

## CHAPTER 4

### THE CASES OF THE CROWN AND EXECUTIVE COUNCIL

#### 4.1 THE CROWN

Mr Doogan presented the Crown's case in this inquiry. In broad terms, he submitted that the Crown had accepted the Tribunal's finding that there were procedural flaws in its original assessment and recognition of the executive council's mandate, and the Tribunal's suggestion that there be a reconfirmation process. The Crown had made a 'proper and full response' to the Tribunal's suggestions and therefore had not breached the Treaty or its principles.<sup>1</sup> In accordance with the Tribunal's 17 December 2004 direction, Mr Doogan addressed two key issues in his submissions. First, he made submissions on the Crown's response to the Tribunal's August 2004 suggestions, and secondly he provided an update on recent mandate developments. In both cases, he referred extensively to the affidavit of OTS manager Heather Baggott.

##### 4.1.1 Crown's response to the Tribunal's August 2004 suggestions

Mr Doogan submitted that the reconfirmation process had substantially accorded with the August 2004 suggestions of the Tribunal. He focused in particular on the Tribunal's suggestion that the Crown and executive council consult with the taumata in an open and transparent manner in developing a reconfirmation process. Mr Doogan argued that this had occurred, and submitted that the robustness of the consultation process was evidenced by the fact that the executive council's draft reconfirmation document was 'significantly amended' as a result of its consultation process.<sup>2</sup>

Mr Doogan then noted that during the reconfirmation process, certain iwi/hapu had undertaken formal processes to withdraw from the kaihautu. He submitted that the withdrawal of these groups had been recognised by the Crown, and that their claims would not be included in negotiations with the executive council. In this respect, he argued, the terms of negotiation of 26 November 2004 reflected the outcome of the reconfirmation process

---

1. Paper 3.3.20, p3

2. Ibid, p4

4.1.2

as a whole. Nevertheless, the Crown's view was that the executive council still represented a 'substantial proportion' of Te Arawa, and it has afforded priority to its negotiations with the executive council. In respect of those iwi/hapu outside the executive council mandate, Mr Doogan advised that the Crown respected 'the right of those who have decided to withdraw from the [executive council] to progress their claims before the Tribunal or to seek direct negotiations with the Crown at a future date'.<sup>3</sup>

With respect to the Tribunal's August 2004 suggestions relating to Waitaha, Ngati Makino, and Tapuika, Mr Doogan advised that the Crown had written to all three groups, advising them that their prospect for priority in negotiations would be enhanced if they joined together for the purposes of negotiations.<sup>4</sup> He also noted that the Crown's understanding was that Waitaha and Ngati Makino intended to pursue their claims through the Tribunal's CNI hearings.

**4.1.2 Update on recent mandate developments**

In respect of recent developments in the mandating process, Mr Doogan referred to the affidavit of Ms Baggott. We turn now to summarise the Crown's position with respect to those Te Arawa groups which have withdrawn from, never mandated, or dispute their inclusion in, the executive council mandate.

**(1) Ngati Rangiteaorere**

According to Mr Doogan, the Crown did not consider that the 5 December hui held by Ngati Rangiteaorere to vote on a motion to withdraw from the executive council had met requisite standards of public notification. Therefore the Crown did not recognise any resolutions passed at it. Nevertheless, the Crown considered that the hui suggested 'a level of ongoing core support' for the kaihautu.<sup>5</sup> In her evidence, Ms Baggott also noted that a process had been put in place to appoint new Ngati Rangiteaorere kaihautu members to fill the vacancies left when five out of six members resigned in October 2004.<sup>6</sup>

**(2) Ngati Rangiwewehi**

With respect to Ngati Rangiwewehi, Mr Doogan noted that a well advertised hui-a-iwi of 12 December 2004 had voted unanimously in favour of withdrawing from the kaihautu.<sup>7</sup> In her evidence, Ms Baggott advised that on 21 December MICOTOWN formally recognised the withdrawal of Ngati Rangiwewehi from the kaihautu, after considering officials' advice on the

---

3. Paper 3.3.20, p4

4. Ibid, p5

5. Ibid, p4

6. Document c2, p17

7. Paper 3.3.20, p5

notification and conduct of the hui.<sup>8</sup> She advised that the terms of negotiation, which still included Ngati Rangiwewehi under the clause 6 definition of Te Arawa, would be appropriately amended by agreement between the Crown and executive council in due course.<sup>9</sup>

**(3) Ngati Whakaue**

Mr Doogan then discussed the recent developments concerning the Ngati Whakaue cluster. He noted that the cluster had recently written to the Crown advising that they would not consider rejoining the kaihautu in the future, and questioning the inclusion of Ngati Te Roro o Te Rangi and certain Ngati Whakaue registered claims in the 26 November terms of negotiation. In her evidence, Ms Baggott noted that MICOTOWN had formally recognised the withdrawal of 11 Ngati Whakaue hapu on 26 November. This decision was based on the outcome of hui-a-iwi held on 12 September and 21 November. However, she advised that officials did not consider that the results of these hui demonstrated that Ngati Te Roro o Te Rangi had endorsed the resolution to withdraw. Accordingly, the Crown considered that Ngati Te Roro o Te Rangi and four other Ngati Whakaue hapu continued to support the executive council.

With respect to the inclusion of certain Ngati Whakaue registered claims in the terms of negotiation, Ms Baggott advised that:

It is consistent with the Crown's policy preference for comprehensive settlements that all the historical claims of those Ngati Whakaue hapu who remain with the [executive council] will be the subject of negotiations, including all registered claims (in whole or in part) that those hapu have an interest in; and

The Terms of Negotiation explicitly exclude the claims (in whole or in part) of those groups who the Crown has formally recognised are not covered by the mandate of the [executive council].<sup>10</sup>

We take this to mean that because the Crown considers that five Ngati Whakaue hapu support the executive council mandate, it has included all registered claims of Ngati Whakaue in the terms of negotiation, but that it will seek to avoid negotiating and settling the interests of those hapu of Ngati Whakaue who are outside the executive council mandate. In his closing submissions, Mr Doogan argued that the inclusion of all Ngati Whakaue claims in the terms of negotiation 'ensure[d] transparency and reflect[ed] the Crown's policy of negotiating comprehensive and final settlements'. He noted that the list of registered claims in clause 10 of the terms of negotiation needed to be read in conjunction with the definition of Te Arawa in clause 6.<sup>11</sup>

---

8. Document c2, p18

9. Ibid, pp18-19

10. Ibid, p16

11. Paper 3,3.34, p3

4.1.2(4)

**(4) Ngati Rangitihī**

With respect to Ngati Rangitihī, Mr Doogan reiterated the Crown's position that, despite the Tribunal's August 2004 suggestions, it did not consider that a further mandating hui was necessary. He submitted that the 17 June 2004 hui-a-iwi had followed due process and clearly demonstrated Ngati Rangitihī's support for the executive council. More specifically, he argued that the 17 June hui 'substantially complie[d]' with the Tribunal's suggestions in respect of notification, venue selection, and neutrality of chair, observers, and record takers. Further, he advised that the Crown did not require the agreement of the individual registered claimants before negotiating the claims of a hapu, where it had recognised the mandate of hapu representatives for that purpose.<sup>12</sup>

**(5) Ngati Whaoa**

With respect to the submissions of counsel for Ngati Whaoa to the effect that a 22 January 2005 hui-a-iwi had voted to withdraw from the kaihautu, Mr Doogan argued that these submissions concerned matters which had taken place since the 12 January Tribunal hearing, and were therefore beyond the scope of this inquiry. He argued that matters concerning Ngati Whaoa were in the nature of 'ongoing mandate maintenance', and that they would continue to be monitored by the Crown in accordance with both Crown policy and the Tribunal's August 2004 suggestions.<sup>13</sup>

**(6) Ngati Wahiao**

With regard to Ngati Wahiao, Ms Baggott noted that, following the well advertised hui-a-iwi of 19 November 2004, MICOTOWN formally recognised Ngati Wahiao's withdrawal in a letter of 26 November 2004.<sup>14</sup>

**(7) Ngati Tuteniu**

With respect to the positions of both Ngati Tuteniu and Ngati Tamakari, Ms Baggott advised that the Crown agreed with the Tribunal's August 2004 finding that the concerns of these groups were 'truly within the domain of Te Arawa to decide'.<sup>15</sup> With respect to the Crown's position regarding Ngati Tuteniu, she referred to the 20 December ORS officials' report to Ministers:

- ▶ six of 11 Ngati Tuteniu kaihautu members had recently been removed following a hui to assess their performance;
- ▶ that three hui had been called for Ngati Tuteniu within three months, with conflicting results regarding the hapu's support for the executive council mandate; and

---

12. Paper 3.3.34, p4

13. Ibid

14. Document c2, p17

15. Ibid, p12

- ▶ that officials continued to monitor the situation with respect to Ngati Tuteniu's support for the executive council.<sup>16</sup>

**(8) Ngati Tamakari**

With regard to Ngati Tamakari, Ms Baggott noted that the 23 November OTS officials' report advised that a hui of Ngati Pikiāo had recently been held at which Ngati Tamakari's concerns about their lack of representation on the executive council were discussed, although Ngati Tamakari did not attend.<sup>17</sup> Officials considered that the views expressed in recent correspondence of legal counsel – that Ngati Tamakari and Ngati Te Takinga were not part of the kaihautu – were the views of individuals, and were not broadly endorsed by Ngati Tamakari.<sup>18</sup>

**4.1.3 Ongoing mandate maintenance**

Mr Doogan also made a number of general submissions around the reconfirmation, and the Crown's monitoring of the mandating process. He reiterated the Crown's view that the reconfirmation had been fair, robust and in accordance with the Tribunal's August 2004 suggestions, and rejected any allegation of bad faith on the part of the Crown.<sup>19</sup> He submitted that the Crown would continue to monitor mandate issues concerning iwi/hapu where appropriate.

Ms Baggott also addressed the issue of mandate maintenance, and argued that mandates were 'rarely attained and held in an uncontested environment'.<sup>20</sup> The Crown had an expectation that levels of support for mandated groups would fluctuate over time, and had processes in place for assessing the decisions of iwi/hapu to withdraw their support for a mandated group. She emphasised to us the importance of this process being rigorous and fair:

The Crown has a number of processes it requires to be followed for an iwi to formally withdraw from a mandated group. These processes reflect the importance of any decision to withdraw and ensure that the affected Maori community has a full opportunity to participate in the decision making process. They are designed to ensure that decisions of such significance are taken by the appropriate community.<sup>21</sup>

Finally, the Crown sought a finding from the Tribunal that, because there had been substantial compliance with its findings and recommendations, no breach of the Treaty had occurred and that this inquiry was now at an end.<sup>22</sup>

---

16. Document c2, exhibit 37, p4

17. Document c2, exhibit 35, p7

18. Ibid

19. Paper 3.3.34, p3

20. Document c2, p19

21. Ibid, pp19–20

22. Paper 3.3.34, p5

**4.2 THE CASE FOR THE EXECUTIVE COUNCIL**

The executive council is not an agent of the Crown. Nevertheless, as the body which was responsible for implementing our August 2004 suggestions, the executive council presented submissions in response to claimants' criticisms of the reconfirmation process. Mr Colson and Mr Stone presented submissions on behalf of the executive council. They opened their submission with two key points:

- ▶ that the executive council had complied or substantively complied with the Tribunal's recommendations; and
- ▶ that mandate matters were 'organic', and were being dealt with appropriately by the Crown and executive council.<sup>23</sup>

He went on to review the Tribunal's suggestions from our August 2004 *Te Arawa Mandate Report*, and the steps the executive council had taken to implement those suggestions. He divided the Tribunal's suggestions into four parts:

- ▶ first, the discussion and reconfirmation of the composition and proportionality of the executive council by the kaihautu;
- ▶ secondly, that the issue of the accountability of the executive council to the kaihautu be addressed;
- ▶ thirdly, that the Crown should negotiate with Ngati Makino contemporaneously with the rest of Te Arawa; and
- ▶ fourthly, that one more mandating hui be held for Ngati Rangitihi.

The bulk of Mr Stone's submissions were concerned with the first of these suggestions, that an open and robust reconfirmation process be implemented by the executive council. Counsel argued that the executive council had met the Tribunal's suggestion through a four-stage process:

- ▶ developing a reconfirmation strategy which addressed the issues of composition and proportionality of seats on the executive council;
- ▶ consulting on the proposed reconfirmation strategy with major Te Arawa groups, including the taumata, at well advertised hui, and amending the strategy to incorporate some of their suggestions;
- ▶ holding a series of four well advertised hui at which kaihautu members could discuss the executive council's reconfirmation document and alternative approaches; and
- ▶ adopting and implementing the reconfirmation strategy, with the support of the majority of kaihautu members who voted at the reconfirmation hui.<sup>24</sup>

Counsel addressed these four stages of the reconfirmation process in more detail. With respect to the development of the reconfirmation strategy, the executive council had conducted an internal review of its composition and proportionality in August 2004, in response to the *Te Arawa Mandate Report*. Counsel submitted that it was entirely appropriate for the

---

23. Paper 3.3.35, p6

24. Paper 3.3.21, pp16-17

executive council to form a preliminary view on its composition at this stage, and noted that its proposal was to form the basis of further discussion, and was therefore open to amendment by kaihautu members.<sup>25</sup> Similarly, the four-region approach to the reconfirmation hui was open to amendment, and, according to counsel, was ‘reconfigured based on feedback from Kaihautu members during [the consultation process]’.<sup>26</sup>

Counsel then noted that two well-advertised consultation hui had been held, and were attended by representatives of the trust board, Te Kotahitanga, Te Pukenga, and the taumata. Counsel for the taumata had attended these hui, tabled a paper and spoken to it. In the submission of counsel, the executive council gave consideration to the taumata’s suggestion that a hui of all kaihautu members be called prior to the reconfirmation hui in order to discuss the composition of the executive council, but considered that such a large hui would not provide reasonable opportunity for all the members to speak.<sup>27</sup>

Counsel then turned to the Tribunal’s suggestion that a preliminary hui of the kaihautu members from core Te Arawa groups be held prior to the main reconfirmation hui, in order to address issues regarding the uncoupling of iwi/hapu, and whether any additional iwi/hapu should be represented on the executive council. Counsel argued that that suggestion had been followed in substance.<sup>28</sup> He claimed that these issues had been considered during the development of the reconfirmation strategy, and that the executive council had consulted with major Te Arawa groups (including the taumata, Te Pukenga, Te Kotahitanga, and Te Arawa Maori Trust Board) in developing this strategy.<sup>29</sup> He also argued that the executive council’s suggested changes to its own composition, contained in its reconfirmation document, had been approved of by a majority of kaihautu members at the four regional reconfirmation hui.

Counsel then turned to the four regional reconfirmation hui. He began by noting that the executive council had followed the Tribunal’s August 2004 suggestions with respect to the notification and conduct of the hui, namely:

- ▶ all kaihautu members received 14 days’ written notice of the agenda, date, time and venue of the hui, and a copy of the reconfirmation document;
- ▶ an independent chair and minute taker were appointed; and
- ▶ independent observers were present to record the outcome of the hui.<sup>30</sup>

Mr Stone noted that counsel for the taumata had the opportunity to present an alternative proposal to the hui, and submitted that kaihautu members had the opportunity to vote against the executive council proposal if they thought the taumata strategy had more merit.<sup>31</sup>

---

25. Ibid, p6

26. Ibid

27. Ibid, p8

28. Ibid, p13

29. Ibid, p14

30. Ibid, p15

31. Ibid, p9

He also noted the report of the TPK observer present at each of the regional reconfirmation hui, who considered that the reconfirmation hui had been conducted in an ‘open, transparent and fair manner’ and that ‘[a]mple time was set aside at each of the four hui for attendees to ask questions, to make comments, and to discuss relevant events’.<sup>32</sup>

With respect to voting rights at the hui, counsel noted that the executive council had decided that only kaihautu members would vote on the reconfirmation strategy. Counsel submitted that to have held a single hui at which all attendees voted on reconfirmation would have been impractical, and was not required by the Tribunal.<sup>33</sup>

Counsel then submitted that the outcome of the vote of kaihautu members in favour of accepting the executive council’s reconfirmation document was emphatic.<sup>34</sup> He also noted that a hui-a-kaihautu was held on 20 October, at which the executive council reported back to kaihautu members on the result of the reconfirmation process. In his submission, the executive council had improved on the Tribunal’s suggestions by holding a total of five hui, including four regional reconfirmation hui at which substantive debate on issues of concern to each region could occur.<sup>35</sup>

Counsel then addressed the rest of the Tribunal’s suggestions. With regard to the Tribunal’s second suggestion, that the issue of the accountability of the executive council to the kaihautu members, and of the negotiation team to the executive council, be addressed, counsel submitted that any such issues were to be dealt with in an upcoming review. Counsel submitted that the executive council undertook to complete this review within four months of the executive council being reconstituted.<sup>36</sup>

Counsel noted that the third of the Tribunal’s suggestions, that the Crown negotiate with Ngati Makino contemporaneously with the rest of Te Arawa, did not directly concern the executive council. However, he did note that in response to this recommendation, the executive council no longer held seats open for Waitaha, Ngati Makino, or Tapuika.

Counsel then turned to the Tribunal’s August 2004 suggestion that one more mandating hui be held for Ngati Rangitihi. He noted the Crown’s position that Ngati Rangitihi’s 17 June hui had clearly demonstrated their intention to participate in the executive council mandate, and that no further hui was necessary.<sup>37</sup>

Counsel then expressed the executive council’s view on the position of a number of iwi/hapu in respect of the executive council mandate. He noted that the executive council and the Crown:

- ▶ had formally recognised the withdrawal of Ngati Wahiao and Ngati Rangiwewehi from the mandate;

---

32. Paper 3.3.21, p9

33. Ibid, p14

34. Ibid, p10

35. Ibid, p14

36. Ibid, p15

37. Ibid, p18

- ▶ considered that Ngati Rangiteaorere had resolved not to withdraw from the kaihautu (we assume this refers to their hui of 5 December 2004);
- ▶ had formally recognised the withdrawal of certain hapu of Ngati Whakaue, but noted that other hapu remained within the executive council mandate, including, in his submission, Ngati Te Roro o Te Rangī;
- ▶ considered that Ngati Tuteniu had recently reconfirmed their mandate for the executive council at a hui-a-hapu;
- ▶ understood that a recent hui-a-iwi for Ngati Pīkiao had resolved that Ngati Tamakari is a hapu of Ngati Pīkiao and is represented on the kaihautu by the Ngati Pīkiao kaihautu members; and
- ▶ considered that the issue of the uncoupling of Ngati Tahu and Ngati Whaoa is one which should properly be dealt with by the hapu themselves, and that this was currently taking place.<sup>38</sup>

In closing, counsel submitted that the focus of much of the material filed for the claimants was on the substantive outcome of the reconfirmation process rather than on the process itself.<sup>39</sup> He argued that, if the Tribunal were to adopt such an approach in its findings, it would risk substituting its view of what should be the result for that of the duly elected kaihautu members.<sup>40</sup>

Finally, counsel submitted that the Tribunal's continued involvement in mandate matters while negotiations continued was adversely affecting those iwi/hapu which wanted to enter direct negotiations with the Crown. To avoid any prejudice to these hapu, it was submitted, the Tribunal should find that its suggestions in our August 2004 *Te Arawa Mandate Report* had been complied with and conclude the inquiry.<sup>41</sup>

#### 4.3 SUMMARY

The key points made in this chapter are as follows:

- ▶ The Crown and executive council argued that the executive council's reconfirmation process had complied with the substance of the Tribunal's August 2004 suggestions.
- ▶ Counsel for the executive council described the reconfirmation process in some detail, concluding that it had complied with the Tribunal's suggestions in respect of: consultation with key Te Arawa groups; addressing the matter of the representivity of the executive council; notification of reconfirmation hui; and use of an independent chair and observers at hui. The Tribunal's suggestion that the executive council review the rules

---

38. Ibid, p19; paper 3.3.35, p5

39. Ibid, p6

40. Ibid, p3

41. Ibid, p7

governing its accountability to the kaihautu was to be addressed within four months of the executive council being reconstituted.

- ▶ The executive council argued that the reconfirmation process had been robust and therefore that its mandate to represent Te Arawa had been reconfirmed.
- ▶ The Crown argued that the withdrawal of certain iwi/hapu had been formally recognised where appropriate. Regarding those iwi/hapu which disputed their inclusion in the executive council mandate, but whose withdrawal had not been formally recognised, the Crown noted that it continued to monitor the situation in respect of these groups.
- ▶ In respect of Ngati Te Roro o Te Rangi, Ngati Rangiteaorere, Ngati Tuteniu, Ngati Whaoa, and Ngati Tamakari, the Crown considered that none of these groups had met the requisite requirements for their withdrawal to be recognised. Therefore, the executive council would continue to represent them in negotiations.
- ▶ In respect of Ngati Rangitihi, the Crown considered that the mandating hui of 17 June 2004 had clearly demonstrated the iwi's support for the executive council mandate. Therefore, the Crown did not consider it necessary to follow the Tribunal's August 2004 suggestion that a further mandating hui be held.
- ▶ The Crown had written to Ngati Makino, Waitaha, and Tapuika, advising them that executive council seats would no longer be held open for them, that it was not possible for the Crown to accord them the same priority in negotiations as had been accorded the executive council, and that their prospects for priority would be increased should all three iwi agree to join together for negotiations.