the mandated entity.

9.19 Te Kotahitanga and Tūhoronuku were in agreement as to *whether* a single approach to settlement should be pursued. They were merely discussing *the specifics* of the structure that would take forward that kaupapa.

Lack of compromise from opponents

9.20 While Tūhoronuku has been trying to accommodate concerns, there has been a failure of Te Kotahitanga and other opponents to "move towards the middle".

9.21 This failure to compromise has alienated former members of Te Kotahitanga. Te Huranga Hohaia notes the following:[190]

> We became disaffected with the leadership of Kotahitanga who sought to stifle all views deemed contrary to those actively promoted by them despite the palpable concessions which had been made by Tūhoronuku.
>
> [...]
>
> Our kaumātua kuia had also grown weary with the division between Te Kotahitanga and Tūhoronuku and exhorted us to lay aside all animosity by saying:
>
> "Ka nui tenei…kua ngenge matou e matakitaki ana i a koutou…hikoi tahi tatou."

9.22 Throughout this process and in this Inquiry opponents have:

(a) continually raised new issues when old ones have been settled (Rudy Taylor, for example, cannot point to an issue where Te Kotahitanga moved to the middle and stayed there[191]); and

(b) refused to acknowledge the substantive changes made by Tūhoronuku IMA to its structures to accommodate their concerns.

Comments on the key concerns still raised by claimants

What the claimants say

9.23 In their applications, claimants allege the Tūhoronuku structure is flawed as follows:

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190 Brief of evidence of Te Huranga Hohaia (Wai 2490, #A092), dated 14 November 2014 at [25] - [27].

191 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 80-81.

(a) The structure does not give effect to hapū rangatiratanga, including because:

(i) election processes are "Westminster style" and do not prioritise the hapū and/or are not consistent with hapū tikanga;[192]

(ii) MHKs can be elected with the support of only two people if there is no other candidate;[193]

(iii) a large number of hapū members (90) are required to remove an elected MHK;[194]

(iv) the structure recognises only a small number of the total hapū in Ngāpuhi and/or does not have hapū support;[195] and

(v) Tūhoronuku is not a representative body for claimants and has no historical or whakapapa links to the claimants.[196]

(b) The claimants want the option of a rohe-based (or "taiwhenua") model.[197]

(c) They consider that there is no process for hapū withdrawal.[198]

(d) Requests for police checks have been resisted.[199]

(e) The Rūnanga continues to be involved.[200]

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192 Closing submissions for Wai 2435 and 2488 (P Harris & Ors) (Wai 2490, #3.3.15) dated 23 March 2015 at [22] and [87]; closing submissions for Wai 2438 (Ngāti Kahu) (Wai 2490, #3.3.26) dated 25 March 2015 at [1.2(e)] and [1.18]; closing submissions for Wai 2341 (Rudy Taylor & Ors) (Wai 2490) dated 30 March 2015 at [173] - [174], and [209] - [215]; and closing submissions of counsel for Wai 2434 (Ngāti Torehina ki Mataka) (Wai 2490, #3.3.24) date 25 March 2015 at [31.2] - [31.3].

193 Closing submissions for Wai 2435 and 2488 (P Harris & Ors) (Wai 2490, #3.3.15) dated 23 March 2015 at [103]; and closing submissions of counsel for Wai 121, 654, 861, 881, 1129, 1460, 1896, 1940, 2130 and others (Taitokerau District Māori Council) (Wai 2490, #3.3.16) dated 22 March 2015 at [31].

194 Closing submissions for Wai 2435 and 2488 (P Harris & Ors) (Wai 2490, #3.3.15) dated 23 March 2015 at [107].

195 Closing submissions for Wai 2435 and 2488 (P Harris & Ors) (Wai 2490, #3.3.15) dated 23 March 2015 at [56] - [60]; and closing submissions for Wai 2438 (Ngāti Kahu) (Wai 2490, #3.3.26) dated 25 March 2015 at [1.18] - [1.19].

196 Closing submissions for Wai 2436 (Gray Theodore & Ors) (Wai 2490, #3.3.27) dated 30 March 2015 at [3(b)]; and closing submissions for Wai 2431 and 2429 (Ngāti Hine and Te Kapotai) (Wai 2490, 3.3.20) dated 25 March 2015 at [120] - [122].

197 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 115, 121, 132, 251, 261 and 370.

198 Closing submissions for Wai 2435 and 2488 (P Harris & Ors) (Wai 2490, #3.3.15) dated 23 March 2015 at [139]; closing submissions of counsel for Wai 121, 654, 861, 881, 1129, 1460, 1896, 1940, 2130 and others (Taitokerau District Māori Council) (Wai 2490, #3.3.16) dated 22 March 2015 at [32]; closing submissions for Wai 2489 (Patuharakeke) (Wai 2490, # 3.3.18) dated 25 March 2015 at [34]; closing submissions for Wai 2341 (Rudy Taylor & Ors) (Wai 2490) dated 30 March 2015 at [97] - [104]; and closing submissions for Wai 2431 and 2429 (Ngāti Hine and Te Kapotai) (Wai 2490, 3.3.20) dated 25 March 2015 at [200].

199 Closing submissions for Wai 2341 (Rudy Taylor & Ors) (Wai 2490) dated 30 March 2015 at [135] - [138].

200 Closing submissions for Wai 2435 and 2488 (P Harris & Ors) (Wai 2490, #3.3.15) dated 23 March 2015 at [122]; closing submissions for Wai 2341 (Rudy Taylor & Ors) (Wai 2490) dated 30 March 2015 at [200] - [203]; and closing submissions for Wai 2443 (T Harris & Ors) (Wai 2490) dated 25 March 2015 at [192].

9.24 We discuss each in turn.

(a) Hapū rangatiratanga

9.25 Tūhoronuku IMA's position has always been that hapū of Ngāpuhi are strong and have an important role to play, and it is for that reason that hapū take up the significant majority of Trustee positions. The role that hapū play in Tūhoronuku IMA is core to what Tūhoronuku IMA is. As Sonny Tau stated in December, this process has always been a hapū-led one:[201]

> If you want a hui-ā-iwi, let's do it. If you want to meet, let's do it at kai, at lunch, let's do it at dinner, let's do it tomorrow, let's do it Sunday after church. **This is a hapū-led process, it always has been, it always will be.** If you don't want any of the TIMA members on the Board or me as the chair, there is a process in place where you can choose someone else...
>
> [...]
>
> Tūhoronuku is not pretending to give hapū rangatiratanga. **Hapū already have rangatiratanga. Tūhoronuku is giving hapū platform and a structure for the exercise of rangatiratanga.**
>
> [...]
>
> The Tūhoronuku model was built over three years by Ngāpuhi. It was not something that was plucked out of the air by me or anyone else. **The Tūhoronuku model was not imposed on Ngāpuhi, but was built from an open starting position as a result of many hui**, in close consultation with kaumātua and kuia through a process review, delay after delay and revision.

9.26 Each hapū has an MHK, who then gather to elect regional hapū representatives onto the Board of Tūhoronuku IMA. Hapū create their own profiles detailing interests and aspirations for settlement, will come together in regional working groups, will be able to meet directly with the Crown to discuss particular grievances, and MHKs will have a direct line to negotiators.[202] Settlement redress can be hapū specific and devolved, if that is what Ngāpuhi wants. This is outlined below from paragraph 14.10. Tūhoronuku IMA's structure is consistent with hapū rangatiratanga and tikanga. For instance, Tame Te Rangi states:[203]

> I was fortunate and privileged to be nominated as the hapū kaikōrero for the five Mangakaahia hapū and subsequently elected to that position... This is how we have applied our hapū rangatiratanga and tikanga alongside the Tūhoronuku processes.
>
> [...]
>
> We are also satisfied that hapū have the majority voice on Tūhoronuku. We believe the processes can accommodate our tikanga and our ability to advance our redress and settlement aspirations. Ultimately, that has been our focus.

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201 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 1139 - 1140.

202 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098 and #098(a)), dated 18 November 2014 at [5.31] and Exhibit U.

203 Brief of evidence of Tame Te Rangi (Wai 2490, #A093), dated 17 November 2014 at [9] and [11].

9.27 As stated by Kara George (who was elected as MHK for Te Kapotai in a process that saw 306 votes cast):[204]

> I do not see Tūhoronuku as against our hapū rangatiratanga. Instead I see Tūhoronuku as enabling that rangatiratanga, and enabling us to settle our claims against the Crown.

9.28 Titewhai Harawira states:[205]

> Based on my knowledge of Ngāpuhi tikanga, Tūhoronuku has followed an appropriate process and has secured the mandate of the people of Ngāpuhi to lead settlement discussions with the Crown. This does not undermine hapū rangatiratanga.
>
> [...]
>
> This mandate process was robust and rigorous, concessions have been made and Tūhoronuku has complied with Ngāpuhi tikanga and standard Crown processes which are well known.

9.29 As Toko Tahere states:[206]

> Tūhoronuku is a way of getting hapū together and moving forward together as Ngāpuhi. Tūhoronuku have the mandate. And Tūhoronuku allows rangatiratanga to be exercised, but it does not pretend to have rangatiratanga over hapū.

9.30 Sam Napia, likewise, sees that the Tūhoronuku IMA model provides for hapū to exercise their rangatiratanga:[207]

> ... my participation in Tūhoronuku is a result of the decision of Te Whiu hapū to engage in the Tūhoronuku process and to mandate me as hapū kaikorero. I am doing the bidding of my hapū, I am happy to do so, I am committed to continue to do so, and I make no apology for any of that. I had my personal views initially but through this process, we as a hapū have decided to move forward in Tūhoronuku with me as kaikorero and I fully respect the decision of our people.

9.31 Similarly, as Dr Benjamin Pittman states:[208]

> I disagree with the idea that Tūhoronuku usurps hapū rangatiratanga. It offers a seat at the table and a direct hand in the settlement of hapū claims. But hapū have to be at the table to be a part of the process. Hapū are not giving up hapū rangatiratanga by being at the table, they are exercising that rangatiratanga. Any fears about hapū not being heard by Tūhoronuku can, and should be, addressed by hapū maintaining strong involvement.

9.32 Formerly key opponents who were concerned with a perceived lack of hapū rangatiratanga in the Tūhoronuku model are now "on board" because of changes that were made to increase hapū representation. Hapū, such as Te Pōpoto and Ngāti Rēhia, are exercising rangatiratanga through Tūhoronuku IMA's structures in the settlement of their claims.

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204 Brief of evidence of Kara George (Wai 2490, #A085), dated 14 November 2014 at [22].

205 Brief of evidence of Titewhai Harawira (Wai 2490, #A102), dated 20 November 2014 at [52] and [74].

206 Brief of evidence of Toko Tahere (Wai 2490, #A086), dated 14 November 2014 at [17].

207 Brief of evidence of Sam Napia (Wai 2490, #A090), dated 14 November 2014 at [20].

208 Brief of evidence of Dr Benjamin Pittman (Wai 2490, #A083), dated 14 November 2014 at [24].

9.33 As stated by Te Huranga Hohaia for Ngāti Rēhia:[209]

> We believe therefore that the iwi platform of Tūhoronuku is the correct one which has the potential to actualise the aspirations articulated in the kaupapa of Te Rūnanga o Ngāti Rēhia in terms of developing a sustainable social, economic and cultural base for our hapū whanau. This potential is not merely confined to Ngāti Rēhia but even now strives to reach out across the entire Ngāpuhi nation.

9.34 Did the Crown breach its duty to actively protect hapū rangatiratanga by recognising the Tūhoronuku single mandate model? Tūhoronuku IMA submits the only answer to that question can be no. Ngāpuhi want a single mandate model, and the Tūhoronuku IMA structure manifestly provides for hapū rangatiratanga.

9.35 And, as shown above in sections 2 - 4, throughout the process there was no concern expressed by the opposition that a single mandate model was inconsistent with hapū rangatiratanga. The opposition supported that very approach.

(b) A preference for a "taiwhenua" model

9.36 Tūhoronuku IMA is based on a regional model for hapū representation which is very similar to Mr Morgan's He Ara Hou report, and which was basically agreed with Te Kotahitanga (as noted above). Under Tūhoronuku IMA's model:[210]

(a) hapū are organised into five rohe;

(b) elected MHKs then appoint the three representatives from their region who sit on the board of Tūhoronuku; and

(c) Tūhoronuku IMA's board members, or regional hapū representatives, report back to the MHKs for their region, and those MHK then report back to their hapū.

9.37 Whatever terminology one wishes to use, that model ensures that decisions representing hapū and claimant interests are made on a rohe-based / regional basis.

9.38 It is important to emphasise that the model represents, and provides for, the will of Ngāpuhi. A finding that the Crown's recognition of the Tūhoronuku was a Te Tiriti breach would have far-reaching effects; it would call into doubt all other settlements in which there has been disagreement between tribal groups.

(c) Withdrawal mechanism for hapū or claimants

9.39 This issue is addressed below in section 13, but in essence, Tūhoronuku IMA submits that providing a low threshold for hapū withdrawal is inconsistent with its unified, single mandate paradigm.

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209 Brief of evidence of Te Huranga Hohaia (Wai 2490, #A092), dated 14 November 2014 at [31].

210 Exhibits RT-3 (Deed of Mandate) and RT-4 (Deed of Mandate Addendum) to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(a) and (c)), dated 4 June 2014 at (respectively) p 20, and p 4.

(d) Police vetting

9.40 The Deed of Mandate Addendum prohibits the holding of office where, amongst other things, the nominee:[211]

(a) has issues relating to mental capacity or mental health (these matters being outlined in the Addendum);

(b) is a bankrupt or an undischarged bankrupt as detailed in the Companies Act 1993; or

(c) ceases to qualify as an officer of a charitable entity under s 16 of the Charities Act 2005, by, for example, being:

(i) an individual who has been convicted of a crime involving dishonesty (within the meaning of section 2(1) of the Crimes Act 1961) and has been sentenced for that crime within the last 7 years;

(ii) an individual who is prohibited from being a director or promoter of, or being concerned or taking part in the management of, an incorporated or unincorporated body under the Companies Act 1993, the Financial Markets Conduct Act 2013, or the Takeovers Act 1993; or

(iii) an individual who is disqualified from being an officer of a charitable entity by the Charities Board under s 31(4) of the Charities Act 2005.

9.41 Amendments to the Deed of Mandate require all Tūhoronuku IMA nominees to agree to undergo police vetting where:[212]

(a) an eligibility dispute arises; and

(a) credible prima facie evidence is provided to Tūhoronuku IMA that shows that the nominee does not meet nominee criteria and/or legislative requirements

9.42 In summary, Tūhoronuku IMA has a robust and orthodox approach to police vetting and eligibility.

(e) Role of the Rūnanga

9.43 In 2008 the AGM of the Rūnanga directed the Rūnanga to lead Ngāpuhi in settling its Te Tiriti claims.[213] Te Rōpū o Tūhoronuku (then a subcommittee of the Rūnanga) then undertook a comprehensive awareness raising exercise.[214]

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211 Exhibit RT-4 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014 at pp 10-11.

212 Exhibit RT-4 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014 at pp 10-11.

213 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.2].

214 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.8].

9.44 From an early stage, it was clear that some people wanted a mandated entity that was not part of the Rūnanga.[215] As a result of the Bolger, Te Rōpū Whaiti, and Morgan processes, Tūhoronuku agreed to financially and legally separate from the Rūnanga once mandate was recognised. That separation is in full effect, and the two bodies have different trustees and trust deeds.

9.45 One seat on the Tūhoronuku IMA board of 22 does remain Rūnanga-appointed. This is entirely appropriate given the experience the Rūnanga has both in the Ngāpuhi mandating process and in Ngāpuhi governance more generally. The Rūnanga is an important entity in Ngāpuhi - it is the Rūnanga-ā-iwi, and it maintains the largest membership database. Further, the Rūnanga has agreed to provide services to Tūhoronuku that assist communications with Ngāpuhi. In any event, it is not for the Tribunal to determine whether one Rūnanga seat on Tūhoronuku is appropriate or not - that decision is for Ngāpuhi, and no issue of a Crown Te Tiriti breach arises from it.

9.46 In the March hearing there was discussion regarding a loan made to Tūhoronuku IMA by the Rūnanga.[216] No Tūhoronuku IMA witnesses were cross-examined on the matter. This is not directly relevant to the issues before the Tribunal, and no evidence on it has been put forward.

Tūhoronuku has responded to concerns and gained support

9.47 Tūhoronuku IMA's structure, viewed objectively, is manifestly open, participatory, and transparent. Its direction is determined by its constituent members.

9.48 Because of amendments made to Tūhoronuku IMA's structure, former opponents (some of them leaders of Te Kotahitanga and Ngā Hapū o Te Takutai Moana) have joined Tūhoronuku IMA, as set out below.

9.49 Te Huranga Hohaia (Ngāti Rēhia), who states:[217]

> Following the Te Whāiti report, changes were made to the Tūhoronuku model and, in particular, the number of hapū kaikōrero representatives on the Tūhoronuku board was increased. **We in Ngāti Rēhia regarded that as a crucial change.**
>
> [Emphasis added]

9.50 Nora Rameka (Ngāti Rēhia), who states:[218]

> During this period of association with the aforementioned groups, we remained strongly opposed to the Tūhoronuku Deed of Mandate. **As a result of amendments** to the Tūhoronuku Deed of Mandate, we considered they were sufficient for Ngāti Rēhia to engage in this process.
>
> [Emphasis added]

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215 Exhibit MCH2(13) to brief of evidence of Maureen Hickey (Wai 2490, #A108(a)), dated 20 November 2014 at [6].

216 See for example, the comments of Maureen Hickey: Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.3), 4-5 March 2015 at p 82.

217 Brief of evidence of Te Huranga Hohaia (Wai 2490, #A092), dated 14 November 2014 at [25].

218 Amended brief of evidence of Nora Rameka (Wai 2490, #A091(a)), dated 18 November 2014 at [26].

9.51 Kara George (Te Kapotai), who states:[219]

> I used to oppose Tūhoronuku, at the stage when it looked like Tūhoronuku might settle claims before they were heard in the Te Paparahi o Te Raki Inquiry. However, the parallel process has given me comfort this is no longer an issue. Further, Tūhoronuku listened to the opposition, and made changes to its Deed of Mandate that illustrated to me that Tūhoronuku was dedicated to representing the views of Ngāpuhi.
>
> [...]
>
> It changed its Deed of Mandate to accommodate concerns hapū were projecting about their lack of involvement in Tūhoronuku and its process

9.52 Dr Benjamin Pittman (Ngāti Hau), who states:[220]

> I was initially opposed to Tūhoronuku and voted against the mandate. This was because I was concerned about the representation of our hapū on the structure - this was my key concern. This was particularly so given Ngāpuhi's strength is through its many hapū, and because of the complex inter-hapū relationships.
>
> **When the new structure was created, I immediately saw how all of the fears I had, had in fact been addressed. I no longer held my previous concerns about hapū interests being excluded. It's really that simple**. Tūhoronuku had listened to the concerns of hapū about the levels of their representation and control of the body. **Tūhoronuku then changed its structure to provide majority power to hapū**.
>
> [Emphasis added]

9.53 Dr Terri Lomax (Ngāti Korohue), who states:[221]

> I originally opposed the Tūhoronuku process because I thought the benefits would be captured by a small group of families. From what I could see, Sonny Tau and others in Te Rūnanga A Iwi o Ngāpuhi ("TRAION") held all the decision-making power and would have controlled the distribution of any settlement. Since then, Tūhoronuku have separated from TRAION, separated the Post-Settlement Governance Entity from Tūhoronuku, increased the hapū representation, and made the selection process far more transparent.

9.54 Those changes in position were the result of reasoned engagement with the issues at hand, and show that the amendments to the Deed of Mandate were material and addressed key opponent concerns.

9.55 In contrast, the opponents are unwilling to acknowledge that real accommodations were made and still insist that these "weren't the

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219 Brief of evidence of Kara George (Wai 2490, #A085), dated 14 November 2014 at [4] and [26].

220 Brief of evidence of Dr Benjamin Pittman (Wai 2490, #A083), dated 14 November 2014 at [25] - [26].

221 Brief of evidence of Dr Terrence Lomax (Wai 2490, #A084), dated 14 November 2014 at [29].

changes that [they] were seeking"[222] or that it was a "tick the box" exercise.[223]

9.56 Factually and objectively, this is simply not the case. Structural concerns were directly addressed, and the outcomes sought by opponents resulted from the process.

10. OPTIONS

> *6.1 To what extent did the Crown seek and consider alternative models to Tūhoronuku?*
>
> *6.2 To what extent, if any, were Ngāpuhi consulted on alternative models?*
>
> *6.3 What did the Crown do to facilitate or mediate competing views within Ngāpuhi?*
>
> *6.4 How did the Crown respond to the outcomes of facilitation and/or mediation?*

10.1 We have largely addressed these issues in section 9 above.

10.2 However, it is important to briefly address each question in turn.

10.3 In relation to issue 6.1, and contrary to claimant submissions,[224] it was simply not the Crown's role to seek and consider alternative models to Tūhoronuku:

(a) The Tūhoronuku mandate process was not a Crown-led consultation process. The Tribunal's Revised Statement of Issues seem to be based on a mistaken assumption that the Crown was running a policy process to determine a settlement model for Ngāpuhi, and on a Tribunal concern that the Crown looked too narrowly at options.

(b) Rather, and fundamentally, the process saw Tūhoronuku test the waters, develop a proposed mandate model, consult Ngāpuhi on that model, and seek their mandate on the basis of that model. Contrary to what some claimants argue,[225] Tūhoronuku was not created out of the requirements of Crown policy - it was created by Ngāpuhi, on Ngāpuhi's terms. Anyone else was free to develop a mandate model.

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222 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 197.

223 Brief of Evidence of Willow-Jean Prime (Wai 2490, #A078), dated 12 November 2014 at [104] and [152].

224 Closing submissions for Wai 2431 and 2429 (Ngāti Hine and Te Kapotai) (Wai 2490, #3.3.20) dated 25 March 2015, at [53] and [83].

225 Closing submissions for Wai 2341 (Rudy Taylor & Ors) (Wai 2490) dated 30 March 2015 at [39].

(c) To the extent claimants argue that other options were presented to the Crown but not fully considered, we note that those parties did not consult Ngāpuhi (or even their hapū) on those options.[226]

10.4 In relation to issue 6.2, Ngāpuhi had the opportunity for three years of focussed discussion between 2009 and 2012. As set out at sections 2 and 3, that discussion led to the Tūhoronuku model.

10.5 In relation to issue 6.3, the Crown could arguably not have done more to facilitate or mediate competing views within Ngāpuhi (these processes being outlined above at sections 2 and 3). Tūhoronuku's model enjoyed significant support and, by the end of 2012, there was very little difference between Tūhoronuku and Te Kotahitanga. That is, facilitation had largely been successful. In these circumstances, respect for Ngāpuhi rangatiratanga required the Crown to tread carefully. It was entirely appropriate to focus on mediating the views being expressed rather than to introduce new models or force Ngāpuhi to start over.

10.6 In relation to issue 6.4, and as set out above, the Crown responded to the facilitation processes by either delaying and seeking further facilitation, or by encouraging changes to the Tūhoronuku IMA model.

10.7 In relation to Tūhoronuku's role in (and response to) those processes:

(a) At the Bolger facilitation, Tūhoronuku offered greater representation to Te Kotahitanga (and hapū in general), but these were rejected.

(b) Later, suggestions canvassed through Te Rōpū Whaiti became the foundation for a structure with greater hapū representation, made up of three representatives from five regions.

(c) Following the Mr Morgan's *He Ara Hou* report, Tūhoronuku adopted key recommendations sought by claimants in an amended structure that placed hapū representation at its core. This occurred after a hui of over 100 kaumātua/kuia directed Tūhoronuku to consider aspects of Mr Morgan's report that would strengthen Ngāpuhi representation within the Deed of Mandate.[227]

10.8 Some claimants complain that the Crown should have required the *He Ara Hou* report to be taken out to Ngāpuhi. Tūhoronuku IMA responds that:

(a) This was three years into a mandate process and over a year since Tūhoronuku's model had been endorsed. There was no basis to revisit issues in the way suggested by Mr Morgan.

(b) It was certainly not the Crown's role to require this.

(c) After receiving Mr Morgan's report, the Crown suggested that Tūhoronuku and Te Kotahitanga form a working party to pursue suggested amendments to the Deed of Mandate. Tūhoronuku

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226 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 120, 132; and brief of evidence of Willow-Jean Prime (Wai 2490, #A078), dated 12 November 2014 at [174].

227 Exhibit RT-4 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014 at p 3.

agreed to participate in this working party, and indicated it would explore the suggested amendments. Te Kotahitanga refused to participate.[228] In light of Te Kotahitanga's refusal, it cannot complain that there was a lack of consultation on the Morgan report's recommendations.

(d) In any event, many of the key substantive recommendations in the report are now reflected in the amended Deed of Mandate.

11. FUNDING

7.1 Was the Crown's funding of the mandating process fair and reasonable and conducted in good faith?

Explanation of tranches of pre-mandate funding

11.1 The Crown provided various tranches of pre-mandate funding to Tūhoronuku. That funding was reasonable, appropriate and provided in good faith.

11.2 The tranches of Crown funding can be summarised as follows.[229]

Pre-mandating hui

11.3 $260,000 was provided in 2009 in relation to pre-mandating hui. This funding was provided to raise awareness of mandate issues generally, and to allow Ngāpuhi to express how it wished to move forward. At this stage in the process, there was no "model" being proposed. The Crown's funding was a retrospective contribution to pre-mandate hui costs (such as catering, venue hire, travel, accommodation and advertising costs). Tūhoronuku IMA submits that this was an appropriate measure to assist Ngāpuhi to move towards redress.

Funding for delays

11.4 $251,325 was provided in August 2011 as a retrospective contribution for costs arising from delays to the mandating process to allow for facilitation between Tūhoronuku and Te Kotahitanga (namely, the Bolger process). This funding was manifestly reasonable. This funding was provided by the Crown acting as an honest broker, as Te Tiriti principles require it to do. It would have been unreasonable for the Crown to require Tūhoronuku to delay its processes to engage with Te Kotahitanga (and incur cost because of that) without providing some recompense.

Separation of Tūhoronuku from the Rūnanga

11.5 $2,184,993 was provided in July 2013 as a partial (75 percent) reimbursement of costs incurred by Tūhoronuku. This funding facilitated the separation of Tūhoronuku from the Rūnanga.

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228 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.66].

229 See brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [322] for a description of pre-mandate funding.

11.6 These costs related to the significant processes undertaken by Tūhoronuku during the mandating process, involvement in the Te Rōpū Whaiti and Morgan processes, and significant changes to the Deed of Mandate. Tūhoronuku had further, and significantly, delayed its processes following the 2011 mandate vote.

11.7 Furthermore, reimbursement was provided *at the demand of claimants.*

11.8 For instance, in the original statement of claim in this inquiry (dated 22 August 2011), a recommendation was sought that the Crown repay costs incurred by the Rūnanga.[230] Further, counsel for one of the claimants stated that:[231]

> The second issue that I raised relates to the ongoing role of the Ngāpuhi Rūnanga ... The undemocratic inclusion of the Rūnanga combined with the level of distrust that many have in the entity provide significant reasons to re-evaluate its relevance within the settlement process. **Perhaps the easiest way to get them out would be for OTS to pay them out so that progress can be made unencumbered.**
>
> [Emphasis added]

11.9 As stated by the Minister in a memorandum for Cabinet Committee on this funding:[232]

> Both Tūhoronuku and Te Kotahitanga acknowledge the importance of financial independence ... I therefore consider it timely to address funding so the issue of financial independence from the Rūnanga is clear before Tūhoronuku's deed of mandate is advertised.

11.10 For these reasons, the Crown's reimbursement of expenses facilitated the separation of Tūhoronuku from the Rūnanga. This tranche of Crown funding cannot be called anything other than good faith or reasonable, as those who now impugn it supported it at the time. And, as is clear from Crown evidence, advice to Ministers noted that it was important that the Crown assessed the validity of the mandate independent of funding decisions.[233]

Funding was entirely appropriate in the circumstances

11.11 The claimants raise concerns about the funding being in breach of usual policies and demonstrating favouritism.

11.12 In Tūhoronuku IMA's submission, the funding was entirely appropriate:

(a) The funding provided was not provided to push through the Tūhoronuku view, but to do the opposite. That is:

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230 Wai 2490, #1.1.1 (22 August 2011) at [59(c)].

231 Exhibit MCH2(39) to brief of evidence of Maureen Hickey (Wai 2490, #A108(a)), dated 20 November 2014, p 435.

232 Exhibit MCH2(46) to brief of evidence of Maureen Hickey (Wai 2490, #A108(a)), dated 20 November 2014 at p 589.

233 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [328]; and Bundle of documents for Darrell Naden cross-examination (Wai 2490, #A152) at p 216, paragraph [c].

(i) The pre-mandating tranche reflected that Tūhoronuku was at this stage trying to raise awareness of settlement issues generally.

(ii) The tranche relating to delays recognised that Tūhoronuku was incurring additional costs by agreeing to delay its intended time frames and participate in facilitation.

(iii) The tranche relating to separation was in fact sought by the claimants and paved the way for Tūhoronuku to become a separate legal entity.

That is, although funding was provided to Tūhoronuku, it was in fact funding that facilitated claimant objectives.

(b) As noted by Maureen Hickey, the particular size and complexity of the Ngāpuhi mandating process meant that the Crown considered it appropriate to provide pre-mandate funding.[234] That was reasonable, and indeed, consistent with the Crown's obligations as a Te Tiriti partner.

11.13 We also note that the funding was provided retrospectively. Tūhoronuku had committed to pursue mandate without funding assistance and remained at risk of not being reimbursed throughout.

11.14 Tūhoronuku IMA also rejects the assertions of counsel for Wai 2435 and Wai 2488 that Tūhoronuku would not have proceeded without the pre-mandate funding it obtained.[235] While the Rūnanga obviously preferred some reimbursement to none, there is no suggestion that Tūhoronuku would not have continued without the funding.

12. ELECTIONS

8.1 Given the sustained opposition to the mandate, is the Crown correct to continue to accept the results of the first vote regarding whether Ngāpuhi was ready to settle?

12.1 The evidence before the Tribunal is that Tūhoronuku enjoys widespread support and this continues to grow:

(a) In the 2011 mandate vote, 5,210 people (76 percent of those who participated) supported Tūhoronuku's mandate.

(b) Key hapū that formerly opposed are now strong supporters of Tūhoronuku IMA (eg Te Pōpoto, Ngāti Rēhia).

(c) In the 2014 elections process, 7,434 votes were cast (that is, 2,224 more than the number who voted in support of Tūhoronuku in 2011). In the five MHK elections required (that is, where more than one nomination was received), 2,183 votes

234 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 995 - 997.

235 Closing submissions for Wai 2435 and 2488 (P Harris & Ors) (Wai 2490, #3.3.15) dated 23 March 2015 at [166].

were cast. This shows the latent support for Tūhoronuku IMA amongst Ngāpuhi. 5,251 votes were cast in the elections of urban and kaumātua/kuia representatives.[236]

12.2 In assessing the voting figures, it is important to note that:

(a) Although the Census figures are the most accurate available, it may be that they overstate Ngāpuhi's total population. Ngāpuhi is the best known iwi in the North, and individuals who have a whakapapa connection to Te Tai Tokerau, but do not necessarily have knowledge about their iwi or hapū, are likely to simply write "Ngāpuhi" when completing the Census.[237]

(b) There is clearly a large group of Ngāpuhi who remain politically apathetic, but who also have an interest in, and may benefit from, settlement.

12.3 In contrast, despite the vocal nature of the opposition expressed in the course of this Inquiry:

(a) there were only 1,600 votes in opposition in 2011 across all of Ngāpuhi;

(b) no hapū has yet submitted a 90 person petition to replace an "unwanted" MHK, despite this being a reasonable replacement threshold (as outlined below at paragraphs 12.5(c) and 13.2-13.4); and

(c) even ignoring that the 2013 submission process was not a vote, there were no age limits or indeed any eligibility criteria, there was not a significant increase in opposition as between the 2011 mandate vote and as expressed in the 2013 submissions process.

12.4 On this basis, the Crown is clearly correct to continue to accept the 2011 vote (when considered alongside the significant amendments to the Deed of Mandate to address opponent concerns since the 2011 vote). It would be inappropriate, and likely a Te Tiriti breach, for the Crown to stop in the face of the strong level of support for Tūhoronuku IMA.

8.2 To what extent do the provisions for the nomination and election of hapū kaikorero protect hapū rangatiratanga and allow it to be exercised?

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236 Exhibit B to brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098(a)), dated 18 November 2014 at pp 57-60.

237 This potential swamping effect is recognised by Leonard Cook, a former Government Statistician in both New Zealand and the United Kingdom (Cook L, *Measuring the population of Ngāti Makino*. A report to the Ngāti Makino Heritage Trust.) We note that in the 1901 Census, for example, Ngāpuhi numbered 3,452. The next largest iwi was Ngāti Kahungunu at 2,809. In the 1991 Census Ngāpuhi numbered 92,973. The next largest iwi was Ngāti Porou at 48,525. Only five other iwi recorded more than 20,000 members. It is difficult to explain this difference in size by demographic factors and Māori from the North may select Ngāpuhi in the census because it is the largest iwi in the North, even though they do might not meet formal eligibility requirements (and so would not be eligible to vote on the Ngāpuhi mandate).

12.5 Tūhoronuku IMA's MHK elections process ensures hapū rangatiratanga can be exercised in a participatory and inclusive framework. Key features include the following:

(a) Nominations:[238] Before voting, an independent returning officer ("**IRO**") calls for nominations in each of the five regions. The nomination period lasts 21 days and individuals cannot self-nominate. Nominees must:[239]

(i) Agree to a police vetting check in certain circumstances (discussed at paragraph 9.40).

(ii) Be an adult member of Ngāpuhi and provide details confirming their Ngāpuhi descent and whakapapa.

(iii) Agree to become a trustee under the Tūhoronuku IMA Trust Deed.

(iv) Agree they will not be a negotiator unless they resign from Tūhoronuku IMA.

If there is only one nomination for an MHK position, the nominated person is accepted as the MHK.

(b) Voting: If there is more than one nomination, the IRO liaises with hapū for the holding of a hui in accordance with the following conditions:[240]

(i) The IRO gives 21 days public notice to hapū members.

(ii) That notice must clearly state the date, time and venue of the hui, its purpose, and indicate that candidate profile information can be viewed on the IRO website, the Tūhoronuku IMA website, and will be available on the day of the hui.

(iii) Voting is undertaken by persons present at the hui by way of paper ballot, online, or by postal vote.

Public notice of persons elected as MHKs is issued within seven days of voting.

(c) Replacement: Hapū members can initiate a process for replacement of a MHK, which is conducted as follows:[241]

(i) Hapū member(s) shall notify Tūhoronuku IMA in writing of reasons why the MHK should be replaced.

(ii) Tūhoronuku IMA will consider the matter and contact affected parties. If appropriate, there will be a hui

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238 See exhibit RT-4 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014 at p 16.

239 Exhibit RT-4 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014 at p 11.

240 Exhibit RT-4 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014 at pp 16 - 17.

241 Exhibit RT-4 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014 at pp 18-19.

between the MHK and hapū members to attempt to resolve the issues raised. Tūhoronuku IMA will consider whether further action may be required to assist in resolution.

(iii) If resolution cannot be achieved, a replacement process is triggered by at least 90 hapū members 18 years or older (and otherwise showing proof of eligibility) writing to Tūhoronuku IMA.

(iv) Within 14 days of receiving notice, Tūhoronuku shall direct the IRO to give 21 days public notice of a hui on the matter.

(v) Minimum attendance at the hui must be 60 hapū members 18 years or over and the existing MHK must be given an opportunity to speak.

(vi) Of those hapū members 18 years or over, 75 percent must vote in support of the replacement of the MHK.

(vii) Where 75 percent support is received for replacement of the MHK, the nominations and voting process discussed above is repeated.

(viii) If the MHK wishes to resign, the MHK should notify Tūhoronuku IMA of his or her intent to stand down, with the nomination and election process then being repeated to determine the new MHK.

12.6 Claimants criticise Tūhoronuku IMA's process on the following basis:

(a) candidates for MHK can be nominated without hui-ā-hapū; and

(b) voting for a MHK can occur other than at a hui-ā-hapū.

12.7 Below we discuss how these concerns misunderstand the nature of the process outlined in the Deed of Mandate Addendum, and are inconsistent with claimants' earlier positions.

Hui remain a central part of the process

12.8 The elections process does not prevent hapū using traditional processes to appoint MHK within this framework; indeed, hapū have done so.

12.9 As is shown in the evidence, hapū can elect MHKs according to their tikanga under the Tūhoronuku IMA Deed of Mandate Addendum. As Te Huranga Hohaia states for Ngāti Rēhia:[242]

> My election as mandated hapū kaikōrero for Ngāti Rēhia resulted from a Hui called for that purpose with my hapū at Te Tii Mangonui on 15 March 2014 ... Our senior kaumātua, Ringa Kaha was present and gave his blessing to Ngāti Rēhia joining Tūhoronuku ... The question to join or not join Tūhoronuku was settled by way of resolution ... supported by an overwhelming majority.

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[242] Brief of evidence of Te Huranga Hohaia (Wai 2490, #A092), dated 14 November 2014 at [6], and [10] - [11].

12.10 Tame Te Rangi was also nominated at a hapū hui, applying hapū rangatiratanga and tikanga alongside Tūhoronuku IMA processes. As Mr Te Rangi states:[243]

> We do not believe our hapū views and position have been compromised in the Tūhoronuku process ... We believe the process can accommodate our tikanga and our ability to advance our redress and settlement aspirations.

The process is inclusive and strengthens hapū participation

12.11 Voting for an MHK can occur other than exclusively by hui-ā-hapū. Tūhoronuku IMA makes no apology for that. To limit the ability of people to vote for MHKs would lessen the accountability of Tūhoronuku IMA, not improve it. Tūhoronuku and Te Kotahitanga agreed that this accountability was important and should be strengthened.[244]

12.12 As such, Tūhoronuku IMA's structure reflects the view that all Ngāpuhi are important and have a role to exercise through their hapū and iwi. It also reflects the fact that Ngāpuhi's population is young and dispersed. As Mr Tau states:[245]

> Geographically, the 2013 Census showed that 19.9 percent of Ngāpuhi resided in Northland, 40.3 percent in Auckland, 10.7 percent in the Waikato and 6.4 percent in the Bay of Plenty. The remainder are spread throughout New Zealand. The Ngāpuhi population is a young one, with 35.4 percent of the population under 15. The median age is 22.4, while the median for New Zealand is 38.

12.13 Claimants have been unable to address how their alternative hapū-based settlement models would accommodate Ngāpuhi beyond the haukāinga. Ms Prime states that:[246]

> Well we actually have people come from Auckland to those meetings, depending on what *take* are being discussed. We regularly advertise them on Facebook and provide updates. So, as my uncle spoke before about our contemporary marae Facebook, we certainly utilise that as Te Kapotai.

12.14 Given the young and dispersed nature of Ngāpuhi, many people are unlikely to not know what hapū they whakapapa to. Facebook does not address that, but Tūhoronuku's structure can. More simply, if the legitimacy to speak on hapū matters is restricted to physical attendance, this excludes the great number of people who may not might not be able to travel to the haukāinga for hapū hui.

12.15 Ahi kā is important; that is not challenged. But mandate and settlement processes must reflect the modern realities of Māoridom, and the urbanisation and remoteness caused by colonisation. To restrict involvement in mandating and settlement decisions to those at hapū hui in the haukāinga simply perpetuates that alienation.

12.16 As stated by Sonny Tau:[247]

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243 Brief of evidence of Tame Te Rangi (Wai 2490, # A093), dated 14 November 2014 at [10] - [11].

244 See below at paragraph 12.23.

245 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [3.35].

246 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 199.

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

12.17 Likewise, in describing key aspects of his model, Tukoroirangi Morgan noted that:[248]

> ...the voice of the urban cannot be denied. Whether they live in Australia, Wellington or Christchurch or Sydney, there had to be some consideration given to their people across the world. ... So, **whether people [were] living abroad it was important for them not to be denied the right to participate and so there were provisions made in the model**, both the mandating authority model and also the PSG[E], the post-settlement model for their participation.
>
> [Emphasis added.]

12.18 The submission that restricting involvement to hapū hui prevents Ngāpuhi from becoming involved is not based on assumptions; it is in evidence:[249]

> I have also found out that if one is not on someone's mailing list, then one simply doesn't find out about hapū-based meetings. **If one lives outside Northland, then it is generally not possible to attend meetings, or to participate in claimant processes.** I recently moved to live in Northland. Until then the Tūhoronuku process was the only one that was accessible to me.
>
> [Emphasis added.]

12.19 In short, Tūhoronuku's MHK election process enables the participation of a dispersed Ngāpuhi population. That cannot be complained of.

12.20 Further, Tūhoronuku's MHK elections have enabled a greater level of participation than election by hui-ā-hapū alone. 306 votes were cast in the Te Kapotai MHK election;[250] the evidence of Willow-Jean Prime is that Te Kapotai hui normally have only between 10 and 40 attendees.[251]

Claimants' alleged concern with tikanga is new and contradictory

12.21 Until very recently, there was no suggestion from claimants that the process outlined in the Deed of Mandate Addendum went against tikanga. In fact, the MHK elections process contained in the Deed of

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247 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 1143.

248 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 585.

249 Brief of evidence of Dr Terrence Lomax (Wai 2490, #A084), dated 14 November 2014 at [21].

250 Exhibit B to brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098(a)), dated 18 November 2014 at pp 57 - 58.

251 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 199.

Mandate Addendum arose because Te Kotahitanga opposed allowing hapū to appoint kaikōrero purely according to tikanga.

12.22 Looking back, appointment processes were a concern raised in early 2011 regarding the Deed of Mandate Strategy - precisely *because* those processes required that kaikōrero be appointed by tikanga and hapū hui alone.[252]

12.23 For this reason, Te Kotahitanga requested that the MHK elections process be changed from exclusively in accordance with each hapū's tikanga, to being a robust and transparent process, commenting:[253]

> We agree that a defined and transparent election process is important to strengthen the accountability to the people of Ngāpuhi.

12.24 In correspondence dated 31 May 2013, Te Kotahitanga stated (after having suggested that MHK election processes be made more transparent through elections, as opposed to tikanga-based, processes):[254]

> On the matter of the detail of the election process being clearly established through the Deed of Mandate amendments, **we agree entirely**.
>
> [Emphasis added]

12.25 Te Kotahitanga, in this correspondence, did not raise any concerns with the tikanga-consistency of Tūhoronuku's election processes. If Te Kotahitanga genuinely held any such concerns, they would have raised them at this stage. They did not.

12.26 Further, Te Kotahitanga did not take exception to the model proposed by Mr Morgan allowed for postal and electronic voting,[255] instead saying:[256]

> We believe with further refinement of the election process Mr Morgan has suggested would provide a far more stable starting point for Ngāpuhi representation throughout the negotiation phase.

12.27 In summary, the approach outlined in the Deed of Mandate Addendum was widely supported (including by Te Kotahitanga and Mr Morgan), and was accepted in the mandate vote. It supplements, but does not replace, tikanga. Further, that approach is entirely reasonable given the demographics of Ngāpuhi. Indeed, we also understand that many iwi vote in this way.[257]

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252 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014, at [76.4].

253 Exhibit MCH30 (Kotahitanga letter dated 7 December 2012) to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014, p 337.

254 Exhibit MCH36 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 397.

255 Exhibit MCH23 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 261 at [5.3.2] and [5.5.2].

256 Exhibit MCH30 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 337.

257 For instance, Waikato-Tainui used a one-person one-vote system in their recent referendum (see Exhibit G to brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014).

13. WITHDRAWAL

9.1 To what extent, if any, are the provisions for the withdrawal of claims and/or hapū kaikorero in the Deed of Mandate fair?

13.1 It is important to distinguish between hapū withdrawal and replacement of MHKs:

(a) Replacement of MHKs refers to the replacement of a hapū's sitting MHK with another person.

(b) Hapū withdrawal refers to the ability of hapū to withdraw themselves from the Tūhoronuku IMA mandate.

Replacement of MHKs

13.2 The process for replacement of MHKs is clearly outlined in the Deed of Mandate Addendum.[258] That process is not onerous - it requires 90 people for it to be triggered.

13.3 Claimants have questioned why it is harder to remove an MHK than it is to appoint one.[259] This arises from a desire to find a balance between hapū ability to change their MHK when they see fit, and providing sufficient stability for Tūhoronuku IMA as a body. If MHKs were to be constantly and easily changing, this would materially affect the manner in which hapū interact with each other within Tūhoronuku IMA, and with negotiators. This would be to the detriment of hapū. Indeed, Te Kotahitanga agreed that stability in Ngāpuhi representation was important for negotiations.[260]

13.4 In any event, the question of whether a 90 person threshold is most appropriate (as opposed to 30 or 60) for the MHK replacement process is fundamentally not a question for the Tribunal to answer. That discretionary detail does not engage questions of Te Tiriti breaches. Concern with such matters loses sight of the fact that this is Tūhoronuku's model, not the Crown's. The Tribunal should support the autonomy of Ngāpuhi to determine its own processes - that is rangatiratanga in practice.

Withdrawal of hapū

13.5 The process for a group to withdraw from the mandate is set out in the Deed of Mandate Addendum.[261] Any hapū wishing to withdraw must undertake a process as robust and thorough as the process undertaken in obtaining mandate.[262]

13.6 The threshold for withdrawal of hapū from the Tūhoronuku mandate reflects the fact that Tūhoronuku's model represents a single, unified

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258 Exhibit RT-4 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014 at pp 18-19.

259 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.3), 4-5 March 2015 at p 247.

260 Exhibit MCH30 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 337.

261 Exhibit RT-4 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014 at p 12.

262 Exhibit RT-4 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014 at p 12.

Ngāpuhi mandate. Individual hapū withdrawing from Tūhoronuku would fundamentally undermine the approach determined by Ngāpuhi.

13.7 This is because provision for hapū withdrawal on an individual rather than group basis would very likely lead to brinksmanship and strategic behaviour by hapū in order to obtain particular redress:

(a) If hapū are able to opt in and opt out as they wish from time to time, the ability of Ngāpuhi to effectively negotiate settlement will be materially prejudiced. As the Crown would not have surety about who it was negotiating with, the nature of redress and settlement might be affected. The settlement process would always be at risk of disintegrating due to hapū brinksmanship.[263]

(b) Indeed, it is because withdrawing would destabilise the solutions sought by the collective that hapū would have unfair bargaining power. Their ability to derail the entire process would give them unwarranted bargaining power *vis-à-vis* other hapū and claimants.

13.8 Such instability would render Ngāpuhi unable to present a unified and co-ordinated front to the Crown in negotiations, to the detriment of all hapū. Put simply, a hapū-by-hapū withdrawal mechanism is not consistent with a unified negotiation for Ngāpuhi.

13.9 The issue of providing an easier means of hapū withdrawal was raised by Te Kotahitanga in December 2012 (at the 11th hour) as the Tūhoronuku model was being finalised for advertising by the Crown. At this point, Tūhoronuku and Te Kotahitanga had been through the Bolger, Te Rōpū Whaiti, and Morgan processes: they had been going through facilitation and engagement processes for over a year and half. They agreed on key issues that had been contentious between them.[264] It was only at this point that hapū withdrawal was raised.

13.10 Under cross-examination, Mr Tipene acknowledged that concern with a withdrawal was first communicated at this very late time in December 2012:[265]

> The first time that I've known that the withdrawal clause was raised was then we sent a letter to the honourable Chris Finlayson and Pita Sharples on 7th of December 2012.

13.11 The unavoidable inference from this is that raising hapū withdrawal was a last-ditch attempt to destabilise the model when Te Kotahitanga thought it would no longer be able to successfully delay or oppose it.

13.12 The Tūhoronuku IMA mandate was sought from all Ngāpuhi. This is fundamental to the issue of hapū withdrawal.

13.13 If it was hapū who gave mandate, it would be for them to revoke. But mandate was not sought from hapū, it was sought from the individuals who make up Ngāpuhi. So, it is for that group collectively to revoke

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263 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [8.1(b)(i)].

264 Exhibits MCH30 and MCH32 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014.

265 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 311.

mandate. If hapū want to withdraw, they need the approval of Ngāpuhi to do so, because Ngāpuhi has said it wants a unified single approach.[266]

13.14 The Crown cannot ignore the wishes of Ngāpuhi katoa just because some hapū disagree (although exactly what particular hapū think has not been established and the basis for the concerns expressed by claimants is strongly challenged by Tūhoronuku IMA). The Crown has had to progress settlements despite disagreements between hapū before, but it is by actively ensuring that hapū interests are provided for (as here, with a strong hapū voice on Tūhoronuku IMA and in negotiations moving forward) that it has a good record of settlements.[267]

14. REPRESENTATION

10.1 To what extent do the Wai 2490 claimants represent the groups on whose behalf the Wai 2490 claims are made?

10.2 To what extent, if any, will historical claims be negotiated and/or settled without the consent of the groups on whose behalf those claims are made? And would this amount to extinguishment?

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

Who do the Wai 2490 claimants represent?

14.1 The evidence presented by the claimants as to the level of opposition of the mandate is fundamentally unsatisfactory:

(a) There is no evidence before this Tribunal that particular hapū (as opposed to a few people who purport to speak on behalf of those hapū) are opposed.

(b) There is no evidence upon which the Tribunal can reliably substantiate claimants' claims to represent significant groups. Hapū members have not been polled, and it is unclear the extent to which the views of the individuals before the Tribunal are representative.

(c) The evidence in relation to Te Kapotai for example is that opposition is based on the 10 - 40 people who regularly turn up for Te Kapotai marae trustees and Māori Committee hui.[268] Yet over 300 Te Kapotai endorsed the Tūhoronuku model by voting in MHK elections.[269] This difference of view within hapū is ignored by the claimants.

14.2 There is no reliable estimate of the numbers opposed to Tūhoronuku, other than the 1,600 who voted in 2011. In contrast, we know from the mandate vote that there was 3:1 support for the Tūhoronuku mandate.

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266 Some claimants rely on *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 in support of the proposition that any hapū may withdraw from a mandate at any time. *Haronga* did not however revisit the principle that mandate may be sought on an iwi-wide basis.

267 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.3), 4-5 March 2015 at p 264.

268 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 199.

269 Brief of evidence of Kara George (Wai 2490, #A085), dated 14 November 2014 at [18].

Greater hapū participation through Tūhoronuku IMA's model

14.3 Tūhoronuku IMA's model provides for full participation of all uri of Rāhiri, and does not prevent hapū hui in any way. A "one person one vote" approach enables greater hapū participation than a purely hapū hui-based decision making process. In this respect, as stated by Kara George:[270]

> Over 300 Te Kapotai voted in the MHK elections. This is evidence that Te Kapotai supports the Tūhoronuku IMA - this is contrary to the idea presented by others that Te Kapotai is unified in its opposition to the Tūhoronuku IMA.

14.4 That model makes particular sense when compared with the numbers that regularly turn up to marae hui (in the case of Te Kapotai, between 10 and 40).

14.5 As well as Te Kapotai, the MHK elections saw 400 votes cast in the election of Moana Tuwhare as MHK for Te Pōpoto. Similarly, that is by all accounts significantly more people than turn up to Te Pōpoto hui.[271]

Urban Ngāpuhi

14.6 Ultimately, a single mandate settlement that provides for all Ngāpuhi wherever they live, and regardless of whether they are active in their hapū, is a process that can best provide justice through settlement to all uri of Rāhiri. In this regard, again, Dr Terri Lomax's evidence is important:[272]

> As claimants, we are not only seeking recompense for those we know – **we are also seeking recompense and settlement for those who were so badly impacted by the loss of land and family structure that they currently do not know how to find their way back to whānau, hapū and iwi**. For natural justice reasons, part of any settlement process has to address what provision is required to those who as yet haven't found out who they are. I was in that position, and I understand how difficult it can be to find out where one belongs.
>
> [Emphasis added.]

14.7 This inclusive position is to be contrasted with the claimants' express desire to exclude those outside the haukāinga. For instance, Willow-Jean Prime stated under cross-examination that:[273]

> ...our starting point is that in terms of the key decisions our tikanga requires that they're made at home on our marae. We notify those hui. We use Facebook to engage with our, you know, people that are on there.
>
> [...]
>
> The whole one person one vote with no information being provided, with no opportunity to wānanga, discuss and hui is inconsistent with our tikanga.

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270 Brief of evidence of Kara George (Wai 2490, #A085), dated 14 November 2014 at [18].
271 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 1144.
272 Brief of evidence of Dr Terrence Lomax (Wai 2490, #A084), dated 14 November 2014 at [18].
273 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 225.

14.8 Lee Harris has said that it does not make sense for Ngāpuhi settlement matters to be discussed, or have votes received from, outside the haukāinga.[274] Tūhoronuku IMA submits this is fundamentally the wrong approach to mandating and settlement, and is an approach at odds with how settlements have been conducted to date.

14.9 What is required from settlement is a fair and equitable outcome not only for those who have retained some of their lands and family connections, but also for those who are have lost those connections.

Different representation structures for Tribunal and settlement purposes

14.10 Some of those who are pursuing historical claims in the Waitangi Tribunal insist that only they can determine how "their" claims are settled. However, there is no requirement that the representative structure for pursuing claims is the same as the structure for settling those claims. Ngāpuhi can, and has, chosen a different (and broader) representation structure in relation to settlement.

14.11 We note that Tūhoronuku IMA undertook a careful and extensive process to secure authority to settle claims. This can be contrasted with the typically less formal processes that have determined representation for the pursuit of historical claims in the Tribunal.

14.12 At any rate, the baton can be, and has been, passed. The iwi-wide process and mandate vote provide Tūhoronuku IMA with the authority to progress negotiations. The extent to which those who are currently pursuing historical claims in the Tribunal participate in the settlement process is in their hands.

The process for negotiating and settling claims has not yet been determined

14.13 The Tūhoronuku IMA is not the final product, but the vehicle through which a settlement model for Ngāpuhi will be determined: the manner in which historical claims are negotiated and settled has not been decided and will be determined by claimants and hapū.

14.14 Of course, not everyone will get their way. It is a fact of life in whānau, hapū and iwi that sometimes a minority will be disappointed. In such cases, what is important is the opportunity to participate and the existence of a fair and robust process.

14.15 The Tūhoronuku IMA model ensures a considered and democratic journey towards settlement. As noted above, and in line with the conditions of its mandate recognition, Tūhoronuku IMA has drafted an Engagement Plan that provides various mechanisms for hapū to be involved in the settlement of their claims, including:[275]

(a) how claimants and hapū are included in the negotiation and design of redress, notably through the relationships between MHK and negotiators;

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274 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 350.

275 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098 and #A098(a)), dated 18 November 2014 at [5.31] and Exhibit U.

(b) how hapū profiles will inform Tūhoronuku IMA's interests and aspirations for settlement;

(c) that working groups will be established to work on issues of common interest across or within regions, then working with negotiators to develop redress options for discussion with the Crown;

(d) how the "telling the story hui" will occur, whereby hapū will be able to meet directly with the Crown to tell them about particular historical grievances; and

(e) how it is up to Ngāpuhi to determine the PSGE model, that discussion will start early on this issue, and that these discussions may include return of specific assets to hapū or hapū groupings.

14.16 The process outlined in the Plan is intended to ensure that the shared aspirations of Ngāpuhi are recognised in the eventual settlement model.

14.17 Where people participate, they will have a role in shaping the negotiations plan and settlement model. There is nothing to stop:

(a) claimants' specific hapū being involved in the negotiations;

(b) hapū close to each other working together;

(c) settlement assets going to hapū or regional entities;

(d) one or many PGSEs; and

(e) Stage Two Tribunal findings being built into the settlement process after a high-level settlement agreement is reached.

14.18 Key claimants, such as Pita Tipene, accept that the Tūhoronuku's single mandate model does not necessarily mean single settlement.[276] The dichotomy between Tūhoronuku and a rohe-based model is a false one.

14.19 If people want regional settlements, they can have that. If people want devolved redress, they can have that too. But the strength of a single mandate means that cross-claims can be co-ordinated and inter-regional issues agreed within a broader shared settlement. Even once negotiations have progressed significantly, the decision whether to support and ratify the eventual model for settlement remains with Ngāpuhi.

Next steps: preparation of hapū profiles, negotiators

14.20 An important next step for hapū is to prepare their hapū profiles. These are intended to summarise hapū identity and aspirations, and will be informed by oral histories, research, and mapping summarised from the hearings process (as well as from other information provided by the hapū). The development of each hapū's profile will be a key role for that hapū's MHK, and will occur with support from Tūhoronuku IMA's Hapū

[276] Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 315.

Coordinator and Research Coordinator.[277] Along with the direct line of contact between MHKs and negotiators, hapū profiles will be an important tool in helping to achieve hapū aspirations for settlement.

14.21 Tūhoronuku IMA has recently appointed three negotiators. The Tūhoronuku IMA Trust Deed provides for the appointment of between three and six negotiators.[278] Accordingly, it will be possible to make further appointments (for example, of those currently opposed) in the future. It is anticipated that initially the negotiators will be focussed on the hapū of Ngāpuhi, to establish the settlement aspirations of those hapū.[279]

Maunganui Bluff

14.22 In cross-examination at the March hearing, counsel for Te Kotahitanga referenced a letter from Mr Tau to the Chairperson of Te Roroa Whatu Ora and Manawhenua Trusts,[280] relating to Maunganui Bluff. Tūhoronuku IMA's position is that the Bluff is fundamental to Ngāpuhi's identity, but that given Te Roroa has settled claims in respect of that area, Tūhoronuku IMA has no interest in those claims. Tūhoronuku IMA witnesses were not cross-examined on this correspondence, and as such the Tribunal should not make findings without the opportunity for Tūhoronuku IMA to explain the statements in question.

Ongoing Crown commitment

14.23 It is also important to note that, to the extent hapū harbour concerns about the settlement process or Tūhoronuku IMA, the Crown has made it clear that it will continue to meet hapū and be an honest broker between opponents. This was shown in the offer by Mr Fyfe to meet Ngāti Kuta and Patukeha in the December hearing.[281] At the March hearing, Mr Fyfe made it clear that the Crown sought meetings with various Tūhoronuku opponents in December.[282]

10.4 In the process of hapū definition for Ngāpuhi, to what extent did the Crown seek the input of hapū, including those opposed to the Tūhoronuku mandate?

Claimant definition was determined by Ngāpuhi and remains ongoing

14.24 The hapū listed in the Deed of Mandate Addendum were determined by Ngāpuhi, not by the Crown.

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277 Exhibit U to brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098(a)), dated 18 November 2014 at p 196.

278 Exhibit RT-2 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(a)), dated 4 June 2014 at clause 7.1.

279 See Memorandum of counsel for Tūhoronuku IMA (Wai 2490, #3.4.49), dated 9 March 2015.

280 Document 98 of March Hearing Common Bundle (Wai 2490, #A145), "TIMA to OTS Mandate Maintenance report 2-9 May 2014 to 9 August 2014", 9 August 2014 at pp 999-1000; Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.3), 4-5 March 2015 at pp 153-154.

281 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at pp 743-744.

282 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.3), 4-5 March 2015 at pp 265-267.

14.25 110 hapū are listed in the Tūhoronuku Deed of Mandate Addendum.[283] This number was determined by a rōpū made up of kaumātua and kuia from across Ngāpuhi.[284] It is important to note that the rōpū included members now associated with both Tūhoronuku and Te Kotahitanga.

14.26 These included, for example, John Klaricich, Hone Sadler and Mere Mangu (supporters of Tūhoronuku) and Owen Kingi and Dr Patu Hohepa (opposed).[285] Dr Hohepa, in particular, was involved and played a part in Mr Morgan's report, which provided the basis for the process of claimant definition.[286]

14.27 The number of hapū understood to exist has changed over time - this reflects the complicated histories and whakapapa that inform that analysis. Initial estimates of 300 or so hapū, given in 2009,[287] were based on estimates provided by kaumātua and kuia at the time. Since then, a concerted effort was made, alongside current opponents, to derive a more accurate figure.

Process following 2014 election

14.28 The Crown is presently assessing what the election of 47 MHKs out of 110 listed hapū tells us about support for Tūhoronuku IMA. It is quite disingenuous to suggest that this analysis is somehow being undertaken to orchestrate a better result.[288] It is simply to understand how to interpret the raw data.

14.29 Understanding the complexities of inter-hapū relationships is important if the Crown is to assess the significance of the number of MHKs that have been elected. In this sense, understanding whether some hapū have decided to have their views represented by their tuakana hapū is material to understanding the nature of hapū support for Tūhoronuku IMA.

Historical and inactive hapū

14.30 Some of the 110 hapū listed in the Deed of Mandate Addendum simply have not been heard from. Of the hapū listed in the Addendum, the following are considered historical or otherwise presumed inactive:[289]

(a) Historical hapū: Kaitore, Ngāti Hurihanga, Ngāti Kohu, Ngāti Mau, Ngāti Miro, Ngāti Miru, Ngāti Mokokohi, Ngāti Patutaratara, Ngāti Pare, Ngāti Rahuwhakairi, Ngāti Tipa, Te Pōtai, Te Rauwera, Te Uri Karaka, Te Wahineiti, Te Uri Kaiwhare, Whānautara.

(b) Unknown (presumed inactive or traditional): Ngāti Hua, Ngāti Kahuiti, Ngāti Kawhiti, Ngāti Kohu, Ngāti Rauwawe, Ngāti Te

283 Deed of Mandate Addendum set out in Exhibit RT-4 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014 at p 36.

284 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [3.31] - [3.32].

285 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [3.31].

286 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.3), 4-5 March 2015 at p 48.

287 See Document 2 of March Hearing Common Bundle (Wai 2490, #A151) "File note Meeting with Te Runanga A Iwi O Ngāpuhi 8 July 2009".

288 For instance, see the closing submissions for Wai 2435 and 2488 (P Harris & Ors) (Wai 2490, #3.3.15) dated 23 March 2015 at [63].

289 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [5.13 (a)].

Ara, Ngāti Tū, Ngāti Uru, Ngā Uri o Te Pona, Te Tahawai, Te Uri o Rātakitaki/Te Uri Rata, Te Uri Ongaonga.

14.31 Precisely determining the number of hapū in Ngāpuhi is an extremely difficult task: none of the claimant witnesses were able to do so in the December hearing, and estimates of the numbers of hapū have varied in the past five years.

14.32 However, the listing of a hapū as "inactive" does not condemn them. Claimant definition is an ongoing issue, and markers such as "inactive" are used as a means of analysing support rather than making a claim on hapū legitimacy. All hapū listed in the Addendum are able to elect MHKs, and as such there is no prejudice if the characterising as inactive was incorrect. For example, Te Uri Karaka is able to elect an MHK if members of that hapū wish to do so.

Tuakana and ririki hapū

14.33 The tikanga of tuakana and ririki hapū is also relevant. While the Tūhoronuku IMA model does not currently allow for MHKs to represent multiple hapū, the strength of tikanga within Ngāpuhi means that some hapū consider that other hapū's MHKs speak for them. This is the case for Ngāti Moerewa, Ngāti Rangi, Ngāti Whakahotu, and Te Whānau Whero.[290]

14.34 In the same way, Te Hikutu, Ngāti Tuatahi and Ngāti Te Rino are tuakana for other hapū.[291]

14.35 Importantly for the Tribunal's analysis, this concept of tuakana and ririki hapū is established tikanga within Ngāpuhi, and is a concept accepted by Ngāti Hine.[292] It is not a concept cynically designed to explain the number of MHKs in Tūhoronuku IMA.

15. SETTLEMENT AND RELATIONSHIPS

11.1 To what extent can the mandate process be said to be open, fair and transparent enough to produce a robust and enduring settlement?

15.1 It is clear that the process leading to recognition of Tūhoronuku's mandate was manifestly transparent, robust and inclusive. It involved a comprehensive awareness raising exercise, numerous hui from Kaikohe to Sydney, a process for claimant submissions, a substantial vote in favour of the Tūhoronuku model and an extended process of facilitation to ensure all interests could be represented. Meanwhile, the Crown monitored events closely and assisted the parties appropriately.

15.2 Claimants have expressed concerns at the manner in which mandating hui were conducted. These were emotive and highly charged hui, as one

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290 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [5.13(b)].

291 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [5.13 (c) - (e)].

292 Exhibit MCH47 to affidavit of Maureen Hickey (Wai 2490, #A026(a)), dated 5 June 2014 at p 516.

would expect of a kaupapa this important. Claimants argue that the mandating hui were inadequate.[293] This is not supported on the facts.

15.3 In any event, both Willow-Jean Prime[294] and Rudy Taylor[295] acknowledge that disruption was caused by both sides. More importantly, such minor disruption does not mean that the process was flawed and the results unreliable. A forensic examination of individual hui distracts from the broader question that the Tribunal must be concerned with: was the mandating process robust? Observer reports by Te Puni Kōkiri show that the process was conducted in a fair and transparent manner.[296]

15.4 Essentially, the same small group of people attempted to disrupt a series of hui.[297] As Titewhai Harawira states:[298]

> [T]he opposition has often been conducted as a dishonest struggle ... There were personal attacks via a website that was put in place for that specific purpose. There were threats of shooting members, marches, protests, and threatening calls. Some hui were postponed as a result... People who attended [hui] in their areas had difficult asking questions, or worse still, [were] prevented from having a conversation because Kotahitanga representatives monopolised their time.

15.5 And, as Sonny Tau states:[299]

> It was Tūhoronuku opponents who aimed to disrupt our mandating hui, which were professionally and fairly managed by Tūhoronuku staff. Despite their attempts, the hui proceeded and were successful.

15.6 Claimants say they were unable to make their views heard at mandate hui, but this is challenged by Sonny Tau,[300] Dr Terri Lomax,[301] and Carol Dodd.[302] For example, Dr Lomax states that:[303]

> In Wellington, I spoke against the flaws I saw in Tūhoronuku... In Northland, I criticised the process for communicating with iwi members... From my experience, I reject the contention by some claimants that opponents were not allowed to voice their opposition at those meetings.

15.7 Comments that the "wairua was really bad" are subjective and do not go to the question of whether a robust process was followed.[304] Any

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293 Closing submissions for Wai 2431 and 2429 (Ngāti Hine and Te Kapotai) (Wai 2490, #3.3.20) dated 25 March 2015, at [126].

294 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 198.

295 Brief of evidence in reply of Rudolph Taylor (Wai 2490, #A114), dated 25 November 2014 at [11].

296 Exhibit MCH(2)11 to brief of evidence of Maureen Hickey (Wai 2490, #A108(a)), dated 20 November 2014.

297 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014, at [4.34].

298 Brief of evidence of Titewhai Harawira (Wai 2490, #A102), dated 20 November 2014 at [69] - [71].

299 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [8.1(e)(i)].

300 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [4.33] - [4.35].

301 Brief of evidence of Dr Terrence Lomax (Wai 2490, #A084), dated 14 November 2014 at [31].

302 Brief of evidence of Carol Dodd (Wai 2490, #A082), dated 14 November 2014 at [37].

303 Brief of evidence of Dr Terrence Lomax (Wai 2490, #A084), dated 14 November 2014 at [31].

disruptions must be considered against the broader background of the communications effort to engage and inform Ngāpuhi.[305]

15.8 Further, arguments that mandate hui were flawed in that alternative models were not presented fundamentally misunderstand the purpose of mandating hui.[306] Those hui were not for broad-based discussion on various alternative models - that discussion had occurred in 2009 and 2010. The mandating hui were to allow Ngāpuhi to discuss, and vote on, Tūhoronuku's specific mandate proposal.[307]

15.9 Looked at forensically five years after the fact, it will always be possible to say some things could have been done better. But based on the facts before the Tribunal, Tūhoronuku IMA submits that its process were near as robust, participatory and transparent as possible.

11.2 To what extent, if any, have the Crown's actions or omissions impacted on whakawhānaungatanga/relationships within Ngāpuhi? And to what extent is the Crown culpable for any negative impact?

15.10 The issues raised in these proceedings predominantly concern internal Ngāpuhi disputes; they do not reflect an absence of good faith by the Crown. It is unsurprising that relationships have become strained. That is the result of a difference of views on matters of judgement that are of importance to Ngāpuhi. The Crown cannot be blamed for any tensions.

15.11 Disagreement over recognition of Tūhoronuku's mandate reflects the accepted truth that conflict within the large tribal group that is Ngāpuhi is common, now and in the past. Hirini Tau notes:[308]

> I... invite the Tribunal to consider some historical examples which demonstrate that when Ngāpuhi is at home within Te Whare Tapu o Ngāpuhi it is not uncommon that division occurs. In actual fact, it has been occurring since we landed here.

15.12 However, despite these differences, Ngāpuhi comes together when it is important. Hirini Tau notes further:[309]

> However, when Ngāpuhi leaves Te Whare Tapu o Ngāpuhi, Nukutawhiti and Ruanui would then unite together.
>
> When Ngāpuhi went to the aid of Te Rauparaha they came together as one group [...]

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304 Brief of Evidence of Willow-Jean Prime (Wai 2490, #A078), dated 12 November 2014 at [206].

305 Brief of evidence of Maureen Hickey (Wai 2490, #A108), dated 20 November 2014 at [227.2].

306 Closing submissions for Wai 2431 and 2429 (Ngāti Hine and Te Kapotai) (Wai 2490, #3.3.20) dated 25 March 2015, at [151].

307 Exhibit RT-7 to affidavit of Rāniera (Sonny) Tau (Wai 2490, #A25(c)), dated 4 June 2014, p 19.

308 Brief of evidence of Hirini Tau (Wai 2490, #A097), dated 18 November 2914 at [16].

309 Brief of evidence of Hirini Tau (Wai 2490, #A097), dated 18 November 2914 at [18] - [19].

15.13 Similarly, Sonny Tau comments:[310]

> Our history reminds us that we too often bickered amongst ourselves, but when facing a common enemy we would set aside our differences, our rangatira would gather, agree on a battle plan and then fight as one. Our history is littered with examples of this throughout Aotearoa. In this way many a dreadful enemy were defeated or utu extracted.

16. BREACHES AND REMEDIES

12.1 Do any of the Crown's policies, practices, actions and omissions breach the principles of the Treaty of Waitangi?

12.2 Have the claimants been prejudiced by any such breaches? How?

12.3 As to remedies, how might any prejudice be remedied?

The Crown's Te Tiriti obligations

16.1 Te Tiriti envisages that the relationship between Māori and the Crown "should be founded on reasonableness, mutual cooperation and trust".[311] That reflects that the relationship between Te Tiriti partners "creates responsibilities analogous to fiduciary duties".[312]

16.2 The Crown has forward-looking obligations arising from that relationship. This includes duties:

(a) of good faith;[313]

(b) to actively protect the interests of Māori;[314] and

(c) to consult with Māori in relation to matters on which a responsible Te Tiriti partner would.[315]

Those obligations reflect the "honour of the Crown" as a Te Tiriti partner.[316]

16.3 The Crown also has a backward-looking obligation to provide redress for its past breaches of the Te Tiriti.[317] That is to be pursued through active

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310 Brief of evidence of Rāniera Teitinga (Sonny) Tau (Wai 2490, #A098), dated 18 November 2014 at [3.11].

311 *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 (PC) (*Broadcasting Assets Case*) at p 517.

312 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (*Lands Case*) per Cooke P at p 664.

313 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (*Lands Case*) per Cooke P at p 664.

314 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (*Lands Case*) per Cooke P at p 664.

315 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (*Lands Case*) per Cooke P at p 664.

316 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (*Lands Case*) per Casey J at p 703.

317 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (*Lands Case*) per Cooke P at pp 664 - 665 and Richardson J at p 674; *New Zealand Maori Council v Attorney General* [1992] 2 NZLR 576 (CA) at p 583.

and positive steps.[318] Accordingly, the Crown has an obligation to meet with groups who wish to settle their Te Tiriti grievances, and to discuss potential avenues for redress (including the process for recognition of mandate) in a timely manner.

16.4 In situations where there is intra-tribal dispute, that proactive duty requires the Crown to "exercise an 'honest broker' role as best it can to effect reconciliation, and to build bridges wherever and whenever the opportunity arises".[319]

The Tribunal's role

16.5 The Tribunal must tread carefully when coming to the ultimate question of whether there has been a breach of Te Tiriti principles by the Crown and if so, what remedy (if any) is appropriate. The Tribunal is not permitted to interfere with mandating decisions except in clear cases of error in process, the misapplication of tikanga Māori or apparent irrationality.[320]

16.6 There was no clear error of process in Tūhoronuku's journey to mandate - the process was as extensive and consultative as any iwi mandating journey in history. As noted above at section 12, arguments that Tūhoronuku IMA's processes are inconsistent with tikanga are unfounded and contradictory. Further, while claimants allege irrationality,[321] there is simply no evidence of the Crown's conduct reaching that high legal threshold. Standards set by the courts for irrationality include where: the irrationality is overwhelming; the decision is outrageous, in defiance of logic; there is a pattern of perversity; or the decision is outside the limits of reason.[322] A decision being debatable does not make it irrational: indeed, it may well signal the opposite.[323]

16.7 The Tribunal's role is not to determine whether the process leading to recognition of mandate could have been conducted better; neither is it to determine whether every Claimant's concerns have been addressed fully by Tūhoronuku or the Crown. The Tribunal must ask whether the Crown, by its conduct in relation to the recognition of mandate, breached the principles of Te Tiriti.[324] Was the Crown's conduct was "so wanting in good judgment and good faith" for the Tribunal to be minded to intervene?[325] The Crown has discretion as to how it meets its Te Tiriti obligations and should not be punished in the absence of such bad faith.

16.8 Before intervening the Tribunal must also ask itself:

(a) What Te Tiriti obligations does the Crown owe to the 76 percent that have expressed the view that they want to move to settlement now?

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318 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (*Lands Case*) per Richardson J at p 674; *New Zealand Maori Council v Attorney General* [1992] 2 NZLR 576 (CA) at p 583.

319 Waitangi Tribunal *Ngāti Awa Settlement Cross-Claims Report* (Wai 958, 2002) at p 88.

320 Waitangi Tribunal *The Pakakohi and Tangahoe Settlement Claims Report* (Wai 142, Wai 758, 2000) at p 57.

321 Closing submissions for Wai 2431 and 2429 (Ngāti Hine and Te Kapotai) (Wai 2490, #3.3.20) dated 25 March 2015 at [160].

322 *Talleys Fisheries Ltd v Cullen* HC Wellington CP287/00, 31 January 2002 at p 51.

323 *Healthcare Providers New Zealand Inc v Northland District Health Board* HC Wellington CIV 2007-485-1814, 7 December 2007 at [219].

324 Waitangi Tribunal *Ngāti Awa Settlement Cross-Claims Report* (Wai 958, 2002) at p 79.

325 Waitangi Tribunal *Ngāti Awa Settlement Cross-Claims Report* (Wai 958, 2002) at p 79.

(b) Would any other mandate of such scale be subject to its own set of objections?

(c) What is the proper role for the Tribunal in a dynamic political process where the Tūhoronuku IMA may look quite different in 12 months time in terms of participation, settlement processes and personnel?

16.9 We draw the Tribunal to the comments of Titewhai Harawira:[326]

> ... what of the duty on the Crown to progress settlements? The applicants say it would breach Te Tiriti to recognise Tūhoronuku's mandate. But, doesn't the Crown have an obligation to right wrongs in a timely manner? And what of the hundred thousand Ngāpuhi who have no interest in these squabbles, but who would benefit from a settlement?

Crown has acted appropriately

16.10 It is submitted that no grounds exist for finding that the Crown has breached its Te Tiriti obligations.

16.11 To the extent the Crown has been an actor, it has acted in good faith and in accordance with its Te Tiriti obligations.

16.12 These actions demonstrate that the Crown has acted in accordance with the Tribunal's recommendations in the *East Coast Settlement Report* and other reports. To find that such conduct constitutes a breach of Te Tiriti principles would set an impossibly high standard for the Crown. Indeed, it would be to substitute the Tribunal's preferences for decisions that are reasonable for the Crown to make.

It is not for Tribunal to impose its preferred settlement model

16.13 As discussed above, the Tribunal's jurisdiction points against intervention. The question is not whether the outcome is one which the Tribunal would have preferred (ie, a substantive question), but rather whether the process to reach that outcome was deficient such that the Crown's actions can be shown to be in bad faith. That has not been proven on the evidence put before the Tribunal; to the contrary it is apparent that Tūhoronuku IMA has been through a lengthy, robust, transparent and consultative process to achieve mandate.

16.14 The claims brought before this Tribunal can variously be summarised as being that the Crown breached Te Tiriti principles by:

(a) forcing its model on Ngāpuhi;

(b) ignoring the interests of hapū and claimants throughout the last five years;

(c) damaging whānaungatanga;

(d) ignoring the overwhelming opposition to Tūhoronuku; and

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[326] Brief of evidence of Titewhai Harawira (Wai 2490, #A102), dated 20 November 2014 at [80].

(e) recognising mandate in a pre-determined manner, in circumstances where the Tūhoronuku process and model are fundamentally flawed.

16.15 In fact, while claimants' arguments are framed as predetermination and Crown imposition of its will on Ngāpuhi, they are in reality just an internal dispute amongst Ngāpuhi. They are simply the claimants saying "we don't like the 'who and how' of your model". As stated by the Hon Shane Jones:[327]

> The weighty issues of settlement, governance and investment must not be held ransom to. Certainly not because certain participants will not accept the final result embroiling the Crown in an internal Ngāpuhi wrangle, does not necessarily make the Crown responsible for the stalemate. Rangatiratanga demands Ngāpuhi take responsibility for these issues themselves. Recourse to the Tribunal is no substitute.

16.16 Indeed, solutions are wanted and discussions continue to be held within Ngāpuhi to see if solutions can be achieved.

16.17 Disputes regarding the process for settlement (including who holds mandate) are common to most, if not all, settlements.[328] However, such disagreements tend to be about "who" and "how" - valid questions, but questions that are best left to the tribal group.

16.18 Moreover, the issues remaining are matters of judgement. These are not questions against which the Tribunal, when considering the Crown's Te Tiriti obligations, can find a suitable yardstick.

16.19 With the exception of predetermination (of which there is no credible evidence), the claimants raise issues which do not have right or wrong answers.

16.20 One way of putting this is to imagine that Tūhoronuku's mandate had not been recognised. Tūhoronuku would have been able to argue at least as credibly as the claimants have in this Inquiry that the Crown's refusal to recognise mandate was a breach of Te Tiriti principles.

Delay would be prejudicial to Tūhoronuku and Ngāpuhi

16.21 A recommendation by the Tribunal to pause or require a new mandating process would cause its own prejudice. Regard must be had to the Crown's obligations to help Māori achieve redress.

16.22 There is common ground as to the levels of need in the North, and as to the potential benefits of settlement. As Annette Kaipo states:[329]

> Our Marae is deteriorating, because of lack of funds, our whenua is undeveloped and under-utilised, housing options for most is rental - buying a home is mostly unachievable - our people largely are unemployed due to lack of employment,

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327 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 1096.

328 Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.3), 4-5 March 2015 at pp 68 and 71. The Tribunal has previously recognised that following mandate, it is not uncommon for parties to file urgency applications and "not being happy with an authorised mandated body does not necessarily give rise to significant and irreversible prejudice". See Wai 532, #2.49, 10 August 2010 per Judge Coxhead at [20].

329 Brief of evidence of Annette Kaipo (Wai 2490, #A089), dated 14 November 2014 at [12-13], [18], and [22].

> consequently most survive day to day the best they can, poverty is rife.
>
> Most Hapū members and their whanau live and work elsewhere and do not often travel home, due to work commitments and affordability. Those that do live at home, largely, are widows and single mothers, surviving on benefits.
>
> [...]
>
> We mourn the loss of our tamariki and our mokopuna, our young families, who now live in other places and other countries. We no longer have a close day to day relationship with them, watching them grow, guiding them along the way, telling our stories, teaching them our tikanga, we rarely see them other than photos on social media. They are now manuhiri living in another country.
>
> [...]
>
> Our tamariki and mokopuna want to come home, to restore and rebuild their whanau hapū Marae and Iwi.

16.23 Starting again will bring delay: all that is uncertain is how much delay. As stated by Sam Napia:[330]

> Te Whiu sees Tūhoronuku as a vehicle through which we can realise our settlement aspirations. Ultimately, it is not the mandated entity that determines the outcomes but the nature and scope of the redress that is obtained through the negotiations that is important. We want to move to that phase of the process.
>
> Te Whiu considers that the actions of the claimants in this urgent hearing will achieve nothing but delay of the Ngāpuhi settlement to the detriment of all hapū and Ngāpuhi as a whole.

16.24 And as stated by Kara George:[331]

> If it's not the Tūhoronuku IMA, then what? What will be the cost to my hapū? Any further delays will prolong the addressing of the many issues we face. The division in Ngāpuhi will reduce us to what? We have always worked together as Ngāpuhi, dealt with our issues, celebrated our successes and achievements together.

16.25 We draw attention to the bigger picture in this Inquiry, and the words of the Hon Shane Jones:[332]

> Some hapū advocates say they are likely to be prejudiced if the Tūhoronuku model is not struck down. These assertions of prejudice must be measured against the injury done to the overall Iwi population through delay. A Tribunal process which persists until 2020 will not deliver a superior result. A Tribunal finding which terminates Tūhoronuku will not solve the mandate challenge rather it will protract the pain and economically cost the Iwi members dearly.

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330 Brief of evidence of Sam Napia (Wai 2490, #A090), dated 14 November 2014 at [29] - [30].
331 Brief of evidence of Kara George (Wai 2490, #A085), dated 14 November 2014 at [31].
332 Brief of evidence of Shane Jones (Wai 2490, #A104), dated 19 November 2014 at [20].

16.26 The Tribunal must not, in attempting to satisfy the concerns of some claimants, set back the aspirations of Ngāpuhi as a whole.

Conclusion

16.27 In conclusion, we submit that:

(a) The Tūhoronuku IMA model and mandate arose from a lengthy, Ngāpuhi-led, and bottom-up process.

(b) While a small number of hapū would seek to go it alone, the overwhelming view has been in favour of unified settlement.

(c) The model Tūhoronuku IMA ended up with is hapū-dominated and flexible. Tūhoronuku IMA provides a platform for hapū and claimants to exercise rangatiratanga through settling their claims in concert with the rest of the iwi. The processes for negotiation and the structure for settlement are matters that are yet to be determined, and are to be determined by those involved.

(d) Tūhoronuku IMA's door remains open: at any point those currently opposed can appoint or replace MHKs, and can apply to be negotiators. Other accommodations can be investigated.

(e) The detail of the negotiation process and the structure of settlement will be worked out over time. Tūhoronuku IMA and Ngāpuhi deserve the opportunity for those matters to be addressed by Ngāpuhi and for Ngāpuhi.

(f) Ultimately, Tūhoronuku is a structure with no owner but the people of Ngāpuhi. As stated by Sonny Tau, if people want to throw out existing representatives and install new ones, they are free to do so.[333]

16.28 The will and desire of Ngāpuhi has been clearly expressed. The Tribunal should support that expression of Ngāpuhi's rangatiratanga and endorse Tūhoronuku IMA's settlement journey.

16.29 Tūhoronuku IMA respectfully submits that the Tribunal should dismiss the applications made, and relief sought, by claimants.

Dated 7 April 2015

J D Every-Palmer | A S Olney | S G Wevers
Counsel for Tūhoronuku IMA

To: The Registrar of the Waitangi Tribunal

[333] Transcript of Ngāpuhi Mandate Inquiry (Wai 2490, #4.1.2), 1-5 December 2014 at p 1139.