

## CHAPTER 4

### THE ARGUMENTS OF THE RESPONDENTS

#### 4.1 INTRODUCTION

Unsurprisingly, the Crown was not the only respondent in this inquiry. The jurisdictional requirement of the Treaty of Waitangi Act 1975 of course necessitates that claims be made against the Crown, but in reality the claimants' concerns were equally directed towards the executive council. We clarify our jurisdiction to hear and report on the claims in the following chapter, since both the Crown and the council submitted that that jurisdiction was very limited and needed to be exercised with particular care. Here, though, we relate the respective arguments of the Crown and the council, which, although similar, were not without some important distinctions.

#### 4.2 THE CROWN

Crown counsel made both opening and closing submissions, but the latter incorporated and built on the former (as Crown counsel had signaled in opening<sup>1</sup>) and is the subject of our focus here. We do not here recount every aspect of the Crown's mandate recognition and assessment policies, as described by counsel, because we examine these in detail in our following chapter.

In its submissions, the Crown addressed some general matters before responding to the allegations of the specific groups in the inquiry. In setting out the Crown's arguments, we have followed this structure. In sum, however, Crown counsel made the following main points:

- ▶ The Crown's responsibility with regard to the mandating process is limited to ensuring that the final mandate meets minimum guidelines. The Crown is indifferent to which group ultimately receives the mandate.
- ▶ The Crown fulfilled this responsibility in assessing whether or not the executive council's mandate should be recognised. Those groups that wished to stand outside the mandate – namely Waitaha, Ngati Makino, and Tapuika – were excluded. Conditions were placed on the Crown's recognition of the executive council's mandate in order to address certain unresolved concerns of Te Arawa iwi and hapu.

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1. Paper 3.3.3, p2

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- ▶ The present claims against the Crown are distractions from a fundamental issue of division within Te Arawa. There is an ‘air of artificiality’ in bringing what are essentially internal Te Arawa disputes to the Tribunal in the guise of claims against the Crown.
- ▶ The Crown’s settlement policy has not been departed from in the case of Te Arawa. The Crown’s actions have been consistent with other districts. In any case, the Crown’s decision on the groups it accords priority to and negotiates settlements with is a political one, and is further constrained by the capacity of ORS to take on new negotiations.

We now describe the Crown’s submissions in more detail.

**4.2.1 The Tribunal’s role and relevant Treaty principles**

Crown counsel stressed what he described as the limits of the Crown’s role in the mandating process. The Crown, he said, is indifferent to which group finally received the mandate to negotiate. It is interested only in assessing whether or not the mandating process adopted meets its minimum guidelines. The Tribunal’s role in the inquiry was, therefore, to ensure that the mandating recognition process had been thorough and fair, not to review the mandate decision itself. Counsel compared the Tribunal’s role in this inquiry to that of a ‘reviewing Court’, referring to the following extract from the Tribunal’s *Pakakohi and Tangahoe Settlement Claims Report*:

It follows from the foregoing that we are clear as to what the Tribunal’s role is *not* in the context of claims of this nature. It is not the role of this Tribunal in investigating claims of this nature to substitute its own view of matters, for that arrived at by the Crown and the working party. There can be no room for second-guessing matters in decisions as delicate and fundamentally political as those relating to the recognition of mandate for the purpose of Treaty settlements. [Emphasis in original.]<sup>2</sup>

Indeed, counsel submitted that the Crown’s decision to accept or reject a deed of mandate is ‘purely political’.<sup>3</sup>

Counsel noted that issues were raised in new evidence filed for the Wai 1150 inquiry that had not been brought to the attention of the Crown at the time that it made its mandate decision. He submitted that any evidence that was not known to the Crown at the time of the mandate decision could not be considered by the Tribunal in reviewing that decision. He added that the Crown would consider this new evidence as a matter of course, regardless of the outcome of the Tribunal hearing.<sup>4</sup>

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2. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p56

3. Paper 3.3.10, pp8–9

4. *Ibid*, p7

Counsel asserted that there was ‘some artificiality’ to the claims brought against the Crown in this inquiry. He submitted that at the heart of the matter were disputes within Te Arawa over who should have facilitated the mandating process and which group should have received the mandate. In support of this statement, he referred to the ‘directly conflicting and irreconcilable’ evidence which had been filed regarding these disputes. Such issues, he argued, were internal matters of concern to Te Arawa only. The Crown had no responsibility in this area. Counsel added that ‘the claims disclose no discernible complaint about the election of the kaihautu members, that is, the individuals selected as representatives of the various hapu/iwi’, and that it was only when ‘the matter crystallised into the selection of a mandated body, and the awareness of those who were elected, that real concern appears to have arisen’.<sup>5</sup>

Counsel emphasised that the Crown’s role in assessing and recognising mandates is a difficult one, requiring it to find a balance between ‘ensuring transparency, accountability and representation . . . and the need for mandate to be developed and recognised in accordance with the relevant tikanga’.<sup>6</sup> He stated that, in many cases, ‘no perfect solution’ to mandating recognition exists, and that a compromise between parties is required. He explained that the Crown does not consider it necessary to gain the consent of every individual within a claimant group before accepting a mandate. The Crown did, however, have a Treaty obligation to act in good faith in its dealings with groups during the mandating process. Counsel particularised the Crown’s specific responsibilities in this area as:

- ▶ Assessing the proposed mandate to ensure it meets the Crown’s minimum guidelines;
- ▶ Being informed of the support for the proposed mandate;
- ▶ Being informed of any opposition to the proposed mandate; and
- ▶ Taking the matters of which it has been informed into account in reaching decisions about the mandate.<sup>7</sup>

Counsel submitted that, in its decision to recognise the executive council’s mandate, the Crown had met these requirements. The Crown’s decision to recognise the mandate was based on its finding that there was broad support for the mandate from within Te Arawa, and that those groups who wished to stand outside the mandate (Waitaha, Ngati Makino, and Tapuika) were able to do so. Furthermore, the Crown placed conditions on its recognition of the mandate (which we discuss at section 4.2.3(2) and (3)), to ensure that certain issues (regarding Ngati Rangiteaorere, Ngati Rangiwewehi, and Ngati Rangitahi) were addressed by the council. Therefore, counsel implied, the Crown had not breached Treaty principles in recognising the council’s mandate.<sup>8</sup>

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5. Ibid, p9

6. Ibid, p10

7. Ibid, p11

8. Ibid, pp11–12

**4.2.2 Crown policy**

Counsel said that the Crown's policy on groups obtaining a mandate to enter into settlement negotiations had several key aspects. In sum, he said (noting that the affidavit of Mr Hampton had gone into these matters in more detail), the Crown preferred comprehensive settlements with 'large natural groupings of tribal interests'. Furthermore, he explained, priority was accorded 'to claimant groups that reduce, rather than increase, the potential number of future settlements by joining together for negotiations'. With regard to the mandating process itself, counsel stressed that the Crown did not confer a mandate and that such a decision was for a claimant group to make itself. Instead, the Crown's role was limited to ensuring that the process gone through to obtain the mandate was 'robust and transparent'. This in part was confirmed by calling for and assessing submissions on the advertised deed of mandate. Any recognition of a mandate, he explained, was 'conditional on the representatives retaining their mandate throughout negotiations'.<sup>9</sup>

In specific response to the submissions of the claimants on the Crown's policy, Mr Hampton made a number of additional verbal comments to what was contained in his written affidavit. He said that there had been some confusion about the shift in the language of *Ka Tika a Muri* from the 1999 edition, which had stated that the Crown's preference was to settle with 'iwi', to the 2002 version, which referred to 'large natural groups'. He said that the intention had been not to introduce and require 'mega settlements' but rather to allow for necessary flexibility. For example, he said that the stipulation about settling with 'iwi' placed some onus on the Crown to say whether a claimant group was an iwi or not, which the Crown did not want or need to do. Furthermore, the Crown continued to negotiate with groups smaller than 'iwi' – such as Ngati Whatua ki Orakei – so the policy can actually be used to negotiate with groups of iwi or groups *within* iwi, depending on what claimant communities want. In sum, he said, the 'large natural groups' policy was 'an attempt to balance . . . matters of tikanga and whakapapa with practicality and efficiency'.<sup>10</sup>

Mr Hampton explained that ORS had the capacity to make about three 'large natural group' settlements a year and that the 'best case scenario' was the requirement for at least another 50 settlements nationwide. Within 15 years, therefore, the Crown would be 'well through the process'. If, however, the number of settlements doubled, he said, it would obviously take much longer than that. He added that, while they were 'useful', the Tribunal's comments in its *Mohaka ki Ahuriri Report* about the Crown's 'large natural groups' policy could not be taken too far, because the Crown was 'never asked to provide any evidence in that hearing on what its policy drivers were'. The answer, he said, was to ensure that the distinctive interests of the groups party to a settlement were properly recognised, and this, he argued, was what the Crown was doing in its negotiations with Te Arawa.<sup>11</sup>

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9. Paper 3.3.10, pp12–13

10. Transcript 4.1.1, p4

11. Ibid, pp5–6

### 4.2.3 Responses to specific claimant groups

#### (1) *The Te Arawa taumata*

Crown counsel considered that the Te Arawa taumata's claim had two main elements: first, that the Crown had failed to treat with the taumata and had preferred to deal with Mr Te Whare; and, secondly, that the Crown's mandate assessment was incorrect.

Counsel began by responding to the claimants' assertions that the taumata had some kind of 'Te Arawa mandate', based on 'popular support', to facilitate the progress of mandate plans for Te Arawa. Counsel argued that the taumata had not provided explicit evidence of the basis of this popular support. He stated that the taumata had not received the endorsement of any hui before that of the 5 March 2003 hui held at Tamatekapua. In any case, the Crown did not acknowledge any outcome from that hui, since its agenda had been changed without sufficient prior notification.<sup>12</sup>

Next, counsel challenged the claimants' attempts to infer widespread hapu/iwi support for the taumata on the ground that support for the VIP taumata's role in the Tribunal process necessarily reflected support for the taumata to facilitate the Te Arawa mandating process. He argued that it was important to distinguish between, on the one hand, support for the VIP taumata among Te Arawa registered claimants within a Tribunal context in September 2001, and, on the other, the level of support among Te Arawa iwi/hapu for the taumata to facilitate the mandating process in 2004. Counsel acknowledged the mana of each of the individuals on the taumata and their role in early mandating and settlement discussions, but he rejected the assertion that the taumata had any exclusive role in facilitating the mandating process for Te Arawa.<sup>13</sup>

Counsel rejected the claimants' assertions that, because the VIP taumata had identified the importance of a robust mandating process in its dealings with the Tribunal, it had in effect signaled to the Crown its intention to assume the role of facilitating the process. He argued that the VIP taumata's observation that a robust process was important was 'nothing more than a truism' and that it did not in itself secure any exclusive role for the VIP taumata or the Te Arawa taumata in the mandating process.<sup>14</sup> Counsel argued that the very fact that mandating hui were held and that kaihautu members were elected demonstrated that the iwi and hapu of Te Arawa did not believe that the taumata had an exclusive role in facilitating the mandating process. In fact, the iwi and hapu of Te Arawa had demonstrated a willingness to follow Mr Te Whare's mandating plan.<sup>15</sup>

Counsel rejected the notion that the Crown had exhibited favouritism in its consideration of Mr Te Whare's mandate plan. He argued that the Crown was in no position to dismiss the plan since there was no 'previously acknowledged authority or mandate' and that, if anything,

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12. Paper 3,3.10, p18

13. Ibid, pp18-19

14. Ibid, p19

15. Ibid, pp19-20

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the Crown would have ‘taken sides’ had it dismissed Mr Te Whare’s strategy. Counsel said that the claimants’ allegations in this matter relied heavily on the letter of 26 June 2003 from Mr Philipson to the Te Arawa claimants, which said that ‘the Crown has always viewed Mr Te Whare as having a facilitative role’. He stressed that the sentences which followed this statement gave the proper context for Mr Philipson’s comment:

This does not imply that the Crown recognises his representative status as being different or more elevated than for any other members of Te Arawa with whom we have been talking. In that light the Crown is indifferent to whom wider Te Arawa finally accord the mandates to represent them. Our primary concern is that any process is open and robust.

Nor, said counsel, could anything be drawn from OTS’ meetings with Mr Te Whare, which were both routine and necessary in order to ensure that the proposed mandate strategy was consistent with the Crown’s minimum guidelines. In short, said counsel, the claimants’ allegation that the Crown had wrongly neglected to treat with the taumata must fail.<sup>16</sup>

Counsel then turned to the taumata’s allegations concerning the Crown’s assessment of, and its decision to recognise, the executive council’s mandate. First, counsel summarised the events leading up to the mandate recognition decision, beginning with the public notification of the receipt of the deed of mandate (which called for submissions), and traversing the issues which officials took into account in making their recommendation to Ministers that the mandate be recognised. Counsel also responded to some of the key allegations made by the submitters. He said that, while the executive council had not been referred to in resolutions passed at mandating hui, it was approved by kaihautu members, and, in any case, the ‘internal structure of Te Arawa was a matter for Te Arawa, not the Crown’. He added that it was incorrect that council members held ‘total power’ in respect of their iwi/hapu because provision existed for them to be removed from office. With respect to the issue of whether certain groups had a right to be separately represented on the kaihautu (such as Ngati Whaoa and Ngati Tuteniu), counsel contended that ‘this was a matter for Te Arawa’, and the council had advised that ‘these matters had been resolved in accordance with the relevant tikanga’. Nevertheless, officials were of the view that the 14 iwi/hapu on the council ‘represented the core of Te Arawa’.<sup>17</sup>

Counsel said that the taumata placed much reliance on the 1 October 2003 petition signed by a large number of kaihautu members. This petition, he argued, did little more than raise a concern about the position of those who had not held their mandating hui before the 16 September hui. He also contended that a number of petitioners subsequently withdrew their support for the petition. These and other factors influenced the weight that the Crown placed upon it, he said. He rejected any notion that the Crown’s assessment was ‘blinded by a desire to progress settlements’, citing – for example – the conditions stipulated with respect to Ngati

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16. Paper 3.3.10, pp20–22

17. Ibid, pp22–25

Rangitahi, Ngati Rangiwewehi, and Ngati Rangiteaorere (see below). In conclusion, counsel submitted that the Ministers' decision to recognise the executive council's mandate was made on the basis of fully considered advice from officials in OTS and TPK.<sup>18</sup>

Counsel did not note the separate advice tendered by TPK on the deed of mandate, but Mr Hampton did comment upon it. Mr Hampton acknowledged that TPK brought 'four issues' (which he did not name) to the Ministers' attention, but he said that these were 'considered by OTS officials who concluded that they did not justify refusing to recognise the mandate'. Mr Hampton felt that TPK's concerns were, in any event, largely addressed by additional material provided by the executive council during the assessment process, such as omitted minutes and the council's trust deed. In any case, he said, TPK's overall recommendation to Ministers was that the council's mandate be recognised.<sup>19</sup> We discuss the TPK report in our concluding chapter.

**(2) Ngati Rangiwewehi and Ngati Rangiteaorere**

While, as Crown counsel noted, no separate claims were filed by members of Ngati Rangiwewehi or Ngati Rangiteaorere, counsel dealt with them under their own subheading in the context of the conditions that the Crown had placed upon its recognition of the executive council's deed of mandate.

Counsel noted that a submission on the deed of mandate had been filed by Te Ururoa Flavell complaining that Ngati Rangiwewehi had been excluded from the mandating process until late in the piece, and had thus been unable to influence the development of that process. Counsel said, however, that Mr Flavell and members of Ngati Rangiwewehi were present at the 16 September hui, and that subsequently Ngati Rangiwewehi agreed to elect representatives to the kaihautu and sought to appoint Mr Flavell to the executive council.<sup>20</sup> Officials considered, he said, that the available information showed support for the executive council and the negotiations process. Therefore, a condition placed on the recognition of the deed of mandate was that the council assist Ngati Rangiwewehi in making its appointment.<sup>21</sup> Under cross-examination, Mr Hampton added that, if Ngati Rangiwewehi had now decided 'not to be part of this process via the same processes they decided to be part of it, the Crown will need to consider that'.<sup>22</sup>

With respect to Ngati Rangiteaorere, counsel said that their situation was similar to that of Ngati Rangiwewehi in that they had also not yet successfully appointed a member to the executive council. However, he submitted that no members of Ngati Rangiteaorere had raised any concerns about the executive council's mandate in the submissions process, although

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18. Ibid, pp 26–27

19. Document A114, para 141

20. This appointment could not be confirmed because 'appropriate process' had not been followed, according to Mr Hampton: see doc A114, para 159.

21. Paper 3.3.10. p28

22. Transcript 4.1.1, p120

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some concerns had been raised in correspondence about the status of Ngati Tuteniu. Further concerns about the mandating process were new and had not been made known to the Crown at the time the deed of mandate was assessed, said counsel. In the circumstances, he said, the Crown was justified in concluding that Ngati Rangiteaorere supported the kaihautu and the executive council. Recognition of the deed of mandate was thus made subject to the council assisting Ngati Rangiteaorere to make its appointment.<sup>23</sup>

**(3) Ngati Rangitahi**

Counsel said that the concerns of the Wai 996 claimants were narrow and appeared to come down to:

1. Whether there should have been more than one hui for Ngati Rangitahi;
2. Whether the condition was correctly described as requiring 'reconfirmation'.

Counsel argued that the first of these matters was primarily the concern of Te Arawa and Ngati Rangitahi rather than the Crown. Indeed, at their 16 July 2003 hui, Ngati Rangitahi chose to take the option available to it of deferring its decision on the mandate until it held a second hui to consider the elements of the mandate proposal. On the second point, counsel submitted that the condition placed on the executive council's mandate explicitly recognised the possibility that Ngati Rangitahi might, at a future hui, decline to give its mandate.<sup>24</sup> Counsel understood that the 'reconfirmation' hui had been held on 17 June 2004 and said that the Crown was waiting to be formally advised of its result.<sup>25</sup>

**(4) Ngati Makino and Waitaha**

Counsel began by noting that the executive council did not claim a mandate to represent Ngati Makino and Waitaha and that the Crown had explicitly noted this in its recognition of the mandate. Counsel agreed that the Crown had 'encouraged' these groups to join a Te Arawa-wide settlement but denied that the Crown had sought to 'compel' them or threaten them with 'punitive delays'. Instead, the Crown was simply trying to 'inform these groups of the impact of their decisions so that they could make informed decisions as to whether or not they should mandate the Executive Council'. Counsel suggested that the Ngati Makino and Waitaha claims were effectively that the Crown 'should accord priority to negotiations with any group that presents itself for negotiations irrespective of their sizes, their distinctiveness or whether they have a Tribunal report'.<sup>26</sup>

As we noted above, Mr Hampton rejected the suggestion of counsel for Wai 664 and Wai

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23. Paper 3.3.10, pp28–29

24. Mr Hampton explained that this condition was placed because the minutes of the second Ngati Rangitahi hui, on 10 August 2003, did not sufficiently demonstrate Ngati Rangitahi support for joining the kaihautu: see doc A114, paras 171–177.

25. Paper 3.3.10, p30

26. Ibid, pp31–32

275 that the Crown had shifted to a policy of ‘mega settlements’. Mr Hampton also made some other specific responses to the claims of Ngati Makino and Waitaha. As did counsel, he denied that these groups had been unduly pressured to join the executive council or had effectively been punished by being told that they would have to wait many years for a settlement for not having come on board. He stressed that this was ‘no punitive delay’ but just ‘the reality of how long it would take anyway’ were it not for the opportunity that currently existed to have a quicker settlement through participation with the rest of Te Arawa. No group was being sent to the ‘back of the queue’, he said, because there ‘isn’t a queue for them to go to the back of’. All there was was a prioritisation of progressing claims in the CNI.<sup>27</sup>

With respect to the suggestion of counsel for Wai 275 that the Crown should consider ‘multi party’ negotiations, Mr Hampton said his experience was that they were ‘the most inefficient and unfruitful negotiations I have been involved in because of the simple number of parties’. He said that the Crown had attempted something like this in northern Taranaki with Ngati Tama, Ngati Mutunga, and Te Atiawa and that it had been unsuccessful and tension-ridden. The Crown’s experience, he said, was that such negotiations were ‘as time consuming’ as entirely separate sets of negotiations. He drew a distinction with the treatment currently being afforded Ngati Manawa and Ngati Whare, stating that those two groups were being dealt with together only on the basis that they work together and that there be a single negotiation. In sum, he said, ‘the Crown has more negotiation experience than . . . any of the iwi parties’ and ‘knows what works and what hasn’t worked’. The Tribunal had almost always found that the Crown’s settlement policies and practices were Treaty-compliant when called upon to inquire, he said.<sup>28</sup>

In sum, said counsel, the Crown did not consider it appropriate for the ‘fundamental parts of the Crown’s negotiation and settlement policy’ to be questioned in the context of this urgent inquiry. Counsel cited the comments of the Tribunal in its *Ngati Awa Settlement Cross-Claims Report* that the Tribunal’s focus was not on whether it liked the Crown’s policy or not but on the Treaty and whether the Crown had ‘fallen foul’ of it. Moreover, said counsel, the Tribunal in its *Pakakohi and Tangahoe Settlement Claims* and *Mohaka ki Ahuriri* reports had expressed support for the policy of settling with ‘large natural groups’. There was simply not sufficient evidence in this inquiry, said counsel, for the Tribunal to ‘make decisions on who constitutes a large natural grouping for the purpose of settlement negotiations with the Crown’. Furthermore, according priority to one group or another was a ‘high level political decision’, and the Crown simply did not have the resources to negotiate ‘all settlements at once’. However, said counsel, the Crown’s policy of seeking to ‘deliver the benefits of settlement to as large a group of Maori as early as possible’ was in line with the Crown’s obligations under the Treaty.<sup>29</sup>

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27. Transcript 4.1.1, p7

28. Ibid, pp 8–10

29. Paper 3.3.10, pp35–37

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Finally, counsel said that if the Tribunal upheld the claims of Ngati Makino and Waitaha it would have ‘serious precedential effects’, such as requiring the Crown to ‘enter into negotiations with any group that presented itself to the Crown’.<sup>30</sup>

**(5) Ngati Tamakari**

Counsel submitted that the substance of Ngati Tamakari’s claim was that they had been denied direct representation on the executive council. Counsel explained that the executive council had advised the Crown that Ngati Tamariki were ‘an old re-emerging hapu’. Counsel said that Mr Whata-Wickliffe’s claim to separate representation for Ngati Tamakari at the 16 September 2003 hui had not been supported. Ultimately, said counsel, ‘Decisions regarding which . . . hapu should have representative seats on the Executive Council is a complex issue of tikanga and is not for the Crown.’ Moreover, Mr Whata-Wickliffe remained a kaihautu member, and thus the decision to recognise the council’s mandate as encompassing Ngati Tamakari ‘cannot be described as being in breach of the Treaty’.<sup>31</sup>

**(6) Ngati Tuteniu**

With regard to the claim that Ngati Tuteniu had decided to withdraw from the kaihautu, counsel drew a distinction between the decision of the Ngati Tuteniu trust to withdraw its Wai 980 claim from the mandate of the executive council and ‘the Ngati Tuteniu hapu’ electing to do so. The latter had not occurred, said counsel. Furthermore, he said, a more recent meeting of the Tuteniu trust had decided to reaffirm support for the council.<sup>32</sup>

**4.3 THE EXECUTIVE COUNCIL OF NGA KAIHAUTU O TE ARAWA**

The executive council of Nga Kaihautu o Te Arawa made the following main points:

- ▶ The Tribunal has limited jurisdiction to inquire into the claims because they relate principally to the executive council’s mandate, which is an internal matter for Te Arawa.
- ▶ The Crown’s decisions with regard to mandate and negotiation ‘form part of a complex process of political judgment’ and, as such, are not justiciable.
- ▶ Any investigation by the Tribunal would need to be limited to matters of error in process, the misapplication of tikanga Maori, or apparent irrationality on the part of the Crown.

We now describe the executive council’s submissions in more detail, but without (so far as it is possible) repeating material already covered in the earlier part of this chapter.

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30. Paper 3.3.10, pp37–38

31. Ibid, pp38–39

32. Ibid, pp39–40

#### 4.3.1 Tribunal's role and Treaty principles

Counsel for the executive council, Mr Stone, submitted that the issues raised by the claimants in this inquiry were 'clearly directed at the Executive Council' and that very little of the evidence submitted was in fact leveled against the Crown. Rather, he said, the bulk of the claimants' evidence relates to 'actions, or to the establishment of the Executive Council'. In his submission, the claim issues 'relate squarely to the mandate of the Executive Council' and, as such, are an internal matter for Te Arawa.<sup>33</sup>

In this context, counsel referred to a passage from the *Pakakohi and Tangahoe Settlement Claims Report*, which commented that:

Although the claims are technically aimed at the Crown, they mask what is essentially an internal dispute between closely related kin groups as to which organisation at which level speaks for them. The Tribunal was not established to deal with these categories of disputes.<sup>34</sup>

With regard to justiciability, counsel noted that it is well-established in law that 'decisions regarding high level political and policy issues' cannot be reviewed by any court. Like Mr Soper, Mr Stone submitted that the nature of the Crown's decision-making in relation to mandate and negotiation is purely political. While acknowledging that the Tribunal's jurisdiction 'potentially extends beyond a review of the exercise of a statutory power of decision by the Ministers involved', he urged that the Tribunal exercise extreme caution in intervening in what is a political process.<sup>35</sup>

Again drawing on the *Pakakohi and Tangahoe* report, it was Mr Stone's further submission that, if the Tribunal is nevertheless of the opinion that there is a case for the Crown to answer, then the mandate of the executive council should be subjected to the Tribunal's close scrutiny only if the claimants can prove that:

- ▶ there had been an error in the process undertaken by the Crown;
- ▶ the Crown had misapplied tikanga Maori; or
- ▶ the Crown had acted irrationally.<sup>36</sup>

Counsel also reminded us that, in considering any case against the Crown, our focus should be solely on whether the Crown's acts or omissions were compliant with the principles of the Treaty of Waitangi, and he stressed that those principles were developed to govern the relationship between Maori and the Crown, not Maori and Maori.<sup>37</sup> It was his submission that: 'The issue that the Tribunal is faced with in this Urgent Inquiry concerns the relationship between the iwi/hapu of Te Arawa and between the members of the iwi/hapu of Te Arawa.' The issue, he said, is not one between Te Arawa and the Crown.<sup>38</sup>

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33. Paper 3.3-7, paras 1.1, 1.2, 2.1, 2.5

34. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report*, p55

35. Paper 3.3-7, paras 4.13-4.14

36. Ibid, paras 1.2, 4.15

37. Paper 3.3-20, paras 2.1, 9.4

38. Ibid, paras 9.4, 10.2

However, in the event of us finding that there were acts or omissions of the Crown that did not comply with the principles of the Treaty, counsel further drew to our attention the stipulation in section 6(1) of the Treaty of Waitangi Act 1975.<sup>39</sup> That subsection states that there must also be prejudice, or likely prejudice, to the claimants as a result of the Crown's acts or omissions. Counsel submitted that there was no such prejudice and, indeed, he stated his opinion that it is the iwi and hapu that support the executive council that will be prejudicially affected if the Tribunal decides to intervene in matters that are internal to Te Arawa.<sup>40</sup>

Enlarging on his submission that there was no existing or potential prejudice to the Te Arawa taumata or other claimants, Mr Stone pointed out that they had participated in the mandating process and were entitled to continue doing so. If some executive council members disagreed with the council's rules, those rules could be changed, he said, as long as the other members were in agreement with the changes. Further, he observed that the direct negotiations were still in their infancy and that recognition of the executive council's mandate was but the start of the settlement process. Any proposed settlement, he noted, would need to be put to the people and approved by them.<sup>41</sup>

Having thus argued against any but the most narrow limits for a Tribunal inquiry, counsel went on to challenge the claims put forward by the various claimants.

#### 4.3.2 The period leading to formal mandating

In counsel's submission, the process leading up to the mandating of the executive council (for the purposes of direct settlement negotiations with the Crown) was not rushed, as the taumata alleged. Rather, it commenced as early as 2001. At that time, counsel argued, the VIP taumata was already operating as a vehicle through which claimants before the Tribunal could consider the issues associated with entering into direct negotiations with the Crown.<sup>42</sup>

However, counsel contended that none of the evidence put before the Tribunal supported the view that the members of the VIP taumata were authorised to facilitate any process of mandating for settlement purposes. Indeed, he went further and suggested that there was evidence that Te Arawa iwi/hapu did not want the VIP taumata to be involved in any such process. In support of the first contention, he took up points made by Rawiri Te Whare to the effect that the primary focus of the VIP taumata was to progress claims made in the Tribunal on behalf of specific claimants and that its role was limited to certain Tribunal matters. It was, according to both counsel and Mr Te Whare, a body that acted for certain claimants before the Tribunal and was never mandated by, or representative of, CNI iwi/hapu. Further, counsel

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39. Paper 3.3.7, para 4.8

40. Ibid, paras 4.9, 4.10

41. Ibid, paras 4.9, 4.11

42. Ibid, paras 5.3–5.4; paper 3.3.20, paras 3.1–3.3

noted that the northern region members within the VIP taumata were appointed, not elected.<sup>43</sup>

In counsel's submission, it was the Crown that approached CNI claimants, in late 2001 and early 2002, about the possibility of entering into direct negotiations for the settlement of historical Treaty claims. This led to informal discussions during 2002 between MICOTOWN and CNI representatives. In cross-examination, Mr Te Whare mentioned the Minister's approach to Tumu Te Heuheu and underlined that it had been made to Mr Te Heuheu in his capacity as a tribal leader. Counsel contended that the Te Arawa taumata should have been aware of these discussions and pointed out that some taumata members had even participated at various times. Mr Te Whare also countered taumata allegations of secrecy around some of the discussions, saying that the Minister had specifically asked for some of the meetings to be kept small.<sup>44</sup>

As noted earlier in this report, on 6 December 2002 a meeting was held at Parliament between MICOTOWN and a group of prominent CNI Maori. Mr Te Whare, in his affidavit, described the group as 'a widely representative delegation from CNI Iwi'.<sup>45</sup> Following that meeting, two working parties were set up, one for the Crown and one for the CNI iwi, and Mr Te Whare noted that the latter was chaired by Tumu Te Heuheu.<sup>46</sup> The CNI iwi working party, said Mr Stone, considered that the decision about whether or not to enter into direct negotiations with the Crown was one that should be made by iwi/hapu. He emphasised that the working party's opinion was that the decision should not be made 'solely by the claimants before the Tribunal within the CNI district represented through the VIP Taumata' and nor could it be made by the membership of the VIP taumata.<sup>47</sup>

In Mr Stone's submission, it was around this time (early 2003) that members from the northern region of the VIP taumata began to separate off and describe themselves as the Te Arawa taumata. He contended that this step was to be expected and that 'It was perhaps a logical conclusion that those VIP Taumata representatives for the Northern Region would seek to represent the iwi/hapu within that region for direct negotiation purposes'. However, he rejected any inference that the taumata ever acquired a mandate to negotiate and stated that there was no evidence before the Tribunal to show that the taumata had even assumed its purported facilitative role, 'except through reference to what the Te Arawa Taumata considers as key resolutions passed at the 5 March 2003 hui'.<sup>48</sup> We take this to be a reference to the resolutions, first, to support an entry into formal discussions with the Crown and, secondly,

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43. Paper 3.3.7, paras 5.5–5.6; paper 3.3.20, para 3.4; doc A109, paras 7–11

44. Paper 3.3.7, paras 5.7–5.8; paper 3.3.20, paras 3.5–3.6

45. Document A109, para 25

46. *Ibid*, para 26

47. Paper 3.3.7, paras 5.9–5.11; paper 3.3.20, para 3.8

48. Paper 3.3.20, para 3.10

to ‘support and uphold the present VIP Taumata and proposed legal entity, that is, VIP Taumata Incorporated Society’.<sup>49</sup>

Regarding the hui of February and March 2003, Mr Stone contended that they were iwi/hapu hui, and not solely claimant hui.<sup>50</sup> The hui were, he said, specifically to gauge whether Te Arawa iwi and hapu wanted to enter into direct negotiations with the Crown.<sup>51</sup> Further, the interim representatives elected as a result of those hui included members of the Te Arawa taumata. While the hui were not, in counsel’s submission, mandating hui as such, he nevertheless contended that the people thus elected were representative in a way that the taumata was not.<sup>52</sup>

With regard to the hui of 5 March 2003 in particular, both Mr Stone and Mr Te Whare denied that it had any validity in terms of conferring any mandate on the Te Arawa taumata to progress settlement negotiations or to have any facilitative role towards that end. Mr Te Whare stated that it had been advertised as a reporting hui and that the taumata ‘sought to impose a different agenda for the meeting on the day’. In any event, as both he and Mr Stone pointed out, the resolution passed referred only to the VIP taumata and not to the Te Arawa, or northern region, taumata.<sup>53</sup>

Responding to the taumata’s allegations of ‘private meetings’ in the period following the February–March hui between Mr Te Whare and others on the one hand and between Mr Te Whare and ORS on the other,<sup>54</sup> counsel stated that these were meetings between the Crown and the interim representatives.<sup>55</sup> Both he and Mr Te Whare also stated that taumata members were present at some of the meetings.<sup>56</sup>

With regard to the development of a mandating plan for Te Arawa, counsel stated that a draft CNI settlement plan – Te Ara Tika – was drawn up by the VIP management team (which included Mr Te Whare himself), largely because it was the VIP project that had the capacity to do it. As part of the settlement plan, a draft mandating plan for Te Arawa was also prepared. The management team was directed to draw up the plans by the VIP taumata, which, counsel noted, included the members of the Te Arawa taumata.<sup>57</sup> Both Mr Stone and Mr Te Whare further contended that the taumata had had ample opportunity to comment on the resulting draft mandate plan and that members had indeed given their approval to it.<sup>58</sup> Likewise, they asserted that it had received the approval of the majority of Te Arawa interim representatives present at the 17 June 2003 hui, who, according to the original intention of the meeting, were

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

50. Paper 3.3.20, para 3.12

51. Paper 3.3.7, paras 5.14–5.15

52. Paper 3.3.20, paras 3.11–3.13

53. Paper 3.3.7, paras 5.17–5.22, paper 3.3.20, paras 3.14–3.22; doc A109, paras 32–35

54. Claim 1.1.1, paras 43–45

55. Paper 3.3.7, para 5.25; paper 3.3.20, para 3.24

56. Paper 3.3.7, para 5.25; paper 3.3.20, para 3.24; doc A109, para 40

57. Paper 3.3.7, paras 5.25, 5.27; paper 3.3.20, para 3.25

58. Paper 3.3.7, paras 5.25–5.26; paper 3.3.20, paras 3.25–3.28

the only people who should have voted. This endorsement was, they said, reinforced by direct approaches to Mr Te Whare after the meeting.<sup>59</sup>

#### **4.3.3 The formal mandating hui, July to September 2003**

Counsel noted that the Te Arawa taumata had accepted that the majority of the mandating hui had reached an acceptable standard of good conduct and legitimacy and that no issues had been raised by any party in respect of most of them.<sup>60</sup>

With respect to the minutes, Mr Stone's contention was that it had never been intended to record all the discussion – only the resolutions passed and the number of votes cast. He acknowledged that there were 'typographical errors' but stated that these did not alter the outcome of the hui, and he further observed that few complaints about the minutes had been raised during the formal submission process. Countering a related complaint about inaccurate attendance registers, counsel submitted that it was always difficult to ensure that all those present at a hui recorded their names on the attendance list. However, he stressed that there had been specific encouragement, at every hui, for people to sign the register.<sup>61</sup>

#### **4.3.4 The 16 September hui and formation of the executive council**

Regarding the allegations about the 16 September hui, and the manner in which the executive council structure was adopted, counsel observed that most of the claimant evidence had been provided by individual kaihautu members who appeared dissatisfied with the outcome. He suggested that they were, in most cases, 'a minority of the Kaihautu members appointed for the relevant Te Arawa iwi/hapu'.<sup>62</sup>

Assertions that people were unaware of any proposal to select an executive body for the kaihautu were, in Mr Stone's submission, unfounded. Both he and Mr Te Whare pointed to three communications that had been sent out to kaihautu members prior to the hui, two of which included explanatory material. Further, they contended that there was additional explanation at the hui, and also discussion, before the vote for executive council members took place. Opinion, they say, was overwhelmingly in favour of the proposed structure.<sup>63</sup> Mr Te Whare also pointed out that Te Arawa taumata members participated in the election of executive council representatives for their respective iwi/hapu.<sup>64</sup>

With regard to those iwi/hapu who had not yet held their mandating hui at the time of the 16 September hui, and who thus did not yet have kaihautu members, counsel submitted

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59. Paper 3.3.7, paras 5.27–5.31; paper 3.3.20, paras 3.29, 3.31–3.36; doc A109, paras 45–49

60. Paper 3.3.20, paras 4.2, 4.4

61. Ibid, paras 4.5–4.14

62. Paper 3.3.7, para 8.1; paper 3.3.20, para 5.1

63. Paper 3.3.7, paras 8.2–8.5, 8.8–8.9; paper 3.3.20, paras 5.2–5.6, 5.10–5.11; doc A109, paras 58–59

64. Document A109, para 62

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that they nevertheless all had representatives present at the meeting. Further, of those groups, only the kaihautu members for Ngati Rangiwewehi, he said, had since expressed disagreement with the structure. However, he then went on to observe that Ngati Rangiwewehi had elected those kaihautu members in the knowledge that an executive council was already in existence.<sup>65</sup> He also observed that the majority of groups who did not have kaihautu members at the time of the 16 September hui had since indicated agreement with the structure and were actively participating in the executive council. Counsel contended that it was not possible to delay the 16 September hui until all kaihautu members had been appointed because ‘a timeframe had been set’. If there was any remedy to be provided, he said, it was within the agreed structure.<sup>66</sup>

Countering allegations made against Mr Te Whare with regard to the allocation of seats on the executive council, Mr Stone contended that, had the composition of the council done ‘violence to settled tribal structures’, it would have been roundly rejected – which it was not. In counsel’s submission, the number of positions available on the council for each of the iwi/hapu was approved unanimously at the 16 September hui. He did, however, note Mr Rangiheuea’s oral evidence as to the difficulty of achieving fair representation and said that, if concerns were held by individuals within Te Arawa, then those people should use the internal processes of Te Arawa to resolve them.<sup>67</sup>

#### 4.3.5 The executive council’s rules

With regard to the rules for the operation of the executive council, Mr Stone stressed that they had been developed over a period of months and had been the subject of much discussion within the council, as witnessed by the affidavit of Eruini George.<sup>68</sup> He further emphasised the concern expressed by council members that the collectivity necessary to the negotiation process should not undermine individual iwi/hapu autonomy. While noting that the copy of the rules submitted in evidence did not include the schedules, he confirmed that they did include provision for kaihautu members to appoint and remove their respective council representatives and likewise provided for new kaihautu members to be elected (a copy of the schedules was in due course provided to us). He stated that they also included reporting requirements and a provision for individual iwi/hapu to have a say on items of redress that related specifically to them. Lastly, he observed that there was provision for the rules to be amended.<sup>69</sup>

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65. Paper 3.3.7, para 8.6; paper 3.3.20, para 5.8

66. Paper 3.3.7, para 8.7; paper 3.3.20, paras 5.9, 5.12

67. Paper 3.3.20, paras 6.1–6.5

68. Document A104

69. Paper 3.3.20, paras 7.2–7.4

**4.3.6 Iwi/Hapu-Specific Issues**

Mr Stone then turned to address points made by specific claimants.

**(1) Ngati Rangiwewehi**

Responding to the concerns of Ngati Rangiwewehi, counsel argued that the matter was one that was internal to Te Arawa. He said that, since there appeared to be good faith on the part of Ngati Rangiwewehi and the executive council to resolve the issues raised, discussions should be allowed to run their course.<sup>70</sup>

**(2) Ngati Rangiteaorere**

With respect to Ngati Rangiteaorere, counsel noted that they already had kaihautu members and it only remained for them to elect a council member. This was, he said, already provided for in the deed of mandate.<sup>71</sup>

**(3) Ngati Wahiao**

In regards to Ngati Wahiao, counsel noted that, as with Ngati Rangiteaorere, it only remained for them to appoint their member to the executive council.<sup>72</sup>

**(4) Ngati Tamakari**

Counsel submitted that the claims of Ngati Tamakari were an internal matter to be resolved between Ngati Pikiaio and Ngati Tamakari. He argued that, in practical terms, giving each hapu separate representation on the council would remove the purpose of having the council, which is to be a small executive group to ‘manage the day to day aspects of the settlement negotiations process’.<sup>73</sup>

**(5) Ngati Rangitihi**

In response to the claims of the Wai 996 cluster, Mr Stone observed that a second opportunity had been provided for Ngati Rangitihi to express an opinion on whether or not to support the executive council and the result had been an overwhelming vote in favour. He indicated that it was now for the Crown to determine whether it was satisfied that the conditions for reconfirmation of support had been fulfilled.<sup>74</sup>

Mr Stone further observed that, although the Wai 996 claim had been filed on behalf of all Ngati Rangitihi, the named claimant had acknowledged under cross-examination that no hui-a-iwi had been held to confirm his mandate to bring the claim in the name of Ngati

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70. Ibid, para 8.2

71. Ibid, para 8.3

72. Ibid, para 8.4

73. Ibid, paras 8.5–8.8

74. Ibid, para 8.9

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Rangitahi. Likewise, he said, representations that had been made about the incorporated society that had been formed having 1500 to 1700 members were without value unless it could be shown that they all supported the claimant's position. It was Mr Stone's assertion that, to the contrary, Ngati Rangitahi had indicated their support for entering into direct negotiations with the Crown, through the executive council.<sup>75</sup>

**(6) Waitaha**

Responding to the Waitaha claimants, Mr Stone stressed that the executive council does not represent Waitaha, although he reiterated that a place is available should they wish to join. Acknowledging that a mandating hui had been held for Waitaha, he nevertheless asserted that no prejudice had been suffered by them as a result of the hui and that the intention had merely been to be inclusive and to give everyone the opportunity to be informed. Had a hui not been held, he said, criticism could have been levelled at Mr Te Whare, as the facilitator, for failing to notify or inform Waitaha. He stressed that 'no usurpation of mana was intended' and that the position of Waitaha to remain separate was and is respected.<sup>76</sup>

**(7) Ngati Makino**

Again, Mr Stone stressed that the executive council does not represent Ngati Makino although, as with Waitaha, if Ngati Makino wish to join there is provision for them to do so. Mr Stone observed that Ngati Makino had indicated for some time that they did not wish to form part of the kaihautu and that, for that reason, no mandating hui had been called for them. In response to the claimants' concerns about Wai 275 being included in the deed of mandate, he pointed to the Crown's stated difficulty in distinguishing between the claims of Ngati Makino and those of Ngati Pikiāo and said that it was reasonable to include the claim on the basis that some of the grievances in it may be 'indistinguishable from Ngati Pikiāo claims'. He stressed, however, that the deed clearly stated that it did not cover the claims of Ngati Makino. Further, he contended that, 'to the extent that there are any issues with the wording used in the Deed', there is no prejudice to Ngati Makino because it is clear that the mandate for the executive council does not include claims of Ngati Makino.<sup>77</sup>

**(8) Ngati Tuteniu**

In the submission of Mr Stone, the evidence regarding Ngati Tuteniu appeared in conflict, but he noted that a further hui was to be held within Ngati Tuteniu to appoint an executive council member.<sup>78</sup>

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75. Paper 3.3.20, paras 8.11–8.12

76. Ibid, paras 8.13–8.15

77. Ibid, paras 8.16–8.20

78. Ibid, para 8.21

#### 4.3.7 Conclusion

Summarising his closing submissions, counsel asserted that the Crown did not take sides when it approved the deed of mandate and in fact had repeatedly indicated that it had no interest in who, or what body, facilitated the mandating process for Te Arawa, as long as the process was open and robust. Likewise, he maintained that (as was appropriate) the Crown had not involved itself in matters of tikanga. Indeed, in counsel's submission, the level of support for the Te Arawa mandating process indicated that tikanga was and is being observed. He further contended that the Crown had already taken all relevant information into account when making its decision to approve the executive council's mandate and that there was no case to be made for the Crown having acted irrationally when it decided to approve the executive council's mandate.<sup>79</sup>

In sum, in counsel's submission, the claimants had failed to prove that the Crown had erred in its process, had misapplied tikanga Maori, or had acted irrationally.

#### 4.4 NGATI RANGITIHI (WAI 524)

As we noted in chapter 2, the Wai 524 claimants filed a submission in opposition to the allegations of the Wai 996 claimants. They maintained that Ngati Rangitihī had indeed conferred a mandate on Henry Pryor and Morris Raureti as kaihautu representatives.

Counsel said that this was 'a matter of mana' for his clients. While he acknowledged that responding to the claims before the Tribunal was 'the sole province and responsibility of the Crown', he nevertheless made several criticisms of the Wai 996 claimants' case. He contended, for example, that the claimants had no right to refer to themselves as 'Ngati Rangitihī te iwi', and that their expressed focus on Crown actions was 'ultimately artificial', since at the heart of the matters was a 'dispute as to who, for the purposes of settlement negotiations with the crown, holds the mana of Ngati Rangitihī'. He submitted further that the Tribunal could address the concerns about the mandating process raised by the Wai 996 claimants only if their right to speak for Ngati Rangitihī was decided by the Maori Land Court.<sup>80</sup>

#### 4.5 SUMMARY

The key points made in this chapter are as follows:

- ▶ Both the Crown and the executive council submitted that our jurisdiction in reporting on the claims was limited and needed to be exercised carefully.

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79. Ibid, para 1.1

80. Paper 3.3.9, paras 4–5, 9–10, 19

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- ▶ The Crown argued that its role in a mandating process is restricted to ensuring an open and robust process takes place that meets its minimum guidelines. It maintained that it is indifferent to which group ultimately receives a mandate.
- ▶ Both the Crown and the executive council submitted that the Te Arawa mandating process had indeed been open, fair, and robust.
- ▶ The Crown denied that its overall settlement policy, and particularly its preference for settling with 'large natural groupings' of claimants, was in breach of the principles of the Treaty.