

CHAPTER 1

THE BACKGROUND TO THE URGENT INQUIRY

1.1 INTRODUCTION

At the end of March 2004, the Minister in Charge of Treaty Negotiations and the Minister of Maori Affairs agreed to recognise a deed of mandate submitted by the executive council of Nga Kaihautu o Te Arawa (the executive council). That deed was filed by the executive council for the purpose of entering into negotiations with the Crown for the settlement of all Te Arawa historical claims. The Crown has indicated that it soon expects to sign terms of negotiation with the executive council.

This report deals with urgent claims lodged in response to the Crown's recognition of the executive council's mandate to negotiate such a settlement on behalf of Te Arawa iwi and hapu.

The claims were brought by: Pihopa Kingi, Pirihiira Fenwick and Malcolm Short, for the Te Arawa taumata; David Whata-Wickliffe, of Ngati Tamakari; Te Ariki Morehu, of Ngati Makino; Stephen Hohepa and Te Kapua Watene, of Ngati Tuteniu; Isobella Hohipera Fox, of Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi; David Potter and Andre Paterson, of Ngati Rangitihi; and Tame McCausland, of Waitaha.

We will discuss the claims further in chapter 2. In the present chapter, we describe the events that led to their filing. We do so in some detail to lay a firm foundation and to provide a point of reference for the ensuing summaries of the cases for and against the Crown and our decision in this matter. However, some material is repeated in subsequent chapters for the sake of adequate context at those points.

1.2 EVENTS LEADING TO THE URGENT INQUIRY

1.2.1 Early background

During the State sector reforms of the mid to late 1980s, the Government decided to transfer its forestry assets into State-owned enterprises. The assets included the Crown forests, the land under the forests, and the cutting rights to the trees. Some of those assets were the subject of claims under the Treaty of Waitangi Act 1975. This led the New Zealand Maori Council (NZMC) and the Federation of Maori Authorities (FOMA) to institute legal proceedings in an

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attempt to protect any Maori interests in the assets pending settlement of those Treaty claims.¹ Concern was expressed that the transfer of the assets into State-owned enterprises would prejudice Maori claims to them.

On 20 July 1989, the Crown, on the one hand, and NZMC and FOMA, on the other, signed a written agreement (the 'compromise agreement').² Under that agreement, the Crown was able to sell the existing tree crop and other forestry assets, but the land under the trees could be alienated only by way of lease. However, the period of that lease was to be sufficiently long for the lessee's investment to be commercially viable and the consideration was to include an annual rental for the land. The parties also agreed that they would jointly use their 'best endeavours' to enable the Waitangi Tribunal to identify and process all claims relating to forestry land and to make recommendations within the shortest reasonable period. A further clause stated that:

The provisions of this agreement are to be reflected and embodied where appropriate in draft legislation and in any event in a trust deed and consent order, the terms of each of which are to be agreed by the parties, in accordance with this agreement.

Legislation for this purpose was enacted as the Crown Forest Assets Act 1989, which provided for the establishment, by trust deed, of a forestry rental trust.³

1.2.2 The 1990s

On 10 April 1990, a trust deed was executed by NZMC, FOMA, and Ministers. The deed recited the compromise agreement and section 34 of the Crown Forest Assets Act, and established the Crown Forestry Rental Trust (CFRT). The purpose of the trust was to:

- (a) receive the Rental Proceeds from Licences; and
- (b) make the interest, earned from investment of those Rental Proceeds, available to assist Maori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve, or could involve, Licensed Land.

In 1996, the Crown was seeking to sell the State-owned Forestry Corporation of New Zealand, which owned and harvested the central North Island (CNI) forests. A consortium comprising Te Arawa and Mataatua (Te Ama) interests, representing many Maori who claimed interests in the forestry assets, sought to be involved in the sales process. Various other Maori interests, including Te Runanga o Te Ikawhenua Incorporation, also participated, although standing apart from Te Ama.⁴ In this context, the possible use of forestry assets in any future

1. See *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142

2. *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157, 163 (PC)

3. Crown Forest Assets Act 1989, s34

4. Wai 791 ROI, paper 2.47, p2

Treaty claims settlements became a subject of interest and appears to have generated discussion between Maori interests and the Minister of Finance. In the course of these discussions, the time being taken to reach such settlements was brought up. On 5 September 1996, the Minister of Finance gave written confirmation to the chairperson of NZMC of the Crown's continuing obligations arising out of the 1989 agreement:

The Government is fully committed to using its best endeavours, jointly with Maori, to enable the Waitangi Tribunal to identify and process all claims relating to Forestry lands and to make recommendations within the shortest reasonable period.⁵

And further:

As you know, the Crown is committed to meeting its obligations under or arising out of the 1989 agreement and the Crown Forest Assets Act 1989.⁶

Against this background, it appears that the CFRT and certain CNI Maori began to strategise about how the settlement of claims could be expedited.⁷

1.2.3 The establishment of the VIP project

The volcanic interior plateau (VIP) project was set up in 1999 under the leadership of a small group of prominent people from CNI iwi; namely, Bishop Manuhuia Bennett, Tumu Te Heuheu, and Rangiuiira Briggs. It was the stated desire of the project organisers to 'assist claimants within the CNI area to achieve a timely and efficient settlement of their claims'.⁸ As part of that project, the leaders (or taumata⁹) filed a claim with the Waitangi Tribunal which contained what the Tribunal's deputy chairperson described as 'an extensive articulation of the various land alienation themes present in the [CNI] region'.¹⁰ On 8 September 1999, the Tribunal issued a direction registering the claim as Wai 791.

However, at the same time as the claim was lodged, a memorandum was filed by claimant counsel indicating an intention to seek urgency for the claim and proposing a process that varied from the Tribunal's usual procedure at that time. The proposal had already been mooted in earlier correspondence to the Tribunal¹¹ and involved, instead of lengthy (or even any) hearings, a programme of judicial conferences, at four-monthly intervals, at which

5. Cited in Wai 791 ROI, paper 2.47, p3

6. Cited in Wai 791 ROI, paper 2.47, p3

7. Document A11(a), pp141-143

8. Ibid, p141; *Treaty Claims within the Volcanic Interior Plateau: What You Need to Know - VIP Project Information*, brochure, [2001]

9. Other than this instance, wherever the word 'taumata' is used alone in this report, it should be taken to mean the Te Arawa taumata. In cases where there might be confusion, we have used the qualifiers 'VIP' and 'Te Arawa' (or 'northern district'), to distinguish between the two bodies.

10. Wai 791 ROI, paper 2.47, p3, para 1.3

11. Wai 791 ROI, paper 2.5

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evidence and submissions would be progressively exchanged and responded to by claimants and the Crown.¹² After two judicial conferences to explore the proposal, the Tribunal's deputy chairperson called a third judicial conference in Rotorua, in November 2000, to discuss the question of priority, rather than urgency, for the Wai 791 claim. In September 2001, he and Joanne Morris issued a direction according higher priority in the Tribunal's forward programme to all CNI claims, including Wai 791.¹³

1.2.4 The impetus towards direct negotiation

(1) Events in 2000

In the meantime, in early 2000, there had been discussion between the Wai 791 claimants and Crown officials about the possibility of the claims being researched and progressed without any further involvement by the Tribunal. In March, representatives of the VIP project put such a proposal to the Minister in Charge of Treaty of Waitangi Negotiations (MICOTOWN). She replied by letter on 15 May 2000 to the effect that the Tribunal had now agreed to hear the claimants' application for urgency and that she considered that a response to the proposals 'would be better made within the Crown's submissions at the Tribunal conference'.¹⁴

(2) Events in 2001

On 25 June 2001, a letter was apparently sent to Ministers of the Crown by Richard Te Heuheu as convenor of a 'leadership group working party'. It is not clear, from the documents submitted in evidence, exactly who was involved in this leadership group, but it would appear that it included representatives of Ngati Awa and Tuwharetoa ki Kawerau and of other iwi with interests in the CNI and Bay of Plenty forests.¹⁵ The letter apparently proposed a 'concept' involving 'the transfer of Central North Island forests, along with the accumulated rentals, to the Leadership Group, which would hold them on trust pending a determination by the Tribunal of appropriate allocation'.¹⁶ The letter did not receive an immediate response.¹⁷

Meanwhile, on a separate track, NZMC and FOMA were preparing to launch High Court proceedings against the Crown. Those proceedings were finally initiated in September, with NZMC and FOMA alleging that the Crown lacked good faith and had breached the Crown-Maori agreement of July 1989 in failing to use its best endeavours, jointly with Maori, to resolve claims affecting Crown forests.¹⁸ In response to the litigation, MICOTOWN, together with the director of the Office of Treaty Settlements (OTS), met with the parties and 'conveyed

12. Wai 791 ROI, paper 2.47, p 4

13. Wai 791 ROI, paper 2.47

14. Ibid, p 4; claim 1.1.1, paras 14-17; doc A11(a), pp 121-123 129-130

15. Document A114, para 28; doc A114(a), p 11

16. Document A114, para 28

17. Document A114(a), p 11

18. Claim 1.1.1, para 22; doc A114, para 26.3

the Crown's policy preference that it wanted to negotiate comprehensive settlements [rather than just settlements of forest claims] with large natural groupings'. They also stressed the need for mandated representation for each iwi.¹⁹

Sometime after that, in a letter apparently sent in late October or early November, Mr Te Heuheu wrote again to Ministers, following up on the earlier letter of 25 June.²⁰ In this second letter, the leadership group appears to have also expressed concern about not being consulted in relation to the NZMC and FOMA action, and about 'rumours of a consultative group'. A joint reply from the Deputy Prime Minister and the Ministers of Finance, Maori Affairs, and Treaty of Waitangi Negotiations to Mr Te Heuheu noted that 'Aspects of the concept proposal . . . cause some difficulty from the Crown's perspective', and went on:

In view of the above, we wonder if the existing direct negotiation process might provide an acceptable mechanism for the early return of the Crown forest lands. This process provides for claimants to join together in large natural groups, and seek a mandate for negotiating the settlement of all their claims.

The Ministers ended by stating:

We should be happy to meet with you, if you wish, to discuss any matter in this letter. We have also asked officials from the Office of Treaty Settlements to be available to meet with you to give you a briefing on the Treaty settlement process, and what options might be available within that process to facilitate achievement of the Leadership group's objectives.²¹

(3) *Events in 2002*

In 2002, a number of informal discussions were held between MICOTOWN, Tumu Te Heuheu, and others to investigate the possibility of progressing CNI claims through direct negotiations. Rawiri Te Whare, a key witness in our present inquiry, was apparently asked by Mr Te Heuheu to attend the discussions,²² presumably in his role as kaiwhakahaere kaupapa or project manager of the VIP project.²³ According to Mr Te Whare, the meetings were small and did not involve Government officials. He said they covered 'such things as how a collective approach might occur, which iwi would be involved and what type of process would be engaged [in] to bring a properly representative delegation together of these iwi to engage in discussion, still with the central focus on the 7 CNI forests'.²⁴

19. Document A114, para 27

20. The letter itself has not been presented in evidence and the Ministers' response (doc A114(a), pp11-13) is undated. However, a rather indistinct 'Received' stamp fixes the Ministers' response at (probably early) November 2001, and the letter refers to a 'recent' letter from the leadership group.

21. Document A114, para 28; doc A114(a), pp11-13

22. Document A109, para 19

23. In the *Information Report, 2001-2002* of the VIP project, Mr Te Whare's role was given as kawhakaheere kaupapa, with particular responsibility for the central, or Kaingaroa, region: doc A11(a), pp372, 375.

24. Document A114, para 31; doc A109, paras 19-21; paper 3.3.7, para 5.8; doc A11(a), p339; <http://www.beehive.govt.nz/PrintDocument.cfm?DocumentID=15709>

As a result of these meetings, Mr Te Whare was asked by Mr Te Heuheu to ‘begin the process of communicating with the five CNI Iwi; namely: Tuwharetoa, Te Arawa, Tuhoe, Ngati Manawa and Ngati Whare’, using the personnel resources of the VIP management team of which Mr Te Whare was himself a member. According to Mr Te Whare, this culminated in two hui in November – one in Rotorua and one in Taupo – which ‘assessed the discussions to date and planned to respond to an invitation from MICOTOWN for a widely representative delegation to attend a special meeting at Parliament’.²⁵

The ‘special meeting’ was held on 6 December 2002 at Parliament and some 40 to 50 CNI Maori attended. After welcoming ‘representatives of two great waka – Te Arawa and Mataatua’, the Minister went on to indicate a desire to ‘enter into a constructive dialogue and to identify what common ground there is between us on how to progress the Central North Island claims’. She then identified four particular issues that would need addressing before any move towards formal negotiation could take place. Those issues were: which claimant groups would be involved; which claims would be covered; how the claimant community – iwi and hapu – would be represented and who would represent them; and what role, if any, the Waitangi Tribunal would play. The Minister then announced that David Caygill had been engaged to facilitate discussions on behalf of the Crown. She said that she envisaged ‘dialogue proper getting underway in the New Year’. Earlier in the speech, she had already stressed that it was ‘very important that the dialogue is an inclusive one, open to any groups with claims in the area who wish to participate or observe’.²⁶

Following the meeting at Parliament, the Crown and CNI Maori each set up a working group to progress matters jointly, with the Crown working group being chaired by Mr Caygill and its Maori counterpart by Tumu Te Heuheu.²⁷

1.2.5 The pre-mandating phase

During early 2003, Tumu Te Heuheu, apparently in his capacity as chair of the CNI Maori working group, called for a series of hui.²⁸ With assistance from CFRT, around 23 hui were organised by the VIP project, which sought to ‘advise others of possible discussion with the Crown about settling claims to 7 Central North Island forestry assets’. Some 16 of the hui were on Te Arawa marae, including one in the coastal Bay of Plenty area. These Te Arawa hui culminated with one for ‘Te Arawa Iwi’ as a whole, on 5 March 2003 at Tamatekapua. The remaining seven hui were for Ngati Tuwharetoa. Rawiri Te Whare was one of the facilitators, and the

25. Document A109, paras 22–24

26. K Blanchard, ‘Treaty Negotiations a Step Closer’, *Daily Post*, 17 December 2002; claim 1.1.1, paras 34–35, 37; doc A11(a), p339; <http://www.beehive.govt.nz/PrintDocument.cfm?DocumentID=15709>

27. Document A114, paras 35–36; doc A109, para 26

28. Document A109(a), p 45; doc A109, paras 26–29

items set down for discussion at the hui mirrored the issues identified in the Minister's speech of 6 December 2002.²⁹

From the minutes that have been made available to the Tribunal, the average attendance at the Te Arawa meetings (not including the final meeting at Tamatekapua) appears to have been around 25 to 30 people. Presentations were variously given by Rawiri Te Whare and Donna Hall (VIP project solicitor and strategic adviser), and at each hui there appears to have been time for questions and discussion. At one hui, in response to a question about whether any resolutions were to be put, Mr Te Whare responded in the affirmative and explained:

This is what the resolutions are premised on – before the Crown can engage with any group you have to have a claim otherwise they have no basis upon which to discuss with you[.] [F]irstly the process asks if the claimants will support the process of participating in the discussions, secondly we seek the support of the hapu to participate in the discussions and thirdly we have to elect a representative or representatives.³⁰

From the minutes of the hui at Tunohopu Marae, Ohinemutu, it is clear that Mr Te Whare had come with three recommended resolutions already prepared, presumably along the lines indicated above.³¹ Certainly, the recorded resolutions from a number of hui (including all the earlier ones) follow the pattern he had outlined:

- ▶ the first resolution sought the specific support of those with registered 'Wai' claims;
- ▶ the second sought support from the whole meeting as a hui-a-hapu/iwi;
- ▶ finally, after an election process, a third resolution nominated specific people to be representatives for the hapu or iwi concerned 'to participate in the Central North Island Iwi formal discussions with the Crown, at every stage and every level, in respect of settlement of the seven Central North Island Forests Lands and Assets'.³²

Minutes from two hui in the series record slightly different resolutions as having been passed, but still relating to whether or not to enter into formal discussions with the Crown.³³ At another hui (at Apumoana Marae), those present felt that attendance was not sufficient for any resolutions to be passed.³⁴ At the latter hui, and at three others, those present indicated a wish to take the issues back to their people for further discussion before making any decisions.³⁵

29. Document A11(a), pp345–347, 348, 376–377, 380; *Central North Island Treaty Discussions Continue*, Government press release, 10 April 2003 (<http://www.scoop.co.nz/mason/stories/PA0304/soo225.htm>); oral evidence of Rawiri Te Whare; doc A109(a), pp18–45

30. Document A109(a), p43

31. *Ibid*, p46

32. *Ibid*, pp2–3, 5–6, 8–10, 14–15, 17–18, 22–27, 48–50

33. *Ibid*, pp29–33, 37–39

34. *Ibid*, pp19–20

35. *Ibid*, pp34–36, 45–46, 51–52

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At one of the series of hui, in response to a question about whether consensus was being sought before going back to the Crown, or simply a majority, Mr Te Whare had replied by saying that a 75 per cent majority was sought.³⁶ On the basis of the various minutes, it would appear that such a majority was attained in all but the four cases where those present wanted time for further discussion.

As a result of all the hui, the following were elected by their iwi/hapu and would later come to be referred to as ‘the interim representatives’: Rawiri Te Whare (Ngati Tahu, Ngati Whaoa); Te Poroa Malcolm, Ruka; Hughes, Toby Curtis (Ngati Tarawhai, Ngati Rongomai); Joe Edward, Wallace; Haumaha, Materoa Peni (Ngati Tura, Ngati Te Ngakau); Pihopa Kingi (Ngati Pukaki, Ngati Tuara, Ngati Waoku); Pirihira Fenwick (Ngati Rangiteaorere); Te Rereamanu Wihapi, Takatu Ahomiro (Ngati Moko, Ngati Kuri, Ngati Tuheke, Ngati Marukukere); Sam Hahunga, Te Ururoa Flavell, Mita Mohi (Ngati Rangiwewehi); Neville Nepia, Awhimate Awhimate, Te Ariki Morehu (Ngati Makino);³⁷ Eruini George (Ngati Tuara, Ngati Kea); Tamati John Waaka, Jarmie Piripi, Bonita Morehu (Tuhourangi).³⁸

This Te Arawa series of hui culminated in a hui-a-iwi at Tamatekapua on 5 March 2003. Two sets of minutes from this meeting have been provided to the Tribunal. They do not record attendance numbers but instead make reference to a separate attendance schedule or list. Both sets of minutes make it clear that the meeting was chaired by Bishop Vercoe and that there were a number of items on the agenda including an update on the ‘CNI Proposal’. With the agreement of those present, the latter item was advanced to earlier on the programme than had originally been intended. Thus, after a presentation from Ms Hall on the VIP project and its progress, the meeting moved straight to a report by Rawiri Te Whare on the series of hui that had been held over the preceding 2½ weeks. One of the sets of minutes notes that the hui agreed to ‘receive & accept’ his report. Following the report by Mr Te Whare, those present voted on two motions:

- ▶ ‘That this hui of all the hapu of Te Arawa move forward and support entering into formal discussions with the Crown for the early return of the Central North Island Forests Lands and Assets’; and
- ▶ ‘That this hui of all the hapu of Te Arawa support and uphold the present VIP Taumata and proposed legal entity, that is, VIP Taumata Incorporated Society.’

Both set of minutes record that these resolutions were carried.³⁹

In her 6 December 2002 speech at Parliament, MICOTOWN had indicated that she hoped to be in a position to report back to Cabinet by March 2003 ‘with a strategy for moving forward,

36. Document A109(a), p 46

37. In addition to the election of these three representatives for Ngati Makino, the meeting voted that ‘Ngati Pikiao, Ngati Makino and Ngati Tamakari support the Bishop Whakahuihui Vercoe’s role as leader for them’: doc A109(a), pp33, 39.

38. The hui was for Tuhourangi and Ngati Wahiao, but the resolution, as recorded, mentions only Tuhourangi: doc A109(a), p 50.

39. Document A11(a), pp381–382; doc A109(a), pp54–55

if that is what the claimants want and we can agree how to do it'.⁴⁰ The generally positive response of the Te Arawa hui held between 16 February and 5 March 2003 enabled the Minister to report to Cabinet later in March 'on the good progress and the desire to continue'. Cabinet both gave its support to dialogue being continued and reinforced the Government's commitment to settling claims in the CNI.⁴¹ It was therefore arranged for the Minister to meet again with CNI Maori on 23 April 2003.

1.2.6 The meeting of 23 April 2003

The meeting of 23 April 2003 was held in Taupo and hosted by Tumu Te Heuheu.⁴² As with the 6 December 2002 meeting at Parliament, some 40 to 50 CNI Maori appear to have attended.⁴³ During the hui, MICOTOWN acknowledged the 'enormous amount of work' done to date and said that it was now 'time to start the negotiation process'. However, she made it clear that the Crown was not willing to negotiate each claim separately. She also made it clear that it was the Crown's wish that any settlement should be comprehensive and not limited to forest-related claims, although she acknowledged that forest land would 'certainly be a central element of any settlement'. On the subject of mandating, she said:

it will be up to iwi members to decide who will carry the process forward into negotiations.

For those of you who have gauged the aspirations of your iwi – and who want to move to the negotiating table – the time is near when we can consider your mandating process. This is the pivotal point, where your people must decide who will carry the process forward for the iwi into negotiations.

There are many different pathways to a mandate and it is for you to determine the appropriate path. For the government's part, we must be certain the negotiators carry the widespread support of their iwi.⁴⁴

The Minister then concluded by outlining what she saw as the next steps, saying:

I am therefore pleased to advise I believe we are ready to move to a new phase of formal pre negotiations. If you are also willing, the government is committed to entering this phase immediately.

Pre-negotiations is the phase where we would explore all of the issues before us so you can make an informed decision as to whether we can proceed to negotiations proper. The

40. Document A11(a), p 339; <http://www.beehive.govt.nz/PrintDocument.cfm?DocumentID=1570921>

41. *Central North Island Treaty Discussions Continue*, Government press release, 10 April 2003 (<http://www.scoop.co.nz/mason/stories/PA0304/S00225.htm>); doc A11(a), p 384

42. Document A11(a), p 384

43. Document A114, exhibit D, pp 15–21

44. Margaret Wilson, *Speech Notes: Meeting with Central North Island Claimants*, 23 April 2003 (<http://www.beehive.govt.nz/PrintDocument.cfm?DocumentID=16565>), p 2

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pre-negotiation phase will include the detailed groundwork needed before iwi members mandate their negotiators.

I believe we could move through pre-negotiations fairly rapidly if we build on the momentum generated to date. By early June, I hope each Central North Island iwi will be in a position to give a clear indication as to whether they will be progressing to formal negotiations.⁴⁵

According to an OTS file note on the meeting, various 'CNI iwi representatives' also made comments during the course of the day. One of them was Rawiri Te Whare, who commented that discussion to date had been around the seven CNI forests but that CNI claims also included non-forest claims. He apparently emphasised the need for unity but noted that 'large iwi groups must not subsume the interests of small iwi groups'. The same OTS file note referred to a number of additional comments made by the Minister after her speech, including mention of 'a CNI collective approach' as being the best means of avoiding court action over overlapping claims. She again stressed the need for a collective approach in relation to comprehensive settlements, but commented that if some wanted to stand outside they would not lose anything except time. As regards those with claims before the Tribunal, the file note records that she acknowledged the importance accorded to the Tribunal process by some claimants and said that, rather than having to choose between the Tribunal or direct negotiations, she wanted to see if it was possible for both processes to move forward together.⁴⁶

1.2.7 Developing a mandate plan

On 8 May 2003, Bishop Vercoe, as chair of the VIP project's northern taumata, held a meeting at the VIP Peace Street office in Rotorua for the 'Northern Taumata and Constitution Members'. The second half of the meeting was also open to the Te Arawa hapu representatives and the kaupapa was to discuss 'CNI pre-negotiations with the Crown'.⁴⁷

Meanwhile, the VIP project staff were drawing up a 'central North Island iwi settlement plan' (CNIISP).⁴⁸ That plan, as submitted in evidence to the Tribunal, included a bullet point presentation called 'Te Ara Tika' outlining overall objectives; CFRT funding criteria; 'Volcanic Interior Plateau Contract Assumptions'; contract management; 'VIP Deliverables'; structure diagrams for the VIP project as a whole and for each regional team; and a 'Milestone Pathway' to settlement showing projected key activities for each quarter from April–June 2003 to January–March 2005.⁴⁹ A further document, drawn up by Rawiri Te Whare and dated 19 May 2003, stated that 'The single entity that will facilitate and support the CNIISP is the Volcanic

45. Wilson, pp2–3

46. Document A114, exhibit E, pp22–24

47. Document A11(a), p388

48. Document A109, para 39

49. Document A11(a), pp389–399

Interior Plateau Project'. However, it went on to state that VIP would remain in existence only 'for the period needed to facilitate and support the process of formal negotiations' until ratification of a settlement offer. It then set out three columns showing parallel strands of activity being carried out by VIP, 'CFRT/Crown', and the Waitangi Tribunal for the period up to October 2003. This was followed by a section headed 'Process to Achieve Mandate for Te Arawa', which consisted of a schedule of mandating hui and a page and a half of notes about the organisation and advertising of these hui. Some 23 hui were proposed in all, including nine in various urban centres around New Zealand and one in Sydney. Under 'Recording of Mandating Hui', Mr Te Whare noted: 'These hui will be recorded by two recorders and the minutes will reflect mandating criteria set down by Office Of Treaty Settlement'. With regard to resolutions, it was noted that a set procedure would be followed, although no details were given. Also noted was the intention that 'Brochures/newsletter will be available at these hui and will be an ongoing regular activity'.⁵⁰

On 20 May, as indicated in a subsequent OTS report to MICOTOWN, OTS officials met with 'a group of representatives of the CNI iwi' to begin pre-negotiation discussions. The report identified a list of six issues to be covered during these discussions, including the need for comprehensive settlements, the relationship between the negotiations process and the Tribunal process, and 'the need to engage with officials to develop sound mandating strategies'. The report also noted:

Officials explained that while the Crown is keen to engage with a collective group of CNI iwi, each iwi will need to develop and undertake a mandating process to select mandated negotiators for that iwi. Following the mandating process, it will be for the mandated negotiators for each iwi to decide the extent to which they would like to negotiate alongside other CNI iwi in a collective.⁵¹

A separate file note on the same meeting recorded that Mr Te Whare had indicated to OTS during the meeting that he was working on a '2½ month mandating process, starting at the end of June'.⁵²

Two days later, on 22 May 2003, Rawiri Te Whare convened a hui at the VIP office in Peace Street, Rotorua. He presented an outline of the proposed mandating process for CNI (the Te Ara Tika plan) to the Te Arawa interim representatives that had been elected during the February–March hui.⁵³ There was evidently some opposition to the plan, but the degree of that opposition has been a matter of contention between the parties in the present inquiry.⁵⁴ At the meeting, Mr Te Whare apparently also outlined 'an itinerary of mandating hui'.⁵⁵

50. Ibid, pp 400–404

51. Document A114, exhibit F, pp 25–26

52. Document A11(a), p 405

53. Document A6, app 2; doc A109, para 43; doc A114, exhibit L, p 48; paper 3.1.1, app 21, 22 May entry

54. Claim 1.1.1, para 51; doc A109, para 43

55. Document A11(a), p 415

On 27 May 2003, OTS staff held another meeting, this time with 15 CNI ‘interim iwi representatives’. The attendance sheet was headed ‘CNI Dialogue: First Pre-negotiation Meeting’, and listed among those present were Rawiri Te Whare, Te Ururoa Flavell, Te Ariki Morehu, Annette Sykes, and Donna Hall. Of these, we note that Mr Te Whare, Mr Flavell, and Mr Morehu had been elected at the hui in February and March to represent their respective iwi or hapu. On the attendance sheet for the meeting, they indicated that they were representing Te Arawa VIP management, Te Arawa taumata, and Ngati Makino/Nga Rauru o Nga Potiki, respectively. Other representatives present gave similarly generic descriptions (‘CNI Tuwharetoa’, ‘Ngati Haka/Patuheuheu/Tuhoe’, and so on).⁵⁶

At the meeting, officials stressed that the Crown wanted to settle all CNI claims but recognised that the forests would be central to that. Andrew Hampton, the director of OTS (and chief witness for the Crown in the present inquiry), indicated that MICOTOWN wanted to move to the mandate strategy stage by June. He emphasised the importance of a robust mandating process to ensure that the Crown would be dealing with people who are ‘fully accountable to, and have the full support of, the claimant community which hold[s] the grievance’, and he noted that it was for claimant groups to run their own mandating process. However, he said that the Crown would take a strong interest in the durability and thoroughness of the mandating procedure and that there would be a review process. He noted that the Crown did not expect there to be 100 per cent support for the mandated group but that everyone should at least have the opportunity to be involved.⁵⁷

The following day, 28 May 2003, Ross Philipson, the CNI project leader at OTS, wrote to Ms Hall and mentioned his awareness of a mandate strategy that had been ‘scoped out’ by Rawiri Te Whare. He indicated his expectation that Mr Te Whare would ‘engage with Tony Sole and the Claims Development Team in the near future on these matters’. The same letter also queried a reference, apparently made by Ms Hall, to Bishop Vercoe being the ‘mandated voice’ of Te Arawa as a result of the Tamatekapua hui held in ‘late March’. Mr Philipson did not (as he might have done) query the date, and he acknowledged the mana of Bishop Vercoe, but he said that, as he recalled, ‘the agenda for that round of Te Arawa hui did not indicate that a mandate was to be decided’.⁵⁸

On 29 May 2003, Mr Philipson sent a letter to all ‘Interim representatives of CNI claimant groups’ noting that, at the meeting with OTS two days earlier, claimant representatives had ‘expressed a strong desire for the Crown to be more specific about its expectations for the mandate process, and in particular, the standards for that process’. He indicated that ‘each claimant group’ would need to develop its own mandating strategy ‘along the lines of the guidelines set out in *Healing the Past, Building the Future*’. He then suggested that each group should discuss their draft mandate strategy with the OTS claims development team, ‘to ensure

56. Document A114, exhibit G, pp 27–36, exhibit H, pp 37–38

57. Ibid, exhibit G, pp 27–36

58. Document A11(a), p 410

that the outcome of the mandating process will be robust and durable and will enable negotiations to begin', and he indicated that the team would be available to discuss any issues that arose during the mandating process. He then stated that the manager of the team, Tony Sole, was available to 'talk with interim representatives about the development of a mandate strategy for their claimant group' and gave Mr Sole's contact number. Mr Philipson ended the letter by noting that there would be another meeting on 10 June 2003, and he reiterated the invitation to claimant groups to discuss their mandate strategy with Mr Sole in the intervening period.⁵⁹

On 3 June 2003, an OTS report to MICOTOWN noted that 'Mr Te Whare has indicated that he is prepared to engage with officials to scope out a comprehensive mandating strategy for Te Arawa, but Ms Hall seems to consider that some key representatives have already been elected'. The report went on to comment: 'Te Arawa has numerous claims and factions within the confederation and officials consider that any mandating will need to be carefully planned, especially ensuring that all Wai claimants and representative hapu/iwi organisations are aware of the process.'⁶⁰

In a memorandum apparently sent out the next day (4 June 2003) through the VIP project office in Rotorua, Rawiri Te Whare advised the northern region taumata, the northern region management team, and the 'Te Arawa Delegates' that a 'working committee' was consulting with OTS officials on 'the framework for mandate'. Mr Te Whare indicated that he wished to meet with the recipients of the memorandum to 'determine the appropriateness' of the itinerary of mandating hui that he had presented at the Peace Street meeting of 22 May. He did not suggest a date for the proposed discussion but stressed that advertising of the hui would need to occur very soon. He went on to say that the hui should aim to elect iwi/hapu representatives who 'might number 20-30 over all' and to secure agreement that 'these elected representatives elect the proposed 5-7 or 6-8 negotiators for Te Arawa'. According to the memorandum, 'a copy of the CNIISP' was enclosed for the benefit of anyone who might not yet have seen it.⁶¹

(1) The 9 June draft mandate plan

By 9 June 2003, Rawiri Te Whare, as 'CEO VIP Project', had completed a draft document entitled *Central North Island Iwi Settlement Plan: Te Arawa Mandating Programme*.⁶² A subsequent letter from Tony Sole to Mr Te Whare indicates that it had been drawn up following discussion between Mr Sole and Mr Te Whare during the week of 2 to 6 June.⁶³ Like the earlier document of 19 May, it included a schedule of mandating hui, although the number and location of those hui varied slightly from the earlier version. The introduction to the

59. Ibid, pp 413-414

60. Document A114, exhibit J, p 41

61. Document A11(a), pp 415-416

62. Ibid, pp 417-424

63. Ibid, pp 428-430

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document stated: 'For the purpose of planning an itinerary of mandating hui throughout the rohe of Te Arawa, the following groups are proposed as the main Iwi groups of Te Arawa as they exist today', and there followed a list of 14 kinship groups. The document then went on to list six aims for the proposed series of hui:

- ▶ agreement to enter into direct negotiations with the Crown;
- ▶ agreement to seek comprehensive settlement through direct negotiations with the 7 CNI Forest lands being a central element;
- ▶ the election of 2 (for smaller iwi) and 3–4 (for larger iwi) Iwi representatives who will be responsible for monitoring and reporting on the negotiation process back to their respective iwi and hapu of Te Arawa and also to Te Pukenga Kaumatua O Te Arawa; (could end up with 28–36 elected iwi representatives)
- ▶ agreement that the elected Iwi representatives, however many, appoint the official Te Arawa Negotiators from within themselves; (5–8)
- ▶ agreement that the Iwi representatives may have the discretion for specialised purposes to coopt from time to time and on a when and as required basis, specialised expertise to assist with negotiations;
- ▶ agreement that the official Te Arawa negotiators must report and be accountable back to the Iwi representatives.⁶⁴

Following these stated aims, the document gave a skeletal indication of the responsibilities and accountabilities that would accrue to the elected representatives.

On 10 June 2003, in Taupo, a further meeting was held between OTS officials and 'CNI iwi representatives', and on this occasion at least nine people from Te Arawa attended. An OTS file note records that, during the meeting, Rawiri Te Whare referred to the recent OTS letter to interim iwi representatives and said that claimants had been discussing the points raised and wished to focus particularly on mandate strategy issues. Tony Sole, for OTS, said that he had met with Mr Te Whare about a mandate strategy for Te Arawa, and he went on to say that he was working with each group to design 'a process for each iwi group that fits that particular group, and which has cognizance of the tikanga of the group'. However, still according to the file note, he stressed that nothing formal had been discussed so far. Mr Te Whare referred to the presentation that he had given on 22 May and said that he had done further work on the mandate plan since then. Anaru Rangiheuea then indicated that Tuhourangi would like to look at the plan and apparently commented that there had been hui but little opportunity to talk. The director of OTS, Andrew Hampton, observed:

everyone here has a mandate of some sort. We are not saying that you should put that aside. All we are saying is, before confirming who is in negotiations, please talk to us. Otherwise,

64. Document A11(a), pp 418–419

you will be challenged on your mandate by others, and the Crown would be able to say here is how we tried to manage it.⁶⁵

The following day, Rawiri Te Whare wrote to the ‘VIP Northern Region Taumata and Alternates, VIP Northern Region Management, Interim Te Arawa Representatives, Te Arawa Trust Board Representatives, Te Kotahitanga O Te Arawa Representatives, [and] Pukenga Kaumatua O Te Arawa’ advising them that a hui was being called for 17 June 2003 at Te Ao Marama, Ohinemutu, to consider the draft mandating programme. The letter was headed ‘Central North Island Iwi Settlement Plan’, with a sub-heading to indicate that it was ‘facilitated by VIP Project’. Mr Te Whare noted that the draft programme had been ‘worked through with officials of OTS in terms of their criteria’ and indicated to the recipients of the letter that it was now time ‘to work it through amongst ourselves’. He noted that OTS officials had also been invited to attend the meeting.⁶⁶

Also on 11 June 2003, Mr Te Whare faxed his draft mandating plan to Tony Sole at OTS and Mr Sole responded on 13 June with detailed comments. As key issues, he noted the 14 kinship groups listed in the plan and acknowledged that it was for Te Arawa iwi and hapu to ‘mutually decide’ how many iwi/hapu would be identified to participate in any process to choose negotiators for Te Arawa. He said that OTS did not have any expectation, for example, that the list would be the same as that drawn up by Te Ohu Kai Moana for fisheries allocation purposes. As a second key issue, he stated that, in OTS’ view, ‘the most robust means of mandating a Te Arawa negotiating body is a “flaxroots” or “from the ground up” process’. He then included a rudimentary structure diagram showing a number of iwi/hapu interacting with a ‘Te Arawa Taumata (or Forum) of elected iwi/hapu representatives (28–36)’ and that body in turn interacting with a group of Te Arawa negotiators. Towards the end of the letter, he stated: ‘It will be very important at all of these proposed hui to emphasise that all Wai claims within Te Arawa will be at the table and to assure claimants that their interests will not be subsumed by the negotiators.’⁶⁷ Mr Sole’s closing comment, that OTS would be pleased to ‘comment on the refined proposal after 17 June’, conveys the impression that he expected the plan to be amended before or after consultation with those invited to the forthcoming hui.

The day before the proposed hui at Te Ao Marama, however, the VIP project held a meeting at the Suncourt Motel in Taupo. Present at the meeting were most members of the VIP taumata: Tumu Te Heuheu, Nepia Williams, Rangiuira Briggs, Anaru Te Amo, Pihopa Kingi and Anne Clarke, and also Graham France, one of the two CFRT members. Bishop Vercoe and Pirihiira Fenwick were not present, but Malcolm Short and Te Ururoa Flavell appear to have attended in their stead. Also present were three VIP staff: Rawiri Te Whare, Stephen Asher,

65. Document A114, exhibit L, p 47

66. Document A109(b); doc A11(a), pp 426, 427

67. Document A11(a), pp 428–429

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and Dickson Chapman. In addition, Paranapa Otimi, from Ngati Tuwharetoa, attended as an observer.⁶⁸

One of the items on the agenda was a report from Mr Te Whare as CEO of the VIP project.⁶⁹ The report was brief and described progress to date towards direct negotiation across the whole CNI region. Towards the end, it observed that the next step in getting to the starting line for negotiations was for each of the five CNI iwi to achieve mandate, and it then stated: ‘This report uses the proposed Te Arawa mandating programme to outline mandating requirements’.⁷⁰ Accompanying the report was an updated version of the *Central North Island Iwi Settlement Plan: Te Arawa Mandating Programme*. The final page of that document was headed ‘CFRT Funding Criteria’ and outlined what funding might be made available for the mandating programme, and for what period.⁷¹

The minutes record that the report was ‘tabled and discussed’ and note that it ‘set out . . . arrangements being implemented for the mandate programme including the draft Te Arawa Mandate programme’. However, it appears likely that the discussion focused, in particular, on funding for the mandate programme because there is reference, in the minutes, to an item on funding then being moved up the agenda⁷² – presumably in response to the reference to CFRT funding on the last page of the mandating plan. Another document filed in evidence seems likely to relate to this agenda item, being entitled ‘VIP Response to CFRT Funding Proposal’. It includes background information, comments, a list of five recommendations, and an attached budget.⁷³ The second of two resolutions that were then passed was that the CEO’s ‘funding report and budget recommendations’ be ‘received and approved’. The first of the two resolutions passed was that the CEO’s report (to which the draft Te Arawa mandating plan was appended) be ‘received and noted’.⁷⁴

(2) The 16 June draft mandate plan

The mandate plan tabled at the Suncourt Motel meeting on 16 June 2003 bore that same day’s date and, as with the earlier 9 June document, had been prepared by Mr Te Whare as CEO of the VIP project. Also like the earlier document, it opened with a list of 14 kinship groups, put forward as being the main present-day iwi groups of Te Arawa. Again as before, it then went on to list six aims for the proposed series of mandating hui, but this time with some modification in the wording of three of them – apparently in response to suggestions made in Mr Sole’s letter. It was now specified, for example, that one of the aims was to achieve agreement ‘to seek

68. Document A132

69. Ibid

70. Document A133

71. Ibid

72. Document A132, para 7

73. Document A137, exhibit M3

74. Document A132

comprehensive settlement of *all historical claims of Te Arawa* through direct negotiations' (emphasis added). More significantly, perhaps, the third aim was now to seek:

agreement that the elected Iwi representatives, however many, appoint the official Te Arawa Negotiators from within themselves (5–8) *and that these negotiators carry the full mandate to negotiate with the Crown. (Proposed name for the group – Kaiwhakarite O Te Arawa.* [Emphasis added.]

Lastly, the sixth aim now specified the need for the kaiwhakarite to report back to the iwi representatives 'on a regular basis'.⁷⁵

Following the bullet-pointed list of aims, there was the same skeletal indication of elected representatives' responsibilities and accountabilities that had featured in the earlier document. Also unchanged was the section on recording procedures for the hui, and likewise the proposed list of dates and venues. The agenda in the sample advertisement, however, had received some attention, reflecting the modified wording in the six aims listed for the hui, and proposed publication dates had been added. Also added was a structure diagram. Like Mr Sole's diagram, it showed lines of interaction between iwi/hapu and a body of iwi representatives, and between those representatives and a group of Te Arawa negotiators. However, the iwi representatives were now shown as 'Nga Kaihautu O Te Arawa' and the negotiators were called 'Nga Kaiwhakarite O Te Arawa'. Further, the VIP project's taumata and staff had been added on the left of the diagram, with lines of interaction between them and all three of the levels shown in the centre (iwi/hapu; kaihautu; kaiwhakarite). Likewise, on the right, the Pukenga Kaumatua o Te Arawa had been added, with a line of interaction linking it to the kaihautu. Below this diagram, some explanatory text had also been inserted:

The iwi/hapu of Te Arawa elect the iwi representatives and the same are accountable back to the iwi/hapu who are the claimant communities; to Te Pukenga Kaumatua O Te Arawa who determine the tikanga and kawa; to VIP Taumata who through its management facilitates and supports the negotiation process.

The iwi representatives are responsible for:—

- i) electing the official Te Arawa negotiators and determining the process by which this is achieved;
- ii) determining principles and protocols on how they work to support the negotiators;
- iii) determining principles, protocols and disciplines on how they work with each other and conduct their business of monitoring and reporting back to iwi/hapu.
- iv) working to the milestone goals and their corresponding work streams as they are set out in the Central North Island Iwi Settlement Plan.⁷⁶

75. Document A133

76. Ibid, p10

1.2.7(3)

(3) *The 17 June draft mandate plan*

On 17 June 2003, the day after the VIP meeting at the Suncourt Motel, Rawiri Te Whare completed a further revision of his Te Arawa mandate plan. This time, the cover described him as 'northern region manager' as well as 'CEO VIP project'. A perhaps more significant change from the version of the previous day was that the list of 'main Iwi groups of Te Arawa' had now been reduced from 14 to 13 by combining Ngati Tarawhai and Ngati Rongomai.⁷⁷

Another noticeable modification since the previous day was in the structure diagram. Whereas the 16 June version had shown the VIP taumata and management interacting with iwi/hapu, kaihautu and kaiwhakarite, the new version now showed VIP taumata and management interaction only with the kaihautu. The text below the structure diagram had also been changed, reordering the content somewhat and creating a rather longer list of 'principles, policies, protocols and disciplines' that the kaihautu would need to establish:

The Iwi/hapu of Te Arawa elect the Iwi Representatives – Kaihautu O Te Arawa.

The Kaihautu O Te Arawa [sic] elect the official Te Arawa Negotiators – Kaiwhakarite O Te Arawa and determine the process by which this is achieved.

The Kaiwhakarite O Te Arawa are responsible to report back to the Kaihautu O Te Arawa on a regular basis

The Kaihautu O Te Arawa need to establish principles, policies, protocols and disciplines on how they work to support the Kaiwhakarite O Te Arawa in determining negotiation strategies.

The Kaihautu O Te Arawa need to establish principles, policies, protocols and disciplines on how they work with each other.

The Kaihautu O Te Arawa need to establish principles, policies, protocols and disciplines on how they monitor the negotiation process, make the appropriate recommendations and report back to Iwi/hapu as the claimant communities;

Te Pukenga Kaumatua who are the guardians of tikanga and kawa of Te Arawa, and the VIP Project who is responsible for facilitating, supporting and resourcing the negotiation process.

The Kaihautu O Te Arawa need to establish principles, policies and protocols on how they work with the VIP Project to achieve the CNIISP and its associated milestones and workstreams.⁷⁸

Given the date of this further revision to the mandate plan, it seems reasonable to assume that it was done specifically for distribution at the hui being held that day at Te Ao Marama.

77. Document A11(a), pp 438-440, 445

78. Ibid, p 441

(4) The hui at Te Ao Marama

Te Ao Marama is the house that stands next to St Faith's church at Ohinemutu. It is owned by the Anglican Church but is in close proximity to the Tamatekapua meeting house. As noted earlier, those invited to the meeting held there on 17 June included the VIP northern region taumata, the VIP northern region management, Te Arawa Trust Board representatives, Te Kotahitanga o Te Arawa representatives, and Te Pukenga Kaumatua o Te Arawa, in addition to the interim Te Arawa representatives that had been elected during the February and March hui.

No minutes or attendance list from this hui have been supplied to the Tribunal, other than a brief page of handwritten notes of unknown provenance.⁷⁹ However, from other documents submitted in evidence, it appears clear that Mr Te Whare's Te Arawa mandating plan was presented to the meeting but was not accepted by a majority of those present. It is also clear that some people at the meeting called for further discussion of the issue.⁸⁰ There is, however, dispute about who was entitled to vote on the plan's acceptance, and we return to consider this meeting in chapter 5.

1.2.8 The repercussions of the 17 June hui

Following the meeting at Te Ao Marama, Mr Te Whare was apparently approached by some of the interim representatives asking that mandating hui nevertheless proceed for their respective iwi/hapu.⁸¹ Mr Te Whare therefore wrote a general letter, on 20 June 2003, to all the interim representatives asking that they each sign a form if they agreed with their particular mandating hui going ahead. The form read:

We the Iwi/Hapu representatives of _____ and in consultation with kaumatua named below, do hereby agree that a mandating hui as prescribed in the Te Arawa Mandating Programme dated 17th June 2003 should proceed as far as our particular Iwi/Hapu groups are concerned. We give the facilitators of the programme led by Rawiri Te Whare our approval to advertise and hold this hui at their earliest convenience.⁸²

Meanwhile, an alternative mandate plan adopting 'some of the plan considered by [OTS] with Rawiri Te Whare', was apparently being 'circulated amongst the various legal teams' in Te Arawa by Ms Hall. In a letter to OTS on 19 June 2003, she proposed forwarding a copy of the

79. Ibid, p 446

80. For example: doc A11(a), pp 435, 448–450; doc A11, para 33; doc A28, paras 6–8; doc A43, para 12; doc A109, paras 46–47; doc A114, paras 55–56, exhibit N, pp 51–57

81. Document A109, para 48

82. Document A109(b); doc A11(a), pp 435–436

document to Tony Sole for comment. She also indicated that a further hui, chaired by Bishop Vercoe, was to be held at Tamatekapua on Saturday 28 June 2003.⁸³

On 20 June 2003, Ross Philipson of OTS reported again to MICOTOWN. He noted that working at a collective CNI level had helped to build momentum and support for moving towards negotiations but it had also led to one or two problems: 'Some [claimants] mistakenly thought that we were only talking to the VIP Taumata, or that the collective is unduly dominated by Ngati Tuwharetoa, whereas we have attempted to be inclusive'.⁸⁴

In addition to such general comments, Mr Philipson reported in some detail on progress with respect to a mandate strategy for Te Arawa. He noted that the vote had gone against Rawiri Te Whare's proposal at the recent meeting but indicated that OTS staff were 'looking closely at the representative status of the attendees at that meeting'. He also reported that an alternative mandating strategy was being proposed by Ms Hall and Bishop Vercoe but said that it did not appear to be 'consistent with the Crown's mandating policies'. He then discussed concerns around Mr Te Whare's role as a facilitator, and the likely degree of support for his mandating proposal in the wider Te Arawa community. Particular mention was made of 'key people from Ngati Rangitihi' not yet having participated in the process and a comment was made about 'the informal nature of the CNI collective and the pre-negotiation discussions, where there is no formal definition around who the collective should be communicating with'. Mr Philipson also reported that: 'OTS is working to provide an opportunity for the different factions to come together prior to Te Arawa undertaking its mandating process. The position is delicate, and a positive outcome cannot be assured'.⁸⁵ In addition, the report made mention of Ngati Makino, noting that the Crown had entered into negotiations with them in 1998 'but negotiations lapsed while the Crown considered the difficulties of distinguishing Ngati Makino and its claims from Ngati Pikiāo'.⁸⁶ A separate report on the issue was promised but has not appeared in evidence.

On 21 June 2003, an advertisement appeared in a number of newspapers, including the *Bay of Plenty Times*, the (Rotorua) *Daily Post*, and the *Dominion Post*, notifying 'Te Arawa Iwi' of a series of hui to begin on 12 July 2003⁸⁷ – although at this stage, according to Mr Te Whare, hui were advertised only for those iwi/hapu whose interim representatives had approached him and asked for the mandating process to proceed.⁸⁸ The newspaper advertisement listed hui for Ngati Tuara/Ngati Kea, Tuhourangi/Ngati Wahiao, Ngati Te Roro o Te Rangi, Ngati Tarawhai/Ngati Rongomai, Ngati Pikiāo, Ngati Tahu/Ngati Whaoa, Tapuika, Te Arawa ki Whakatane, and Waitaha. The kaupapa of the hui was advertised as being to:

83. Document A11(a), p 434

84. Document A114, exhibit N, p 53

85. Ibid, pp 55–56

86. Ibid, p 56

87. Document A130, sch 5

88. Document A109, paras 48–51

- ▶ Secure mandate to enter into direct negotiations with the Crown;
- ▶ Secure mandate to seek a comprehensive settlement of all historical claims of Te Arawa Iwi;
- ▶ Secure mandate of elected Iwi representatives (Kaihautu O Te Arawa) to monitor the negotiations process, make the appropriate recommendations and be accountable back to the Iwi/Hapu of Te Arawa and to Te Pukenga Kaumatua O Te Arawa;
- ▶ Secure mandate that the Kaihautu O Te Arawa elect from within themselves the official Te Arawa Negotiators (Kaiwhakarite O Te Arawa) of between 6–8 persons, who will carry a full mandate to negotiate on behalf of Te Arawa.⁸⁹

The advertisements did not give any indication of who was calling the hui, but this was corrected in later versions of the notice. On 24 June 2003, for example, the advertisement now gave to understand that the hui were called by ‘na nga Kaumatua nei: Patariki Hiini. Manny Kameta, Wi Keepa Te Rangipuawhe Maika, Anaru Rangiheuea, Bill Galvin, Riki Reweti, Pinda Pirika, Te Po Hawaiki Wirangi Jones, Eru George, Tutewehiwehi Kingi, Kaiawhiti Tahana, Hirini Katene, Roka Kingi, Arthur Moke, Te Poroa Malcolm’. From 25 June 2003 onwards, the name of Henry Pryor was also added to that list.⁹⁰

Meanwhile, on 23 June 2003, Ms Hall had sent a further letter to OTS, indicating concern with the way the Te Ao Marama hui had gone and stating that there would be further discussion about a mandating plan at the hui called for 28 June at Tamatekapua. She indicated that a planning hui would be held prior to that event, on 25 June, to which Rawiri Te Whare was to be invited. She also requested input into the event from OTS.⁹¹ It is not clear, from the evidence submitted, whether the planning meeting was held and, if so, whether Mr Te Whare attended.

We are not aware of the full advertising schedule for the Tamatekapua hui set for 28 June, but an advertisement which ran on 24 June 2003 in the *Daily Post* carried the name of Bishop Vercoe and listed five main agenda items:

1. Te Arawa Waitangi Tribunal claims involving freshwater issues, (this topic includes claims about what used to swim in the freshwater), geothermal, tourism and land claims, and claims to the 7 CNI forests;
2. A proposal to enter into direct negotiations with the Crown to achieve settlement of all Te Arawa’s claims;
3. A process to achieve mandate and representation for Nga Hapu o Te Arawa and for Te Arawa claimants in the negotiations;
4. An update of the Hui held at Tamatekapua Meeting House on March 5, 2003 and May 30, 2003;

89. Document A130, sch 5

90. Document A11(a), p 451; doc A130, sch 5

91. Document A11(a), pp 448–450

5. Strategies for improving the working relationship between Te Arawa Maori Trust Board and Te Kotahitanga o Te Arawa, Nga Hapu o Te Arawa and claimants.⁹²

1.2.9 Circular letters from OTS

(1) *The letter of 26 June 2003*

On 26 June 2003, Ross Philipson of OTS sent out a letter to ‘all those members of Te Arawa who have an interest in the mandating process within Te Arawa to elect representatives in relation to proposed negotiations’. It stated that, in OTS’ view, Mr Te Whare’s mandating proposal was ‘robust and inclusive’ and that it was ‘now up to Te Arawa representatives and kaumatua to decide how to proceed’. Mr Philipson stressed the Crown’s expectation that mandating and negotiations would be based ‘on kinship groups (hapu and iwi) rather than Wai numbers’ and that having a registered claim therefore did not, in OTS’ opinion, give that claimant ‘an automatic right to be part of any representative body’. With reference to the advertisement of Saturday 21 June that had appeared without any names attached, Mr Philipson advised that Mr Te Whare had informed OTS that he held ‘written endorsement from the leaders of the iwi/hapu named in the advertisement to proceed on their behalf’.⁹³

The letter also commented on the advertisement for the forthcoming hui at Tamatekapua, noting with respect to agenda item 5 that the trust board was recognised by the Crown as ‘holding a mandate to represent Te Arawa for lakes negotiations’ and that Te Kotahitanga was ‘recognised by Te Ohu Kai Moana as representative of Te Arawa for fisheries matters’. Mr Philipson then went on to state a view that, in light of the status of those two organisations, it was ‘incumbent upon the Crown to give serious consideration to their views, if any, on the mandating strategy for Te Arawa as part of the CNI dialogue’.⁹⁴

Commenting on the earlier hui that had been held in February and March 2003, Mr Philipson noted that these had been held at short notice and pointed out that the advertised agenda included an item merely ‘to discuss’ who would represent iwi and hapu that wanted to be included in discussions with the Crown. He stated that the Crown could therefore give ‘no formal recognition to any persons who were elected as iwi or hapu representatives at those hui’, although he noted that ‘any number of these persons may eventually be elected in the formal Te Arawa mandate process’. With respect specifically to the hui of 5 March 2003, Mr Philipson stated that the Crown could recognise ‘no outcomes of that hui’ because the agenda had changed from that advertised and OTS had received correspondence challenging and objecting to that change of agenda.⁹⁵

The letter ended by encouraging all parties ‘to engage with one another in order to ensure

92. Document A11(a), p 451

93. Ibid, pp 452–453

94. Ibid, p 453

95. Ibid, p 453; doc A114, para 63

that a “bottom up” mandating process can eventuate’, and by emphasising that there could only be one mandating process for Te Arawa.⁹⁶ We take the latter comment to have been made in light of Ms Hall’s advice to OTS, noted above, that an alternative mandating strategy was under active discussion by at least some parties in Te Arawa.

(2) *The letter of 27 June 2003*

The following day, Mr Philipson wrote to all CNI ‘Wai claimants’. His stated aim was to update them on progress in discussions with the Crown and to outline how they could become involved in the mandating process that was to take place. He said that OTS had discussed mandating with each iwi with the goal of ensuring that ‘each mandate strategy follows an inclusive process appropriate for each iwi’. He encouraged the Wai claimants’ participation in their iwi’s mandating process and suggested that they contact their legal counsel or iwi. He also explained that, were formal negotiations to eventuate, those negotiations would cover all the historical claims of the claimants’ iwi, ‘including all Wai claims that have been lodged on behalf of any member’ of that iwi. He stressed that ‘This does not mean that every Wai number has a place at the negotiating table as of right’, and then went on to say: ‘But we expect that when each iwi enters into formal negotiations with the Crown, it will have good processes and structures in place that will enable the interests of individual hapu and whanau to be properly addressed.’⁹⁷

1.2.10 The 28 June 2003 hui at Tamatekapua

The hui held at Tamatekapua on 28 June 2003 was chaired by Pihopa Kingi and was attended by around 60 people. According to the minutes, it opened with VIP project business before moving to ‘an update of Te Arawa claims’, given by Ms Hall, and a presentation from Annette Sykes that included ‘Hapu/Iwi development of their mandate and representation process’. Three ‘infrastructure models’ were then presented for consideration, showing various ways that iwi/hapu could interact with elected representatives and other bodies such as the VIP regional taumata.⁹⁸

Again according to the minutes, a number of resolutions were passed, including a resolution that ‘this hui of all the Hapu and claimants of Te Arawa move forward and support entering into discussion with the Crown for the Central North Island lands on which the forests are grown’. Those present also passed a resolution that ‘re-confirmed support of the Te Arawa Taumata’ (namely Bishop Vercoe, Pihopa Kingi, and Pirihiira Fenwick), in response to the Crown’s stated non-recognition of the outcome of earlier meetings.⁹⁹

96. Document A11(a), p 454

97. Ibid, pp 457–458

98. Ibid, pp 459–468

99. Claim 1.1.1, para 70; doc A3, para 47; doc A11(a), pp 459–468

On 30 June 2003, Ms Hall wrote to OTS to advise it of the outcome of the 28 June hui and also to state that every effort would be made for Te Arawa to come up with ‘one mandating process’. She indicated agreement with a ‘hapu approach’ but raised a number of specific questions in relation to hapu mandating hui. She observed that hapu status was said to be uncertain and asked how many representatives were to be elected by each hapu. Other queries related to provision of information, the method of voting, eligibility for voting, and scrutineering. She requested a prompt response ‘so that Te Arawa can understand the rules before the advertised Hui begin’.¹⁰⁰

1.2.11 OTS expectations of the mandating process

Ross Philipson responded to Ms Hall’s letter on 1 July 2003, with comments under each of the specific points she had raised. With regard to the ‘uncertainty of hapu status’ he stated: ‘We anticipate that Te Arawa kaumatua will determine who the constituent hapu/iwi are for representative purposes. We appreciate that the number of hapu/iwi could be as low as ten, or considerably greater than that.’¹⁰¹ As regards the information that should be provided to attendees at the hui, he said that in OTS’ view the important messages to convey were, first, that the Crown anticipated a comprehensive settlement of all historical claims of Te Arawa and, secondly, that ‘multiple negotiations with individual Te Arawa kinship groups is not an option’.¹⁰²

On the subject of voting rights, he observed that eligibility was ‘normally based on whakapapa’, and specified that each hui should have a register of attendees recording name, hapu/iwi affiliation, and signature. He stated that OTS was ‘not primarily concerned with the adequacy or existence of hapu rolls’, but did anticipate that voting would be restricted to ‘those attendees who affiliate to the hapu or iwi who are holding the hui’. With regard to multiple iwi/hapu affiliation, he said it was for Te Arawa to decide whether people could vote at any hui where they had a whakapapa connection or whether they should be restricted to choosing only one hapu/iwi. As regards a minimum age for voting, he stated that ‘The Crown would be concerned if persons younger than 18 were allowed to vote’.¹⁰³

With respect to the number of representatives per kinship group, he stated that it was a matter for the groups themselves to determine. However, he noted that the number of people then elected to the smaller body that would be formed (which he referred to as the ‘hapu forum’ or ‘kaihautu’) was clearly ‘a matter for negotiation between all the groups’. He commented that there may be a case for certain groups such as Ngati Whakaue and Ngati Pikiāo

100. Claim 1.1.1, paras 70, 72; doc A11(a), pp 469–470

101. Document A11(a), p 471

102. Ibid, p 472

103. Ibid, pp 471–473

to have ‘extra weight’ on the ‘hapu forum’ because of their large populations, although he again stressed that this was ‘a matter to be decided by Te Arawa representatives’.¹⁰⁴

1.2.12 The mandating hui

The advertised series of mandating hui opened as scheduled on 12 July 2003. Progressing on from the nine originally advertised, further hui were held throughout August and into September until a total of some 24 hui had been held in all.¹⁰⁵ Like the amended advertisements for the July hui, advertisements for the later hui all bore the names of kaumatua who, according to Mr Te Whare, had endorsed the holding of formal mandating hui for their respective iwi/hapu.¹⁰⁶ However, the documents presented in evidence do not give a clear rationale for why some hapu had mandating hui and others did not. We will return to this point below.

No independent observer from Te Puni Kokiri (TPK) was present at any of the hui,¹⁰⁷ and minutes are often sketchy. However, it appears that for each hui Mr Te Whare produced a handout comprising an agenda, a ‘presentation overview’, and a structure diagram.¹⁰⁸ We note that some of the content of the handout changed after 16 September, following a hui at Owata Marae (of which more below).¹⁰⁹

The agenda for all hui, both before and after 16 September, provided for a presentation, discussion, and the putting of resolutions. The presentation was presumably the one outlined in the presentation overview included in the handout, which noted key facets of progress so far towards entering direct negotiations and then ended with the headings ‘Pre-negotiation Phase’, ‘Deed of Mandate’, and ‘Plan for Negotiation Progress’.¹¹⁰

The agenda also listed four ‘mandating principles’. These were based on the kaupapa for the hui as advertised in the press but tailored so as to be specific for the iwi/hapu concerned. For example, the agenda for the hui of 15 July 2003 listed the second principle as being to ‘Secure mandate to seek a comprehensive settlement of all of Ngati Pikiao’s historical claims’. Likewise, the third was to ‘Secure mandate of Ngati Pikiao’s elected representatives to be involved in the negotiations process’.¹¹¹ One of the remaining two principles was common to all hui; namely, to secure a mandate to enter direct negotiation with the Crown. The fourth principle, however, was modified after 16 September. For mandating hui prior to that date, it read:

104. Ibid, p472

105. Document A130, sch 5; doc A1, para 26

106. Document A130, sch 5; doc A109, paras 54–55

107. Document A1, paras 15, 27

108. Document A142, paras 4–5

109. Ibid, para 6

110. See, for example, doc A142, app B, p3

111. Ibid, app B, p2

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Secure mandate that the total number of elected representatives of iwi/hapu of Te Arawa, ('Kaihautu O Te Arawa'), elect from within themselves, between 5–8 negotiators ('Kaiwhakarite O Te Arawa'), who will carry a full mandate on behalf of Te Arawa Iwi/hapu to negotiate with the Crown a comprehensive settlement of all their historical claims.¹¹²

We note that, for the pre-16 September hui, the structure diagram that accompanied the agenda did not reflect the wording of the fourth principle just cited. Instead, it showed Nga Kaihautu o Te Arawa, a body of about 30 people, being elected by iwi/hapu and claimants, and then a smaller 'komiti' of about 14 people being drawn from the kaihautu. The Kaiwhakarite o Te Arawa were then shown as being drawn, in turn, from the komiti (not from the kaihautu).¹¹³ This was also a departure from the structure diagram put out in the 17 June draft mandating plan.¹¹⁴ A further change from the 17 June draft was that, while the VIP project and the Pukenga kaumatua still featured on the new diagram, there were now no lines of interaction shown between those bodies and any of the other elements of the diagram.

Following the 16 September hui, the fourth mandating principle was amended to read:

Secure mandate that the total number of elected representatives of iwi/hapu of Te Arawa, ('Kaihautu O Te Arawa'), elect an Executive Council from within themselves.

• • • • •

And that 5–8 negotiators ('Kaiwhakarite O Te Arawa'), who will conduct the negotiations be appointed by the Executive Council. (refer to structure)¹¹⁵

The new structure diagram to which the principle referred was rather more elaborate than previous versions. It now showed a number of iwi and hapu together forming 'Nga Uri O Te Arawa', whose role was indicated as being 'To mandate and to ratify'. Below this came Nga Kaihautu, the mandated iwi/hapu representatives, whose role was described as 'To protect and preserve claimant interests'. Interposed between these two, and with links to both, was the Pukenga kaumatua ('To support and to give advice'). Below the kaihautu came the 'Mandated Executive Council', whose role would be 'To lead and to Govern'. They in turn were shown as linking to two other groups. First, to the side was a box marked 'Negotiators'. Above the line linking the negotiators and the kaihautu was written 'To conduct negotiations'. Secondly, below the executive council came a box marked 'Operations', the role of the latter being shown as 'To Coordinate and manage the various work streams'.

Attendance at the various hui was mixed. From the attendance lists and the minutes, numbers appear to have averaged about 30 to 35 per hui (not including the hui in urban centres such as Auckland, Wellington, and Christchurch, where attendance was much lower). This is slightly higher than the earlier round of hui in February and March, at which the interim

112. See, for example, doc A142, app B, p 2

113. See, for example, doc A142, app B, p 4

114. Document A11(a), p 441

115. See, for example, doc A142, app O, p 2

representatives had been elected and at which, as we have indicated, the average attendance was around 25 to 30. It should be noted, however, that the average attendance figure for the formal mandating hui was raised by the significantly higher turnouts at the hui for Ngati Tahu and Ngati Whaoa, where over 100 people attended, and the hui for Tuhourangi and Ngati Wahiao, which attracted around 50 to 60 people.

At the earlier hui, at least, it appears that a series of five ready-prepared resolutions were put to those present:

1. That [name of iwi/hapu] agrees to enter into direct negotiations with the Crown, to seek a comprehensive settlement of all their historical claims.
2. That [name of iwi/hapu] elects [names of those elected] to be their official representatives in the negotiation process.
3. That [name of iwi/hapu] agrees that the total number of elected representatives of iwi/hapu of Te Arawa, ('Kaihautu O Te Arawa'), elect from within themselves, between 5–8 negotiators ('Kaiwhakarite O Te Arawa'), who will carry a full mandate on behalf of Te Arawa Iwi/hapu to negotiate with the Crown a comprehensive settlement of all their historical claims.
4. The [name of iwi/hapu] agrees that the Kaihautu O Te Arawa establish an agreed terms of reference with the appropriate protocols and disciplines by which both they and the 5–8 Kaiwhakarite O Te Arawa are to carry out their functions and responsibilities.
5. That [name of iwi/hapu] agrees that the Kaihautu O Te Arawa have the discretionary powers to engage specialised expertise on an as and when required basis, when it is deemed necessary that such expertise will assist the negotiation process.¹¹⁶

It is not at all clear, from the minutes, that all five resolutions were put to every hui. Nevertheless, it is evident that at most (but not all) hui, a clear majority of those present were in favour of entering into direct negotiations with the Crown.

A summary of the outcomes of various hui, in tabular form, can be found at appendix 11 of this report. From that table, it can be seen that the minutes of 20 hui have been located among the documents presented in evidence to this Tribunal. Of those, only 18 were appended to the deed of mandate.¹¹⁷ However, OTS' assessment report states that 'over 24 hui were held during the mandate process'.¹¹⁸ We have no information on what happened at the remaining hui.¹¹⁹

116. Document A130, sch 8; doc A143

117. We are assuming, here, that the deed of mandate filed in evidence (doc A130) was a complete copy of the original.

118. Document A1, para 26

119. We know from other documents filed that Tapuika's first hui, for example, was held on 19 July 2003: see advertisement, *Bay of Plenty Times*, 26 July 2003 (doc A130, sch 5). Likewise, a second hui was held for Ngati Rangitihia on 10 August 2003: see paper 3.3.9, para 17.1. However, we have seen no minutes for these meetings. We note, though, that the hui originally mooted for centres such as Taupo, Tokoroa, and Whakatane, and overseas in Sydney, do not seem to have eventuated: see doc A11(a), pp 401–402.

Nevertheless, it is abundantly obvious that the original intention to have an elected body of about 30 people, as shown on the structure diagram in the handout for the pre-16 September hui, was quickly overtaken by events. Five kaihautu representatives were elected at the very first meeting, and numbers tended to increase at succeeding hui. The eventual number of representatives on the kaihautu was to be 98.¹²⁰

Also evident from the minutes is that additional kinship groups, beyond those listed in the original plan of 17 June 2003, were accorded mandating hui as events unfolded. At the hui for Ngati Uenukukopako, for example, Blanche Kiriona asked: 'Where does Ngati Tuteniu fit in?' Mr Te Whare's response was: 'If Ngati Tuteniu wants us to have a hui with them, then you just need to let us know so that we can advertise 21 days prior to having the hui.'¹²¹

A mandating hui was held for Ngati Tuteniu on 22 September 2003, despite a protest lodged with OTS by the taumata on 1 September.¹²² In the event, two other groups not listed in the 17 June plan also held mandating hui and elected representatives. They were Ngati Te Roro o Te Rangi and Ngati Te Ngakau/Ngati Tura/Ngararanui.¹²³

1.2.13 The hui at Owhata Marae, 16 September 2003

According to Mr Te Whare, the date of 16 September for the first formal meeting of kaihautu representatives had been dictated by the decision to submit a deed of mandate to the Crown on 25 October 2003 on behalf of Te Arawa iwi and hapu.¹²⁴ Questioned by the Tribunal as to the basis for choosing the 25 October date, Mr Te Whare explained that, counting back from the next parliamentary election (the target date for settlement), the deed would need to be ratified by early 2004 if the target were to be met. That would necessitate the deed being submitted to OTS by late October and, to meet such a deadline, the kaihautu members would first need to convene to 'consider possible negotiation structures and other associated issues'. A meeting was therefore called for 16 September 2003 at Owhata Marae, Hinemoa Point.¹²⁵

With respect to the chosen date, Ms Hall had indicated to OTS on 4 August that she and two members of the Te Arawa taumata were unavailable to attend any hui between the dates of 6 and 22 September.¹²⁶ Tony Sole had responded that OTS had 'absolutely no authority to influence marae, hapu or iwi choosing when a particular hui might take place' and 'no authority over the actions of Mr Te Whare'. He suggested that Ms Hall discuss the timing of any hui

120. Document A130, sch 2

121. Document A114(a), p106

122. The protest noted, among other things, that Ngati Tuteniu has 'close connections to Ngati Rangiteaorere and Ngati Unenuku Kopako' and that it has no marae of its own at present: doc A11(a), pp 492-293. A later letter stated that Ngati Rangiteaorere had not been consulted about Ngati Tuteniu's separate status: doc A11(a), p524.

123. Document A11(a), p 439; cf doc A130, sch 2

124. Document A109, para 56

125. Ibid, paras 56, 58

126. Document A11(a), pp 482, 483, 485-486

with ‘the appropriate members of Te Arawa’.¹²⁷ It is not clear from the documents submitted in evidence whether such discussion ensued.

On 2 September 2003, Mr Te Whare sent out advance notice of the hui to those representatives who had already been elected, stressing it was important that they attend. The notice stated that the meeting was to ‘officially establish Nga Kaihautu O Te Arawa and its executive body’.¹²⁸ This letter was followed up, on 8 September, by another notice carrying more detailed information as to the purpose and conduct of the meeting:

Purpose of the Meeting: The sole purpose of this meeting is for each group within the Kaihautu to elect one person from their group onto the Executive Council.

Attendance at the Meeting: Only officially mandated representatives can attend the meeting.

Voting at the Meeting: Only officially mandated representatives can vote.¹²⁹

This second notice indicated that no proxy votes would be allowed at the hui but that those unable to attend in person could vote by completing the form attached to the notice and returning it on or before 16 September 2003. It also stated that, once the executive council had been elected, its first tasks would be to:

- (a) develop reporting and accountability procedures and processes for the Executive Council and the Kaihautu and report back to the Kaihautu on them;
- (b) file the Deed of Mandate with the Crown.

A third communication, sent out on 9 September 2003, proposed some guidelines to assist the kaihautu members in choosing appropriate people for the executive council. It suggested that factors to consider might include whether the person:

- ▶ Has some knowledge of the Treaty Of Waitangi Claims sector and the Treaty itself
- ▶ Has knowledge of and has been on or associated with your group’s claimant interests
- ▶ Has standing within and commitment to his/her iwi/hapu community
- ▶ Has the ability to manage high level information and the articulation of that information both verbally and in writing
- ▶ Is able to commit and be available to provide governance and leadership to the negotiation process for the duration of negotiations (approx 24 mths)
- ▶ Has some knowledge of dealing with Crown officials.¹³⁰

On the day of 16 September, Mr Te Whare, as ‘CNI iwi mandating facilitator’, wrote to Tony Sole at OTS informing him that the mandated iwi/hapu representatives would be meeting at

127. Ibid, p484

128. Document A109(b), exhibit D

129. Ibid, exhibit E

130. Ibid, exhibit F

Owhata Marae that evening to put in place the kaihautu's executive body. With reference to the choice of venue, he commented that he lived nearby and that the marae committee had offered it for the meeting, although it was not his own principal marae. With respect to the kaupapa of the meeting, he listed the number of members that would be elected from each iwi/hapu, giving an initial body of 13 members, but with the possibility of Ngati Makino, Tapuika, Ngati Tura/Ngati Te Ngakau/Ngararanui, and Ngati Rangiwewehi each having a seat at a later date. Waitaha was not mentioned. The 'Whakaue configuration' was shown as having three seats – two for Ngati Whakaue and one for Ngati Te Roro o Te Rangi. The 'Pikiao configuration' was shown as having two seats – one for Ngati Pikiao and one for Ngati Tarawhai/Ngati Rongomai (with a possible extra seat for Ngati Makino, 'if they choose to join'). The remainder had one seat each, with a note beside the seat allocated to Ngati Rangiteorere saying '(will include Ngati Tuteniu)'.¹³¹ Mr Te Whare indicated that, once the body was established, it would be responsible for drawing up draft terms of reference, a draft deed of mandate, the appointment of negotiators, and a plan for draft terms of negotiation.¹³²

When the iwi/hapu representatives arrived at the meeting that evening, they were given a rundown on the establishment and membership of the kaihautu and an explanation of the proposed mandating structure.¹³³ The structure diagram used was the same as that subsequently included in the revised handout for the remaining mandating hui.¹³⁴ Mr Te Whare then advised that, while most iwi/hapu would be entitled to elect one member to the executive council, Tuhourangi could appoint two members, 'Ngati Whakaue (Iwi)/Te Roro O Te Rangi (Hapu)' could have '2 + 1 members respectively', given its overall population, and the 'Pikiao/Tarawhai-Rongomai/Makino configuration' could likewise appoint '1 + 1 + 1 members respectively'.

Voting at the 16 September meeting was restricted to those already elected to the kaihautu. Nevertheless, it would appear that iwi/hapu that had not yet held their mandating hui also had (non-voting) representatives present at the meeting – despite the notice of 8 September which indicated that 'only officially mandated representatives can attend the meeting'.¹³⁵ For those iwi/hapu, Mr Te Whare indicated that a similar voting process to elect council members would be facilitated once their mandating hui had taken place. Each iwi/hapu group would have one seat on the executive council, he said, although 'Tuteniu will be included with Ngati Rangiteorere where only 1 seat is provided'.¹³⁶ Mr Te Whare also noted that Tapuika and

131. In the event, Tuteniu were to have a seat of their own on the council, and the Ngati Tura/Ngati Te Ngakau/Ngararanui grouping was to acquire a second seat – one for Ngati Tura and Ngati Te Ngakau, and a separate one for Ngararanui. We return to this matter later in the chapter.

132. Document A114, exhibit U, pp80-81

133. Document A109, para 59

134. Document A109(b), exhibit F

135. Paper 3.3.7, para 8.6; doc A109, para 60; doc A109(b), exhibit E

136. Document A109(b), exhibit F, handout, p3

Waitaha were ‘undecided’ about participating and Ngati Makino had chosen to ‘remain outside this process’.¹³⁷

The minutes of the meeting record that there was:

lengthy discussion over structural and process concerns; ensuring individual claimant interests would be protected; who was dictating the terms – OTS or [claimants]; how many negotiators will be appointed and how [to] ensure that they will negotiate in accordance with claimant expectations; reporting back and accountability concerns etc.¹³⁸

A motion on whether to accept the structure of the kaihautu and its executive body was then put and carried, although David Whata-Wickliffe spoke against the motion, saying that Ngati Tamakari ‘had one of the biggest claims’ and should therefore have two members on the executive council. When that assurance was not forthcoming, Ngati Tamakari withdrew from the meeting.¹³⁹

The meeting then moved on to the election of executive council members, with Mr Te Whare explaining that the council would be the mandated body ‘to govern and lead in the direct negotiation process to settlement with the Crown’. He went on to state that the negotiators would be appointed by this body but would not be confined to it. Eleven executive council members were then elected.¹⁴⁰

On 1 October 2003, an executive council meeting was held at the VIP project’s office in Peace Street, Rotorua. Around nine council members attended and, together with two who sent email votes, elected Mr Te Whare as the council’s chairperson.¹⁴¹ At the meeting it was also agreed that a first draft of the executive council’s rules would be circulated to all members by 13 October 2003.¹⁴²

1.2.14 The petition of 1 October 2003

On the same day as the executive council meeting, Ms Hall forwarded to OTS copies of a petition to MICOTOWN protesting that the 16 September meeting had been held before all iwi/hapu had elected their kaihautu members. The petition asked the Minister to direct OTS staff to:

meet with all Te Arawa CNI mandated Hapu representatives to explain the Crown’s position with regards to a structure called the Nga Kaihautu o Te Arawa and to fully explain the

137. Ibid, exhibit G, p2

138. Ibid

139. Ibid, p3

140. Ibid, pp3-4

141. Document A11(a), pp523, 526-527

142. Document A104, para 14

implications of the Crown's comprehensive approach to settlement of all Te Arawa's Treaty of Waitangi claims.¹⁴³

Also on 1 October 2003, Bishop Vercoe, as Te Arawa taumata chairman, wrote to Mita Ririnui and Stevie Chadwick, as members of Parliament for Waiariki and Rotorua respectively, to ask for their assistance with presenting the petition to MICROTOWN 'in an appropriate manner'. Bishop Vercoe stated that the taumata was satisfied that 11 of the 14 iwi/hapu hui convened over the preceding three months had reached 'an acceptable standard of good conduct and legitimacy'. However, they 'challenged outright' the hui of 16 September, which was the subject of the petition.¹⁴⁴

Ms Hall's analysis of the support for the petition was that:

- ▶ eight hapu supported it 'either unanimously or by a majority';
- ▶ Ngati Makino also supported it unanimously;
- ▶ Ngati Pikiao was 'expected to support by a majority';
- ▶ Ngati Whakaue was evenly divided;
- ▶ Ngati Uenukukopako was 'neutral'; and
- ▶ 'Ngati Tahu/Ngati Whaoa [was] the only Hapu wholly opposed'.

Ms Hall noted that Ngati Rangitihi and Tapuika were not included because they were 'still deciding on whether to join CNI'.¹⁴⁵

The Minister responded to the petition on 15 October 2003 in a letter to Bishop Vercoe. With respect to the request for OTS staff to meet with hapu representatives, she said that she had been advised that officials had been invited to attend a meeting of the executive council 'to answer questions and discuss the mandating and negotiation processes'. Regarding the structure of the kaihautu, she observed that, 'Provided that the proposed structure is transparent, representative and accountable it is not for the Crown to comment upon the internal configurations of Te Arawa'. She then went on to state that it was only after a deed of mandate had been submitted and assessed that decisions would be made concerning recognition of a Te Arawa mandate to enter negotiations for the settlement of Treaty claims. She ended by pointing out that, once such a deed had been submitted, there would be an opportunity for claimants to raise any concerns about the mandating process during the public notification period.¹⁴⁶

On 16 October 2003, Bishop Vercoe and Pihopa Kingi wrote again to the Minister. They drew attention to specific aspects of the 16 September hui which they claimed were problematic: namely, that 14 iwi/hapu had been allowed to appoint representatives rather than the 13 originally advertised; that the hui had been called when it was known that key leaders would

143. Document A11(a), pp 520–522; doc A145

144. Document A114, exhibit BB, pp 92–93

145. Document A11(a), pp 520–522; doc A145

146. Document A11(a), pp 528–529

be absent; and that there had been no prior discussion as to what was an appropriate structure and only one option had been put forward. In relation to the last point, they said: ‘That is not Te Arawa’s custom. Te Arawa’s custom is that the take (proposal) must lie on the ground before the meeting is called. Here the meeting was caught by surprise.’¹⁴⁷ They ended by informing the Minister that the Te Arawa taumata were calling a further meeting of hapu representatives for 27 October 2003, at Tamatekapua, stating that if OTS staff continued to talk to the executive council it would be seen as ‘interfering with Te Arawa’s own process’.

An ‘update on Te Arawa mandating’ was recorded in an OTS file note of 14 October 2003. It noted a number of developments, including the submission of the petition to the Minister. It also noted that a draft deed of mandate was being compiled but that it was unlikely to be ready for submission by 25 October as originally planned. Further, after noting that the period for mandating hui had been extended but that all mandating hui had now been completed, it went on to record that ‘Some issues have arisen, and they are being worked through’.¹⁴⁸

1.2.15 Development of the executive council rules

As noted earlier, draft rules were drawn up and circulated following the executive council’s meeting of 1 October 2003. On 17 October, the executive council met again to discuss the draft. As a result of those discussions, amendments were requested and a further meeting held on 7 November 2003. Additional points were raised at that meeting, necessitating consultation with the council’s legal advisers. Further rounds of amendment and discussion took place throughout the month of November.¹⁴⁹

1.2.16 The hui of 27 October 2003 at Tamatekapua

Meanwhile, Bishop Vercoe, on behalf of the Te Arawa taumata, had called a meeting of hapu representatives for 27 October 2003 at Tamatekapua.¹⁵⁰ According to Mr Te Whare, the newspaper advertisement for the meeting specifically listed ‘all the Nga Kaihautu members’.¹⁵¹ In the event, Bishop Vercoe was unable to chair the meeting owing to ill health, so that role was taken by Ken Hingston.¹⁵² However, according to minutes taken, it was made clear at the beginning of the meeting that it was the taumata who had called the meeting. Also according to those minutes, discussion initially revolved around support for the taumata as against support for the kaihautu. Exchanges appear to have been heated at times, but after lunch an

147. Ibid, pp 530–531

148. Ibid, p 533

149. Document A104, paras 15–20

150. Document A11(a), pp 525, 531

151. Document A109, para 63

152. Document A16, para 33

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attempt was made to find a way forward. At this point, discussion turned more to the relative roles of the taumata, the kaihautu, and the executive council. Mention was also made of Te Pukenga Kaumatua o Te Arawa.¹⁵³ Discussion again appears to have become heated and, according to Mr Te Whare, Mr Hingston vacated the chair and Pihopa Kingi took over – after which Mr Kingi ‘sought resolutions from the floor to the effect that the Taumata should join with the Executive Council’.¹⁵⁴ Mr Hingston, in his subsequent report on the meeting, was of the opinion that there were ‘irreconcilable differences between the Taumata as a separate entity and Nga Kaihautu, the working group’. His estimate was that the taumata had insufficient support to ‘hold itself out to be the representative organization for Te Arawa in the negotiations with Government’. However, he reported that:

- (5) After considerable discussion, a motion by Whetu Whata (Ngati Pikiao) that a recommendation be made to add the three members of Te Taumata to the Executive of Nga Kaihautu was carried unanimously.
- (6) The effect of this motion effectively allows for unity and more importantly, spells out that there is only one body representing Te Arawa and any internal problems will not be aggravated by people playing one organization against the other. Problems that arise must now be dealt with internally.
- (7) As chairman I consider that the result was as much as could have been achieved. I recommend acceptance by Nga Kaihautu.¹⁵⁵

1.2.17 Further meetings of the executive council

As noted above, the executive council, once elected on 1 October 2003, had begun to meet at fairly regular intervals to discuss the rules that would govern their operation. They met on 7 November, held a teleconference on 10 November, and met again on 14 and 28 November. At the latter meeting, they resolved to amend the rules further, so as to ‘better reflect the commitment and obligations of the executive council members to the groups that had appointed them, and also the wider Te Arawa interests’. It was anticipated that the rules would be finalised at the next council meeting scheduled for 10 December 2003. In the event, they were not finalised at that meeting, since it was decided that there needed to be yet more discussion about ‘operating on a collective basis while also protecting the autonomy of each group’.¹⁵⁶ The rules submitted to the Tribunal in evidence were dated 12 March 2004.¹⁵⁷

Again as noted earlier, some iwi/hapu did not hold their mandating hui until late September, so still did not have executive council members in place at the time that the council first started meeting. It is not clear, from the documents we have available, at what point the

153. Document A8, exhibit PS2

154. Document A109, para 63

155. Document A8, exhibit PS2

156. Document A104, paras 16–18

157. Document A104(a)

members for Ngati Tura/Ngati Te Ngakau, Ngararanui, and Ngati Tuteniu began attending council meetings. Materoa Peni, the member for Ngati Tura/Ngati Te Ngakau, stated that he was nominated for council membership on 3 November 2003 and was ‘subsequently elected unanimously by the other Nga Kaihoutu members representing Ngati Te Ngakau/Ngati Tura’. He stated that he had attended ‘a number’ of executive council meetings since that time.¹⁵⁸ Mita Pirikia said he was elected as an ‘interim Executive Council representative’ for Ngati Tuteniu, and likewise said he had attended a number of council meetings, but gave no information about the date of his election nor when he had started attending meetings.¹⁵⁹

In the case of Ngararanui’s member, Wallace Haumaha said that he had sought separate representation for Ngararanui on the council after it had become evident that the kaihoutu members for Ngati Tura/Ngati Te Ngakau, on the one hand, and Ngararanui, on the other, were having difficulty working together. He stated that:

The response I received was that the Executive Council would prefer for Ngararanui to determine that issue for themselves. I then reiterated to the Executive Council at a meeting held before the council, that Ngararanui would require separate representation and requested the Executive Council to consider this request. I understand that the Executive Council met to discuss this issue and resolved, collectively as representatives of Te Arawa Iwi/hapu, that Ngararanui be represented separately on the Executive Council.¹⁶⁰

Mr Haumaha did not say when he first began formally attending council meetings as the member for Ngararanui.

1.2.18 The deed of mandate

Also under discussion during the November meetings, we presume, was a draft deed of mandate. In any event, on 1 December 2003 the executive council formally submitted a deed of mandate to ORS for consideration by the Crown.¹⁶¹ The deed comprised:

- ▶ a definition of the claimant group (noting that the executive council did ‘not yet’ have the right to represent Ngati Makino, Waitaha, and Tapuika);
- ▶ a list of ‘marae associated with Nga Uri o Te Arawa’;
- ▶ an indication of the area of land covered by the deed;
- ▶ a list of claims to be negotiated, including those of Waitaha, Tapuika, Ngati Makino, Ngati Tuwharetoa Te Atua Reretahi Ngai Tamarangi, and others (but specifically noting the exclusion of particular Ngati Rangiteorere and Ngati Whakaue claims already settled in 1993–94 and also the Te Arawa lakes claims);

158. Document A50, paras 9–11

159. Document A131, paras 9–11

160. Document A96, para 10

161. Document A1, para 20

1.2.19

- ▶ a section on the executive council (noting that the rules by which the body would operate were ‘currently being developed’);
- ▶ a section on ‘How the mandate was obtained’; and
- ▶ an agreement to provide details of the deed to other parties, if requested.

Appended were copies of supporting material, such as copies of advertisements, minutes of mandating hui, and lists of attendees.¹⁶²

Communication then ensued between OTS and Rawiri Te Whare concerning the text of a newspaper advertisement that would give public notification of the receipt of the deed. Sarah Jardine of OTS explained that the notice needed to include the names of ‘all Te Arawa iwi/hapu, including those who are not currently represented by the Executive Council’ (emphasis in original). It would then, she said, go on to explain which were currently represented by the council and which were not. With reference to marae, she noted that the list in the deed of mandate did not include Waitaha, Tapuika, or Ngati Makino marae, and she asked that Mr Te Whare supply a list of marae associated with those groups.¹⁶³ The following day, further communication from OTS indicated that the Te Arawa Trust Board had supplied additional hapu names and that OTS staff had identified yet others from an ‘examination of Wai claims’. They again requested that Mr Te Whare inform them of ‘any Ngati Makino, Tapuika and Waitaha marae that should be added to the list’.¹⁶⁴

Following these exchanges, the notice was finalised and, beginning in the second week of December 2003, OTS and the council jointly advertised the executive council’s deed of mandate in both national and regional (Bay of Plenty) newspapers. The advertisement invited ‘submissions, views or inquiries about the Deed of Mandate and the proposed negotiations’ and indicated that any submissions would be considered by the Crown and by the executive council. The closing date for submissions was given as 30 January 2004.¹⁶⁵

1.2.19 Assessment of the deed

An assessment of the deed was carried out by OTS staff and, independently, by TPK staff.¹⁶⁶

As part of the OTS assessment, some 52 submissions were considered in addition to the material in the deed and its supporting documents. Thirteen of those submissions opposed recognition of the deed,¹⁶⁷ and 39 were ‘form letters in support of the Executive Council’s mandate’. Key issues raised in the opposing submissions were apparently that:

- ▶ the council did not have a mandate to represent registered claims put in by certain groups;

162. Document A130

163. Document A11(a), p550

164. Ibid, p554

165. Document A1, para 20; *Dominion Post*, 13 December 2003

166. Document A1; doc A11(a), pp695–696

167. See, for example, doc A44(a)

- ▶ some people had been excluded from the mandating process or had subsequently withdrawn support;
- ▶ the Crown had not given adequate consideration to Te Arawa's existing tribal arrangements, policy, and structures; and
- ▶ OTS had not acted even-handedly.¹⁶⁸

These opposing submissions notwithstanding, OTS expressed itself satisfied overall that the executive council's mandating process was 'open and robust' and that the council had the 'broad support of the Te Arawa people'. Nevertheless, the report also noted that, given the size of Te Arawa, 'mandate maintenance and open and regular communication within the claimant community will be particularly important to achieve a durable settlement'.¹⁶⁹ OTS completed the report on 30 March 2004.

The assessment report from TPK mentioned only the deed of mandate and did not refer to the submissions. It expressed concern about:

- ▶ mandating hui minutes that were incomplete or inaccurate (or both);
- ▶ ambiguity over where mandate sits; and
- ▶ limited accountability to the claimant community.

It also noted the October petition and an urgency application made in February 2004 to the Waitangi Tribunal. Overall, however, it concurred with the assessment that had been made by OTS. The report was transmitted to the Minister of Maori Affairs, copied to MICOTOWN, on 31 March 2004.¹⁷⁰

1.2.20 Recognition of the deed

On 30 March 2004, MICOTOWN signed the assessment report from OTS, indicating agreement with the proposal to recognise the mandate of the executive council. The following day, the Minister of Maori Affairs also signed and indicated his agreement.¹⁷¹ On 1 April 2004, both Ministers wrote to Eru George, as the current chairperson of Nga Kaihautu o Te Arawa Executive Council, informing him of the Crown's recognition of the council's deed of mandate.¹⁷² On 2 April 2004, the Crown put out a press statement announcing that recognition.¹⁷³

The claims that are the subject of this report arise out of this decision by the Crown to recognise the deed. They focus on issues relating to both the Crown's assessment of the Te Arawa mandating process and its negotiation policy as applied in the Rotorua district.

168. Document A1, para 21

169. Ibid, paras 3, 4

170. Document A11(a), pp 695–696

171. Document A1

172. Document A1; doc A11(a), pp 697–698

173. Document A11(a), p 699

1.3 SUMMARY

The key points made in this chapter are as follows:

- ▶ In the late 1980s, the Crown and Maori began to express a desire to settle claims relating to forestry lands as quickly as possible.
- ▶ In 1999, the VIP project was set up to try to expedite this aim in so far as it related to forestry land in CNI.
- ▶ On 6 December 2002, MICOTOWN gave a key speech indicating the Crown's willingness to enter into a dialogue with CNI Maori about progressing CNI claims.
- ▶ In February and March 2003, a series of 'pre-mandating' hui were held for Te Arawa and 'interim representatives' were elected.
- ▶ Rawiri Te Whare, as part of the VIP management team, developed a mandating plan for Te Arawa.
- ▶ The majority of attendees at a hui on 17 June 2003 rejected the plan, but the voting criteria had not been made clear and the result was contested.
- ▶ A series of mandating hui went ahead, mostly between July and September 2003, and resulted in the election of 98 kaihautu members.
- ▶ At a meeting on 16 September 2003, kaihautu members met to elect representatives from among their number to sit on the executive council.
- ▶ The executive council submitted a deed of mandate to the Crown on 1 December 2003.
- ▶ On 1 April 2004, MICOTOWN and the Minister of Maori Affairs wrote to inform the council that its mandate had been recognised by the Crown.
- ▶ The claims that are the subject of this report arise out of the Crown's decision to recognise the deed.