

CHAPTER 5

ANALYSIS, FINDINGS, AND RECOMMENDATIONS

5.1 INTRODUCTION

In our *Te Arawa Mandate Report* of August 2004, we gave claimants the opportunity to return to the Tribunal, without further application for urgency, should the Crown fail to make an adequate response to the suggestions contained in that report.<sup>1</sup> In order to assess whether the Crown's response to our August 2004 suggestions has in fact been adequate, in this chapter we focus on two key issues:

- ▶ whether the substantive suggestions of the *Te Arawa Mandate Report* have been addressed; and
- ▶ the information provided to us at the reconvened inquiry on recent developments in the Te Arawa mandating process.

Although the broader issues concerning the consistency of the Crown's negotiation and settlement policies with the Treaty of Waitangi were beyond the scope of the inquiry, the presiding officer did advise claimants and the Crown that the Tribunal would consider the more specific issues of the implementation of the policy in the context of the claims before us.

It was these issues that became the focus of the January 2005 hearing.<sup>2</sup> The present chapter begins by briefly considering submissions of counsel regarding the proper role of the Tribunal in reviewing the Crown's reconfirmation of mandate policy and practice. Next, we discuss the Treaty principles relevant to this inquiry. We then consider in turn each of the two key issues identified above, firstly the Crown's response to our suggestions and secondly recent mandate developments. As part of this discussion, we consider the Crown's application of its 'large natural groupings' policy in respect of Ngati Makino, Waitaha, and Tapuika, and we review the process for managing overlapping claim issues contained in the terms of negotiation. Lastly, we make findings and recommendations regarding the reconfirmation process and the wider Te Arawa mandating process.

---

1. Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p112

2. Paper 2.3.37

**5.2 JURISDICTIONAL ISSUES**

In chapter 2, we set out the process by which we reached our decision to grant the requests of the taumata and other claimants to resume the Te Arawa mandate inquiry. In a nutshell, the Tribunal granted the request because it had not been provided with sufficient information by the Crown regarding the reconfirmation process.<sup>3</sup> We considered that only by a resumption of the inquiry could we fully assess whether or not our suggestions had been followed.

In our August 2004 report, we discussed the jurisdictional issues relating to our hearing of the claims before us at the June 2004 hearing. We emphasised that claims must be directed at the actions of the Crown, rather than the executive council. We commented that:

The claims [before us at the June 2004 hearing] also concerned the actions of Nga Kaihautu o Te Arawa Executive Council. While we believe our jurisdiction to hear them was clear, we nevertheless have borne this reality in mind in reporting on them and have focused on the omissions or actions of the Crown. We have considered the actions of Mr Te Whare and the executive council only where they have impacted on the responsibility of the Crown. We acknowledge, as other Tribunals have, that there is an air of artificiality about claims of this nature being advanced in the Tribunal. That air of artificiality relates to the Tribunal's concern that it not be used as a forum for ventilating what are in reality internal disputes between closely related kin groups rather than claims against the Crown.<sup>4</sup>

We adopted the same position at the January 2005 hearing in relation to our jurisdiction to hear the claims. We again focused on what are genuinely claims against the Crown. We agree with counsel for the Crown that the Tribunal should not be drawn into an open-ended 'monitoring' or 'supervisory' role in respect of the question of mandate recognition and maintenance.<sup>5</sup> The Tribunal is not usually placed in a position where it must monitor or supervise the mandating process. Nevertheless, in our August 2004 report we did advise the claimants that they could return to the Tribunal and request a resumption of the inquiry to determine whether or not the Crown had made an adequate response to our substantive suggestions.<sup>6</sup> Therefore, we consider that our function in this context is to review and assess the reconfirmation process.

We consider that all matters which have occurred during the reconfirmation process, including the withdrawal of iwi/hapu from the executive council mandate, are appropriate issues for our consideration in making such an assessment. For this reason, we give consideration to the substantive outcome of the reconfirmation process itself, in terms of the current level of support for the executive council mandate.

---

3. Paper 2.3.36

4. Waitangi Tribunal, *The Te Arawa Mandate Report*, p93

5. Paper 3.3.20, p7

6. Waitangi Tribunal, *The Te Arawa Mandate Report*, p112

### 5.3 RELEVANT TREATY PRINCIPLES

In our August 2004 report, we listed the principles of the Treaty of Waitangi relevant to the claims.<sup>7</sup> We did not feel the need to discuss the principles in detail for the purposes of that report, because we believed that the jurisprudence on them had been sufficiently traversed in other Tribunal reports. However, we now elaborate on some of these principles to more fully explain the context within which we make our present findings and recommendations.

#### 5.3.1 The principle of reciprocity

The Maori cession of kawanatanga to the Crown was made in exchange for the Crown's recognition of tino rangatiratanga. In the words of the Mohaka ki Ahuriri Tribunal, the 'Crown's exercise of kawanatanga ("sovereignty" in the English text) has to be constrained by respect for Maori rangatiratanga'.<sup>8</sup> The Crown's right to govern, which must include the right to make decisions regarding public expenditure, the resourcing of Treaty settlements, and setting criteria for determining priorities for negotiations, is not an absolute right. The right to govern was in exchange for the protection of the 'rangatiratanga' of hapu over all their lands, villages, and taonga. Therefore, the Crown must provide for hapu and iwi to exercise their tino rangatiratanga in the settlement of their claims. It follows that the Crown must also consider its Treaty obligation to a particular group or groups, if their circumstances warrant an alternative approach to the Government negotiation policy, processes, and targets for the settlement of claims.

To attain true reciprocity, there must be consultation and negotiation in practice as well as in name, and flexibility in the application of policies where shown to be strictly necessary. Such reciprocity is the key to durable Treaty settlements. We think that the aspirations of the Te Arawa tribes, and their preferred mode of exercising their tino rangatiratanga in the settlement process, emerged clearly during the reconfirmation process and other hui, and at our January hearing. The Crown now knows whether most Te Arawa wish to negotiate their claims through the kaihautu. Reciprocity requires a careful, fair, and practical response from the Crown. This is the context for our findings later with regard to Ngati Makino, Waitaha, Tapuika, the Ngati Whakaue cluster, and other claimants outside the executive council's mandate.

#### 5.3.2 The principle of partnership

The principle of partnership carries with it an obligation for each Treaty partner to act towards the other with the utmost good faith. Fundamentally, the principle of partnership is

---

7. Ibid, p94

8. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol1, p22

about the post-1840 relationships between Maori and the Crown, based on the reciprocal obligations of each partner to the other. The Muriwhenua Fishing Tribunal described the Treaty's ongoing role in mediating future relationships between the Crown and Maori in these terms:

It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.<sup>9</sup>

Similarly, the Motunui–Waitara Tribunal found that:

The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.

We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles.<sup>10</sup>

Thus, we consider that the principle of partnership envisages that, far from ending relationships, a Treaty settlement will lay the foundation of an ongoing mutually beneficial partnership. The Crown risks significantly curtailing its ability to forge such a renewed partnership with some Te Arawa, if they are left too far behind in the settlement process. We address this important point below.

We note here that the obligations of partnership are not one-sided, and nor should negotiation and settlement processes be decided unilaterally. Both Treaty partners should make reasonable decisions during the settlement process. In order to ensure that their future relationship is mutually beneficial, the Crown should not pursue its nationwide Treaty settlement targets at the expense of some of its Treaty partners. Where the particular circumstances of a group or groups warrant a more flexible approach, the Crown must be prepared to apply its policies in a flexible, practical, and natural manner. We accept that the Crown has financial and other practical constraints. In our assessment of the claims below, we suggest a practical way forward for the Crown, to assist it in meeting its partnership obligations.

---

9. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p192

10. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p52

### 5.3.3 The principle of active protection

The principle of active protection arises from reciprocity and partnership. The Crown's obligation to protect Maori rights under the Treaty was discussed by the president of the Court of Appeal in 1987:

The Treaty signified a partnership between Pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith. The relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. The duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.<sup>11</sup>

We have had particular regard to this principle in determining whether the reconfirmation process met our August 2004 suggestions. Our findings on the reconfirmation process, and the Crown's monitoring and acceptance of it, are set out below. Here, we note the Crown's obligation to actively protect the just rights and tino rangatiratanga of all Te Arawa.

### 5.3.4 The principles of equity and equal treatment

The principles of equity and equal treatment were neatly summarised by the Foreshore and Seabed Tribunal:

The principle of equity is that the protections of citizenship apply equally to Maori and non-Maori. Sometimes expressed as the principle of equal treatment, it requires the Crown to treat Maori and non-Maori fairly and equally, and to treat Maori tribes fairly vis-à-vis each other.<sup>12</sup>

This principle places an obligation on the Crown to act fairly and impartially towards Maori by ensuring it treats Maori hapu/iwi fairly vis-à-vis each other.<sup>13</sup> This logically extends to not allowing one iwi an unfair advantage over another. Under this principle, in seeking to negotiate a comprehensive settlement of all the historical claims of Te Arawa, the Crown must deal fairly with all claimant groups within Te Arawa, and not allow one group an unfair advantage over another. This does not mean treating all groups exactly the same, where they have different populations, interests, leadership structures, and preferences. Tino rangatiratanga must be respected. What it does mean is that the Crown must treat each group fairly vis-à-vis the others, and in doing so, it must do all in its power not to create (or exacerbate) divisions and damage relationships.

---

11. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA)

12. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p133

13. *Ibid*

In practical terms, this principle consists of two duties: the duty to act fairly and impartially towards Maori and the duty to preserve amicable tribal relations. Both of these duties have been discussed in Tribunal reports. In relation to the first, the duty of the Crown to act fairly and impartially towards Maori, the Maori Development Corporation Tribunal stated:

There is, in our view, a duty arising from the Treaty that the Crown act fairly and impartially towards Maori. This Treaty principle derives from the large concession made by Maori in 1840 of the gift of governance to the Crown, in return for which it is reasonable to assume that Maori would receive good governance and laws and policies that would be beneficial to them all. The guarantee of rangatiratanga then, with which the Crown responded, was a guarantee to all of the iwi, not to a selected number. Implicit in this is a guarantee that the Crown would not, by its actions, allow one iwi an unfair advantage over another.

... The onus of fairness and impartiality was thus created. Transported to modern times, the principle remains the same but is now to be applied in different circumstances. A critical feature of today's circumstances, however, is the continuing vitality of Maori tribal organisation and identification. From our own knowledge and experience we are able to confirm to the Crown a fact of which it is no doubt already aware: tribal rivalry remains healthy and dynamic.

The Court of Appeal has characterised the Crown's Treaty relationship to Maori as that of a fiduciary thereby setting a very high standard of performance for its Treaty obligations (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641). It is fundamental that a fiduciary must act fairly as between beneficiaries rather than allowing one of the group to be favoured.<sup>14</sup>

In the context of this inquiry, we consider that to fulfil its duty to act fairly and impartially towards Maori, the Crown must not prefer to negotiate and settle with one group of Te Arawa over another. It must act fairly and impartially towards all groups in Te Arawa.

The second duty – the duty of the Crown to preserve amicable tribal relations – is closely related to the first. Should it fail in the first duty, the Crown will run the risk of entrenching or worsening extant tensions and divisions between groups within Te Arawa. The Crown's duty to preserve amicable tribal relations is discussed in the *Ngati Awa Settlement Cross-Claims Report*:

We think that the Crown should be pro-active in doing all that it can to ensure that the cost of arriving at settlements is not a deterioration of inter-tribal relations. The Crown must also be careful not to exacerbate the situations where there are fragile relationships within tribes.

---

14. Waitangi Tribunal, *Maori Development Corporation Report* (Wellington: Brooker's Ltd, 1993), pp 31–32

Inevitably, officials become focused on getting a deal [in seeking to settle cross-claims]. But they must not become blinkered to the collateral damage that getting a deal can cause. A deal at all costs might well not be the kind of deal that will effect the long-term reconciliation of Crown and Maori that the settlements seek to achieve.

... The simple point is that where the process of working towards settlement causes fall-out in the form of deteriorating relationships either within or between tribes, the Crown cannot be passive. It must exercise an 'honest broker' role as best it can to effect reconciliation, and to build bridges wherever and whenever the opportunity arises. Officials must be constantly vigilant to ensure that the cost of settlement in the form of damage to tribal relations is kept to the absolute minimum.

We do not underestimate the difficulty of this task. But neither do we underestimate the potential for harm to Crown–Maori relations if this area of risk is not carefully and positively managed.<sup>15</sup>

While the comments of the Ngati Awa Settlement Cross-Claims Tribunal relate mainly to the cross-claims of different iwi, rather than different overlapping groups within an iwi, we consider that their analysis of the Crown's duty remains relevant to our present inquiry.

#### 5.4 THE CROWN'S RESPONSE TO OUR AUGUST 2004 FINDINGS AND SUGGESTIONS

We now turn to address the matter of whether the Crown substantively complied with our suggestions regarding reconfirmation of the executive council mandate. In order to do this, we consider each of our August 2004 suggestions in turn. For the sake of convenience, we have divided these into three sections:

- ▶ First, that the executive council hold hui of all kaihautu members to reconfirm its mandate. We also made various procedural suggestions relating to this hui.
- ▶ Secondly, that a further mandating hui should be held for Ngati Rangitahi.
- ▶ Thirdly, that the Crown should seek to enter contemporaneous negotiations with Ngati Makino, and afford priority status to negotiations with Waitaha. We contemplated the possibility that some or all of Ngati Makino, Waitaha, and Tapuika may wish to join together for the purposes of negotiations.

For each of these, we begin by outlining the suggestion, then summarise the Crown and claimant positions on how it was implemented, and finally we provide our comment on the adequacy in Treaty terms of the Crown's response to our suggestions.

---

<sup>15</sup> Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), pp87–88

5.4.1

**5.4.1 Reconfirmation hui**

The principal suggestion contained in our August 2004 report was that a hui-a-kaihautu be held to reconfirm support for, and the composition of, the executive council. We set out our suggestion as follows:

We believe that the Crown and the executive council should now allow some time for the kaihautu to discuss and ‘reconfirm’ the composition of the council and the proportionality of the seats on it. We also believe that the kaihautu should be allowed to address the issue of accountability from the council to the kaihautu and to its constituent iwi and hapu.

. . . we do not think it would be practical for a hui of all Te Arawa to make this decision, for two reasons. First, a mandating process has been gone through which has, for the most part, fairly elected Kaihautu representatives. . . . Secondly, an open hui of all Te Arawa would run the severe risk of being overtaken by those whose agenda is only to take matters back to square one.

. . . So our suggestion is that a hui of kaihautu members be called to ‘reconfirm’ acceptance.<sup>16</sup>

We then made a number of suggestions regarding procedural aspects of such a hui. We reproduce our proposals here at some length, to provide a full context for our later comments. With respect to the planning, notification, and rules of the reconfirmation hui, we proposed:

The Crown and the Executive Council should take joint responsibility for planning the hui. For its part, the Crown must ensure that the issues as to representivity and accountability are fully addressed. . . . Both the Crown and the council should also consult with the Taumata, in recognition of the mana of its leaders.<sup>17</sup>

. . . We believe this hui should be properly notified with no less than 14 days’ notice of agenda, date, time, and venue. It should have a suitable and independent chair who should carefully manage the agenda. Given what we heard during the hearing, it may be appropriate to conduct that meeting at Tamatekapua, but again that is for the Crown and the Executive Council to decide, possibly in consultation with the Taumata and Te Pukenga Kaumatua. There should be independent observers present to record the outcomes.<sup>18</sup>

With respect to the rules around voting rights at the reconfirmation hui, we considered that thought would ‘need to be given to who should be permitted to vote’:

In this respect, in view of the very disproportionate numbers of representatives elected across the iwi/hapu, we wonder whether it is equitable for voting rights at the hui to be extended to all Kaihautu members. In other words, is it really fair that 11 representatives of Ngati Tuteniu should be able to outvote seven representatives of Tuhourangi/Ngati Wahiao?

---

16. Waitangi Tribunal, *The Te Arawa Mandate Report*, p113

17. Ibid

18. Ibid, p114

Or, is it better and in accordance with tikanga for each iwi/hapu to have equal voting rights? Perhaps Ngati Whakaue and Ngati Pikiao, who are manifestly the two largest iwi within the confederation, should have double the number of votes of each other group, but that is for Te Arawa to decide.<sup>19</sup>

With respect to outstanding issues regarding the representation of iwi/hapu on the executive council, we commented:

Other questions include whether there are groups not represented on the executive council who should be there, whether all the groups currently there are entitled to representation, and what justification there is for the current composition. These are issues that must be rationalised and articulated so that Te Arawa whanui can see that there are real and transparent reasons for the current composition of the council.

Obviously, some groups within Ngati Whakaue, such as Ngati Te Ngakau/Ngati Tura and Ngararanui, now also have seats on the council, and this too may skew the proportionality of the voting pattern that we have just suggested. That is another issue that will need to be carefully considered. One possible way of dealing with it is through the preliminary step of having the kaihautu representatives for the 10 core groups named by Mr Te Whare in his mandating plan (this excludes Ngati Makino, Waitaha, and Tapuika) vote first on:

- ▶ whether any of the groups joined together should be uncoupled (such a vote should address the concerns of some members of Ngati Whaoa);
- ▶ whether any additional groups should be added to the list (this should address the concerns of the Wai 1173 claimants, for example) or whether the iwi/hapu groups affected by any such inclusion (such as Ngati Whakaue, were Ngararanui included) should be able to exercise a right of veto; and
- ▶ whether, if any additional groups are added, there would subsequently be a need to reduce the votes of Ngati Whakaue and Ngati Pikiao in the voting that would follow.

If agreement is reached on the groups to be represented on the executive council, the next possible step would be for those groups to vote on which – if any – among them should have more than one seat.<sup>20</sup>

Finally, in response to concerns expressed over the accountability of the executive council to the people of Te Arawa, we thought:

there should perhaps be a series of votes on those aspects of the council's rules that we believe warrant attention. Foremost amongst these should be the accountability of the council to the kaihautu and of the kaiwhakarite or negotiators to the council. The opportunity might also usefully be taken for voting on other matters, such as the passing of resolutions

---

19. Ibid, pp 113–114

20. Ibid, p 114

5.4.2

(in terms of Mr Baird's discussion with Mr Te Whare that we mentioned above); whether there should be any right of withdrawal from the process and, if so, the protocols governing how and when that could occur; and so on.<sup>21</sup>

We now turn to review the Crown's response to our suggestions.

**5.4.2 Crown response**

At the January 2005 hearing, Mr Doogan argued that the Crown had accepted and substantially implemented the overall course of action suggested by the Tribunal – that the executive council call a hui of kaihautu members to reconfirm its mandate. He submitted that, despite minor variances from the detail of our recommendations, the reconfirmation which took place had substantially accorded with the Tribunal's views.<sup>22</sup> He noted that the strategy, as it was ultimately implemented, provided for:

- ▶ The adjustment of the executive council structure, namely the addition of three executive council seats for Ngati Pikiao, one seat for Ngati Rangiwewehi, and the removal of seats for Ngati Makino, Waitaha, and Tapuika.
- ▶ Consultation on the reconfirmation process with key Te Arawa groups, including the taumata, at hui attended by officials from OTS and TPK.
- ▶ The convening of four reconfirmation hui, at which kaihautu members voted on the adoption of the reconfirmation strategy, and on adjustments to the composition of the executive council.
- ▶ A final hui-a-kaihautu at which the executive council reported back to kaihautu members on the results of the regional reconfirmation hui (added after consultation with the taumata and other key Te Arawa organisations).

Mr Doogan argued that the ability of the Crown to scrutinise actively every stage of the mandate process, and to insist upon the proper application of tikanga, varied from time to time and place to place. It was dependent on the resources and expertise available to the Crown, and the transparency or otherwise of tribal politics in any particular region.<sup>23</sup> Nevertheless, he submitted that the Crown had acted to implement the Tribunal's suggested course of action, and therefore that no Treaty breach had arisen.

**5.4.3 Claimants' submissions**

The claimants were not satisfied that the Crown had ensured that the reconfirmation process followed the Tribunal's suggestions. A number of criticisms were commonly made by

---

21. Waitangi Tribunal, *The Te Arawa Mandate Report*, p114

22. Paper 3.3.20, pp 3–4; doc c2, pp 3–4; doc c2, exhibits 1–2

23. Paper 3.3.20, pp 2–3

claimants in respect of the Crown's response to our proposal of a reconfirmation hui. Briefly, claimants alleged that:

- ▶ the process by which the executive council mandate was reconfirmed was a closed one, and did not provide for input from groups other than the executive council;
- ▶ consultation with Te Arawa groups, such as the taumata, was perfunctory and ineffective;
- ▶ in general, the reconfirmation process was carried out with undue haste, and that this haste seriously compromised the validity of the process (more specifically, insufficient notice was given of the reconfirmation hui);
- ▶ OTS officials had not fully informed the Ministers of perspectives of groups other than the executive council;
- ▶ the four-region approach did not accord with Te Arawa tikanga; and
- ▶ at no point in the reconfirmation process were constitutional issues such as the joint representation of hapu, and the rules governing the accountability of the executive council to the kaihautu, addressed.

We consider these criticisms in more depth in our general comments on the reconfirmation process, contained in the next section.

#### 5.4.4 Tribunal comment

Before we begin our assessment, we believe it is important to place our findings and recommendations in the context of the Crown's strategy to negotiate and settle claims in the central North Island (CNI). We have discussed the background to this in chapter 1. That background is relevant here, because it seems to us that OTS officials were concerned with pursuing the CNI strategy during the reconfirmation process. In assisting in the development and implementation of the reconfirmation process, officials evaluated proposals in terms of the extent to which they deviated from CNI settlement targets. As officials reminded the Ministers, those targets were:

developed to resolve, as quickly as possible, the claims of all CNI iwi, including the claims to licensed Crown forest land. The core of the strategy was a concept, jointly developed with claimant leaders, of a single, comprehensive settlement for each of the five generally recognised CNI iwi. A key risk to deviating from this concept is the consequential escalation of the number of negotiations, resulting in settlements not being completed for many years.<sup>24</sup>

##### (1) *Planning phase*

In our August 2004 report, we began our concluding remarks by reviewing the Crown's duty to actively scrutinise the mandating process and we stated:

---

24. Document c2, exhibit 35, p7

5.4.4(1)

In our view, the role of the Crown should be to scrutinise actively every stage of the mandating process. The Crown should require the correction of errors and the proper application of tikanga throughout the mandating process, rather than wait until the receipt of submissions to make its assessment. This would clearly be in the interests of both the claimants and the Crown. A more active role in monitoring and scrutinising is required to ensure the Crown's actions in recognising a mandate remain Treaty-compliant.<sup>25</sup>

We consider that there is evidence that the Crown was very active during the reconfirmation process. Officials from OTS assisted the executive council to design the reconfirmation strategy.<sup>26</sup> They, along with TPK officials, attended key hui.<sup>27</sup> They provided detailed advice to Ministers in five reports.<sup>28</sup>

We note that OTS officials summarised our August 2004 suggestions in their 12 August report to Ministers. The report also included some preliminary comment on the Tribunal's suggestions.<sup>29</sup> Officials recognised that some measures ought to be taken by the Crown and the executive council to address the concerns and suggestions made by the Tribunal with respect to representivity and accountability of the council. With respect to our suggestion that a reconfirmation hui be held, officials considered that this appeared to be 'a sensible way forward', which could 'well provide the opportunity to address the concerns raised by the claimants, enable reconciliation between the factions within Te Arawa and assist the durability of the mandate'.<sup>30</sup> However, they were concerned that there was a risk that:

a hui that revisits fundamental questions of the Executive Council's accountability and composition may further exacerbate tensions and polarise factions within Te Arawa. There is also a risk that such a hui may provide dissatisfied hapu with the opportunity to withdraw from the process, although this risk is likely to exist anyway.<sup>31</sup>

Officials were also concerned that the reconfirmation be carried out 'without compromising the current momentum with Te Arawa, including the signing of the Terms, and without jeopardising the guiding objective of reaching a settlement agreement within two years'.<sup>32</sup> We note that at this early stage after the release of our report – and before they had met with the executive council – officials were concerned that our suggestion of a reconfirmation hui could lead to instability of the executive council's mandate, and affect the Crown's target of achieving a Te Arawa settlement within two years.<sup>33</sup>

---

25. Waitangi Tribunal, *The Te Arawa Mandate Report*, p111

26. Document c2, exhibit 2, p7

27. Document c2, pp6–10; see also doc c2, exhibit 18

28. Document c2, exhibits 1, 2, 21, 35, 37

29. Document c2, exhibit 1, p2

30. *Ibid*, p7

31. *Ibid*

32. *Ibid*

33. *Ibid*, p11

In their next report to Ministers, on 30 August, officials recommended that Ministers approve the executive council's proposed reconfirmation strategy.<sup>34</sup> Officials from both OTS and the Crown Law Office had assisted the executive council to develop the proposed strategy.<sup>35</sup> Officials advised that while some aspects of the strategy were 'slightly different' from the Tribunal's suggestions, they were comfortable that the proposal was 'robust and appropriate', given that ultimately the proposal would be 'considered and agreed by Te Arawa themselves'.<sup>36</sup> We presume this comment refers to the vote of kaihautu members at the regional reconfirmation hui.

The officials also believed that the proposal would address the majority of the Tribunal's concerns, and would 'minimise the risk that the Crown will be found to be in breach of the Treaty by not acting on the Tribunal's suggestions'.<sup>37</sup> We note that this is the only evidence of an assessment being made in reports to the Ministers of whether the proposed reconfirmation strategy was consistent with Treaty principles.

OTS officials did not advise Ministers of at least one major development during the planning process. The officials did not mention in their report the extensive comments made by the taumata in their 20 August paper.<sup>38</sup> It seems to us that an objective outline of those proposals and the reasons given for rejecting or accepting them would have been a fair approach to take. Instead, the report of 30 August did not record the comments at all. However, MICOTOWN appears to have been aware of the 20 August memorandum because she wrote to the taumata and thanked them for their contribution.<sup>39</sup>

The end result was that a reconfirmation strategy was approved that substantially varied from our original suggestions. The major variations were:

- ▶ The executive council conducted its own review of its composition, rather than putting the matter to the kaihautu in the manner we suggested. Without that first step, the council members went ahead and confirmed their own hapu representation on the executive council. They then determined they should increase the number of seats for Ngati Pikiāo by three and Ngati Rangiwewehi by one. This process of internal review was not in keeping with our suggestion at all, as it was completed in isolation from the rest of Te Arawa and so could not be described as an open and transparent process.
- ▶ The four-region hui approach was adopted where voting on the reconfirmation proposal would take place, rather than a combined meeting of all kaihautu representatives.<sup>40</sup> Initially, there was not going to be a large hui-a-kaihautu. That later stage was added only following consultation with the taumata and other Te Arawa organisations.<sup>41</sup>

---

34. Ibid, pp7-9

35. Document c2, exhibit 2, p7

36. Ibid

37. Ibid

38. Document c2, exhibit 6

39. Document c2, exhibit 4

40. Document c5, pp6-7

41. Ibid, p12

5.4.4(1)

However, the combined hui of all kaihautu representatives was only to be a discussion and report-back session.<sup>42</sup> The executive council believed that adopting the four-hui regional approach, rather than one big hui, was more in accord with tikanga.<sup>43</sup> The executive council argued that this approach was broadly reflective of the four natural clusters of the Te Arawa iwi/hapu identified in the historical research of Dr Paul Tapsell.<sup>44</sup> There was a general view among the council that sensitive issues concerning its composition and proportionality were more appropriately dealt with at the regional level.<sup>45</sup> Furthermore, ORS officials and the executive council considered that to hold a hui of all 98 kaihautu members would preclude meaningful discussion and opportunities to be heard.<sup>46</sup>

- In our August 2004 report, we suggested that a preliminary hui of kaihautu members could be held, prior to the reconfirmation, at which matters such as the rules governing the accountability of the executive council and negotiators, and whether hapu should have a right of withdrawal from the kaihautu, could be discussed and put to a vote.

Instead, ORS officials and the executive council agreed that the revision of the rules would take place within four months of the executive council being reconstituted. Counsel for the executive council advised us that this review would be carried out by the council itself, and that it would also address any issues of accountability from the kaihautu to its constituent iwi/hapu.<sup>47</sup>

Officials advised the Ministers that ‘while some of the elements of the proposed reconfirmation strategy are slightly different from what the Tribunal suggested in its Report, officials are comfortable that the strategy is robust and appropriate’.<sup>48</sup> Accordingly, the Ministers agreed to proceed with the reconfirmation strategy.

Officials also expressed concerns about the stability of the executive council’s mandate.<sup>49</sup> In particular, they were concerned that in not requiring that executive council seats be held open for Ngati Makino, Waitaha, and Tapuika, the Crown might be perceived as willing to implement the Tribunal’s suggestion of separate and priority negotiations. Officials advised that such a perception would ‘pose a serious threat to the stability of the Executive Council’s mandate’, and that a strategy was needed to mitigate this risk.<sup>50</sup> It is clear to us that officials’ concerns that the Crown’s CNI settlement strategy be preserved intact, underpinned their advice to Ministers.

---

42. Document c5, pp3, 22

43. Ibid, p7

44. Document c2, exhibit 2, pp4, 6-7

45. Ibid, p4

46. Ibid; doc c5, pp6-7

47. Paper 3.3.21, p17

48. Document c2, exhibit 2, p7

49. Ibid, p6

50. Ibid

**(2) Consultation phase**

We note that our suggestion that the executive council consult with the taumata in planning the reconfirmation strategy was complied with, and that in fact two consultation hui were held. Along with the taumata, other key Te Arawa organisations such as the Te Arawa Maori Trust Board, Te Kotahitanga o Te Arawa Waka, and the Pukenga Kaumatua o Te Arawa were invited to participate.<sup>51</sup> During the consultation round a draft reconfirmation strategy (at this point only comprising three stages) was sent out to participants seven days before the first consultation hui.<sup>52</sup> OTS and TPK officials attended these hui on 9 and 14 September 2004.<sup>53</sup> Those officials asked that the taumata provide a written submission on the reconfirmation strategy.<sup>54</sup> Others who attended were given the opportunity to submit their views in writing following the hui.<sup>55</sup> Written responses were received from the Te Arawa Maori Trust Board and Te Kotahitanga o Te Arawa Waka.<sup>56</sup> Since they have not appeared before us raising any concerns, we can only assume they are at ease with the process. The chairperson of the Te Arawa Maori Trust Board supported the work of the executive council.<sup>57</sup> As a result of the consultation round, a hui for all kaihautu representatives was added to the reconfirmation strategy.<sup>58</sup>

One of the complaints of the taumata was the fact that they were not consulted in accordance with their special status.<sup>59</sup> In addition, it was their view that their ideas had been marginalised. We agree that the taumata's 20 August comments (some of which were consistent with our suggestions, such as those pertaining to a hui-a-kaihautu to address the issues concerning composition and proportionality of the executive council) appear to have been given only perfunctory consideration by the OTS officials, the Ministers, and the executive council during the initial planning process. None the less, we consider that enough was done to ensure that the views of the taumata were subsequently taken into account during the implementation process.<sup>60</sup> Furthermore, shades of their comments and their views are to be found in the reconfirmation strategy. These aspects are:

- ▶ That the seriousness of the issues identified by the Tribunal required more than one hui.<sup>61</sup> The reconfirmation strategy allowed for four regional hui and one large hui-a-kaihautu.

---

51. Document c5, pp7-13

52. Ibid, pp8-9

53. Ibid, p9

54. Ibid, p12

55. Ibid, p9

56. Ibid, p11

57. Document c2, exhibit 11

58. Document c5, p12

59. Document c2, exhibit 8, pp1-2

60. Document c5, exhibits 9, 10

61. Document c2, exhibit 6, p2

5.4.4(3)

- ▶ That a consultation paper should be produced identifying all the issues to be determined, their implications, and a range of possible solutions.<sup>62</sup> A consultation paper was produced for the reconfirmation strategy.
- ▶ That those groups already represented at the negotiation governance level (ie, the executive council) should remain represented at that level, unless they wished to withdraw or merge.<sup>63</sup> The executive council voted in favour of all those represented retaining their seats.
- ▶ That the question of whether groups should be unbundled (particularly Ngati Whaoa and Ngati Tamakari) should be determined by hui called by those groups alone to determine whether there was a majority from those groups in favour of unbundling.<sup>64</sup>

We are generally satisfied that this stage of the reconfirmation process was completed appropriately and did accord with the spirit of our suggestions that key organisations be consulted. We note also that the draft reconfirmation strategy was amended as a result of that consultation. In our first report, we said that the taumata had much to offer Te Arawa in assisting the executive council to resolve issues of accountability and representivity. We considered that there was good reason to believe that their status demanded more than the bare right to be consulted. However, in our view, their status was recognised. It seems to us that the executive council gave the taumata and their counsel ample opportunity to influence the consultation process on the draft reconfirmation strategy, and subsequently throughout the reconfirmation process.

**(3) Notice and procedure of reconfirmation hui**

The reconfirmation hui were held on 2 and 3 October 2004. The hui were held in the morning and afternoon. The kaihautu members were directly notified in writing by way of letter from the executive council, dated 17 September 2004. In effect, 14 days' notice was given.<sup>65</sup> That letter advised kaihautu members that the hui was to reconfirm the composition and proportionality of the executive council, and it requested their attendance.<sup>66</sup>

We assume that on 22 September 2004, the executive council released its final reconfirmation discussion document to all the kaihautu for consideration.<sup>67</sup> We make this assumption because its foreword is dated 22 September.<sup>68</sup> This was only 10 days before the weekend round of regional hui. We considered whether this gave sufficient time for consultation between kaihautu members and their hapu, which was a matter of complaint before us. We were concerned to see that these very important hui were held over one weekend. We agreed with

---

62. Document c2, exhibit 6, p3

63. Ibid, p5

64. Ibid, pp5-6

65. Document c5, p13

66. Ibid

67. Document c2, exhibit 15

68. Ibid

the advice of the Crown Law Office that to conduct the four regional hui over one weekend involved a risk that discussion would be constrained by time pressure. We note, however, the view expressed by OTS officials that, given the ‘clearly defined discussion parameters and small number of agenda items’, this risk was negligible.<sup>69</sup>

In the end, our concerns were allayed by reports of the actual hui. The TPK report on the regional hui dated 14 October 2004, suggests that sufficient time was available for full discussion.<sup>70</sup> Furthermore, the minutes and independent reports of these hui show that the kaihautu representatives were very informed and aware of the positions of their respective hapu or iwi, and that they voted, abstained or did not attend in accordance with the instructions of their hapu or iwi.<sup>71</sup> In addition and before the vote, the participants had the benefit of a presentation by counsel for the taumata.<sup>72</sup>

We turn now to the issue of an independent chair and minute taker. We note that all the regional hui were chaired by Willie Te Aho and the minutes were taken by Linda Te Aho of Indigenous Corporate Solutions.<sup>73</sup> Both these people were independent and neither claimed to be beneficiaries of any Te Arawa hapu.<sup>74</sup> TPK observers were also present at the regional reconfirmation hui and provided a separate report on the outcomes of those hui.<sup>75</sup>

We are satisfied that the executive council ran the regional reconfirmation hui in an open and transparent manner, meeting our basic procedural requirements in that respect.

#### **(4) Voting rules at reconfirmation hui**

The reconfirmation was ultimately decided upon by a vote of kaihautu members. The rules adopted for the reconfirmation hui were announced in the reconfirmation document.<sup>76</sup> Voting was by show of hands at the hui and no postal or proxy voting was allowed. Kaihautu members had to vote in their own regions.

The problem with this approach was that it did not address the Tribunal’s findings that the kaihautu membership did not and does not reflect the composition of the population of Te Arawa. The result of the hui was that 58 out of 95 kaihautu members recorded votes. Of those, 36 voted for the resolution, 19 were against and 3 abstained. In addition to this simple majority of all votes cast, the resolution was also passed by a majority at each hui. They voted that ‘the reconfirmation document proposal as presented be tabled, be received and adopted’.<sup>77</sup> We note that Ngati Whakaue koromatua representatives attended the regional hui only to withdraw from the process and to state that the executive council had no mandate to

---

69. Document C2, exhibit 2, p7

70. Document C2, exhibit 18, p5

71. Document C2, exhibits 17, 18

72. Document C2, exhibit 18, p5

73. Document C4, p15

74. Document C2, exhibit 17, p2

75. Document C2, exhibit 18

76. Document C2, exhibit 15, p12

77. Document C2, exhibit 18, pp7–8

5.4.4(5)

settle their claims.<sup>78</sup> Because they did not participate, their opposition to the process was not reflected in the outcome of the vote on reconfirmation. We reflect further on this outcome below.

**(5) Representation of iwi/hapu on executive council**

We were concerned that no vote on the composition and proportionality of the executive council was undertaken, and the matter was instead addressed by an internal executive council review. The council decided upon adjustments to its own composition early in the piece and behind closed doors. The executive council clearly rejected our suggestion that there should be a meeting of the 10 core groups named in Mr Te Whare's initial mandating plan. These groups were to vote on the uncoupling of groups such as Ngati Whaoa and Ngati Tahu, and they were to address the proportionality of the executive council.<sup>79</sup> We do, however, acknowledge that the adjustments improved the representation of Ngati Pikiaio on the executive council, and were acceptable to those kaihautu members who voted in favour of the reconfirmation process.

We remain concerned about issues of proportionality, and the fact that only 36 members voted in favour of the reconfirmation document. None the less, we have determined that, for those hapu and iwi who agreed and voted for the executive council's reconfirmation proposal, they accept any process deficiencies and wish to abide by their decision. That is a valid exercise of their rangatiratanga, and it is not appropriate for this Tribunal to try to unsettle their positions. Instead, we focus below on what the outcome was for those hapu and iwi who do not support the executive council.

**(6) Hui-a-kaihautu**

We note that the executive council also held a hui-a-kaihautu on 20 October. The hui-a-kaihautu was held for the purposes of reporting back to kaihautu members on the reconfirmation process, and no substantive decisions were taken at it.

**(7) Crown assessment of the reconfirmation process**

On 21 October, OTS officials reported to Ministers on the progress of reconfirmation, outlining the outcomes of the four regional hui and the hui-a-kaihautu.<sup>80</sup> They noted that a majority of kaihautu members who voted, voted in favour of the reconfirmation document. They also noted continuing opposition to the executive council's reconfirmation strategy from the taumata, the Ngati Whakaue cluster, and a number of other iwi/hapu, including Ngati Rangiwewehi, Ngati Rangitearere, Ngati Wahiao, the Wai 996 claimants of Ngati Rangitihi, and certain hapu of Ngati Pikiaio. Despite the opposition of these groups, officials

---

78. Document c2, exhibit 18, p5

79. Document c5, p16

80. Document c2, exhibit 21

concluded that the reconfirmation had demonstrated that there was 'broad support' among Te Arawa for the executive council's mandate to negotiate. They stressed that the majority of the voting kaihautu members, and 10 out of 14 Te Arawa iwi/hapu, had approved the reconfirmation.<sup>81</sup>

We note that the officials assessed the outcome of the reconfirmation hui results by adopting a similar approach to that taken for Crown assessments of governance entity ratification results.<sup>82</sup> In our view, the use of this measure was not appropriate, given that governance entity ratification is usually uncontroversial, as in the case of Ngati Awa. This is because, by the time governance entity ratification occurs, most of the controversial aspects of a negotiation have been settled by a group of negotiators who hold the confidence of the hapu or iwi. The ratification of governance entities has, in the past, usually occurred after the ratification of a settlement. That explains why participation ratings and support or disapproval ratings would be lower, and why it is not a useful measure for assessing mandate support.

We consider that to comment that the executive council still represented 10 out of 14 of the groups of Te Arawa without discussing the level of support in terms of the population of Te Arawa, as OTS officials did in their 21 October report, did not give Ministers a full picture of the situation. While the withdrawal of Ngati Whakaue and other iwi/hapu had not been formally recognised at this point, officials were aware that there was a good chance that a number of groups would withdraw in the near future. It seems to us that their advice failed to convey to Ministers the full significance of the probable withdrawal of these groups, in terms of the percentage of the total Te Arawa population represented by the executive council mandate.

The Ministers, without this knowledge, agreed that there was broad support for the executive council to negotiate a settlement package.<sup>83</sup> In letters of 22 October, they advised the executive council and the taumata that they considered that the reconfirmation had been 'fair and robust', and that the executive council had the 'broad support of the people of Te Arawa'.<sup>84</sup>

### **(8) Conclusion**

The variations to our suggestions regarding the reconfirmation process would have been a major concern for us if there had not been sufficient support among Te Arawa for the executive council. For those hapu/iwi kaihautu representatives who did vote in favour of the reconfirmation proposal, they exercised their tino rangatiratanga in favour of the executive council. We agree (despite the understatement on the extent of the variations) with the underlying sentiment expressed by OTS officials in their report to the Ministers, dated 30 August 2004, when they advised:

---

81. Ibid, p5

82. Ibid, pp7-8

83. Ibid, p16

84. Document c2, exhibits 22-23

5.4.5

While some of the elements of the proposed reconfirmation strategy are slightly different from what the Tribunal suggested in its Report, officials are comfortable that the strategy is robust and appropriate, given that, once the strategy is implemented, these elements will have been considered and agreed by Te Arawa themselves.<sup>85</sup>

That is exactly what happened with respect to those hapu and iwi of Te Arawa whose kaihautu representatives have reconfirmed their support of the executive council. While we have criticisms, they do not detract from the position that 10 hapu/iwi of Te Arawa agreed to reconfirm the mandate of the executive council, and they are obviously satisfied that that council and the Crown should proceed to settle their claims. In our view, so far as those iwi/hapu are concerned, there has been no breach of the principles of the Treaty of Waitangi. We do have concerns for the remaining 48 per cent of the Te Arawa population and make findings in that regard below. We now turn to examine the Crown's response to our suggestions with respect to particular iwi.

**5.4.5 Ngati Rangitahi**

In respect of Ngati Rangitahi, we recommended that the reconfirmation hui 'should not take place until Ngati Rangitahi have held one more hui at which they, finally and in the fairest of circumstances, either elect kaihautu representatives or choose to stand apart'.<sup>86</sup>

**(1) Crown response**

Crown counsel admitted that the Crown chose not to follow the Tribunal's recommendation in respect of Ngati Rangitahi.<sup>87</sup> This decision was reached after the Crown reviewed the 17 June 2004 hui. It was the Crown's view that the hui had been properly advertised and that a TPK official had attended and then reported on it.<sup>88</sup> The TPK observer at the hui concluded that the hui itself was conducted in an open and fair manner.<sup>89</sup> Ms Baggott stated that the majority of those in attendance voted to confirm the mandate of the executive council and the Ngati Rangitahi kaihautu members.<sup>90</sup>

Finally, it was contended that the Wai 996 claimants were no more than individuals, and that the Crown did not require their agreement to list their claim in the terms of negotiation. It had recognised the mandate of hapu representatives to pursue a negotiated settlement of all the Ngati Rangitahi claims, and in the Crown's view the Wai 996 claim must be considered as one of those hapu claims.<sup>91</sup>

---

85. Document c2, exhibit 2, p7

86. Waitangi Tribunal, *Te Arawa Mandate Report*, p118

87. Document c2, pp10-11

88. Ibid

89. Document c2, exhibit 27

90. Document c2, pp10-11

91. Paper 3.3.34, p4

**(2) Claimant submissions**

The Wai 996 claimants noted that the Crown had chosen not to follow the Tribunal's recommendation to hold a further hui for Ngati Rangitihi. As we have previously noted, the evidence from Andre Patterson challenges the reliability of the 17 June 2004 hui.<sup>92</sup>

Counsel reiterated that the Wai 996 clients want to have their claims heard by the Tribunal in the CNI inquiry, and then settled comprehensively and fairly by the Crown and properly mandated representatives.<sup>93</sup> It was the Wai 996 claimants' position that they had never mandated the executive council to negotiate their claims. They requested that their claims be removed from the terms of negotiation. They also expressed frustration at the refusal of the Ngati Rangitihi kaihautu member who sits on the executive council to meet with them and discuss their concerns.<sup>94</sup>

**(3) Tribunal comment**

Officials advised the Ministers that, at the time that it made its recommendation with respect to Ngati Rangitihi, the Tribunal had not seen any supporting information regarding the notification and conduct of the 17 June 2004 hui. Therefore, they considered that the Tribunal's recommendation had not been made with a full awareness of the facts. Officials advised that they were in fact satisfied that the hui had been held in a fair and open manner.<sup>95</sup>

It is clear that the Crown has ignored our recommendation. But the Wai 996 claimants themselves no longer want another hui to be called. Rather, they want the entire process for all of Te Arawa to begin afresh. We cannot agree to that. What we can assure the Wai 996 claimants of is that their claims will and are being heard by the CNI Tribunal. It is unlikely that any settlement with the executive council will be given legislative effect until well after that Tribunal reports on stage 1 of its inquiry. Consequently, there is at this stage, no prejudice being suffered by the Wai 996 claimants over and above that of other claimants, such as Te Takere o Nga Wai.

In the meantime, the Ngati Rangitihi representative on the kaihautu must be sure to represent all Ngati Rangitihi interests on the executive council. That by necessity means that he should be actively engaged in dialogue with the Wai 996 claimants, if that is their wish. The evidence for the Wai 996 claimants was that this was not happening.<sup>96</sup> The Crown has a duty to ensure that the executive council requires that he perform his obligations in this regard. This is doubly so, given the Crown's position that the Wai 996 claim will be settled as a result of its negotiations with the kaihautu. It follows that there is a Treaty obligation for the Crown to ensure that the kaihautu and executive council member consults with and reports to the Wai 996 claimants, as they have sought in the past.

---

92. Document c1

93. Paper 3.3.33

94. Document c1, p8

95. Document c2, exhibit 2, p5

96. Document c1, p8

5.4.5(4)

**(4) Conclusion**

Given the position now taken by the Wai 996 claimants, we find that the Crown did not breach the Treaty when it failed to require the executive council to conduct a further hui for Ngati Rangitahi.

The Tribunal will now proceed to hear the generic aspects of the Wai 996 claim as part of its CNI stage 1 inquiry, as per our statutory obligations and the wishes of the Wai 996 claimants. No prejudice as yet arises nor is likely to arise in the near future, from the hearing of that claim while the Ngati Rangitahi representatives on the kaihautu pursue direct negotiations. We think that there will be time and opportunity for the Wai 996 claim to be resolved in a manner compliant with the Treaty.

We do, however, find that the Crown has a Treaty obligation to ensure that the kaihautu members consult with and report to the Wai 996 claimants, if that is the claimants' wish.

**5.4.6 Ngati Makino, Waitaha, and Tapuika**

We comment on the Crown's response to our recommendations regarding Waitaha, Ngati Makino, and Tapuika in some detail, because we consider the issues involved to be very important. We begin by repeating our August 2004 suggestions in respect of these three iwi:

As for Ngati Makino, we think that their legitimate expectation of entering their own separate negotiations for some years now means that the Crown is obligated, both morally and under its Treaty duty of good faith conduct, to honour that undertaking at last. It means, effectively, that the Crown should now find some way to negotiate with Ngati Makino contemporaneously with the rest of Te Arawa. Furthermore, if Ngati Makino agree, Waitaha and Tapuika should be invited to join those negotiations.

. . . With respect to Waitaha, we do not believe that the Crown has in fact altered its 'large natural groups' settlement policy to their disadvantage. To the extent that we need to consider this policy in any detail, we simply adopt the essential stance of the Tribunal in its *Mohaka ki Ahuriri Report* that there is clearly a need for a flexible Crown policy, which should be applied in a practical yet natural manner. The current application of the policy, however, may well give Waitaha a legitimate sense of grievance. For example, we think it vital to bear in mind the extent of Waitaha's traditional differences with the rest of Te Arawa (as explained persuasively by Tame McCausland). In those circumstances, the Crown should perhaps have anticipated that Waitaha would choose to stand apart and have accordingly come up with a contingency plan. In conclusion, and depending on the decision of the Tau-ranga Moana Tribunal, which we understand is imminent, we believe that Waitaha should be afforded 'priority' status, even if the exact same priority as the rest of Te Arawa is impossible under OTS' current level of resourcing.<sup>97</sup>

---

97. Waitangi Tribunal, *The Te Arawa Mandate Report*, p117

**(1) Crown response**

According to Heather Baggott, our suggestions that the Crown negotiate contemporaneously with Ngati Makino and afford priority status to Waitaha, presented the Crown ‘with a number of concerns about the practicality and desirability of this approach’. The Crown’s concerns included the ‘potentially significant implications for the stability of the KEC’s [executive council’s] mandate, the Crown’s policy framework and resourcing of OTS’.<sup>98</sup> We address these matters in more detail below, in our discussion of OTS officials’ analysis of the implications of our August 2004 report.

In essence, the Crown responded to our suggestions by writing to each iwi, advising them that:

- ▶ the Crown and executive council agreed that it was no longer appropriate for the executive council to hold seats open for Ngati Makino, Waitaha, and Tapuika;
- ▶ at a special meeting on 27 October, the executive council amended its deed of trust so that there was no longer provision for those seats to be held open;
- ▶ the Crown would not currently accord the same priority to separate negotiations with Ngati Makino, Waitaha, and Tapuika as to negotiations with the executive council;
- ▶ the Crown remained willing to discuss the matter, including the proposal that Ngati Makino and Waitaha negotiate jointly; and
- ▶ the Crown was more likely to accord them priority if all three iwi joined together for negotiations.

Ms Baggott noted that the Crown had not yet received a response to these letters.

**(2) Claimant submissions**

Ms Sykes for Ngati Makino argued that the Crown’s actions subsequent to the Tribunal’s August 2004 report fly in the face of our suggestions with respect to Ngati Makino. She also made extensive submissions regarding the Crown’s settlement policies.

Ms Feint for Waitaha submitted that the reports to the Ministers of August 2004 indicated that the Crown had rejected ‘out of hand’ the recommendations of the Tribunal with respect to Waitaha and Ngati Makino.<sup>99</sup> She pointed to the 12 and 30 August 2004 reports of OTS officials to the Ministers, and the letters of 4 November 2004 to Ngati Makino and Waitaha, noting that the Crown never changed its position on the priority, or lack of it, to be accorded to these two groups.<sup>100</sup> This was, in her view, a prima facie indication of bad faith on the part of the Crown.<sup>101</sup>

---

98. Document C2, p12

99. Paper 3.3.22, p3

100. Ibid

101. Ibid, p5

5.4.6(3)

(3) *Tribunal comment*

We agree with Ms Feint that it was unlikely that the Crown would change its position regarding Ngati Makino and Waitaha, unless it was persuaded that the application of its settlement policies were in breach of the Treaty of Waitangi.

Consistent with the Tribunal's 17 December 2004 direction, and despite requests by counsel for Ngati Makino and Waitaha, we have not considered the broad issue of whether the Crown's general settlement policies are in breach of Treaty principles.<sup>102</sup> We have restricted our consideration to the evidence concerning the application of the 'large natural groupings policy' to Ngati Makino and Waitaha. Our aim is to determine whether the way in which the policy was applied inhibited or prevented the Crown from responding appropriately to our August 2004 suggestions.

In its booklet *Ka Tika a Muri, Ka Tika a Mua*, OTS explains the rationale behind the 'large natural groupings' policy thus:

The Crown strongly prefers to negotiate settlements with large natural groups of tribal interests, rather than with individual hapu or whanau within a tribe. This makes the process of settlement easier to manage and work through, and helps deal with overlapping interests. The costs of negotiations are also reduced for both the Crown and claimants.

Comprehensive negotiations with large natural groups also allow the Crown and mandated representatives to work out a settlement package that includes a wide range of redress. Redress is the term we use for all the ways the Crown can make amends for the wrongs it has done. For instance, many of the Statutory Instruments available for cultural redress (see Part 3) are only workable and cost-effective for large natural groupings. Having a wide range of redress means that the settlement is more likely to be lasting because it meets a greater number of needs.

Attempts to have the Waitangi Tribunal or the High Court reject the Crown's preference for negotiating settlements with large natural groupings and endorse negotiations with specific hapu and whanau have not been upheld by either body. In its *Pakakohi and Tangahoe Settlement Claims Report 2000* (page 65), the Waitangi Tribunal says of the Crown's preference for dealing with large natural groupings, that 'this is an approach with which we have considerable sympathy. There appear to us to be sound practical and policy reasons for settling at iwi or hapu aggregation level where that is at all possible.'<sup>103</sup>

As noted above, the Pakakohi and Tangahoe settlement claims Tribunal considered that there were sound practical reasons for the 'large natural groupings' policy. That Tribunal also

---

<sup>102</sup>. Paper 2.3.7

<sup>103</sup>. Office of Treaty Settlements, *Ka Tika a Muri, Ka Tika a Mua: He Tohutohu Whakamarama i nga Whakataunga Kereme e pa ana ki te Tiriti o Waitangi me nga Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: Office of Treaty Settlements, [2002]), p44

adopted the view of the Whanganui River Tribunal that, ‘While Maori custom generally favours autonomy, it also recognises that, on occasion, the hapu must operate collectively’.<sup>104</sup> We adopt and endorse these views.

We did not feel the need to review the large natural grouping policy in depth in our August 2004 report, as we believed that the Crown had not altered its policy at that time to the disadvantage of Waitaha, and had already in fact recognised the mandate of Ngati Makino. Nevertheless, we expressed the view that there was clearly a need for the policy to be flexible, and encouraged the Crown to apply the policy ‘in a practical yet natural manner’. We then gave an indication of what a flexible, practical, and natural application of the policy might look like.

We suggested that the Crown find some way to negotiate with Ngati Makino contemporaneously with the rest of Te Arawa. If Ngati Makino agreed, we suggested that Waitaha and Tapuika should be invited to join together with them for those negotiations.<sup>105</sup> As we discuss below, our suggestions were based on our understanding of the particular historical circumstances of these iwi. We noted that Waitaha’s circumstances warrant ‘priority’ status, even if the exact same priority as the rest of Te Arawa was impossible under the current level of OTS resourcing.

We have considered the evidence presented to us on the Crown’s application of its policy in this context. In particular, we have read closely the various OTS officials’ reports to Ministers. We now turn to review those reports, to provide some context for our findings concerning whether the Crown responded adequately to our suggestions for Ngati Makino and Waitaha.

In their 12 August report to Ministers, OTS officials reported on the Tribunal’s August 2004 findings.<sup>106</sup> They advised that our suggestion to accord priority to separate or joint negotiations with Waitaha and Ngati Makino had been made with ‘little analysis’.<sup>107</sup> Officials were also concerned that the Tribunal had not responded to the Crown’s evidence regarding its prioritisation and large natural groupings policies. They advised that the Tribunal’s suggestions presented a number of problems to the Crown’s settlement policy and its CNI strategy, and that these would require careful consideration. A number of issues would need to be addressed before reaching a final position on whether to accept the Tribunal’s suggestions. Officials advised that prioritising negotiations with Ngati Makino, Waitaha, and Tapuika would have the following impacts:

- ▶ the executive council mandate may be destabilised;
- ▶ increased pressure would be placed on OTS resources;
- ▶ a reshuffling of priority claims would be required;

---

<sup>104</sup> Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p 65; Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p 13

<sup>105</sup> Waitangi Tribunal, *The Te Arawa Mandate Report*, p 117

<sup>106</sup> Document c2, exhibit 1, p 2

<sup>107</sup> Ibid, p 7

5.4.6(3)

- ▶ there would be a ‘precedent effect’ for other Te Arawa iwi/hapu and the rest of the country, which would increase the total number of remaining settlements; and
- ▶ the Crown’s settlement policy framework would possibly be undermined.<sup>108</sup>

Officials advised that there should be a deferral of any decision on separate negotiations with Ngati Makino and Waitaha.<sup>109</sup>

In their 30 August report to Ministers, OTS officials described the reconfirmation strategy proposed by the executive council, and recommended that the Ministers agree to that strategy.<sup>110</sup> They noted that, from the date the deed of mandate was recognised, officials had encouraged Ngati Makino, Waitaha, and Tapuika to take up seats available to them on the executive council.<sup>111</sup> Following the release of the Tribunal’s August 2004 report, the executive council had advised officials that neither Ngati Makino nor Waitaha wished to take up their seats. Accordingly, the executive council proposed to remove the seats allocated.<sup>112</sup>

Officials advised that there were risks to the stability of the executive council’s mandate if the Crown agreed that it should not hold seats open for Ngati Makino, Waitaha, and Tapuika. They considered that there was:

a danger that not requiring the seats to remain available might be perceived as the Crown being willing to implement the Tribunal’s suggestion for separate and priority negotiations. Such a perception would pose a serious threat to the stability of the Executive Council’s mandate.<sup>113</sup>

On balance, however, officials considered that it would be inappropriate for the Crown to continue to advocate that the three iwi join the executive council negotiations. They advised the Ministers to approve the executive council’s proposal to cease to hold open seats for Ngati Makino, Waitaha, and Tapuika.

In their 21 October report to Ministers, officials provided an update on the regional reconfirmation hui and recommended that the Ministers agree that results of the hui demonstrated majority support for the executive council’s reconfirmation strategy.<sup>114</sup> The report also advised that the executive council had ceased to retain seats for Ngati Makino, Waitaha, and Tapuika, and that OTS officials had ceased encouraging these iwi to mandate the executive council.<sup>115</sup>

In their 23 November report, officials updated the Ministers on recent mandate developments and, in the light of the recent withdrawal of a number of groups, provided a detailed

---

108. Document c2, exhibit 1, p8

109. Ibid, p9

110. Document c2, exhibit 2, p2

111. Ibid, p6

112. Ibid

113. Ibid

114. Document c2, exhibit 21, p2

115. Ibid

analysis of the viability of entering negotiations with the executive council grouping, taking into account the following factors:

- ▶ the Crown's 'large natural groupings' policy and settlement targets;
- ▶ the risk of multiple Te Arawa settlements; and
- ▶ the likelihood that a larger collective of Te Arawa could be found.<sup>116</sup>

Officials considered that the executive council grouping in its current state still constituted a 'large natural group', in terms of its:

- ▶ cohesiveness, distinctiveness, and natural community of interest;
- ▶ population;
- ▶ size and spread of geographical interests; and
- ▶ coverage of licensed Crown forest claims.<sup>117</sup>

With respect to the risk of multiple Te Arawa settlements, officials considered that there would be at least two more Te Arawa settlements in addition to that of the executive council.<sup>118</sup> One would be with Ngati Makino, Waitaha, and Tapuika, while the other would include those iwi/hapu which had recently withdrawn from the kaihautu. Officials acknowledged that it was possible that a greater number of settlements could eventuate. Nevertheless, they considered that the executive council grouping continued to be 'an effective means of advancing the Crown's objective of limiting the number of future settlements as far is appropriate'.<sup>119</sup> They also advised that 'as the bulk of the iwi or hapu outside the mandate are clustered around Lake Rotorua and Rotorua township in particular, rather than being scattered throughout the rohe, strategies could be designed and implemented to accommodate these matters'.<sup>120</sup>

Officials considered that there was little or no chance that a larger collective of Te Arawa iwi/hapu than the executive council grouping could be assembled at that time. They advised that the executive council represented approximately 22,000 people, and 10 of the 14 hapu who initially mandated the executive council in 2003.<sup>121</sup> Further, the executive council grouping covered a significant geographical area and represented the bulk of the Te Arawa licensed Crown forest land claims.<sup>122</sup> Officials reminded the Ministers of the possibility that groups may yet rejoin the executive council mandate.<sup>123</sup>

Based on this analysis, officials recommended to Ministers that the Crown continue towards negotiations with the executive council. They advised that 'significant cross-claim, forest lands and cultural redress issues' would arise, but that these matters could be managed with standard policies.<sup>124</sup>

---

116. Document c2, exhibit 35, p2

117. Ibid, p8

118. Ibid, pp8-9

119. Ibid, p13

120. Ibid, p10

121. Ibid, pp8, 12

122. Document c2, exhibit 35, p8

123. Ibid, p10

124. Ibid

5.4.6(3)

In their 20 December report to Ministers, officials provided an update on mandate developments, including the recent withdrawal of Ngati Rangiwewehi.<sup>125</sup> Officials reported that letters had been sent to Ngati Makino, Tapuika, and Waitaha on 4 November. These letters advised the iwi, first, that executive council seats were no longer being held open for them and, secondly, that the Crown could not accord to them the same priority in negotiations as it accorded to negotiations with the executive council.<sup>126</sup> Similarly, letters had also been sent to Ngati Whakaue and Ngati Rangiwewehi, advising them that the Crown could not accord priority to negotiations with them.<sup>127</sup> Officials also noted that, at the 10 December judicial conference for the Tribunal's CNI stage 1 inquiry, Ngati Makino and Waitaha had indicated that they would pursue their claims before the Tribunal. Officials had advised all claimants that the Crown would not enter negotiations with them while they pursued their claims through the Tribunal process.<sup>128</sup>

We have considered all the evidence presented to us regarding the Crown's application of its 'large natural groupings' policy in the context of our August 2004 suggestions regarding Ngati Makino and Waitaha. We do not believe that the Crown's actions constitute a flexible, practical, and natural application of this policy, as we suggested in our August 2004 report.

We are concerned that in none of the material presented to us is there any detailed analysis of the Crown's Treaty obligations to these iwi. It appears to us that, in the absence of any detailed analysis of its Treaty obligations, the Crown allowed itself to focus almost exclusively on its concerns that entering any new negotiations might lead to the further splintering and derailment of the executive council negotiations, and that this would create a precedent for settlements in the rest of the country.<sup>129</sup> It seems that ORS did have the resources to deal with negotiations involving Ngati Makino (at the least). As we pointed out in our August 2004 Report, Ngati Makino should have been in negotiations some years ago, and contemporaneous negotiations were now incumbent upon the Crown. We thought that Waitaha should be added to those negotiations if Ngati Makino agreed, and we understand that they have so agreed.

It is clear to us, then, that the Crown's response to our August 2004 suggestions was unsatisfactory and inadequate. We consider that, effectively, the Crown rejected our suggestions regarding Ngati Makino and Waitaha.

The fact that the Crown has advised these iwi that it remains 'willing to discuss matters' does not convince us that it intends to accord priority to separate negotiations with these iwi in the near future. In its letters of 4 November 2004, the Crown clearly signalled to Ngati Makino and Waitaha that they will not be accorded the same priority in negotiations as the executive council. This is despite the unique circumstances of these two groups, which

---

125. Document c2, exhibit 37, p 2

126. Ibid, pp 6–7

127. Ibid, p 9

128. Ibid

129. Document c2, exhibit 1, p 8

warrant their immediate elevation on the prioritisation list for negotiations. These unique circumstances were amply demonstrated in the evidence presented at the Tribunal's June 2004 hearing. Briefly, with respect to Ngati Makino, we note that they have had a Crown-recognised deed of mandate since 1997, and have a history of attempting to negotiate with the Crown. With respect to Waitaha and their history of raupatu, we simply reiterate our August 2004 comments:

we think it vital to bear in mind the extent of Waitaha's traditional differences with the rest of Te Arawa (as explained persuasively by Tame McCausland). In those circumstances, the Crown should perhaps have anticipated that Waitaha would choose to stand apart and have accordingly come up with a contingency plan.<sup>130</sup>

We note also that the Tauranga Moana Tribunal found that:

The position of Waitaha is not one that lends it to being 'naturally grouped' with the other hapu of Tauranga Moana or elsewhere. . . . Waitaha's rohe straddles two inquiry districts and they have, from the nineteenth century to the present day, been estranged from the mainstream of Te Arawa tribal organisation. It may therefore be preferable for Waitaha to negotiate a separate settlement with the Crown, if that is their desire and if their claims cannot be considered in the central North Island inquiry. Though Waitaha are numerically relatively small, the Crown has shown a willingness to negotiate settlements with Taranaki groups of a similar size, and we consider it appropriate that the Crown hold open the possibility of doing the same with Waitaha.<sup>131</sup>

Furthermore, since September 2004, Ngati Makino and Waitaha have agreed to cooperate, and seek to enter joint negotiations with the Crown.

#### **(4) Conclusion**

Essentially, we believe that, in its approach to our suggestion of separate negotiations with Ngati Makino and Waitaha, the Crown has preferred to follow its CNI settlement targets rather than seek to act in accordance with Treaty principles. As a result, we consider that the Crown has breached the principles of partnership and of equal treatment in relation to Ngati Makino and Waitaha.

Prejudice is likely to have arisen from the failure to negotiate with Ngati Makino during the years since the recognition of their mandate, although we had no direct evidence on that point. During that time, other tribes such as Ngati Awa and Ngati Tuwharetoa ki Kawerau have progressed their negotiations towards settlement. Now it seems that Ngati Pikiāo, whose overlapping interests with Ngati Makino were of such concern to the Crown in the past, will also proceed to a negotiated settlement before Ngati Makino. We find that prejudice is likely

---

130. Waitangi Tribunal, *The Te Arawa Mandate Report*, p117

131. Waitangi Tribunal, *Te Raupatu o Tauranga Moana Report* (Wellington: Legislation Direct, 2004), p 408

5.4.7

to result from the long delay in negotiating with Ngati Makino, combined with the present refusal to consider concurrent negotiations with them.

We therefore recommend that the Crown should now commence negotiations with Ngati Makino. Ngati Makino having agreed, these negotiations should also include Waitaha. Tapuika could perhaps be joined to those negotiations as well, if the Crown and tribes together accept that that would be a natural grouping. However, Ngati Makino and Waitaha should not have to wait for Tapuika if the latter do not wish to participate.

In our August 2004 report, we suggested in any case that Waitaha should be accorded priority, even if the exact priority vis-à-vis Te Arawa was impossible under current OTS resourcing. We continue to be of this view and believe that, unless an appropriate priority is accorded to Waitaha, the Crown will be acting in a manner inconsistent with the Treaty of Waitangi.

**5.4.7 Update on mandate issues**

We now turn to consider the information provided to us by the Crown and executive council on recent developments in the mandating process for Te Arawa. Our analysis of recent mandate developments is comprised of three parts. First, we review and comment on the Crown's position with regard to each of the Te Arawa groups who have withdrawn from, or sought to withdraw from, or continue to dispute their inclusion in, the executive council mandate. We do so to demonstrate why we have found that the executive council mandate cannot be representative of a Te Arawa-wide collective. Secondly, we describe the reduction in the size of the executive council mandate as it occurred between April 2004 when its deed of mandate was recognised by the Crown, and our 15 January 2005 hearing. Thirdly, we comment on the implications for the Crown in negotiating and settling with the executive council, given the current size and nature of its mandate. Specifically, we address the matter of 'overlapping claims' management, which we consider will be a key issue for the Crown.

**(1) Ngati Wahiao, Ngati Whakaue, and Ngati Rangiwewehi**

These three iwi withdrew from the executive council mandate during the reconfirmation process. According to the executive council's figures reproduced in table 2, Ngati Whakaue represent 27 per cent of the population of Te Arawa.<sup>132</sup> Ngati Rangiwewehi represent 9 per cent of Te Arawa. No figure is given for Ngati Wahiao, but we note that the combined figure for Tuhourangi and Ngati Wahiao is 9 per cent of Te Arawa. Consequently, the withdrawal of these iwi must have been a significant blow to the Crown and the executive council. We also appreciate that the decision to withdraw from the executive council mandate is a very significant one for any hapu or iwi. The recognition by the Crown of the withdrawal of each

---

132. We note that this figure includes Ngati Te Roro o Te Rangi, whose support for the executive council is under dispute, and four other hapu – Ngati Ngararanui, Ngati Tuteaiti, Ngati Tura, and Ngati Te Ngakau – that support the executive council.

of these groups followed well advertised hui-a-iwi. We are satisfied that the Crown was right and showed proper diligence in requiring that hui-a-iwi met requisite standards of notification and conduct, before recognising resolutions of these iwi to withdraw from the executive council's mandate. We commend the Crown for recognising the withdrawal of these hapu or iwi once duly notified.

As outlined in chapter 1, Ngati Wahiao's withdrawal was formally recognised by MICOTOWN on 26 November.

The withdrawal of the Ngati Whakaue cluster was also recognised on 26 November. We note that the Crown and the Ngati Whakaue cluster continue to dispute the inclusion of Ngati Te Roro o Te Rangi in the executive council's terms of negotiation. We agree with Ngati Whakaue that their tikanga demands that the six koromatua hapu should be considered the core of the Ngati Whakaue confederation, and that it is not appropriate to have their primary tribal name recorded in the terms of negotiation given the extent of their opposition. At the least, the terms of negotiation should be amended to delete any reference to Ngati Whakaue and their registered claims, leaving only the hapu names and the claims of those who have clearly signed up to the reconfirmation of the executive council's mandate.

The withdrawal of Ngati Rangiwewehi was formally recognised by MICOTOWN on 21 December 2004. Ms Baggott assured us that the terms of negotiation would be amended to reflect the withdrawal of Ngati Rangiwewehi in due course.

### **(2) Ngati Rangitihi**

The Crown's position with respect to Ngati Rangitihi, based on the outcome of the 17 June 2004 mandating hui, is that the majority of the iwi support the executive council mandate. It does not consider that there is wide support within Ngati Rangitihi for the Wai 996 claimants.<sup>133</sup>

We agree that the majority of active Ngati Rangitihi appear to support the executive council mandate. This conclusion is inescapable given the voting at the 17 June 2004 hui. On the other hand, the Wai 996 claimants do have a list of over 1500 people, whom they claim support them. They cannot, therefore, be readily dismissed. As we noted above, their claims will and are being heard by the CNI Tribunal. In the meantime, the Ngati Rangitihi representative on the kaihautu and executive council must be sure to represent all Ngati Rangitihi interests. The Crown has a duty to ensure that the executive council requires that he perform his obligations in this regard.

### **(3) Ngati Tuteniu**

The Crown continues to monitor the situation as regards Ngati Tuteniu's support for the executive council mandate. In their 20 December report, OTS officials advised the Ministers that a

---

133. Document c2, exhibit 37, p5

5.4.7(4)

hui-a-iwi for Ngati Tuteniu held on 11 September resolved to support the executive council. Then, at a November hui, six out of 11 Ngati Tuteniu kaihautu members were removed. A further hui had been held on 5 December at which a majority of attendees voted to withdraw from the executive council mandate, but the turnout at the hui was relatively low.<sup>134</sup>

The situation in respect of Ngati Tuteniu certainly appears fluid. While it is not clear to us that there is strong Ngati Tuteniu support for the executive council, nor do we consider that there has yet been a clear resolution by this hapu to withdraw its support. We note the executive council has yet to address issues of accountability and develop a process of withdrawal. When it does so during its review of its rules in May 2005, the Crown should ensure that there is provision made for hapu such as these to withdraw or properly affirm their support for the executive council's mandate.

**(4) Ngati Tamakari, Ngati Hinekura, Ngati Tutaki a Koti, Ngati Tutaki a Hane, Ngati Rongomai, and Ngati Rangiuuora**

The Crown's position with respect to these hapu of Ngati Pikiāo is similar to its position regarding Ngati Rangitihī. According to the Crown, the contention that these hapu do not support the executive council is the view of individuals, and is not widely endorsed by the hapu concerned. The Crown also considers that Ngati Pikiāo as a whole mandated the executive council, and that it is for Ngati Pikiāo to resolve such internal disputes.<sup>135</sup>

We note that in our August 2004 report, we specifically suggested a preliminary hui of kaihautu members to discuss matters of decoupling and representation of iwi or hapu on the kaihautu and the executive council. As our review of the Crown's responses suggests, the Crown did not ensure that this took place before the four regional reconfirmation hui. Instead, the adjustments made to the executive council's composition (including provision of three extra seats for Ngati Pikiāo and one for Ngati Rangiwewehi) were initially made by the executive council in isolation, albeit subsequently accepted by those who voted in support of the reconfirmation document. We note that kaihautu representatives were given a package deal in this respect – they could not vote on the individual components of it. This may well have meant that some interests or issues were sacrificed to achieve an overall outcome. If Te Arawa thought that certain hapu should be uncoupled, for example, they would have had to reject the whole reconfirmation.

In accepting this aspect of the reconfirmation process, and allowing certain issues and interests to be subsumed, the Crown might have been in breach of the Treaty principle of equity and equal treatment. The position is saved, however, because the executive council has yet to address issues of accountability and develop a process of withdrawal. When it does so in May 2005, the Crown should ensure that there is provision made for hapu such as these to

---

134. Document c2, exhibit 37, p 4

135. Document c2, exhibit 35, p 7

withdraw or affirm their support for the executive council's mandate. This will enable the Crown to avoid a Treaty breach.

**(5) *Ngati Rangiteaorere***

In October 2004, five out of six Ngati Rangiteaorere kaihautu members resigned from the kaihautu. On 5 December, a hui was held at which a resolution was put that Ngati Rangiteaorere should withdraw from the executive council's mandate. However, OTS officials did not consider that this hui met the requisite standards of notification and conduct for its result to be recognised. Notwithstanding this, in their 20 December report, officials advised the Ministers that 'the results indicate there is ongoing core support for the executive council'.<sup>136</sup> Accordingly, officials told us that they were continuing to monitor the situation.

We note that officials are trying to have it both ways by not recognising the result of the hui, while at the same time, taking from it that there is ongoing core support for the executive council. The most that can be said about this iwi is that support either for or against the mandate is disputed. According to the evidence, a vote was conducted and it resulted in 60 votes against the resolution to withdraw, and 53 in favour of it. We reiterate our comments with regard to Ngati Tuteniu. We note that Tuteniu and Rangiteaorere are represented together in the terms of negotiation, and together constitute one per cent of Te Arawa population.

**(6) *Ngati Whaoa***

The Crown's position in respect of Ngati Whaoa is similar in some respects to its position regarding the various hapu of Ngati Pikiao discussed in section 5.4.7(4). The Crown's view, expressed in the 20 December officials' report to Ministers, is that the Ngati Whaoa claimants Peter Staite and Richard Charters have expressed opinions as individuals, and do not represent the position of the majority of Ngati Whaoa.<sup>137</sup>

We believe that Ngati Whaoa's situation is a good example of uncoupling that should have been addressed at a preliminary hui of kaihautu members, as we suggested in August 2004. The claimants maintained that they were not a part of Ngati Tahu and deserved representation in their own right. In May 2005, when the executive council reviews its accountability rules and develops a process by which hapu may withdraw from its mandate, the Crown should ensure that provision is made for coupled hapu to be uncoupled, should they wish.

On 26 January 2005, we were advised that a Ngati Whaoa hui-a-iwi had been held on 22 January. However, because it took place after our January 2005 hearing, we do not consider that the outcome of that hui is a proper matter for our consideration in the present inquiry. We note that the Crown has advised that it will continue to monitor issues relating to Ngati Whaoa's support for the executive council, as part of its ongoing mandate maintenance.<sup>138</sup>

---

136. Document c2, exhibit 37, p 3

137. Ibid, p 5

138. Paper 3.3.34, p 4

5.4.7(7)

**(7) *Ngati Makino, Waitaha, and Tapuika***

The Crown has accepted that the executive council is not mandated to represent these three iwi, and they have been expressly excluded from the definition of Te Arawa in the terms of negotiation.<sup>139</sup> We note that, according to the executive council's figures, Ngati Makino, Waitaha, and Tapuika together represent 12 per cent of the Te Arawa population. As discussed in section 5.4.6, we believe that by refusing to conduct concurrent negotiations with Ngati Makino and accord Waitaha an appropriate priority, the Crown has breached the principles of the Treaty.

**(8) *Te Takere o Nga Wai***

In their report to Ministers of 20 December, OTRs officials stated their position with respect to the Te Takere o Nga Wai claimants:

In accordance with their obligation under the Terms of Negotiation, the Kaihautu Executive Council is in the process of writing to all registered Wai claimants that will be covered by the negotiations, to request that they do not pursue their claims and to withdraw from inquiries before the Tribunal. While this is an important signal to those registered Wai claimants, as you are aware, neither the Kaihautu Executive Council nor the Crown can compel these individuals to withdraw their claims. If those claimants do not withdraw, it is at the discretion of the Tribunal as to whether or not they will continue to hear claims that are in simultaneous negotiations with the Crown.

In accordance with the Crown's policy for comprehensive settlements, all claims (registered or unregistered) of iwi/hapu groups that continue to mandate the Kaihautu Executive Council will continue to be covered by the negotiations, notwithstanding the position of Wai claimants in the Tribunal.<sup>140</sup>

In a sense, the situation of the Te Takere o Nga Wai claimants is analogous to that of the claimants discussed above, who dissent from the majority position of their hapu. The Crown's policy is to negotiate and settle with mandated claimant groups, not to negotiate on the basis of individual registered Wai claims. Thus, where the views of registered claimants (be they individuals or whanau) conflict with the views of their hapu, or where there is little evidence of support for a claimant from their hapu, we believe that the Crown is right to consider that the view of the hapu provided at a duly convened hui should take precedence.

However, the reality is that section 6 of the Treaty of Waitangi Act 1975 provides for any Maori to file a claim with the Tribunal. We have a statutory duty to hear those claims. In our view, claimants of this type are, at the least, entitled to be consulted regarding the negotiation and settlement of their claims. The evidence is that there was no consultation with individual claimants before the terms of negotiation were signed by the Crown and the executive

---

139. Document c2, exhibit 46, p3

140. Document c2, exhibit 37, p5

council. This is a matter we did not address in our August 2004 report, but it is a logical extension of the guidelines to good practice that we appended to that report. The Crown should ensure that there is a process that enables these claimants to be consulted.

Also, we draw a distinction between individually filed claims that are in fact about the same generic issues as the broad historical claims, and those which raise genuinely distinct and individual issues. We note the Crown's settlement of the 'ancillary' Ngai Tahu claims, alongside and in conjunction with its settlement of the main historical claims. The central North Island is a region with very many such 'ancillary' claims, all of them dear to the hearts of those who have brought them to the Tribunal. We note the caution contained in the *Ngati Awa Raupatu Report* in respect of such claims:

As to these matters generally, we can find no proper basis for incorporating the claims of particular persons into general tribal settlements. One should not be compromised by the other. The broad principle of law must apply: where plaintiffs are not the same and the causes of action and the subject-matters are distinct or severable, the cases must be handled separately.<sup>141</sup>

As a matter of general principle, we caution the Crown and executive council to ensure the proper treatment of such 'ancillary' whanau and individual claims in their negotiations.

**(9) Current state of the executive council mandate**

We now turn to our discussion of the incremental reduction of the executive council mandate. The executive council was established with the express purpose of 'entering into negotiations with the Crown for settlement of all Te Arawa historical claims'.<sup>142</sup> As we described in section 1.2, the executive council's 1 December 2003 deed of mandate contained a list of 14 hapu/iwi which it represented. The deed of mandate specifically noted that the executive council did not represent Ngati Makino, Waitaha, and Tapuika. Together, these three iwi constitute approximately 12 per cent of the total population of Te Arawa. Thus, in April 2004, when its deed of mandate was formally recognised, the executive council represented 88 per cent of the population of Te Arawa.

Based on the evidence presented to us at the June hearing, in our August 2004 report we expressed confidence that the majority of Te Arawa supported the executive council, and had approved its mandate to represent them in negotiating and settling the historical claims of Te Arawa.<sup>143</sup> However, between 1 April 2004 (when the executive council deed of mandate was formally recognised by Ministers) and 26 November 2004 (when the terms of negotiation between the Crown and executive council were signed) the level of support within Te Arawa for the executive council dropped.

---

141. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p142

142. Document A130, p1

143. Waitangi Tribunal, *The Te Arawa Mandate Report*, p112

5.4.7(10)

We note that OTS officials advised in their report to Ministers of 23 November 2004 that, taking into account the recent withdrawal of the Ngati Whakaue cluster and Ngati Wahiao, and the then imminent withdrawal of Ngati Rangiwewehi, the executive council mandate represented ‘just over half of the total Te Arawa population’.<sup>144</sup> We also note Mr Doogan’s comment along similar lines made during Tribunal questioning. Based on the executive council’s population figures taken from table 2, the combined total population of groups which are expressly excluded from the definition of Te Arawa in the terms of negotiation is around 48 per cent.<sup>145</sup> We also note that there is some uncertainty over support for the executive council from other hapu or iwi, as discussed above. Therefore, we consider that the Crown’s conclusion that ‘just over half’ of Te Arawa support the executive council is realistic.<sup>146</sup> However, we consider that to comment that the executive council still represented 10 out of 14 of the groups of Te Arawa – as OTS and TPK officials have done – misrepresents the true level of support for the executive council among the people of Te Arawa. Nevertheless, by the time the terms of negotiation were signed, the Ministers had properly been advised that the executive council represented 10 groups, and that those groups comprised 22,000 people, or ‘just over half’ of Te Arawa.<sup>147</sup>

The Crown signed the 26 November 2004 terms of negotiation in the knowledge that the executive council was mandated to represent ‘just over half’ of Te Arawa, and conversely, that 48 per cent of Te Arawa did not support the executive council. Further, in their 23 November report, officials had advised Ministers of the risk of additional iwi/hapu withdrawing from the mandate before the terms of negotiation were signed.<sup>148</sup> In particular, officials advised that Ngati Rangiteaorere continued to be divided over their support for the executive council.

Thus, the Ministers made their decision to proceed to signing the terms of negotiation in the knowledge that the executive council had lost a considerable portion of its support since April 2004, and that uncertainty remained over the support of some iwi/hapu for the executive council.

**(10) Managing overlapping claims**

The Crown has identified that there will be ‘significant cross-claim, forest lands and cultural redress issues’ arising from negotiations with the executive council.<sup>149</sup> We do not believe that we would be properly exercising our role if we were to leave the Crown and executive council to proceed with the negotiations without our views on these issues.

Given that the executive council is now mandated to represent ‘just over half’ of Te Arawa,

---

144. Document c2, exhibit 35, p8

145. The figure of 48 per cent is comprised of: Ngati Makino, Waitaha, and Tapuika (12 per cent); Ngati Whakaue (27 per cent); and Ngati Rangiwewehi (9 per cent). This figure does not include Ngati Wahiao, whose withdrawal from the executive council’s mandate has been formally recognised but for whom we do not have a population figure.

146. Document c2, exhibit 35, p8

147. Ibid

148. Ibid, pp 4–7

149. Ibid, p10

we have asked ourselves how the Crown will deal with their interests fairly and impartially. Clearly, the issue of ‘cross-claims’ is critical, and has been identified as such by the Crown and claimants to this inquiry alike.

We should say at the outset that we do not consider that this is a cross-claim issue in the same sense as those previously considered by the Tribunal, for example in the *Ngati Awa Settlement Cross-Claims Report*. Previous Tribunals have generally considered cases which involved distinct iwi which share a common border, and perhaps distant ancestry. The present inquiry concerns the overlapping core interests of related iwi/hapu. There is no question that there will be significant overlap between the interests of Te Arawa groups within the executive council and outside it. This is even more the case for iwi like Ngati Whakaue and Ngati Pikiao, with some hapu supporting the council, and some outside its negotiations. We have no doubt that it will be extremely difficult for the Crown to settle the claims of those iwi/hapu of Te Arawa who have mandated the executive council, without prejudicing the interests of other Arawa groups.

Counsel for the taumata provided two examples to demonstrate this point. The first was the Whakarewarewa village and geothermal area, which is claimed by both Tuhourangi, who have mandated the executive council, and Ngati Wahiao, who have withdrawn. Secondly, Mr Taylor provided the example of the Whakapoungakau Ranges, which are claimed by both Uenukukopako, who have mandated the executive council, and by Ngati Rangiteaorere and Ngati Tuteniu, whose support for the executive council is under dispute.<sup>150</sup>

We understand that the registered claims of certain iwi/hapu who have clearly signalled their withdrawal from the executive council mandate, are still listed in the terms of negotiation. These claims have been included because they also deal in part with the issues and interests of iwi/hapu which have mandated the executive council. The terms of negotiation, however, do not purport to negotiate a settlement for groups who have not mandated the council. Their claim issues will remain to be settled, presumably after the settlement of those parts of their claims relating to their kin. Inevitably, identical issues will thereby be settled for some but not others. We do not see a way for the Crown and kaihautu to avoid this outcome, by following the process set out in the terms of negotiation.

We believe that Ngati Whakaue, for example, will be put in a position where they have to protect their interests during the executive council’s negotiations, in the same way as other ‘overlapping’ claimants. Despite the fact that their withdrawal from the executive council mandate has been formally recognised by the Crown, Ngati Whakaue will be required to ascertain the nature and extent of their claims, and seek to ensure that their own interests are not settled. With a minority of Ngati Whakaue hapu participating in negotiations but most of that kin group remaining outside, the situation will be very difficult to manage.

The Crown is aware of the need to manage what it calls overlapping claims, and has sought to deal with the issue by developing a process by which the claims and interests of all Te

---

<sup>150</sup>. Paper 3.3.30, p13

5.4.7(10)

Arawa iwi/hapu will be considered, before the deed of settlement is finalised. This process is written into the terms of negotiation in clauses 60 and 61:

**60.** The Kaihautu Executive Council and the Crown agree that overlapping claim issues over redress assets will need to be addressed to the satisfaction of the Crown before a Deed of Settlement can be finalised. The parties also agree that certain items of redress provided to Te Arawa as part of the Deed of Settlement may need to reflect the importance of an area or feature to other claimant groups.

The process by which the claims of overlapping claimants will be assessed is, in summary:

- a. following the signing of this document:
  - i. the Crown will inform potential overlapping claimants of the Crown's intention to negotiate a comprehensive settlement of Te Arawa Historical Claims, seek the overlapping claimants' views as to their interests in Te Arawa's area of interest, and outline the Crown's overlapping claims policies and processes; and
  - ii. the Kaihautu Executive Council will initiate dialogue with overlapping claimants and seek to establish a process for addressing issues of common interest;
- b. prior to making an initial redress offer for the settlement of Te Arawa Historical Claims, the Crown will ensure that it:
  - i. has knowledge of the interests of both Te Arawa and overlapping claimants; and
  - ii. has considered if redress can be provided in a way that accommodates these interests; and
- c. following the signing of an Agreement in Principle, the Crown will undertake a consultation process with overlapping claimants;
  - i. if Te Arawa and the overlapping claimants are unable to reach an agreement as to their respective interests, the Minister in Charge of Treaty of Waitangi Negotiations will make a provisional decision on contested redress. The Minister will invite overlapping claimants and the Kaihautu Executive Council to comment on that provisional decision; and
  - ii. the Minister will make a final decision on contested redress after taking any additional responses into consideration.

**61.** The Crown may be in Treaty settlement negotiations with overlapping claimants. Issues arising in those negotiations, including issues concerning licensed Crown forest land, may be relevant to these negotiations and vice versa. The Crown will ensure that Te Arawa is kept informed of these issues (subject only to the confidentiality of matters specific to the other negotiations).<sup>151</sup>

---

151. Document c2, exhibit 46, pp14–15. Note that the term 'Te Arawa' as used here is defined as those iwi or hapu of Te Arawa that have mandated the executive council.

The Crown considers that this process will enable it to treat fairly and impartially with those iwi/hapu of Te Arawa which have withdrawn from or have not mandated the executive council. We are concerned, however, that the process described in the terms of negotiation may put groups outside the executive council mandate at a disadvantage relative to groups within it. We now elaborate on these concerns.

Groups within the executive council mandate have the opportunity to engage fully in the negotiation process itself, to negotiate the Treaty breaches that the Crown will acknowledge, and to discuss the nature and extent of the redress they seek, before the signing of an agreement in principle. The provisions to protect the interests of groups outside the mandate where those interests overlap with the executive council grouping, however, appear to be weak.

In the early stages of its negotiations with the executive council, the Crown's responsibility with respect to addressing the concerns of overlapping claimants is simply to 'seek the overlapping claimants' views as to their interests in Te Arawa's area of interest'. Similarly, the executive council is obliged to 'initiate dialogue' with the overlapping claimants. Before the Crown makes its initial offer of redress to the executive council, it must ensure that it 'has knowledge of the interests of both Te Arawa and overlapping claimants' and 'has considered if redress can be provided in a way that accommodates [the interests of both groups]'.<sup>152</sup>

Thus, at no point before the signing of an agreement in principle is there a requirement that the Crown ensure that there has been full and effective consultation with overlapping claimants. There is an onus on the executive council simply to 'seek to establish a process for addressing issues of common interest'. We believe that by following this process the Crown cannot help but give secondary consideration to the views of the so-called overlapping claimants relative to those of the executive council.

The provisions for consultation after the signing of the agreement in principle between the Crown and executive council offer little more by way of protection for the interests of overlapping claimants. If the discussions between the executive council and overlapping claimants fail to produce a satisfactory resolution to cross-claim issues, MICOTOWN will make a provisional decision on contested redress. The executive council and overlapping claimants are invited to comment on the provisional decision. Then, after a consideration of these responses, MICOTOWN makes a final decision.

Ultimately, then, decision to provide any redress for overlapping claimants who are outside the executive council mandate rests with the Minister, whose decision will be based largely on the advice of ORS officials and, indirectly, from the executive council. Thus, the executive council is in the privileged position of being a party to, and potential beneficiary of, negotiations over 'cross-claims' on the one hand, and a de facto provider of specialist advice to the Crown on the other.

---

152. Document c2, exhibit 46, pp14-15

5.4.7(11)

The Crown's proposed process for managing overlapping claims leaves us concerned for those iwi/hapu who have never mandated the executive council or who have withdrawn from its process. We consider that the process will unfairly favour those at the negotiation table over those who are not.

This might be acceptable if the Crown had a contingency plan to negotiate with those who have withdrawn from the executive council process, but it does not. In their 23 November report to Ministers, OTS officials discussed the likelihood that the Crown would eventually need to negotiate with at least two Te Arawa groups in addition to the executive council. Nevertheless, we are not aware that the Crown has seriously considered how and when it may approach these additional negotiations. As we mentioned above in our discussion with respect to Ngati Makino and Waitaha, the overriding imperative behind the Crown's actions appears to be its objective 'to limit as far as appropriate the number of future settlements'.<sup>153</sup>

In short, we believe that the Crown has made it clear which group it prefers to negotiate with. In fact, this position is explicitly stated in the terms of negotiation:

8. The Crown wishes to make clear it is according priority to negotiate a settlement with the iwi/hapu that have mandated the Kaihautu Executive Council to negotiate a settlement of their claims.<sup>154</sup>

Such an approach may have been appropriate where the mandated body is challenged by only a small minority, such as in the Pakakohi and Tangahoe situation. But it is now clear to us that this is no longer the case in respect of the Te Arawa mandate. As we discussed in section 5.4.7(9), the level of support for the executive council has now dropped to the point where, and by the Crown's own admission, 'just over half' the population support it. Conversely, 48 per cent of the population, including one of the largest Te Arawa groups, have withdrawn from the executive council, or they have never joined it.

We agree with the Crown's comments that 'achieving a larger collective of Te Arawa iwi/hapu is probably unrealistic at this time'. We do not, however, consider this a valid reason to leave the considerable proportion of Te Arawa hapu and iwi who do not support the mandate 'out in the cold'.

**(11) *Implications of Crown negotiation and settlement with executive council***

In our 17 December direction, we defined the scope of the reconvened inquiry. We stated that the January 2005 hearing would focus firstly on the issue of whether the Crown had followed the substance of our August 2004 suggestions, and secondly on recent developments in the Te Arawa mandating process.

During the January 2005 hearing, our attention was drawn to two issues which we now

---

153. Document c2, exhibit 35, p9

154. Document c2, exhibit 46, p4

consider to be key, as a result of hearing evidence from both claimants and the Crown, updating the Tribunal on developments. First, it became clear that divisions within Te Arawa remain as strong as they were at the time of our June 2004 hearing. In our August 2004 report, we expressed the view that, should it fail to respond adequately to our suggestions regarding the reconfirmation of the executive council mandate, the Crown would risk entrenching division between the supporters of the executive council, and its opponents. We feared any such split could take many years to overcome.<sup>155</sup> Having seen and heard from the parties, we now consider it very unlikely that bridges can be mended between iwi/hapu outside the executive council mandate and those who support it. There is no point in recommending mediation or alternative dispute resolution for them. To attempt to force them to work together now will merely frustrate the negotiation process rather than expedite it. Nor is there any point in the executive council holding open seats for those iwi/hapu who have resolved to withdraw. Secondly, the extent of the reduction in the level of support for the executive council became clear to us only during the January hearing.

We acknowledge that the executive council presently represents a substantial proportion of the Te Arawa population. In fact, it is one of the largest groups ever represented in negotiations with the Crown. We encourage the Crown to continue to assist the executive council to maintain, and where possible build upon, its mandate. However, we do not believe that to proceed with negotiations with just over half of Te Arawa, and to leave the other groups waiting indefinitely for the opportunity to negotiate and settle their claims, would be consistent with Treaty principles. Rather, in the current context, where almost half the population of Te Arawa are not represented by the executive council, the principle of equal treatment suggests that the Crown negotiate the historical claims of Te Arawa contemporaneously with more than one mandated group.

This suggestion should not conflict with the Crown's 'large natural groupings' policy. Rather, we consider that the Treaty obligation on the Crown requires that the policy be applied with some flexibility, and in a practical and natural manner. After all, it appears to us that, with the possible exception of the Wai 996 claimants, all the claimants in this inquiry are prepared to negotiate with the Crown. Even before the terms of negotiation were signed, Crown officials had identified two additional Te Arawa groupings with whom it may have to negotiate in the future. We note that Ngati Makino and Waitaha have agreed to work together towards negotiating and settling their claims. We note also that the Ngati Whakaue cluster, representing approximately a quarter of the population of Te Arawa, would on the face of it appear to constitute a 'large natural grouping'.

While the Crown is extremely reluctant to negotiate with more than one group at this time, by avoiding this in the context of the Te Arawa negotiations, it is creating a very serious set of problems for itself in attempting to manage so-called 'overlap' issues. It is possible that

---

155. Waitangi Tribunal, *The Te Arawa Mandate Report*, p112

5.4.7(12)

managing overlapping claims in a way that is consistent with Treaty principles may turn out to be just as much work as mandating additional Te Arawa groups and proceeding to negotiations with them.

We believe and have recommended that the Crown should commence negotiations with Ngati Makino. With the latter's agreement, Waitaha and perhaps Tapuika could be joined to those negotiations. That recommendation is consistent with our August 2004 suggestions.

As far as the future arrangements are concerned, we note that another group based around the Ngati Whakaue cluster has formed. Ngati Rangiwewehi and Ngati Wahiao could be given the option of joining with the Ngati Whakaue cluster for the purposes of concurrent negotiations. We also note that there are outstanding issues in respect of Ngati Rangiteaorere, Ngati Tuteniu, and Ngati Te Roro o Te Rangi, and that some or all of these groups may choose to join with a mandated Ngati Whakaue grouping.

**(12) Concluding comments**

It follows from our discussions above that, with the exception of Ngati Makino and Waitaha, we have not upheld the claims of any of the hapu or iwi or individual claimants that appeared before us. Rather, we have recognised that the Crown's monitoring and acceptance of the reconfirmation process was not in breach of the Treaty of Waitangi. That process will now continue with the re-evaluation of the executive council's rules and accountability, for the benefit of those Arawa groups who have exercised their tino rangatiratanga by reconfirming their mandate of the council. We wish them well.

That said, we have signalled that the Crown must now deal with the positions of those who have remained outside the executive council mandate. Furthermore, we agree with the claimants that given the current state of the mandate, it is not appropriate to describe the negotiations with the executive council as a Te Arawa settlement negotiation, however narrowly defined in the terms of negotiation. At the most, it is a negotiation involving some hapu or iwi of the Te Arawa confederation, and it should be honestly and transparently presented as such. Should the Crown proceed to negotiate with just over half of Te Arawa, continue to call that a comprehensive settlement of Te Arawa historical claims, and not properly safeguard the overlapping core claims of other Arawa groups, we believe that Treaty breaches and prejudice will inevitably arise. We also believe that, as we have outlined above, it is within the power and capacity of the Crown to prevent such an outcome.

Finally, we note that our inquiry into the mandate of the executive council is now at an end. There is still the prospect of fresh claims being filed throughout the negotiation process. Whether or not the chairperson will grant urgency depends on the circumstances of any future claimant group. To avoid the need for a future hearing, we have attempted to provide some direction to the Crown on how to advance the interests of all of Te Arawa. We believe that the Crown should act upon our advice. In that limited sense, the case as put by the tau-mata has been vindicated.

### 5.5 SUMMARY

The key points made in this chapter are as follows:

- ▶ The reconfirmation process was designed by the executive council and the Crown, and accepted by those Te Arawa groups which have voted in favour of it. We are satisfied that the Crown has not breached the Treaty of Waitangi in its monitoring of the process, nor in its acceptance of the outcome. Those Te Arawa groups which have reconfirmed the mandate of the executive council have exercised their tino rangatiratanga, and they will now negotiate their claims with the Crown.
- ▶ The reconfirmation process departed from our suggestions when the council decided to defer a review of its rules and accountability until May 2005. As a result, the kaihautu has yet to determine a process for the uncoupling of groups that do not wish to remain coupled, and a formal process for withdrawal. In our view, this has left Ngati Tuteniu, Ngati Rangiteaoere, the six Ngati Pikiāo hapu who pursued claims before us, and Ngati Whaoa, in an unsettled position. We do not find their claims to be upheld, as we expect their position to be resolved successfully when proper procedures are finalised in May. These hapu need to be given the opportunity to properly and formally confirm their support or otherwise for the mandate of the executive council.
- ▶ The Wai 996 Ngati Rangitihi claimants and the Te Takere o Nga Wai claimants are responsible for registered Wai claims which have been included in the executive council's mandate. They are, therefore, affected by the Crown's policy of negotiating historical claims with mandated groups. Where the views of registered claimants conflict with the views of their hapu, or where there is little evidence of support for a claimant from their hapu, we believe that the Crown is right to give precedence to the view of the hapu provided at a duly convened and monitored hui. For that reason, we do not uphold the Wai 996 Ngati Rangitihi claim or the Te Takere o Nga Wai claims in this inquiry. Their other claim issues will be heard in the CNI inquiry, as is our statutory obligation. None the less, we consider that claimants of this type are, at the least, entitled to be consulted regarding the negotiation and settlement of their claims. We also remind the Crown that individuals and whanau may have specific, 'ancillary' claims which must be properly provided for in Treaty settlements.
- ▶ The Crown rejected our August 2004 recommendation that another mandating hui be held for Ngati Rangitihi. Given the additional information provided to the Tribunal, and the position now taken by the Wai 996 claimants in respect to holding another hui, we do not find that this failure constitutes a breach of Treaty principles.
- ▶ Moving beyond the reconfirmation process, we consider that the Crown effectively rejected our August 2004 suggestions regarding Ngati Makino, Waitaha, and Tapuika. We do not consider that the Crown's concern to limit the number of CNI (and national) settlements provided a justification for this. Quite apart from Treaty principles, ORS has accepted the necessity of at least two additional Te Arawa settlements. We find that the

Crown has breached the Treaty principles of partnership and of equal treatment in relation to Ngati Makino. Prejudice is likely to result from the long delay in negotiating with Ngati Makino, combined with the present refusal to consider concurrent negotiations with them. We therefore recommend that the Crown should now commence negotiations with Ngati Makino.

- ▶ With respect to Waitaha, we remain of the view (from our earlier report) that priority should be accorded to negotiations with them. Unless the Crown does so, it will be acting in a manner inconsistent with the Treaty of Waitangi. As above, we note that OTS has accepted that two additional Arawa settlements will be required, and we note also that Waitaha and Ngati Makino have agreed to enter joint negotiations. We think that Tapuika could be joined to those negotiations, if the Crown and claimants together thought that that would form a natural grouping. It seems to us, therefore, that priority is both practicable for the Crown, and required if it is to act consistently with the principles of the Treaty of Waitangi.
- ▶ Finally, we note the formal withdrawal of Ngati Whakaue, Ngati Wahiao, and Ngati Rangiwewehi from the executive council's mandate. We are satisfied that the Crown acted consistently with the Treaty when it required that well-notified and conducted hui-a-iwi were held before it recognised the withdrawal of these groups.
- ▶ Their withdrawal, however, in combination with the non-participation of Ngati Makino, Waitaha, and Tapuika, means that just over half of Te Arawa have reconfirmed their support for the executive council's mandate. It is now the case that 48 per cent of Te Arawa have exercised their tino rangatiratanga in favour of pursuing a different path.
- ▶ First, we think that this creates a new order of problems for the Crown. There will be very significant overlaps between core Te Arawa claims, some of them inside the negotiations, some of them outside. This is particularly so for Ngati Whakaue and Ngati Pikiao, but also for other groups. These are not 'cross-claims' in the conventional sense. We are concerned that the process for managing these overlapping claims, as set out in the terms of negotiation, will put groups outside the executive council at a significant disadvantage.
- ▶ Secondly, we do not believe that to proceed with negotiations with just over half of Te Arawa, and to leave the other groups waiting (for an unspecified time) for an opportunity to negotiate and settle their claims, would be consistent with Treaty principles. This would not in effect be a comprehensive settlement of Te Arawa's historical claims, no matter how narrowly the terms of negotiation define 'Te Arawa'. Nor would it properly safeguard the overlapping core claims of other Te Arawa groups. We believe that Treaty breaches and prejudice will inevitably arise. We also consider that, given the size of the Ngati Whakaue cluster, and the willingness of at least Waitaha and Ngati Makino to negotiate jointly, that practicable solutions are available to the Crown, that will enable it to act consistently with the Treaty.

Dated at *Wellington* this *29th* day of *March* 20 *05*



CL Wickliffe, presiding officer



J Baird, member



GH Herbert, member



