THE

NGĀTIWAI MANDATE

INQUIRY REPORT

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WAI 2561

WAITANGI TRIBUNAL REPORT 2017

The cover design by Cliff Whiting invokes the signing of
the Treaty of Waitangi and the consequent interwoven
development of Māori and Pākehā history in New Zealand
as it continuously unfolds in a pattern not yet completely known

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HE MIHI KI A TE RANGI KARAITIANA MCGARVEY

Tātai whetū ki te rangi, mau tonu, mau tonu
Tātai tangata ki te whenua, ngaro noa, ngaro noa
Te Tama a Tūhoe Pōtiki, te tama a Ngāti Whakaue
Kua ngaro rā koe ki te pū o mahara
Kua wahangū te reo whakapākehā o Te Rōpū Whakamana i te Tiriti o Waitangi
Kua haumūmū te tohunga reo Māori o te Pāremata
Kua ngū te manu tatangi whakatiriripa o kupu whakarākei, o rerenga waiwaiā
Tēnei mātou ka auē, tēnei mātou ka auhi
E Rangi kua ngaro rā koe i te hinganga o te tini, i te moenga o te mano
He aha mā mātou?
He tangi, he mihi, he poroporoaki
Nā reira e te hoa, e moe, i te moenga roa, ki reira okioki ai

While the starry hosts above remain unchanged and unchanging
The earthly world changes inevitably with the losses of precious, loved ones
The son of Tūhoe Pōtiki, the son of Ngāti Whakaue
You have been lost to the void of memories
The Waitangi Tribunal's translator has been silenced
Parliament's expert interpreter speaks no more
The mellifluous bird of words adorned who epitomises excellence is silent
For you we cry in distress
Rangi you who has departed to the assembly of the hundreds and the congregation of the thousands
What are we left to do?
Grieve, acknowledge, farewell
Therefore dear friend, rest now, rest in peace

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and

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Minister for Māori Development

Parliament Buildings
WELLINGTON

26 October 2017

E ngā Minita, tēnā koutou

Enclosed is the report of the Ngātiwai Mandate Inquiry Tribunal, the outcome of an urgent inquiry conducted into the Crown's recognition of the Ngātiwai Trust Board as the body authorised to negotiate a settlement of all remaining historical Ngātiwai Treaty claims.

The central theme for inquiry was whether the Crown recognised the mandate of the Ngātiwai Trust Board without ascertaining whether the hapū included in the mandate had given their support and consent to the trust board.

Although neither the Crown nor the Waitangi Tribunal has previously maintained that hapū consent is a requirement to achieve a mandate, where hapū play a central role in the social and political life of their communities the Crown has obligations to ensure hapū can determine how and by whom they will be represented in settlement negotiations. They must be allowed to make decisions according to their tikanga.

Although Ngātiwai is not a large iwi, the communities involved are diverse and complex.

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MINISTRY OF JUSTICE
Tāhū o te Ture

Nevertheless, the hapū claimants in our inquiry asserted their tino rangatiratanga and we accept that hapū are an essential source of identity and organisation within Ngātiwai.

We find that the Crown failed to fulfil its duty of active protection of hapū tino rangatiratanga and in so doing breached the Treaty principles of partnership and equal treatment.

Our findings in relation to Crown actions are:

The Crown improperly pressured the trust board into responding to the government's timetable and settlement policies.

The process of determining the claimant definition was unsatisfactory and incomplete at the time the Deed of Mandate was recognised by the Crown.

The Crown recognised a Deed of Mandate that:

- does not include mechanisms for individual hapū to consent to the mandate, nor to withdraw from it; empowers an entity, the Ngātiwai Trust Board, that as presently structured is not 'fit for purpose' to represent the hapū named in the Deed of Mandate, including the shared hapū; and
- proposes supporting structures or advisory bodies that do not provide meaningful representation of hapū.

There has been unequal treatment of hapū. Some were settled separately or released from the Deed of Mandate, as compared to other hapū who remain within the Deed of Mandate and have no mechanism to withdraw.

There is no clear and robust Crown policy for dealing with the range of interests, including 'shared' interests, that need to be accounted for in Treaty settlement mandates.

Crown policy has had the effect of sharing hapū claims among mandated entities without ensuring that hapū are able to exercise tino rangatiratanga.

Although we heard from all claimants on the central theme of our inquiry, in determining prejudice we have focused on the hapū claimants: Patuharakeke, Te Waiariki, Ngāti Kororā, Ngāti Takapari, and also Te Whakapiko. The hapū will be prejudiced through their exclusion from representation in the Deed of Mandate, with the result that their historical Treaty claims will be negotiated, settled, and extinguished without their consent. The Treaty relationship with the Crown has been damaged and if the mandate continues in its present form will likely be damaged further. Division and dissent among hapū and between the hapū and the trust board has caused serious harm to whanaungatanga relationships.

The opportunity must be taken now to address the issues we have identified so that Ngātiwai and the hapū named in the Deed of Mandate can move together to settlement.

We do not, in the first instance recommend that the mandate be withdrawn. Rather, what is required is a pause in the negotiations process so that the following matters can be attended to:

We recommend a process of mediation or facilitated discussions to debate and seek agreed and acceptable solutions to the problems we have identified. If agreement is reached on a way

forward, then the Crown's support will be required for any changes proposed so that the Deed of Mandate can be amended and re-submitted to the parties, including the hapū listed in the deed, for approval.

Should the amended Deed of Mandate be rejected however, we recommend withdrawal of the mandate and the setting up of a new entity such as a rūnanga or taumata, named and organised more inclusively and able to represent all hapū and groups in the inquiry district, whether or not they are Ngātiwai.

The objective of settlement policy is to achieve robust, durable, and fair settlements, and a restoration of the Crown's Treaty relationship with Māori. We urge the Crown to support the process we have outlined so that this objective may be realised.

Nāku noa, nā

Judge Sarah Reeves
Presiding Officer

ABBREVIATIONS

ANZAC	Australian and New Zealand Army Corps
AOI	area of interest
app	appendix
CA	Court of Appeal
ch	chapter
cl	clause
comp	compiler
doc	document
DOM	Deed of Mandate
ed	edition, editor
fol	folio
IMA	independent mandated authority
LNG	large natural group
ltd	limited
memo	memorandum
n	note
no	number
NTB	Ngātiwai Trust Board
NZLR	*New Zealand Law Reports*
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
PSGE	post-settlement governance entity
pt	part
PTB	Patuharakeke Te Iwi Trust Board
RMA	Resource Management Act 1991
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
sch	schedule
sec	section (of this report, a book, etc)
TCC	Treaty Claims Committee
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, endnote references to claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 2561 record of inquiry, a select copy of which is reproduced in the appendix. A full copy is available on request from the Waitangi Tribunal.

The Tribunal would like to thank the staff who assisted us in arranging the inquiry, hearing the claims, and preparing this report. They are Wiremu Rikihana (assistant registrar), Danny Merito, and Toni-Faith Temaru (claims coordinators), Kim Glazebrook and Hannah Boast (inquiry facilitators), and Sonja Mitchell, Lawrence Patchett, and Richard Thomson (report writers). Jane Latchem and Dominic Hurley provided editorial and typesetting services.

During the hearings, the Tribunal relied on the skills of Rangi McGarvey (interpreter and translator) and Alan Doyle (sound technician).

CHAPTER 1

INTRODUCTION TO THE URGENT INQUIRY

1.1 What Is at Issue?

The Ngātiwai Mandate Inquiry (Wai 2561) is an urgent inquiry concerning the Crown's recognition of a mandate to negotiate a settlement of the historical Treaty of Waitangi claims of Te Iwi o Ngātiwai. The mandate is held by the Ngātiwai Trust Board. The central theme of the claimants' allegations was stated by the Tribunal's Deputy Chairperson Judge Patrick Savage when he granted the urgent hearing. It is that the Crown recognised a mandate based on one person-one vote without ascertaining whether the hapū included in the mandate had given their support and consent to the trust board. The inquiry, in other words, concerns hapū tino rangatiratanga.

The Ngātiwai Trust Board decided in 2013 to seek the support of iwi members to pursue direct negotiations with the Crown. The board developed a mandate strategy, which was put to a vote of Ngātiwai members during August and September that year. A substantial majority voted in favour of the strategy, and the board submitted a Deed of Mandate to the Office of Treaty Settlements (OTS) in July 2014. OTS then sought and considered submissions on the proposed mandate. On 21 October 2015 the mandate was recognised by the Crown. In the Crown's assessment, the trust board 'has the support of Ngātiwai and is an appropriate body to represent Ngātiwai in settlement negotiations'.[1]

The claims we consider in this inquiry were made on behalf of hapū included in the Deed of Mandate, adjacent hapū, whānau groups, and individuals who have historical claims filed with the Waitangi Tribunal. Some agree they are Ngātiwai; others deny this. The claimants deny that hapū gave consent to be included in the Deed of Mandate. They also raised a range of concerns with the adequacy of representation and accountability in the mandate and the robustness of the Crown's decision to recognise it.

1.2 Te Iwi o Ngātiwai

The Crown's policy is to negotiate settlements with what it calls 'large natural groups of tribal interests'. It recognised Te Iwi o Ngātiwai as a large natural group in 2012. The Ngātiwai Deed of Mandate sets out a 'claimant definition', which names the founding tūpuna (ancestors) of this group, lists the hapū and marae included in the mandate, and describes the 'area of interest' within which customary rights were exercised. Two Ngātiwai hapū, Ngāti Manuhiri and Ngāti Rehua-Ngātiwai ki Aotea, are excluded from the mandate. This is because in 2012 the Crown had already recognised these hapū as 'large natural groups'. It has negotiated separate settlements with them.[2]

There is no uncontested founding ancestor for Ngātiwai, unlike Rāhiri, for example, to whom all Ngāpuhi can relate. There is no eponymous ancestor called 'Wai': the reference is to the mana of the sea or the surrounding waters of the rohe (territory), as explained by revered Ngātiwai elder Mōrore Pīripi who said: 'Ko nga mana katoa o Ngati Wai kei te wai, i nga taniwha me o ratou manawa.' This was translated by the Ngātiwai elder Witi McMath as: 'All the mana of Ngati Wai comes from the sea, from its guardian taniwha and their spiritual force.'[3]

In terms of ancestry, the Deed of Mandate defines Ngātiwai as 'an amalgam of a number of older iwi groups', but also identifies Ngātiwai as synonymous with Ngāti Manaia, one of the oldest descent groups in Te Taitokerau.[4] The deed also mentions Ngāi Tāhuhu, Te Kawerau, and other early peoples, but acknowledges that these other ancient descent lines are shared with other iwi and hapū. The tūpuna Manaia I and Manaia II and their descendants are specifically mentioned. The deed says that, for the purposes of Treaty settlement negotiations, 'Ngātiwai means all those members of Ngātiwai who can claim descent from these tūpuna of Ngātiwai'. The Ngātiwai Trust Board asserts that this Ngāti Manaia identity is a heritage unique to Ngātiwai, and that the 'tribal name Ngātiwai applies collectively to all hapū who share descent from Manaia II and ngā kōpikopikotanga maha o Ngātiwai'.[5]

This last phrase means, literally, 'the many meanderings of Ngātiwai'.[6] Kristan MacDonald, who was deputy chair of the trust board at the time of our hearings, explained this was a phrase used by his kaumātua (elders), with two meanings: either 'the overlapping whakapapa of Ngātiwai' or the 'many connections and journeys that we had, particularly up and down the coast, the East Coast and on the offshore islands'.[7]

Te Iwi o Ngātiwai, according to the Deed of Mandate, includes 'the many related hapū and persons affiliated to the kāinga and marae' that occupy the eastern coastline of Te Taitokerau between Pēwhairangi (the Bay of Islands) and Mahurangi, and extending offshore to encompass Aotea (Great Barrier), Hauturu (Little Barrier), and many other island groups.[8]

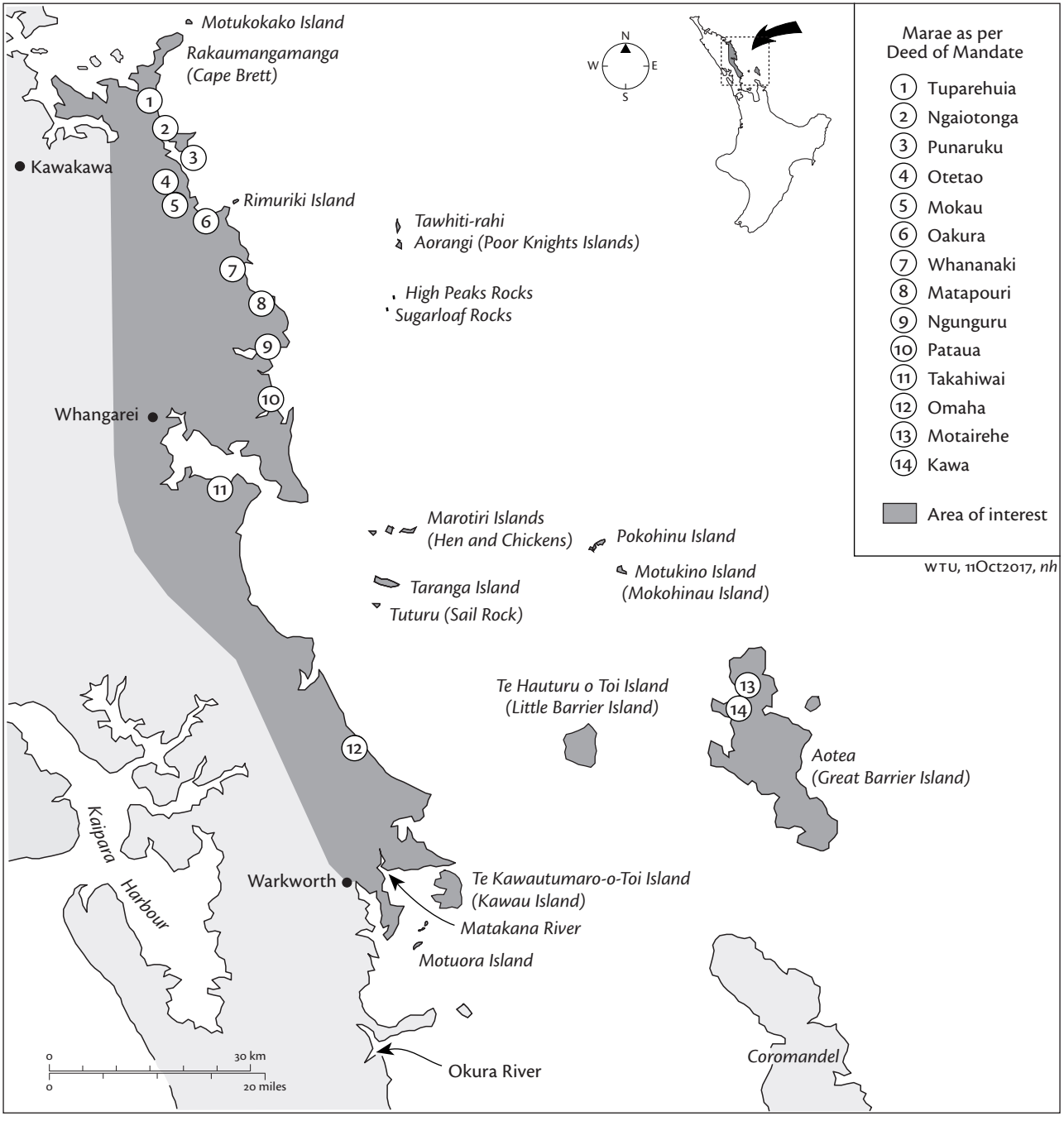
Under the heading 'Hapū included in this Deed of Mandate', 12 hapū are named. Of these, only four appear to be Ngātiwai tūturu, in that active links with other iwi are not evident.[9] The other eight hapū are described as 'shared'. This means that they are hapū with affiliations to other tribal groupings, and they are 'included in the claimant definitions' of other large natural groups recognised by the Crown for the purpose of settling historical Treaty claims. Only the claims of these 12 hapū are to be settled by the trust board. In the case of the 'shared' hapū, their claims are only to be settled 'to the extent that they are descended from Ngātiwai tupuna'.[10]

The Deed of Mandate lists 35 (or 36[11]) hapū described as 'Ngātiwai hapū, and Ngātiwai-related hapū, both historic and present-day'.[12] 'Ngātiwai-related hapū' are defined as 'descendants of Manaia I and II, who also hold primary identity with tūpuna of other Iwi groupings.' There are 19 hapū labelled as 'historic'.[13]

The southern hapū Ngāti Rehua-Ngātiwai ki Aotea and Ngāti Manuhiri who are excluded from the mandate are acknowledged in a separate section.[14] Had they been included among the active hapū of section 12, they too would have been shared hapū because of their links with Te Kawerau, Tainui, and others.[15] Their members were however eligible to vote for the Ngātiwai Deed of Mandate 'through their wider whakapapa to any other Ngātiwai tūpuna/Hapū other than Rehua/Ngāti Rehua or Manuhiri/Ngāti Manuhiri'.[16]

A trust board representing Ngātiwai interests has existed in a variety of forms since 1945. In that year, according to the Deed of Mandate, 'the identity of Ngātiwai as a tribe was defined for the first time in a modern context' when a trust was formed to administer the Tāmati Mokaraka lands (which 'relate' to the 95 acres of Whangaroa-Ngaiotonga 4A3A) for the benefit of the 'Ngātiwai tribe'. The 18 trustees were, at that time, representative of the hapū that were then regarded as making up the iwi. The Whangaruru-Ngātiwai Trust Board was incorporated in 1966 under the Charitable Trusts Act 1957.[17]

The current trust deed was adopted in 1984. It was at this time that the board adopted a system of marae affiliation, rather than the previous hapū-based structure. Initially, seven marae affiliated to the board, encompassing the



Map 1.1: Ngātiwai area of interest and marae as set out in the Ngātiwai Trust Board Deed of Mandate. Source: document A62, pp 9, 12.

core Ngātiwai rohe of Whangaruru and Whananāki. By 1987, trustees had been appointed for Ngunguru, Pātaua, and Takahīwai Marae. Subsequently, marae at Pākiri, Matapōuri, and Aotea (Great Barrier) also affiliated.[18]

The trust deed 'aims to embrace the members of Ngātiwai wherever they live today but with a clear linear relationship between each member, their nominated marae for voting purposes and the NTB'.[19] The board now comprises 14 trustees. Each is elected by the adult registered members who have chosen to affiliate, for this purpose, to one of 14 'Ngātiwai marae'. The mandate to settle the historical claims of Te Iwi o Ngātiwai is held by these trustees.[20]

In its current formulation, most recently amended in 2006, the Ngātiwai Trust Board is structured in response to the legislative requirements of the 2004 fisheries settlement. The chief duty of the trust board is to 'receive, hold, manage and administer the Trust Fund', for the benefit of Ngātiwai. A deed of trust sets out 'the functions and purposes, and provides for the control, governance and operation' of the Ngātiwai Trust. In part, the deed must meet the requirements of the Māori Fisheries Act 2004 and establishes the trust 'to act, amongst other things, as the Mandated Iwi Organisation of Ngātiwai for the purposes of the Māori Fisheries Act 2004, and to act as the Iwi Aquaculture Organisation for the purposes of the Māori Commerical Aquaculture Claims Settlement Act 2004'.[21]

The trust board established a Treaty Claims Committee in 2013. This committee has delegated authority to 'facilitate the settlement process by planning, implementing and following up on any matters that need attention to ensure that a settlement is secured in an efficient and effective manner'. The committee reports to the trust board at least once a month and will also provide advice and information to negotiators, once they are appointed.[22]

The Deed of Mandate does not specify how many trustees are appointed to the Treaty Claims Committee. Two employees of the board, the chief executive officer and the Treaty claims manager, are ex officio members, and the chair of the trust board may attend any committeee meeting. Two additional positions on the committee are proposed in the deed. Suitable applicants 'must have demonstrated skills and experience and support from among Wai claimants, hapu or rangatahi'. These additional positions are advisory only.[23]

Three further advisory bodies or 'supporting structures' are proposed in the Deed of Mandate. Their purpose is to give the board access to additional skills and experience, as needed:

- A kaumātua group of up to four members, two men and two women, will provide the trust board with 'advice, oversight, direction and guidance . . . particularly on matters of Ngātiwai tikanga'.
- Hapū and marae will be invited to discuss how they can best be included in the settlement process. The purpose of these discussions will be to 'develop positive working relationships, work through issues and find agreeable solutions'.
- All Ngātiwai claimants and researchers will be able to participate in a research group. The trust board will also support parallel funded process for Wai claimants who want to continue to participate in the Waitangi Tribunal's Te Paparahi o Te Raki inquiry. However, the trust board and Crown must agree on the design of the process, and all parties (including all Wai claimants) must agree to the process.[24]

1.3 Events Leading to the Urgent Inquiry

In 2009, the Crown presented settlement proposals as part of negotiations with claimant groups in Tāmaki Makaurau, Kaipara, and Hauraki. Two hapū of Ngātiwai, Ngāti Manuhiri and Ngāti Rehua, were included in the Tāmaki Makaurau proposals.[25] The Ngātiwai Trust Board requested an urgent meeting to discuss settling the Treaty claims of all Ngātiwai hapū.[26] In response, the Crown told the board it intended to settle Ngātiwai's historical Treaty claims in two phases: first, it would continue to work with Ngāti Rehua and Ngāti Manuhiri; secondly, it planned a comprehensive settlement of Ngātiwai's remaining Treaty claims 'at the same time' that it dealt with Ngāpuhi's Treaty claims.[27] The Crown completed a settlement with Ngāti Manuhiri in 2012 and initialled a Deed of Settlement with Ngāti Rehua-Ngātiwai ki Aotea in December 2016.[28]

Ngātiwai were recognised as a large natural group in August 2012. As part of the partial sale of four Crown-owned energy companies, the Crown offered the option of purchasing 'on-account' shares against a future settlement of historical Treaty claims. To be eligible Ngātiwai needed to be recognised as a large natural group, with a representative body that was appropriately accountable and had a recognised mandate to settle their Treaty claims.[29] The Crown set a deadline of 30 April 2013 for the trust board to submit a mandate strategy application form.[30]

The Ngātiwai Trust Board began work in earnest in 2013 to gain a mandate. A Treaty claims manager was employed in January. Three preliminary information-sharing hui were held and a draft mandate strategy prepared. Mr MacDonald told us OTS requested 'a list of hapū, marae and an area of interest (AOI) that constituted Te Iwi o Ngātiwai'.[31] The draft mandate strategy went through six versions, with varied lists of hapū, before it was submitted to OTS and then endorsed by the Crown on 24 July 2013.[32] The Crown has acknowledged this was an error in process, because submissions on the mandate strategy had not been received and addressed prior to endorsement.[33]

The strategy listed 13 'present day' hapū of Ngātiwai. While acknowledging that some of these hapū 'shared whakapapa' with other iwi, it did not specify which ones. The strategy would 'seek to clarify and address Ngātiwai related claims only'. Because Ngātiwai hapū and marae were also included in the claimant definitions of other large natural groups, the trust board would 'seek agreement to the treatment of these hapū and marae with the Crown, following discussions with the relevant groups'.[34]

Submissions were received between 27 July and 17 August 2013.[35] They showed significant opposition, notably from hapū. These hapū included three groups, Patuharakeke, Te Kapotai, and the cluster of Te Waiariki, Ngāti Kororā, and Ngāti Takapari, that have affiliations to other iwi.[36]

The Deed of Mandate describes the steps by which the mandate stategy was presented at hui and voted on, from July to October 2013, as the 'official mandate process'.[37] Individual members of Ngātiwai were asked to support this resolution:

> That the Ngātiwai Trust Board is mandated to represent Te Iwi o Ngātiwai in direct negotiations with the Crown for the comprehensive settlement of all the remaining historical Treaty claims of Ngātiwai including registered and un-registered historical claims.[38]

The vote on the mandate was held between 17 August and mid-October 2013. The trust board presented the mandate at 13 hui (three were in Australia). There were 4,693 potential voters (those aged over 18). A valid address was required to actually vote, although it was not necessary to be registered with the trust board. The board made considerable efforts to locate and register eligible members. By the close of voting 395 members had been added to the register, of whom 249 were eligible to vote.[39] A total of 2,735 voting packs were sent out and 772 votes were cast. This was a 28 per cent return (although just 16 per cent of potential voters). Of those who voted, 636 were in favour (82 per cent of those who cast a vote) and 131 against (17 per cent). Five votes were blank.[40]

The trust board made further changes to its mandate strategy, and on 27 June 2014 the board voted to submit its Deed of Mandate to the Crown for recognition. At this stage the claimant definition included 13 hapū 'who have exercised or descend from those who have exercised customary rights within the Ngātiwai rohe'.[41] Eight of these were described as 'shared' hapū. The Deed of Mandate stated that the trust board 'will only negotiate the settlement of historical claims of these hapū to the extent that they are descended from Ngātiwai tupuna'.[42]

OTS publicly advertised the mandate on 12 July 2014, and asked for submissions, which were received up until 6 September 2014.[43] In total, 269 submissions were received. OTS officials described the number as unprecedented for an iwi of Ngātiwai's size. Most opposed the mandate and officials identified lack of hapū involvement as a common concern. In particular, the three hapū groups mentioned above remained opposed.[44] The officials sought to meet as many submitters as they could. Hui were held with submitters on 18 October 2014, and OTS met representatives of the 'Te Waiariki cluster' and Patuharakeke in March and April 2015. Te Kapotai declined to meet.[45] As a response to

Hapū in the Ngātiwai Trust Board Deed of Mandate

Four of the 12 hapū currently included in the Deed of Mandate are only in the claimant definition of the Ngātiwai large natural group. They are:

- Te Uri o Hikihiki;
- Te Āki Tai;
- Te Kāinga Kurī; and
- Te Whānau a Rangiwhakaahu.

The remaining eight hapū are described as 'shared' or 'related' hapū, because they are 'included in the claimant definitions' of other large natural groups. They are:

- Ngare Raumati;
- Ngāti Tautahi;
- Te Whānau Whero-mata-māmoe;
- Ngāti Toki-ki-te-moana;
- Ngāti Takapari;
- Ngāti Kororā;
- Te Waiariki; and
- Patuharakeke.

In the version of the Deed of Mandate submitted to OTS in July 2014, Te Kapotai were included and Ngāti Takapari were not classed as a 'shared' hapū. Te Kapotai were removed in May 2016.

the issues raised in submissions, and at the suggestion of OTS, the trust board developed and implemented a plan to improve engagement and communication. In the officials' view, these efforts addressed submitters' concerns 'as much as possible'. Nevertheless, they remained concerned that the three hapū groups would take their opposition to the Waitangi Tribunal.[46]

On 7 August 2015 the board approved further amendments to the Deed of Mandate. On the same day, OTS provided Ministers with a report recommending that the Crown recognise the mandate. Several versions of this briefing were produced, the last on 15 October 2015.[47]

The Crown formally recognised the Ngātiwai Trust Board's mandate on 21 October 2015.

The previous month, on 11 September, the Waitangi Tribunal had released its *Ngāpuhi Mandate Inquiry Report*. That Tribunal found the Crown had breached Treaty principles by recognising the mandate of an entity which did not sufficiently protect the tino rangatiratanga of Ngāpuhi hapū. Three hapū groups that have made claims of Treaty breach in this urgent inquiry – Patuharakeke, Te Kapotai, and Te Waiariki, Ngāti Kororā, and Ngāti Takapari – were also participants in the Ngāpuhi mandate inquiry.[48]

1.4 Granting the Inquiry

The first application for an urgent hearing was received by the Tribunal on 20 November 2015. A further nine applications were received, the last on 3 March 2016.[49]

Judge Savage granted an urgent inquiry on 2 May 2016. He summarised the claimants' proposition as being that

> the confirmation and guarantee contained in article 2 of Te Tiriti was to the rangatira, the hapū, and to all the people, and that is the way that the matter should be dealt with. The Crown should not attempt to go over the head of hapū without hapū consent.[50]

Judge Savage determined the central issue for urgent inquiry to be the Crown's recognition of a mandate based on one person one vote, without ascertaining which hapū, if any, had given their mandate to the trust board. This raised serious concerns that the Crown had failed in its Treaty obligations to hapū. Judge Savage granted urgency only to the part of the claims that related to the central theme.[51]

Judge Savage said that if prejudice had been caused to the hapū concerned, it would only increase if the settlement process continued. Therefore, he considered that the matter of hapū rangatiratanga needed to be addressed now. We note that when the urgent inquiry was granted the Crown paused negotiations with Ngātiwai and intends to re-engage once the Tribunal has reported.[52]

Judge Savage accepted submissions on the scope of the urgent inquiry and finalised his decision on 26 May 2016. He confirmed that the alleged Treaty breach was the Crown's recognition of a mandate that claimed to represent hapū who had not given their 'support or consent'. Judge Savage reiterated that the matter for inquiry related to the Treaty relationship between the Crown and hapū and not other groups. However, the inquiry could hear all claimants, and any hapū referred to in the Deed of Mandate, on that central matter of hapū rangatiratanga.[53] Although he excluded the internal processes of the trust board as a central issue for the inquiry, Judge Savage said these processes might be relevant as possible reasons hapū 'have not and will not' give the trust board a mandate.[54]

On 27 May 2016, the day after Judge Savage confirmed the issue for inquiry, the Ngātiwai Trust Board voted to amend its Deed of Mandate by removing Te Kapotai, one of the 'shared' hapū covered by the mandate, and the Wai 1416 and 1546 claims. On this basis, Te Kapotai withdrew their application for urgency and sought leave to become an interested party in the inquiry.[55]

On 15 June 2016, the chairperson of the Waitangi Tribunal, Chief Judge Wilson Isaac, appointed Judge Sarah Reeves as presiding officer for the inquiry. Chief Judge Isaac appointed Dr Angela Ballara, Professor Rawinia Higgins, and Dr Hauata Palmer as members of the Tribunal panel.[56]

1.5 The Parties to the Inquiry

1.5.1 The claimants

There are 10 claimant groups in this inquiry.

Two claims are made on behalf of hapū that are named in the Deed of Mandate:

- The Te Waiariki, Ngāti Kororā, and Ngāti Takapari claim (Wai 2549) is brought by Pereri Māhanga, Mītai Parāone-Kawiti, Violet Sade, Ngaire Brown, and Winiwini Kīngi on behalf of these three hapū. These hapū, the claimants say, are not Ngātiwai, and their historical claims 'are within the Mana of Te Waiariki, which is mutually exclusive of Ngatiwai'.[57] The claimants say the Te Waiariki, Ngāti Kororā, and Ngāti Taka Pari Hapū Iwi Trust was given the authority to advance the Treaty claims of these hapū at hui in 2012 and 2015.[58]
- The Patuharakeke claims (Wai 745 and 1308) are brought by Paki Pirihi, Ngāwaka Pirihi and others on behalf of the Patuharakeke Trust Board and others. This board was established in 1990 to govern and administer the affairs of that hapū. A committee of this trust has responsibility to address issues relating to claims being heard by the Waitangi Tribunal in its Te Paparahi o Te Raki Inquiry (Wai 1040).[59] The claimants say that, although Patuharakeke is a hapū with close links to Ngātiwai, Patuharakeke has never given the Ngātiwai Trust Board a mandate to speak to the Crown on its behalf to settle historical Treaty claims.[60]

Two claims were received from groups which do not claim to speak on behalf of their hapū but nevertheless say their hapū, which are named in the mandate, are not part of Ngātiwai:

- The Te Whakapiko claim (Wai 156) is made by Marie Tautari and Rowan Tautari. They say they are a hapū of Ngāti Manaia and that the Crown's reliance on the Ngātiwai Trust Board at the expense of hapū has resulted in a flawed claimant definition that excludes them from participation or representation in the settlement process.[61]
- The Te Waiariki and Ngāti Kororā claim (Wai 2550) is brought by Ruiha Collier and Haki Māhanga on behalf of Te Waiariki and Ngāti Kororā hapū. They assert not only that Te Waiariki and Ngāti Kororā are not Ngātiwai, but that they are hapū of Ngāpuhi. They say the Crown failed to assess and understand matters of whakapapa and tikanga properly or to recognise appropriately the mana of the hapū when it recognised the Deed of Mandate.[62]

Two claims were received from groups which acknowledge their Ngātiwai status but say they speak for their whānau rather than particular hapū:

- George Davies and Hūhana Lyndon claim on behalf

of the whānau of Ngātiwai ki Whangaruru. They allege the Crown recognised a mandate that was the product of inadequate consultation, did not ensure adequate accountability to, and representation of, Ngātiwai, and did not properly recognise or observe tikanga. The claim was registered by the Tribunal as Wai 2544.[63]

- Mylie George, Carmen Hetaraka, Mike Leuluai, and Ngaio McGee claim on behalf of their whānau of Te Uri o Hikihiki, a hapū of Ngātiwai (Wai 2546). They say the Crown failed to engage meaningfully. As a result, they say, the Crown has recognised an entity that does not provide adequate accountability. While not speaking for a hapū, the claimants say that, by recognising a mandate that does not provide for the ability of hapū to exercise rangatiratanga, the Crown has subverted Ngātiwai tikanga.[64]

Two claimants laid particular weight on the trust board's decision to seek direct negotiations with the Crown rather than participate in the Te Paparahi o Te Raki district inquiry:

- Elvis Reti of Ngātiwai is a named claimant for the Whangaruru lands claim (Wai 1384). His claim (Wai 2557) alleges the mandate was recognised on the basis of inadequate research and despite concerns about the lack of representation and accountability of the trust board to its beneficiaries. He says the internal relationships of his whānau have been damaged by the Crown's involvement in the trust board's mandate.[65] He argues that the Tribunal process provides an opportunity for whānau and hapū to work through the 'significant tension and opposition' within Ngātiwai.[66]
- Deirdre Nehua is of Ngāti Hau and Ngātiwai. Her claim (Wai 2545) alleges the Te Taitokerau settlement issues claim (Wai 1837) was included in the Deed of Mandate, and part of the claim will be settled, without the claimants' consent. They do not want to begin negotiating with the Crown until the Waitangi Tribunal has reported on the Te Paparahi o Te Raki inquiry.[67]

A further two claims were brought on behalf of groups that said Ngātiwai rights and authority do not extend south into the Whangārei and Mahurangi districts:

- Mira Norris and Marina Fletcher claim on behalf of the descendants of Tiakiriri, Te Parawhau, Ngā Hapū o Whangārei, and Te Uri o Hau (Wai 2337). They say they have the support of Te Parawhau.[68] Patuharakeke, they say, are not a hapū of Ngātiwai but of Te Parawhau, and Te Parawhau are 'a sub set' of Ngāi Tāhuhu, Ngāpuhi, and Ngāti Whātua.[69]
- William Kapea and Michael Beazley claim on behalf of Te Uri o Maki-nui (Wai 2181). This is not a traditional name, but the name of the claim which relates to the interests of two hapū, Ngāti Maraeariki and Ngāti Rongo ki Mahurangi.[70] This claim is not included within the Ngātiwai Trust Board mandate, although it is included within the Ngāti Manuhiri Deed of Settlement 'in so far as it relates to Ngāti Manuhiri or a representative entity'. They say Ngātiwai does not have mana whenua rights in Mahurangi, in the south of its claimed area of interest.[71]

1.5.2 The Crown

The starting point for the inquiry, in the Crown's view, is that the mandated body is essentially sound, with a broad base of support for the mandate demonstrated by the individual members of Te Iwi o Ngātiwai who voted. The Crown submitted the inquiry needed to focus on the level of support for the mandate from Patuharakeke and the 'Te Waiariki cluster' (Te Waiariki, Ngāti Kororā, and Ngāti Takapari), as well as the status of Te Whakapiko within the mandate.[72] The Crown argued that the key issue for the inquiry 'is whether the hapū of Ngātiwai oppose (or do not support) the mandate'. It questioned the status of some claimant groups to bring claims on behalf of hapū. While the Crown acknowledges that there is opposition to the mandate, it says this comes from individuals and no evidence exists to support a conclusion that any Ngātiwai hapū oppose the mandate.[73]

1.5.3 The interested parties

The Ngātiwai Trust Board participated in the inquiry as an interested party in support of the Deed of Mandate.

In its view, the trust board has a history and a trust deed that is 'entirely consistent with representing the collective best interest of all Ngātiwai'. It says that to focus on hapū rangatiratanga would not accurately reflect the way Ngātiwai choose to organise themelves. The expression of rangatiratanga within Ngātiwai must be 'understood, recognised and respected' on Ngātiwai's terms.[74] The trust board structure, it said, is premised on kotahitanga and common interests. It has 'never been a vehicle for debate and determination of the differing – and potentially competing – interests of hapū, marae or any other groups'.[75] But, it said, this is not to say that hapū are not recognised within the Deed of Mandate. The trust board proposes to 'enable and provide' for hapū to retain a voice within the negotiations through a range of 'supporting structures' that ensure it is 'fit for purpose' for the negotiation process.[76]

Opposing the mandate, Te Rīwhi Whao Reti, Hau Tautari Hereora, Rōmana Tarau, and Edward Cook claim on behalf of Te Kapotai hapū (Wai 2548). As noted, Te Kapotai were removed from the mandate in May 2016. Although this resolved most of their concerns, they say the Crown still refuses to engage with Te Kapotai. They said this shows the Crown 'still does not understand or accept its obligations to hapū when it comes to settlement negotiations'.[77]

Six other interested parties supported the claimants but did not take an active part in the inquiry.[78]

1.6 The Issues for Inquiry and the Hearings

The Tribunal released a Statement of Issues on 20 July 2016. We stated that the key issues for the inquiry were:

- How did the Crown require the Ngātiwai Trust Board (NTB) to demonstrate support and consent for their deed of mandate? To what extent, if any, was that support and consent shown?
- To what extent, if at all, did the Crown seek to establish the nature and level of support for groups who opposed the mandate?
- To what extent, if any, did the Crown actively protect the position of hapū and the ability for hapū to exercise tino rangatiratanga?
- Did the hapū referred to in the NTB deed of mandate support and/or consent to that mandate?
- Does the NTB mandate provide for representation of hapū?
- Are the remedies available under the NTB deed of mandate workable?
- Are the claimants prejudicially affected, or likely to be prejudicially affected, by the Crown's recognition of the NTB deed of mandate? If so, to what extent?
- Was the Crown's decision to recognise the NTB mandate consistent with the principles of the Treaty of Waitangi/Te Tiriti o Waitangi?
- What structures are currently available to Ngātiwai for use as a mandated entity for Treaty settlement purposes?
- What is the relationship between the claimants' hapū that are listed in the NTB deed of mandate and the marae listed in section 14 of the NTB deed of mandate?
- If the Tribunal concludes any of the claims are well-founded, what, if any, practical recommendations should the Tribunal make?[79]

Hearings took place at Toll Stadium in Whangārei from 4 to 6 October 2016. A further hearing was held at the Waitangi Tribunal offices in Wellington on 1 and 2 December 2016, following which closing submissions were received in writing.

1.7 Our Approach to the Issues in this Report

The fundamental allegation shared by the claimants was that hapū had not consented to the mandate.[80] The parties who said they represented hapū submitted that article 2 of the Treaty guaranteed to hapū the ability to make their own decisions on matters that affected them.[81] Conferring a mandate to negotiate a comprehensive settlement of historical Treaty claims is one of the most important contemporary issues confronting Māori.[82] The question of whether the hapū named in the Ngātiwai Deed of Mandate had consented to the mandate is therefore vital to any analysis of whether their rangatiratanga is being protected by the Crown's decision to recognise the mandate.[83]

The focus of our inquiry, as determined by Judge Savage in the application for urgency, is whether the Crown acted in breach of Treaty principles by recognising the mandate of the Ngātiwai Trust Board without the support and consent of the hapū named in the deed.[84] Before our hearings, we sought to clarify the central issue of the inquiry through a statement of the issues we considered relevant to measuring the Crown's conduct.

After hearing from the parties and considering the evidence brought before us during the hearings, we have concluded that, in order to answer this central question of consent, we must focus particularly on two issues:

- First, is the the Ngātiwai Trust Board appropriately accountable to and representative of hapū?
- Secondly, how did the Crown's actions influence the outcome of the mandating process?

In our next chapter, we set out the parties' positions on these matters, bearing in mind the direction that all parties would be able to be heard on the central issue.

Then, in chapter 3, we identify the Treaty principles we consider relevant to these issues, and how these principles might apply to the particular circumstances of this inquiry. From this, we set out the standards by which we will assess the Crown's conduct in terms of our jurisdiction to make findings of Treaty breach.

In the following two chapters, we assess the evidence according to our key issues, and finally, in chapter 6, we make our findings and recommendations.

Notes

1. Document A2(a), exhibit A, p 1
2. Office of Treaty Settlements, *Ka Tika ā Muri, ka Tika ā Mua/Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 2015), pp 39, 42, 44–45; doc A62, pp 7–12
3. Document A98(a), annexure 1, p 10
4. Document A62, p 7
5. Ibid
6. This is a Tribunal translation.
7. Transcript 4.1.3, pp 64–65
8. Document A62, p 7
9. The four tūturu hapū are Te Uri o Hikihiki, Te Āki Tai, Te Kāinga Kuri, and Te Whānau a Rangiwhakaahu: doc A62, p 11.
10. Document A62, pp 11–12
11. 'Te Ure Whakapiko or Te Whakapiko' are listed. The trust board has not taken a position on whether these are the same group: transcript 4.1.2, p 107; transcript 4.1.3, p 73; submission 3.3.19, pp 34–35.
12. Listed alphabetically, they are Ngare Raumati, Ngāti Horahia, Ngāti Kahuerueru, Ngāti Kiripakapaka, Ngāti Kororā, Ngāti Kura, Ngāti Manuhiri, Ngāti Paeahi, Ngāti Pare, Ngāti Rehua, Ngāti Rongo, Ngāti Tai, Ngāti Takapari, Ngāti Taura, Ngāti Tautahi, Ngāti Te Rāhingahinga, Ngāti Toki-ki-te-moana, Ngāti Toremātao (Ngāti Tao), Ngāti Tū, Ngāupaiaka, Te Akitai, Te Iri Haku, Te Irirata, Te Kāinga Kurī, Te Kapotai, Te Patuharakeke, Te Uri-o-Hikihiki, Te Uriokātia, Te Uri o Te Aoheiwa, Te Uri Papa, Te Uri Rata, Te Waiariki, Te Whakapiko or Te Ure Whakapiko, Te Whānau-a-Rangiwhakaahu, and Te Whānau Whero-mata-māmoe: doc A62, pp 10–11.
13. Document A62, p 10
14. Ibid, p 12
15. Document A132, tab 3, pp 25–26, 29; doc A27(a), exhibit G, p 47
16. Document A62, p 32
17. Ibid, p 16
18. Wai 244 ROI, claim 1.1, p 2
19. Document A62, p 16. NTB refers to the Ngātiwai Trust Board. In our report we abbreviate to 'trust board' and use NTB only when quoting from evidence.
20. Document A62, p 16
21. Submission 3.1.106(a), p 1
22. Document A62, pp 18–19
23. Ibid
24. Ibid, pp 20–22
25. Document A2(a), exhibit B, p 191
26. Document A9(a), exhibit I, p 93
27. Document A68(a), exhibit M, p 117
28. Document A2(a), exhibit B, p 192
29. Ibid, p 192. Large natural group status was recognised by the Minister of Māori Affairs and Minister for Treaty of Waitangi Negotiations on 28 August 2012, although we have not seen that letter (doc A73(a), exhibit 7, p 79); doc A43(b), exhibit J, pp 308–309.
30. Document A43(b), exhibit J, pp 306–307
31. Document A98, p 2
32. Document A62, pp 24–25, 28
33. Document A73(a), exhibit 7, p 77; submission 3.3.23, p 45
34. Document A19(a), exhibit M, pp 58, 68–69
35. Document A73(a), exhibit 7, p 77; doc A62, p 35
36. Document A62, pp 33–34; doc A2(a), exhibit I, p 340. See also document A17, p 5, where Sonny George recounts how Te Kapotai got its name.
37. Document A62, p 25
38. Ibid, p 34
39. Document A2(a), exhibit B, p 272
40. Ibid, exhibit B, p 272
41. Document A19(a), exhibit O, p 115
42. Ibid, pp 115–116
43. Ibid, exhibit F, pp 36, 41
44. Ibid, pp 36–37; doc A73(a), exhibit 8, pp 196, 198

45. Document A91, pp 7–10
46. Document A91(a), exhibit F, pp 36–37, exhibit I, pp 126–127
47. Ibid, exhibits F–I
48. In the Ngāpuhi inquiry, their claims were Wai 2489, Wai 2431, and Wai 2433 respectively.
49. Memorandum 2.5.8, pp 2–3
50. Ibid, p 57
51. Ibid, pp 55–56, 61
52. 'Treaty Settlement Update', Ngātiwai Trust Board, http://www.ngatiwai.iwi.nz/treaty-settlement1/treaty-settlement-update5765839, accessed 28 July 2017
53. Memorandum 2.5.2, paras 13–14, 26–27
54. Ibid, para 7
55. Document A62; submission 3.1.94; submission 3.1.89, para 5
56. Memorandum 2.5.9
57. Submission 3.3.18, pp 3, 6
58. Document A20(b), p [7]
59. Document A8, p 6
60. Submission 3.3.21, p 5
61. Wai 156 ROI, claim 1.1(c), pp 5–9; submission 3.3.13
62. Submission 3.3.24, pp 1, 3
63. Wai 2544 ROI, claim 1.1.1, pp 4–7; submission 3.1.2
64. Wai 2546 ROI, claim 1.1.1, pp 3–7; submission 3.3.4, paras 12–13, 17
65. Submission 3.3.25, pp 1, 4–5
66. Wai 2557 ROI, claim 1.1.1, paras 7–9; submission 3.3.25, pp 3–4
67. Submission 3.3.15, pp 6, 8–9
68. Documents A11, A12; submission 3.3.12
69. Submission 3.3.12, p 2
70. Transcript 4.1.1, p 54
71. Submissions 3.3.16–3.3.17; transcript 4.1.1, p 54; Ngāti Manuhiri deed of settlement, 21 May 2011, p 71
72. Submission 3.3.23, pp 6, 13–14
73. Ibid, pp 3–4, 17–29
74. Submission 3.3.19, pp 5–7, 21, 43
75. Ibid, p 10
76. Ibid, pp 21–24, 43
77. Submission 3.3.20, pp 4–5
78. Arthur Harawira and Te Raa Nehua on behalf of Ngāti Hau, Ngātiwai, and Te Uri o Hikihiki (Wai 1148): submission 3.1.5, doc A5(a); Waimarie Bruce, Chas Pēpene, Sandra Rīhari, and others on behalf of Ngāti Kahu o Torongare me Te Parawhau (Wai 619): submission 3.1.6; Jasmine Cotter-Williams on behalf of Ngāti Taimanawaiti (Wai 2063): submission 3.1.7; Hori Parata and the children of Hinetapu Maihi Māhanga (Wai 245): submission 3.1.8; Lydia Karaitiana on behalf of Ngāti Kahu (Wai 2368): submission 3.1.33; Gregory McDonald, 'previous claimant rep of Wai 532 Mahurangi', on behalf of the Timi Paraone whānau: submission 3.1.91. See also memoranda 2.5.4, 2.5.7, and 2.5.10.
79. Claim 1.4.1
80. Submission 3.3.13, pp 4, 8; submission 3.3.21, p 14; submission 3.3.12, pp 4, 5; submission 3.3.17, p 26; submission 3.3.24, p 19; submission 3.3.18, p 5
81. Submission 3.3.18, pp 6–7, 24; submission 3.3.21, p 12
82. Submission 3.3.14, p 6
83. Submission 3.3.18, p 5
84. Memorandum 2.5.8, p 61

Sidebar Sources

Page 6: Document A62, pp 11–12; doc A19(a), exhibit O, p 115; submission 3.1.89

CHAPTER 2

THE PARTIES' POSITIONS ON THE INQUIRY ISSUES

2.1 Introduction

In this chapter, we summarise the positions of the parties on the issues we have identified. We first set out the parties' positions on whether and how hapū are recognised and represented within the Deed of Mandate, and what accountability to hapū is provided. We then set out the arguments on the central issue of hapū consent to the mandate. Our analysis of these issues is presented in chapter 4. Then we look at what the parties told us about the Crown's actions in respect of the mandate. Our analysis of these matters is presented in chapter 5.

We present the views of the interested party Te Kapotai alongside those of the claimants. The views of the Ngātiwai Trust Board, also an interested party, are summarised separately.

2.2 Claimant Definition in the Deed of Mandate and the Recognition of Hapū

2.2.1 The claimants

The claimants alleged that the way they were described in the Deed of Mandate is flawed. They said the 'claimant definition' section of the deed was changed several times during the mandating process and continued to be altered even after the Crown recognised the Deed of Mandate. This, they said, made the definition difficult to rely on.[1] The Te Waiariki, Ngāti Kororā, and Ngāti Takapari claimants, the Te Waiariki and Ngāti Kororā claimants, and the Patuharakeke claimants objected to their hapū being included in the deed.[2] The Te Whakapiko claimants' hapū was described as 'historic' in the Deed of Mandate, although their Wai claim was included. For these claimants, this meant the hapū claim had been appropriated by the Deed of Mandate without proper hapū representation.[3]

Claimants told us that the claimant definition was 'inappropriately broad' and 'confused' about how rights and interests were defined for the purposes of Treaty settlement.[4] The deed placed too much reliance on intermarriage between certain ancestors. That is, although these marriages had created whanaungatanga (kinship or relationship) obligations, they had not transferred customary rights.[5] The claimants alleged that Crown officials had become involved in designing the claimant definition, and that this was inappropriate.[6]

The trust board's decision to seek direct negotiations with the Crown and not wait for the findings of a Tribunal inquiry process had, the claimants said, contributed to a

'deficit in historical research' and to uncertainty over which groups had customary ownership over certain lands and areas.[7] Patuharakeke alleged the Crown expected them to relinquish care and responsibility for their hapū knowledge, something they were not prepared to do.[8]

An additional problem, identified by claimants generally, was that the 'claimant definition' in the deed exceeded the understood 'tribal boundary' of Ngātiwai in terms both of the area of interest and of the groups that were included.[9] Claimants from within the Te Waiariki, Ngāti Kororā, and Ngāti Takapari group of hapū, the Te Uri o Makinui claimants, and the Te Parawhau claimants all alleged the area of interest described in the Deed of Mandate extended over areas where their hapū, rather than Ngātiwai, customarily held mana whenua or mana moana (authority over land, sea, and taonga).[10]

Te Kapotai said their inclusion in the claimant definition meant the Deed of Mandate had extended beyond the marae-based structure that the trust board said it represented. This was because no Te Kapotai marae were included in the deed.[11]

2.2.2 The Crown

As already noted, the Crown emphasised that most claimants did not purport to represent hapū. Because the central theme for the inquiry concerned hapū consent and support for the mandate, the Crown argued that the inquiry needed to focus primarily on the views of the claimants who did claim to represent hapū: the Patuharakeke claimants and the two claimant groups from within Te Waiariki, Ngāti Kororā, and Ngāti Takapari (Wai 2549 and Wai 2550). Accordingly, its response on the issue of the claimant definition largely focused on issues related to these hapū.[12]

The trust board sought to represent the interests of these hapū only to the extent that some of their members descended from the Ngātiwai tūpuna Manaia I and Manaia II. The board had provided the Office of Treaty Settlements (OTS) with a report clarifying the basis for the inclusion of these hapū in the mandate, and officials were satisfied with that.[13]

The Crown drew attention to the range of views among Te Waiariki, Ngāti Kororā, and Ngāti Takapari on their connections to Ngātiwai.[14] It was, the Crown said, not for it to decide who was right or wrong. Rather, the Crown accepted that the trust board had a reasonable basis for its view that Te Waiariki, Ngāti Kororā, and Ngāti Takapari were hapū that Ngātiwai 'shared' with other iwi. Given this range of views, it would be wrong for the Crown to require the board to amend its mandate to remove the hapū.[15]

The Crown said it had relied on the trust board's assessment of whether hapū listed in the Deed of Mandate were 'active' or 'historic'and did not understand why it should have insisted that the trust board describe Te Whakapiko as an active hapū.[16]

2.2.3 The Ngātiwai Trust Board

The Ngātiwai Trust Board emphasised the influence of Crown policy in shaping the claimant definition. The 'Red Book' states that the 'core component' is descent from one or more named or recognised tūpuna. Hapū and marae were listed in the definition, and geographic areas described, to add clarity and detail rather than to expand the definition. Just because hapū were listed in the claimant definition did not mean they would be subject to it. Rather, individual members of the hapū might be, depending on whether they could trace their descent from the named tūpuna. Similarly, the claims of 'shared' hapū, which were included in the claimant definitions of other large natural groups, were to be settled only to the extent that they were Ngātiwai claims.[17] The Crown's policy of 'comprehensive settlement' meant the board had no 'real choice' in the claims that were included in the Deed of Mandate. Claims that fell within the definition of the claimant group had to be included, whether or not the named claimants individually agreed or consented. This position was confirmed to the board by OTS during the mandating process.[18]

The trust board said some changes to the claimant definition had occurred because the board wanted the people of Ngātiwai to explain how they should be described. The board acknowledged that it had not been easy to attain 'a degree of precision' in identifying named and recognised

Ngātiwai tūpuna. It expected further refinements to the claimant definition would be required.[19]

The area of interest in the claimant definition did no more than indicate the potential area within which Ngātiwai customary rights had been exercised. The board intended to settle aspects of claims located within this area only insofar as they related to Ngātiwai interests.[20]

2.3 Representation and Accountability

2.3.1 The claimants

The claimants argued that the Crown's recognition of the Ngātiwai Trust Board for mandate purposes was inappropriate because it was not set up or structured in a way that could enable the Crown to meet its Treaty obligations to hapū properly.[21] The trust board was set up to receive and distribute fisheries settlement allocations, but through the support of the Crown it was now viewed as the iwi authority for Ngātiwai. That it was an easy structure for the Crown to identify as an entity for Treaty settlement purposes, did not, in the claimants' view, make it the right structure.[22]

Problems with the trust deed identified by claimants were the influence marae chairpersons were able to exert over elections to the board,[23] and that trustees were responsible to all Ngātiwai, not to the communities that elected them.[24] The claimants were concerned that this meant the mandate granted to trustees by marae communities could not extend to representing their claims in Treaty settlement negotiations.[25]

Claimants acknowledged that marae were important places to come together for discussion, but they argued there was 'no link' between the board's marae-based system and proper hapū decision-making and representation based on their tikanga.[26] The marae-based system of representation was problematic for the claimants whose marae reservation sat on Horahora land without a wharenui (meeting house); the suggestion that such a marae could represent their hapū was 'absurd'.[27]

Hapū claimants contrasted the limited input they were able to provide through the mandated structure with the processes of collective decision-making they followed, under their own tikanga, through their own mandated hapū organisations.[28] Both the Patuharakeke and the Te Waiariki, Ngāti Kororā, and Ngāti Takapari claimants had given a mandate for Treaty settlement work to their hapū organisations, the Patuharakeke Trust Board and the Te Waiariki, Ngāti Kororā, and Ngāti Taka Pari Hapū Iwi Trust.[29] The Patuharakeke Trust Board had carried the hapū Treaty claims since 1997 without assistance from any other mandated entity and did not want to surrender that role to an entity that did not have their consent or support.[30] It said the lack of appropriate hapū representation within the mandated entity amounted to a clear failure to uphold their hapū rangatiratanga.[31]

Claimants acknowledged that the Ngātiwai Trust Board had made amendments to the Deed of Mandate but said these changes had not resolved problems of representation and accountability. The proposals were 'tokenistic', they said, because they were solely advisory. The proposals did not amount to proper hapū representation.[32] The interested party Te Kapotai submitted that none of the submissions on the Deed of Mandate had suggested adding advisory positions as the way to resolve concerns about hapū representation. It was therefore no surprise, Te Kapotai argued, that the changes had not resolved concerns about hapū representation.[33]

Further improvements were required, the claimants stated. One suggestion was that a tribal taumata was needed, which would be representative of Ngātiwai kaumātua and kuia and would have a power of veto over the board's Treaty settlement decisions.[34] The Patuharakeke claimants pointed to the Whangārei Terenga Paraoa Assembly as a possible alternative hapū-based structure that might better reflect and uphold the rangatiratanga of hapū.[35]

2.3.2 The Crown

The Crown submitted that neither the Crown nor the Tribunal, has previously maintained that hapū consent is required in order to achieve a mandate.[36] Ngātiwai was not a confederation of distinct and autonomous hapū units in the way that Ngāpuhi might be, and it was a far smaller iwi. For these reasons, the Crown said, it was not practical

for the Ngātiwai Trust Board to create a separate entity for mandating purposes.[37]

The Crown said that, in any case, hapū had been effectively represented on the trust board for several decades through marae-based representatives. Alternatives had been considered at one time, with hapū, takiwā (districts), and marae-based systems put to a general meeting of Ngātiwai. Marae representation was chosen, and therefore the Crown had reason to consider it was appropriate.[38] The Crown acknowledged that there were complex and interwoven relationships between Ngātiwai hapū and marae, with some hapū closely connected to particular marae and others less so.[39] However, in the Crown's view the marae-based system still adequately represented hapū, while proposed advisory bodies and new positions on the Treaty Claims Committee would further enhance hapū representation.[40]

2.3.3 The Ngātiwai Trust Board

The Ngātiwai Trust Board highlighted the statement in the *Ngāpuhi Mandate Inquiry Report* that the Crown has a duty to respect and protect actively the rangatiratanga of Māori communities according to the particular circumstances of the community involved. The structure set out in the Deed of Mandate was appropriate to Ngātiwai, the board said, and matched the particular circumstances of the community.[41]

The trust board told us Ngātiwai hapū and marae communities were not separate and discrete. Rather, it said that, because the hapū and the marae contained the same people, the board's marae-based structure was an appropriate form of representation.[42] Marae-based systems of mandate representation were not unusual, the board said; the Ngāpuhi mandate was the only hapū-based mandate in Te Taitokerau.[43] There had been no consistent practice of Ngātiwai hapū acting autonomously for at least 70 years.[44] Over recent decades the board had represented Ngātiwai and had become part of the rangatiratanga of Ngātiwai.[45]

The board was aware that the trust deed had flaws and it had tried to gain support for amendments to the deed. Responsibility for reviewing the trust deed and recommending changes now lay with a group that was independent of the board. The trust board said the review process was continuing.[46] The board's trustees were obliged to make decisions solely on the basis of what was best for all of Ngātiwai, based on the principle of kotahitanga and the common interests of all.[47] For the purpose of settlement negotiations, however, the board said it had created advisory roles to allow for more input from hapū.[48]

2.4 Did Hapū Consent to the Mandate?

2.4.1 The claimants

The claimants alleged that hapū have not given their consent to the Deed of Mandate. Moreover, they say hapū consent was never sought. Instead, they said, support for the mandate was secured through a vote of adult registered members of Ngātiwai. This was not, in the claimants' submission, the way to obtain or gauge hapū consent.[49] In order to be certain the Ngātiwai Trust Board had obtained the consent of hapū, the Crown should have required the board to put the question to hapū. That was the tikanga that should have applied to decision-making on matters that affected the hapū.[50] The claimants said decisions affecting the whole hapū were made collectively through hui-ā-hapū, and mandates for any particular work on behalf of hapū were granted by the hapū as a whole.[51]

Claimants said the Patuharakeke Trust Board and the Te Waiariki, Ngāti Kororā, and Ngāti Taka Pari Hapū Iwi Trust had been given, through such hui, the authority to advance Treaty settlement work on behalf of those hapū.[52] They said decisions taken by the bodies representing Patuharakeke and Te Waiariki, Ngāti Kororā, and Ngāti Takapari to refuse consent to the mandate were clearly signalled to the Crown and the Ngātiwai Trust Board, yet the Crown proceeded to recognise the mandate anyway.[53]

Some claimants placed hapū consent within a wider argument that the consent of Ngātiwai – claimants, whānau, hapū, and the iwi as a whole – had not been obtained. They said flaws in the vote on the mandate were the main reason.[54] For example, they said the vote did not reveal which hapū or marae voters belonged to, and so the Crown could not know which hapū or marae had

given their consent.[55] This, they said, meant support for the mandate might have come from within all the hapū of Ngātiwai or might have been concentrated within just one or two hapū. Similarly, they said that while it was possible that all marae communities supported the mandate, support might have been concentrated among just a few marae.[56] It was impossible, in the claimants' view, for the Crown to argue for hapū or marae consent from the results of the mandate vote.[57]

Claimants said the low rate of participation (28.2 per cent) in the vote was characteristic of mandate voting and a fundamental problem they said the Crown must do more to address. The low participation rate, it was submitted, might indicate that opponents preferred to use the submissions process to state 'reasoned opposition'.[58] Additional problems with the vote were that not all who could have been eligible to vote had received voting packs or been able to participate.[59]

The claimants alleged that the vote proceeded with a claimant definition that was incorrect, unclear, and still undergoing change.[60] This problem was compounded, in the claimants' view, by the error in Crown process in July 2013, when the Crown endorsed the mandate strategy before seeking submissions. The claimants noted that voting began before submissions on the strategy had been fully considered, further undermining the status of the vote as a means of showing consent to the mandate.[61]

The whānau of Ngātiwai ki Whangaruru claimants pointed to the minimum standards of active protection of tino rangatiratanga that were set out by the Ngāpuhi Mandate Tribunal.[62] They submitted that the vote fell short of those standards and therefore the Crown had undermined the rangatiratanga of Ngātiwai hapū and claimants.[63]

Te Kapotai said they had made their opposition to the mandate clear to the Crown, but were included in the mandate against their wishes.[64] Neither the Deed of Mandate nor the mandate process contained a mechanism to seek consent from hapū. The vote did not show if members of Te Kapotai had voted in favour of the mandate. It was not acceptable, Te Kapotai submitted, for the Crown to recognise a mandate that would result in the full and final settlement of a group's historic grievances when it was possible that only a small number of that group had voted in support.[65] They said the Crown knew there was opposition from Te Kapotai, and other hapū, and its failure to require the trust board to demonstrate support for the mandate from those hapū showed the Crown's disregard for hapū rangatiratanga.[66]

2.4.2 The Crown

The Crown argued that it was reasonable for it to rely on the vote, which demonstrated a 'broad base of support' for the mandate.[67] The participation rate of 28 per cent and the 82 per cent level of support were comparable to other mandate votes.[68] It noted that just 131, or 17 per cent, of the 772 votes cast were opposed to the mandate.[69] While acknowledging that 144 of 269 submissions (including a petition with 119 signatures) opposed the mandate, the Crown said submissions should not be considered in the same way as the result of a vote. It said people who were already satisfied with the mandate arrangements had little incentive to make a submission. The Crown told us that submissions could be made by any member of the public, meaning anyone could make a submission on a mandate that might not necessarily affect them. By contrast, it said the vote was open only to adult members of Ngātiwai. The Crown submitted that the submissions process did not reveal a 'discernable change in the overall attitude' of Ngātiwai to the mandate. It said that analysis of the petition showed that 104 individuals who listed an affiliation to Ngātiwai hapū opposed the mandate, which indicated a similar level of opposition to the 131 votes against the mandate. But, the Crown said, the mandate vote followed a clear and widely advertised process, including hui, and it was not valid to compare the two.[70]

The Crown accepted there was evidence of opposition to the mandate, but it said this came from individuals. This individual opposition, as expressed through the mandate vote, submissions, and petitions, did not, it said, equate to hapū opposition. It therefore, in the Crown's submission, fell outside the scope of the inquiry.[71] Nor, the Crown argued, had evidence of hapū opposition to the mandate been demonstrated during the inquiry.[72] It said only the

Patuharakeke claimants and the claimants from the Te Waiariki, Ngāti Kororā, and Ngāti Takapari hapū purported to represent hapū.[73] None of these claimants had provided evidence that their hapū opposed the mandate. the Crown said each claimed that their hapū trust had a mandate to represent their hapū on matters of Treaty settlement, but neither had held properly documented hui or voting processes comparable to the Ngātiwai Trust Board's mandate process. Nor had they run equivalent processes to find out whether hapū members opposed the trust board's mandate as they claimed.[74]

2.4.3 The Ngātiwai Trust Board

The Ngātiwai Trust Board submitted that the decision of those who voted in favour of the mandate should be respected.[75] The vote was 'the sole concrete indication' of the level of support for the mandate, and had to be weighed against the concerns that claimants had raised.[76]

The trust board said it had undertaken an extensive process of engagement, including hui with hapū representatives, marae trustees, named claimants, and kaumātua.[77] Throughout that 'drawn-out process', only two of the many hundreds who had taken part had questioned whether it was appropriate to hold a vote of individuals to approve or reject the mandate strategy. Before the urgent inquiry, the board said, no member of Ngātiwai had proposed the mandate should be approved through a series of decisions at hapū level, rather than by individual vote.[78]

The board rejected the proposition that the Patuharakeke or Te Waiariki, Ngāti Kororā, and Ngāti Takapari claimants had any mandate to speak on behalf of their hapū. It said there was no evidence to suggest they had sought or obtained such a mandate, whether by a hui-ā-hapū or some other means.[79]

2.5 Withdrawal of Consent

2.5.1 The claimants

The claimants' key submission was that the mechanism to withdraw support from the Ngātiwai Trust Board's Deed of Mandate is so costly, onerous, and impractical as to be unworkable.[80] They said they were trapped within a mandate they had not agreed to and that did not allow them sufficient representation. By recognising a mandate that put the claimants in this position, they said the Crown had failed in its duty of protecting actively their tino rangatiratanga.[81]

The claimants said the withdrawal process was practically equivalent to that followed by the trust board in obtaining a mandate. But they submitted that, whereas significant funding was available to the trust board, no funding was available to claimants who wished to withdraw support.[82] Te Kapotai told us the process conferred 'a significant and unfair amount of power' on the trust board, and to expect those who opposed the mandate to follow such a process compromised their rangatiratanga, meaning their right to choose not to be involved.[83] Even if the withdrawal process was followed to the end, the claimants said, withdrawal was not guaranteed because the Deed of Mandate stated that the trust board had then to discuss the next steps with OTS. The claimants were unwilling to trust the Crown with that decision.[84] In any case, they said, the mechanism was not designed to allow groups such as hapū to withdraw, but so that the claimant community as a whole could withdraw their mandate from the trust board.[85]

The fact that Te Kapotai had been allowed out of the mandate, without using the withdrawal mechanism and for reasons that claimants found 'difficult to decipher', added to claimants' sense of unfairness. They argued that this amounted to unequal treatment of the hapū by the Crown.[86] Te Kapotai acknowledged that release from the Deed of Mandate had been a key objective. Having been included against their wishes, they had spent 'over three years' trying to be removed. But they still did not know with any certainty why they had been released. Problems with the claimant definition should have been resolved before the mandate was recognised, they said.[87]

2.5.2 The Crown

The Crown did not agree that the withdrawal mechanism was unworkable. While the requirement to hold nine hui nationwide and within the rohe might sound onerous, the Crown said there was no evidence to suggest that such a

task needed to be expensive or difficult to organise. It was understandable that such hui were required, given that the trust board had held extensive hui in the process of obtaining its mandate.[88]

On the question of why Te Kapotai had been released from the mandate without using the withdrawal mechanism, the Crown stressed that this had been a decision for the trust board to make.[89]

2.5.3 The Ngātiwai Trust Board

The trust board argued that, because all of Ngātiwai were involved in the decision to confer its mandate, Ngātiwai collectively should have the opportunity to withdraw the mandate.[90] In any case, the board said it was constrained by the Crown's policies of comprehensive settlement with large natural groups, which meant it was not possible for individual hapū, named claimants, or other groups to withdraw. The Crown had stated it did not intend to settle separately with any further Northland hapū. Although the board did not see its role as defending that policy, the separate settlements process pursued for its two southern hapū had damaged Ngātiwai.[91] The board was, therefore, 'unapologetic in continuing to advocate for a single, comprehensive settlement for all remaining Ngātiwai claims'.[92] The board said it removed Te Kapotai from the mandate because whānau with Te Kapotai ties asked it to.[93]

2.6 Did the Crown Effectively Protect the Interests of the Groups Involved in Mandating?

2.6.1 The claimants

Claimants alleged that the Crown acted inconsistently and in error as it worked towards its decision to recognise the mandate.[94] They said the Crown's approach was driven by its desire to satisfy its own targets and priorities, including the achievement of a Treaty settlement with Ngātiwai 'at any cost', rather than the need to ensure that the mandate was robust and that the interests of hapū and claimants were protected.[95]

The claimants said that in order to achieve its goal of quick settlement the Crown held early discussions with the trust board, which had a history of working with the Crown as a fisheries settlement entity.[96] This, the claimants said, was a 'first cab off the rank' approach, rather than searching for or encouraging the formation of an appropriate group for the purpose.[97]

Confidence in the Crown's approach was further undermined by the Crown's error in endorsing the mandate strategy before seeking submissions.[98] Claimants alleged that this showed a lack of care and even a level of predetermination in the Crown's approach.[99] They said the Crown did not properly consider submitters' concerns before advising the trust board to move to the next stage, meaning mandate hui and voting went ahead before claimants' views were adequately addressed.[100]

Te Kapotai alleged the Crown's failure to analyse the mandate vote to assess levels of support from hapū and marae undermined the robustness of the mandate. They said neither the Crown nor the trust board knew how many members of Te Kapotai had voted in favour.[101]

The claimants said the Crown's actions and decisions in respect of the claimant definition also undermined the mandate. They said the Crown had 'injected' itself into the process by suggesting changes to hapū ancestors in the claimant definition.[102] They said the Crown had become an 'active party' in the formulation of the claimant definition because it wanted a broader mandate to be achieved.[103] They said the Crown had worked with the trust board in these discussions instead of engaging properly with hapū or claimants to establish the correct whakapapa.[104] The Crown's reliance on the trust board, claimants said, had led to the alleged errors and inaccuracies, and overreach in terms of the area of interest.[105] The claimants said self-definition was a fundamental element of tino rangatiratanga, and so the inability of hapū and other groups to determine their identity within the mandating process amounted to a failure by the Crown to protect their tino rangatiratanga.[106]

The claimants alleged a key Crown failing lay in its response to submissions on the Deed of Mandate. They noted officials had assessed the number of submissions as 'unprecedented for an iwi of Ngatiwai's size' and demonstrating a level of opposition that was of 'high concern'

to the Crown.[107] The claimants said that instead of working with the claimant community to develop solutions to these concerns, the Crown chose to work with the trust board.[108] The result was that claimants' concerns were left unresolved.[109] Claimants submitted that this undermined their rangatiratanga. The Crown had long been aware of concerns about hapū representation and other issues, but had not resolved these concerns as a good Treaty partner would have.[110]

The claimants said the Crown placed heavy reliance on reviews commissioned by the trust board rather than undertaking its own assessments. Claimants alleged that the process of commissioning these reviews was not sufficiently robust, and the consultant was not sufficiently independent from the trust board.[111] Claimants also alleged that, whereas Crown policy was for Te Puni Kōkiri and OTS to separately review mandates, evidence and cross-examination had shown that these Crown agencies were not sufficiently independent of each other.[112]

Claimants stated the Crown was aware of a risk of legal challenge to the mandate if Ministers decided to recognise it. In their advice to Ministers, Crown officials identified 'a high risk of litigation' from groups opposing the mandate.[113] Instead of trying to resolve these concerns, officials recommended that Ministers recognise the mandate.[114] Claimants also alleged that, in deciding to recognise the mandate, the Crown failed to take account of the recommendations made by the Ngāpuhi Mandate Tribunal, which had been released a month earlier.[115]

In pursuing its settlement objectives, claimants alleged the Crown had failed to protect whanaungatanga obligations and relationships among the groups affected by the Deed of Mandate. There are several elements to this allegation. The Crown was said to have applied its large natural group policy inappropriately. The result was that, for some groups, acknowledged whanaungatanga links were used to bring them under a Ngātiwai mandate without their consent. The Te Uri o Makinui claimants alleged that intermarriage between tūpuna was used to allow Ngātiwai to claim mana whenua in areas to which it was not entitled. They alleged the Crown used this reasoning to push the related parties into one settlement.[116] The forced application of the Crown's large natural groups policy had caused 'massive division'.[117] Strain to 'intra-iwi relations' and internal conflict to whānau, hapū, and marae were identified by other claimants.[118]

The claimants said the Crown's insistence on pushing ahead with the mandate despite opposition caused further damage to whanaungatanga, affecting both internal and external relationships. The Crown's policies had harmed Patuharakeke's relationships with some Ngātiwai whanaunga (kin) to a point that was nearly irreversible. But the impact was felt internally too. Conflict had erupted among whanaunga and whānau.[119]

2.6.2 The Crown

The Crown stressed the limited role it had in mandating processes. The Crown did not confer mandates. Rather, it was asked to recognise them.[120] The Crown noted that the urgent inquiry did not concern the process leading to the recognition of the mandate. However, to the extent that the Crown's role in the mandating process was relevant to the central theme, it had assessed the level of support for opponents to the mandate at appropriate points.[121]

While the Crown accepted it had erred in endorsing the mandate strategy before seeking submissions, it noted that none of the submissions had criticised the Ngātiwai Trust Board's proposal to hold a Ngātiwai-wide vote of adult individuals. Nor was there any call to halt the vote so that hapū could confer a mandate.[122]

The Crown argued that the submissions process did not reveal a higher level of opposition than had already been indicated by the mandate vote.[123] Nevertheless, it drew attention to the advisory roles the trust board had proposed in response to concerns raised through the submissions and mandating processes.[124]

Crown officials had specifically addressed the issue of hapū representation when they advised Ministers to recognise the mandate.[125] However, the Crown maintained its view that nothing had required the Crown to interfere in the trust board's mandate by insisting that the board restructure itself or create an entirely new structure to provide for hapū representation.[126]

Noting the findings and recommendations of the

Ngapuhi Mandate Tribunal, the Crown said that Tribunal had not said hapū were fundamentally prominent in all Māori communities or that all mandates should be hapū-based. The Crown said careful consideration needed to be given to the Ngātiwai context.[127]

2.6.3 The Ngātiwai Trust Board

The trust board told us of the negative effects that the separate settlements for Ngāti Manuhiri and Ngāti Rehua have had on Ngātiwai. The board had decided only reluctantly to support those groups to pursue settlements separate from the rest of Ngātiwai. One result of the mamae (pain) and division this had caused was the board's decision to pursue direct negotiations with the Crown rather than participate in a Waitangi Tribunal inquiry first. The trust board had believed this would enable Ngātiwai to 'catch up' with its two southern hapū and rebuild the unity that separate settlements had threatened.[128]

The trust board stressed that the formation of its claimant definition had been influenced by Crown policy. In particular, it was influenced by the Crown's requirement that all claims deriving from a named or recognised Ngātiwai tupuna must be included in the Deed of Mandate, even if they were only partially Ngātiwai claims.[129]

The trust board defended the Crown's response to the concerns of groups who opposed the mandate. It said the Crown had monitored closely the board's mandating process and conducted its own hui and communications with claimants and others affected by the mandate. The board said the Crown had fulfilled its obligations in a way that reflected the particular circumstances of the Ngātiwai community, which did not have a history and tradition of hapū operating autonomously.[130]

Notes

1. Submission 3.3.22, p 15
2. Submission 3.3.21, p 14; submission 3.3.18, p 5; submission 3.3.24, p 3
3. Submission 3.3.13, p 5
4. Submission 3.3.12, p 3
5. Submission 3.3.17, pp 17, 26; submission 3.3.12, p 3
6. Submission 3.3.22, p 14; submission 3.3.18, pp 6, 21, 36
7. Submission 3.3.25, pp 3–4, 51
8. Submission 3.3.21, p 25
9. Submission 3.3.14, p 9
10. Submission 3.3.17, pp 5–10; submission 3.3.18, p 31; submission 3.3.24, p 68; submission 3.3.12, p 2
11. Submission 3.3.20, p 13
12. Submission 3.3.23, pp 12, 13–14, 28
13. Ibid, p 52
14. Ibid, pp 46–47
15. Ibid, pp 47–48
16. Ibid, pp 52–53
17. Submission 3.3.19, pp 16–17
18. Ibid, pp 19–20
19. Ibid, pp 13, 18
20. Ibid, p 19
21. Submission 3.3.14, p 8; submission 3.3.21, pp 31–32
22. Submission 3.3.21, pp 16–17; submission 3.3.18, p 35; submission 3.3.13, p 7; doc A45, p [5]
23. Submission 3.3.13, p 7
24. Submission 3.3.21, p 31
25. Submission 3.3.18, p 33; submission 3.3.21, pp 27–31
26. Submission 3.3.14, p 12
27. Submission 3.3.18, p 31
28. Submission 3.3.21, p 27; submission 3.3.18, p 10
29. Submission 3.3.21, p 24; submission 3.3.18, p 10
30. Submission 3.3.21, pp 13, 44
31. Ibid, p 3; submission 3.3.13, p 8
32. Submission 3.3.21, pp 28, 29, 32
33. Submission 3.3.20, p 22
34. Submission 3.3.22, p 17
35. Submission 3.3.21, pp 33–34
36. Submission 3.3.23, pp 29–30
37. Ibid, pp 35–37
38. Ibid, pp 38–40
39. Ibid, p 40
40. Ibid, p 43
41. Submission 3.3.19, pp 42–43
42. Ibid, pp 5–6
43. Ibid, p 10
44. Ibid, p 29
45. Ibid, pp 40, 42–43
46. Ibid, pp 8–9
47. Ibid, pp 9–10
48. Ibid, p 20
49. Submission 3.3.18, p 5; submission 3.3.15, p 8; submission 3.3.14, p 2; submission 3.3.25, pp 3–4; submission 3.3.22, p 10
50. Submission 3.3.21, p 27; submission 3.3.18, p 5
51. Submission 3.3.18, pp 5, 31, 44
52. Submission 3.3.21, pp 24–25, 30; submission 3.3.18, pp 10, 23, 67–68; transcript 4.1.1, pp 20–21
53. Submission 3.3.21, pp 14, 24; submission 3.3.18, pp 5, 23, 52
54. Submission 3.3.14, p 2; submission 3.3.22, pp 12–13

55. Submission 3.3.22, pp 11–13; submission 3.3.14, p 17; transcript 4.1.3, pp 267–268
56. Submission 3.3.24, pp 35–36; transcript 4.1.3, pp 267–268
57. Submission 3.3.22, pp 11–13, 19; submission 3.3.14, p 17; transcript 4.1.3, pp 267–268; submission 3.3.21, pp 17–18
58. Submission 3.3.21, p 43
59. Submission 3.3.14, p 15; submission 3.3.22, p 12
60. Submission 3.3.22, pp 14–15
61. Submission 3.3.14, p 14; submission 3.3.25, pp 12–14
62. Submission 3.3.14, pp 16–17
63. Ibid, p 16
64. Submission 3.3.20, pp 3–4, 15, 20
65. Ibid, p 14
66. Ibid, p 15
67. Submission 3.3.23, p 3
68. Ibid, p 6
69. Ibid, p 7
70. Ibid, pp 7–11
71. Ibid, p 3
72. Ibid, p 3
73. Ibid, p 3
74. Ibid, pp 19–25
75. Submission 3.3.19, p 43
76. Ibid, p 15
77. Ibid, pp 13–14
78. Ibid, p 14
79. Ibid, p 16
80. Submission 3.3.21, pp 37–39; submission 3.3.22, pp 15–16
81. Submission 3.3.21, pp 14, 40, 44; submission 3.3.22, p 16; submission 3.3.14, pp 11, 13, 18; submission 3.3.18, pp 59–61
82. Submission 3.3.21, pp 36–38
83. Submission 3.3.20, pp 23–24
84. Submission 3.3.21, p 39
85. Submission 3.3.18, p 37
86. Ibid, p 39
87. Submission 3.3.20, pp 3–4, 23–25; transcript 4.1.1, p 113
88. Submission 3.3.23, p 55
89. Ibid, pp 48–49
90. Submission 3.3.19, p 25
91. Ibid, pp 12–25
92. Ibid, p 25
93. Ibid, p 30
94. Submission 3.3.14, p 2
95. Ibid, p 2; submission 3.3.21, p 14
96. Submission 3.3.21, pp 6–7
97. Ibid 3.3.21, pp 12–16
98. Submission 3.3.14, p 14; submission 3.3.22, pp 6–7
99. Submission 3.3.24, p 14
100. Ibid, p 14
101. Submission 3.3.20, pp 13–14
102. Submission 3.3.18, pp 21, 36
103. Ibid, p 21
104. Submission 3.3.14, p 12; submission 3.3.17, pp 20–21; submission 3.3.18, pp 6, 21; submission 3.3.24, p 3
105. Submission 3.3.14, p 12; submission 3.3.18, p 29
106. Submission 3.3.14, p 13
107. Ibid, p 18
108. Ibid, p 19
109. Ibid, pp 18–20
110. Ibid, pp 18–20; submission 3.3.18, p 23
111. Submission 3.3.24, pp 18–19
112. Ibid, pp 5–6; submission 3.3.25, pp 30–31, 34
113. Submission 3.3.18, pp 23, 26
114. Ibid, pp 23, 26
115. Submission 3.3.21, p 11
116. Submission 3.3.17, pp 16–17
117. Submission 3.3.14, p 9
118. Submission 3.3.22, p 16; submission 3.3.25, p 48
119. Document A8, p 8; doc A20(b), pp [18]-[19]
120. Submission 3.3.23, p 44
121. Ibid, pp 16, 54
122. Ibid, pp 45–46
123. Ibid, pp 6–11
124. Ibid, pp 42–43
125. Ibid, p 43
126. Ibid, pp 38, 44
127. Ibid, p 30
128. Submission 3.3.19, p 12
129. Ibid, p 19
130. Ibid, p 38

CHAPTER 3

TREATY PRINCIPLES AND STANDARDS

3.1 Introduction

In this chapter, we identify and set out the relevant Treaty principles and standards by which we will assess the actions and omissions of the Crown in the circumstances under inquiry. The central theme of our inquiry concerns hapū rangatiratanga. To address this issue we consider the key Treaty principle concerns the Crown's duty to protect actively the tino rangatiratanga of the groups affected by the Ngātiwai Trust Board's Deed of Mandate.

The Crown's recognition of mandates has now been the subject of several Tribunal inquiries. Although the circumstances have varied, and the Crown's approach to settlement has developed over time, the findings of those Tribunals have assisted in determining our approach to assessing the Crown's conduct against Treaty principles. The Ngāpuhi mandate Tribunal framed a set of minimum standards by which to assess the Crown's duty of active protection in a mandating context. These seem to us to provide an appropriate test of the Crown's conduct in the circumstances of the Ngātiwai mandate.

We acknowledge at the outset that the circumstances we face are not the same as those of the Ngāpuhi mandate inquiry. We therefore set out the evidence presented to us about how tino rangatiratanga has operated in the context of Ngātiwai and the groups bringing claims in this inquiry, both historically and to the present day. We have paid close attention to what the claimants and the trust board have told us about the exercise of hapū rangatiratanga within the groups included in the Ngātiwai Deed of Mandate.

3.2 Previous Mandate Inquiries

3.2.1 *The Pakakohi and Tangahoe Settlement Claims Report* (2000)

The Pakakohi and Tangahoe settlement claims Tribunal was the first to consider the Crown's approach to mandating. The Tribunal determined that the relevant Treaty principles were those that guaranteed rangatiratanga to Māori groups in the conduct of their own affairs and required the Crown and Māori to act reasonably and with absolute good faith towards each other. The settlement of historical claims, in the Tribunal's view, should not create fresh grievances.[1]

Before assessing the Crown's handling of the mandate, the Tribunal sought evidence among the claimants of distinct cultural and political identity, distinct claims, and support for a separate settlement. It did not consider the claimants met the threshold it had established and so did not closely examine the Crown's conduct. However, we place some

importance on the Tribunal's statement that, as a general principle, a conjoint marae and hapū approach to mandating was 'fundamentally sound'. The Tribunal considered that local marae were the best place to look to in matters of customary authority and commended a 'bottom up' process of hui on marae to generate support for the mandate.[2]

3.2.2 The Te Arawa mandate reports (2004, 2005, 2007)

Over three inquiries, the Te Arawa mandate and settlement process Tribunals encountered a situation in which the Crown was required to weigh widespread opposition to a mandate from well-organised hapū. The relevant Treaty principles were determined to be those of reciprocity, active protection, partnership, equity, and equal treatment. In the context of the mandating process, the Tribunal considered these principles required the Crown to act honourably and with the utmost good faith, fairly, and impartially; to protect actively all Māori interests; and to consult with Māori.

In its first report in 2004, the Tribunal identified flaws in the mandating process. It did not, however, make a finding of Treaty breach. It suggested that the accountability and representivity of the mandated body should be debated thoroughly, and that these issues be resolved before the mandate could be reconfirmed. The Crown needed to ensure that it minimised damage to tribal relations.[3]

By the time of its second report in 2005, the Tribunal calculated that just under half of the affected hapū of Te Arawa wanted to withdraw from the mandate. Although, again, the Tribunal did not make a finding of Treaty breach, it suggested the Crown should negotiate with more than one mandated group at the same time in a flexible, practical, and natural application of the Crown's large natural groups policy.[4]

In a third report in 2007, the Tribunal concluded that the Crown had not taken up the suggestion of contemporaneous negotiations. The Tribunal found that the Crown had breached the Treaty principles of partnership and equal treatment by not ensuring that Te Arawa hapū could vote at hui-ā-hapū on their representation on the mandated entity. Such a vote would clarify whether certain claimant groups, which the Crown characterised as 'disaffected individuals', had wider support. In recommending a clearer process to determine support for a mandate, the Tribunal also said the Crown must ensure that hapū were able to withdraw from the mandate.[5]

The Tribunal suggested that the Office of Treaty Settlements (OTS) take steps to better understand the tikanga of communities affected by matters of mandate. If the Crown was to work with Māori communities in a way that allowed them to exercise their tino rangatiratanga, it was vital to ensure the proper application of tikanga. This understanding would help to ensure sustainable Treaty settlements. The promotion of hui or mediation and the time needed for consensus decision-making were all mechanisms that could be used to determine and put to bed issues of mandate.[6]

3.2.3 *The Tāmaki Makaurau Settlement Process Report* (2007)

The Crown's approach to settling the historical claims of Ngāti Whātua o Ōrākei was the subject of the Tāmaki Makaurau settlement process Tribunal. OTS had selected one group to work with exclusively towards a settlement.[7] By the time the Crown met neighbouring groups face to face, a settlement with the first group was on the table and the interests of the various parties had become polarised. The Tribunal said this damaged whanaungatanga. It was 'a great wrong', as it affected Māori society at its very core.[8] The Tribunal considered the extent of the problems it encountered required it to examine the Crown's overall process:

> We think Treaty settlements are supposed to improve relationships. What we are seeing in the Tribunal, though, is that the process of settling is damaging more relationships than it is improving. How has this come about?[9]

The question went to the heart of the Treaty guarantees in article 2.[10] The Treaty had confirmed tino rangatiratanga, and being a rangatira was about maintaining relationships, not just between a rangatira and the people,

but also between different hapū and iwi that independently possessed and exercised rangatiratanga. Rangatira were maintained in their positions of authority by their whanaunga, which meant that whanaungatanga was a value deeply embedded in the maintenance of rangatiratanga. The Tribunal emphasised the reciprocal obligations that whanaungatanga bestowed on rangatira, as it 'encompassed the myriad connections, obligations, and privileges that were expressed in and through blood ties, from the rangatira to the people, and back again'.[11]

The Tribunal said this was why OTS officials needed an understanding of whanaungatanga when seeking a settlement.[12] Officials needed to take a considered approach in applying the Crown's large natural groups policy, talking to all groups that would be affected by settlement and taking into consideration the negative impacts for whanaungatanga if the wrong approach were taken.[13]

The Tribunal said the principle of active protection requires the Crown to understand the relationships, arising both from whakapapa and from politics, between all relevant groups; to act wherever possible to preserve amicable tribal relations; and to act fairly and impartially towards all iwi without giving an unfair advantage to one. This last point was especially important in situations where inter-group rivalry was present. The Tribunal found that prejudice existed, arising primarily from damaged relationships. Instead of supporting the whanaungatanga that underpinned rangatiratanga, the Crown's actions had undermined it.[14]

3.2.4 *The East Coast Settlement Report* (2010)

The East Coast Settlement inquiry addressed the Crown's recognition of the mandate of Te Rūnanga o Ngāti Porou. The claimants said the groups they represented were not Ngāti Porou but independent iwi in their own right and Te Rūnanga had no mandate to represent them. They alleged the Crown had recognised a mandate that did not make it clear that their historical claims were included and that Crown officials did not consult them until after the mandating process was complete.[15]

The *East Coast Settlement Report* confirmed the importance of assessing the level of support or opposition to a mandate. By making that assessment, the Tribunal concluded there was not sufficient evidence of support for the claimants' position, and that delaying the settlement would involve prejudice to 'far greater' numbers than 'the small minority represented by the claimants in this inquiry'.[16]

Although the Tribunal identified flaws in the Crown's mandating process, these did not amount to a breach of Treaty principles and were not sufficiently severe to a halt to negotiations.[17] However, the Tribunal made suggestions for improvements. These included: inviting submissions when a proposed mandate strategy was released and when the Deed of Mandate was released; providing claimant communities with early and comprehensive information; writing directly to affected Wai claimants; and ensuring that 'all interested parties in a negotiated settlement have access to unhindered participation at every stage of the mandating process'.[18]

3.2.5 *The Ngāpuhi Mandate Inquiry Report* (2015)

The Crown's obligations to hapū have been at the forefront of Tribunals' considerations of mandating processes. These obligations were stated most forthrightly by the Ngāpuhi mandate Tribunal, which addressed the Crown's recognition of the Tūhoronuku Independent Mandated Authority (IMA) to represent all Ngāpuhi in Treaty settlement negotiations. The Tribunal identified the centrality of hapū as a primary social grouping within Ngāpuhi, of hapū rangatiratanga as a 'very important dynamic of the iwi', and of hui-ā-hapū on home marae as the centre of decision-making.[19] Where hapū are central to the social organisation of the community, the Tribunal said, the active protection of the rangatiratanga of the hapū is the primary Treaty responsibility of the Crown.[20]

In order to assess the Crown's performance of its duty of active protection during mandating, the Tribunal established minimum standards. The Crown has obligations to:

- ensure that it is dealing with the right Māori group or groups, having regard to the circumstances specific to that claimant community so as to protect its intra-tribal relationships;

- practically and flexibly apply the large natural groups policy according to the tikanga and rangatiratanga of affected groups;
- allow for an appropriate weighing of interests of groups in any recognised mandated entity, one that takes into account factors including the number and size of hapū, the strength of affected hapū, and the size and location of the population; [and]
- recognise that the structure of the mandated entity must allow for hapū interests to be tested and heard[.]

An assessment against these standards provided the basis for protecting actively the rangatiratanga and tikanga of hapū that were opposed to their claims being negotiated by the mandated entity. The protection of hapū interests then needed to be weighed with that of non-hapū interests in the modern context.[21]

The Tribunal focused on the structure of the Tūhoronuku IMA and the extent to which hapū could exercise their rangatiratanga within that structure. It did not agree with the Crown's view that problems with the structure were manageable because changes could be made. The Tribunal found that the Crown's recognition of the Tūhoronuku IMA's mandate had locked in some hapū against their will, amounting to a breach of their Treaty right to choose their leadership according to their tikanga and their cultural preferences.[22] The Tribunal found that the constitution of the Tūhoronuku IMA was not tika because it did not sufficiently support hapū rangatiratanga.[23] The Tribunal found that the Crown had failed to act in partnership or sufficiently protect hapū rangatiratanga.[24]

The Tribunal recommended that the Crown pause its negotiations with the Tūhoronuku IMA until the mandate included a workable withdrawal mechanism and means for resolution and consensus discussion. The Tribunal wanted the Crown to be satisfied that Ngāpuhi hapū had been given the opportunity to discuss and confirm:

- whether they wanted to be represented by the Tūhoronuku IMA;
- who would be their hapū kaikōrero and hapū representatives on the Tūhoronuku IMA; and
- whether they thought there was an appropriate level of hapū representation on the Tūhoronuku IMA board.[25]

3.3 The Principles of Partnership and Equal Treatment, and the Duty of Active Protection

Our assessment of previous mandating inquiries confirmed to us that the Treaty principles of partnership and equal treatment, and the duty of active protection are of fundamental importance to the Crown's role, and in the context of mandating, are closely linked. The settlement of historical Treaty claims is intended both to provide restitution for past grievances and to restore the Treaty relationship. The Crown must act in good faith and with consistency.[26]

At the heart of the Treaty relationship is a partnership between kāwanatanga and tino rangatiratanga.[27] Tino rangatiratanga is guaranteed to Māori by article 2 of the Treaty and has been expressed as 'the highest chieftainship' and as 'full authority'.[28] This guarantee imposes upon the Crown a duty of protection, which – in the words of the Court of Appeal – is 'not merely passive but extends to the active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.[29]

As we have seen, Tribunals that have inquired into mandate issues have emphasised the importance of protecting actively the tino rangatiratanga of hapū. To do this requires the Crown to understand and provide for the application of tikanga, and to understand and preserve tribal relations where possible.[30]

Tribunals have not always considered flaws in the Crown's conduct to amount to a breach of the Treaty. Nor has the active protection of hapū rangatiratanga always been given absolute primacy. We agree with the Ngāpuhi mandate Tribunal that what is required is set out in that Tribunal's minimum standards. The Crown must balance its Treaty responsibilities to the Māori groups with whom

it is seeking to restore a relationship and settle historical grievances, while respecting the tikanga of these groups. Foremost is the question of how the Crown can best balance its preference to settle with 'large natural groups' – often but not always iwi – with the Treaty rights of hapū.

A pre-requisite to meeting the Crown's obligations of partnership including active protection, therefore, is an understanding of tino rangatiratanga. We first discuss this with reference to what previous Tribunals have said about tino rangatiratanga. In the following section we examine the evidence of how tino rangatiratanga is expressed among the groups involved in this inquiry. We do so to better understand, in the context of settlement negotiations, the Crown's Treaty obligations to Ngātiwai and to the hapū included in the Deed of Mandate.

3.3.1 Tino rangatiratanga, mana, and decision-making

A number of Tribunals have discussed the relationship between tino rangatiratanga and mana.[31] The Ōrākei Tribunal determined that 'rangatiratanga denotes the mana not only to possess what one owns but, and we emphasise this, to manage and control it in accordance with the preferences of the owner'.[32] Tribunals have therefore considered autonomy to be a core aspect of the guarantee of tino rangatiratanga.[33]

In traditional Māori thinking, the 'respect paid to the independent mana or rangatiratanga of all groups was the key to keeping the peace'.[34] The Tūranga Tribunal said the need for the Crown to use its kāwanatanga powers to foster autonomy 'cannot be overstated. It is the single most important building block upon which to re-establish positive relations between the Crown and Maori.'[35]

The Ngāpuhi mandate Tribunal said tino rangatiratanga is the basis of Māori political and social organisation and the foundation of Māori decision-making. Therefore, in the modern context the duty of active protection can be applied to the range of structures – such as iwi, councils, trusts, or hapū – that Māori might use to make their decisions and exercise their authority. However, the Tribunal stressed that, in the context of mandating leaders to negotiate the settlement of Treaty claims, 'which, above all, concern hapū', hapū must be empowered to make that choice according to their tikanga.[36]

A key element of autonomy is the capacity to make decisions about matters such as resources, land, and leadership. In decision-making, all members of a community have a part to play. The Te Whānau o Waipareira Tribunal drew attention to the fact that leaders cannot act effectively without the respect, loyalty, and trust of their communities. Leaders and supporters owe each other reciprocal rights and duties. Indeed, that Tribunal characterised rangatiratanga as the reciprocal relationship of trust between leaders and members of a Māori community that bound the people together.[37] The Ōrākei Tribunal similarly said the authority embodied in the concept of rangatiratanga was 'also the authority of the people'.[38]

3.3.2 Tikanga and whanaungatanga

Tikanga has been described as the set of beliefs and customs worked out over time to guide the 'tika' conduct of Māori affairs. Tikanga governs how people should interact, identify themselves, and behave. Such guidelines tend to be predicated on personal connectedness and group autonomy.[39] The importance of observing the tikanga that guide collective decision-making through hui-ā-hapū was highlighted, as mentioned earlier, by the Te Arawa and Ngāpuhi Tribunals.

Although there are many constants throughout Aotearoa, ideas and practices relating to tikanga can vary from region to region.[40] The Te Arawa settlement and Ngāpuhi mandate Tribunals reminded the Crown of the importance of knowing the tikanga of the communities with which it seeks to settle grievances and restore relationships.[41]

Whanaungatanga is a fundamental principle underpinning tikanga. Mead describes whanaungatanga as embracing whakapapa and focused on relationships. Individuals may expect to be supported by their relatives, but the collective group also expects the support and help of its individuals.[42] As we observed earlier, the Tāmaki Makaurau

Tribunal stated that whanaungatanga is at the core of being Māori and remains a value 'deeply embedded in the maintenance of rangatiratanga'.[43]

Obligations of whanaungatanga apply not only to internal relationships between rangatira and their people, but externally, too, between groups such as hapū who hold and exercise rangatiratanga. The ability of rangatira and of Māori groups to maintain these relationships is vital to their tino rangatiratanga and is protected under article 2.[44]

3.4 Treaty Principles, Tino Rangatiratanga, and Ngātiwai

In order to show how the Treaty principles we have identified are relevant to the circumstances of this inquiry, we need to establish how tino rangatiratanga is exercised within Ngātiwai and the groups that are included within the scope of the Ngātiwai Deed of Mandate.

We look first at what the parties told us about tikanga, particularly as it affects mandating for settlement purposes. We then discuss the dynamics of tribal affiliation, as they were presented to us in the context of the inquiry.

3.4.1 Rangatiratanga guided by tikanga

The evidence of the parties on their tikanga varied, but we identified three themes.

First, the claimants emphasised the importance of collective decision-making and action, particularly in the context of a mandate decision. Hūhana Lyndon was clear that 'when we face challenges it's through the process of hui and coming together and seeking guidance from one another that we see rangatiratanga in its full fruition'. For Ms Lyndon, it was not the location of decision-making that mattered but the fact that communities came together to make decisions.[45]

For Mylie George, the ability to make decisions and choices was key to the exercise of rangatiratanga. She described the model of decision-making she learned from childhood:

> It's about our whānau being able to choose for themselves where they stand in those positions and to activate a hapū rangatiratanga, whether that's family, whether that's through our hapū or marae, whatever that may be.[46]

This was the tikanga that needed to be used, in Ms George's view, in the context of the Treaty settlement kaupapa.[47]

We observe that what is at issue for these claimants is not really the question of whether hapū or marae are to be preferred. Rather, the claimants say it is for the communities themselves to determine how they are to be represented. And to do so, collective decision-making at hui is the foundation.

Pereri Māhanga stressed hui-ā-hapū as the 'cornerstone' of hapū decision-making and action for Te Waiariki. Without the specific authority of the hapū hui – without endorsement – it was impossible for a person from the hapū to 'bind our collective force to a path, or to an agreement'.[48]

Counsel for Patuharakeke submitted that decisions on Treaty settlement processes for the hapū had been made by hui-ā-iwi, consultation with kaumātua, and discussion with and support from all three of the hapū's formal governance entities: its trust board, the Takahīwai Marae Committee, and the Takahīwai Marae Trustees.[49]

Asked how Patuharakeke would make decisions on matters that touched on the affairs of another hapū, Jared Pitman said this would usually be done through hui-ā-hapū, and usually with guidance from the taumata and rangatira of the hapū: 'if it's a discussion that needs to take place between ourselves and another hapū, then we need to ensure that that's done under tikanga Māori'.[50]

A second focus for the claimants was whanaungatanga.

Mr Māhanga was concerned that relationships had been damaged profoundly by the Crown's decision to recognise the Ngātiwai Deed of Mandate:

> I am witnessing tribal conflict and division almost everywhere I go in Te Taitokerau because of the effect this recognition is having on our people at home. Our whanaungatanga and kotahitanga is being tested by the very people that we entered into a relationship with to protect this tikanga.[51]

Mr Pitman described whanaungatanga as a 'central

principle' of Patuharakeke identity and rangatiratanga, both today and in the past. Hapū rangatiratanga, he said, encompasses a duty to manage 'inter-tribal relationships'.[52] The negative impact of the mandate process on Patuharakeke's ability to manage these relationships was a key concern for the hapū and, he claimed, a clear failing of the Crown's duty of active protection.[53]

Patuharakeke depended on whanaungatanga in its interactions with other groups, including Ngātiwai.[54] This point was also made by the Te Uri o Makinui claimants, who acknowledged their whanaungatanga links with Ngātiwai.[55] The Te Uri o Hikihiki whānau claimant Carmen Hetaraka said many of the hapū affected by the mandate acknowledged their whanaungatanga as Ngātiwai.[56]

The third theme we identified was the importance the trust board placed on the principle of kotahitanga or unity. Indeed, the board told us that its whole mandate structure is premised on the principle of kotahitanga and the common interests of all members of Ngātiwai.[57]

During the mandating process, the trust board seems to have come to a view that it needed to give more attention to acting in accordance with Ngātiwai tikanga. In 2015 it prepared a 'Hapū Response Report' which outlined to OTS the board's position on the hapū that had been included in the mandate. The trust board's overall approach, the report said, was a response to 'concerns expressed to us by our kaumātua regarding our Tikanga'. The board said it valued and respected these concerns and in future would base its engagement on its tikanga practices. It also said it would make every effort to engage with its people in a manner consistent with the values and beliefs of Ngātiwai tūpuna. The approach would be based on an understanding and acknowledgment of 'working together in harmony within our tikanga'. In particular, this would involve practising the five principles of kotahitanga, aroha, whakapono, rangimārie, and tūmanako. We interpret these broadly as unity, love, honesty, peace, and hope. Kotahitanga, the report said, is:

> The notion of unity, working and bringing our people together, being open to debate and difference of opinion being expressed, our ultimate goal is to arrive at a united iwi position.[58]

These tikanga principles do not focus directly on the decision-making process in the way that the claimants' evidence does. Rather, they appear to us more to address the obligation to maintain whanaungatanga relationships.

In the settlement context, however, counsel for the trust board submitted that most in Ngātiwai wanted to maintain 'a unified approach' to settlement and that 'kotahitanga is a message that has come through strongly from all quarters.'[59] The trust board identified the separate Treaty settlements for the two southern Ngātiwai hapū, Ngāti Manuhiri and Ngāti Rehua-Ngātiwai ki Aotea, as a source of division for the iwi, and this had strengthened the board's resolve to keep the iwi together.[60] A single, comprehensive settlement for all remaining Ngātiwai claims, in the board's view, would minimise the negative consequences of allowing separate settlements including impacts on the social and cultural dynamics of Ngātiwai and its unity, whakapapa, and identity.[61] For Kristan MacDonald, who at the time of our hearings was deputy chair of the trust board and chair of its Treaty Claims Committee, unity in achieving a mandate for settlement negotiations was critical: 'It is more important than ever that the Ngatiwai iwi shows mana and kotahitanga at this historic time. Kia kotahi te hoe.'[62]

3.4.2 Te iwi o Ngātiwai: iwi and hapū

The assertions of Ngātiwai unity made by the trust board prompted us to consider the evidence presented in this inquiry on the identity of Ngātiwai, especially in relation to their neighbouring and 'shared' hapū and iwi. Introducing the Deed of Mandate, trust board chair Haydn Edmonds wrote: 'We are now at the cusp of clarifying the origins and identity of Te Iwi o Ngātiwai in the history books.'[63] It became clear to us during the inquiry that the origins and identity of Ngātiwai are complex.

Neither the claimants (who are divided among themselves on this issue) nor the Ngātiwai Trust Board could agree on when Ngātiwai came into existence as an iwi. The Deed of Mandate claims 'the first period of human

occupation, extending back to Māui-tikitiki-a-Taranga and Māui Pae' as the birth era of the iwi. It is 'the unbroken line of descent from the eponymous ancestor Manaia; his descendant Manaia II and his people of Ngāti Manaia which gives the Iwi its unique and distinctive identity'.[64] Manaia II is said to be the father of Tāhuhu-nui-a-rangi, the progenitor of Ngāi Tāhuhu, and it is related by some claimants that he came from Hawaiki in the *Tūnuiarangi* waka (canoe).[65] (Others say Ngāi Tāhuhu came originally from Hawaiki in the *Moekakara* waka.[66]) In any case, Ngāi Tāhuhu pre-date Ngāpuhi's founding ancestor, Rāhiri, by several generations. At least one of Rāhiri's wives was Ahuaiti of Ngāi Tāhuhu. Another wife, Whakaruru, may also have been of Ngāi Tāhuhu, although others say she belonged to the early Taitokerau iwi, Ngāti Awa.[67] By associating Ngātiwai with Ngāti Manaia and Ngāi Tāhuhu, the trust board appears to us to be attempting to be as inclusive as possible of those who might have interests through Ngātiwai. In cross-examination, Mr MacDonald agreed with the proposition that 'Ngātiwai is Ngāti Manaia rebranded.'[68]

This 'unique' identification of Ngātiwai with Ngāti Manaia was contested by the Te Whakapiko claimants, who regard themselves as a hapū of Ngāti Manaia and not Ngātiwai, but whose claims are assumed by the trust board to be of Ngātiwai (and, since OTS have recognised the trust board's mandate, also assumed to be so by OTS). A similar situation exists with groups who identify with the early peoples, Ngāi Tāhuhu or Te Kawerau (the latter a Tainui people). The claimant Rowan Tautari was concerned about the broad statements made about Ngāi Tāhuhu and other groups because the 'inference seemed to be that these were hapu of Ngati Manaia, which automatically transformed them into Ngatiwai'.[69] Marie Tautari told us that it 'was not until 1974 . . . that Ngātiwai began to form as a group beyond Whangaruru'. She also said:

> Today, Ngātiwai is perceived as an iwi. However, this is a relatively later phenomenon, strengthened by the Fisheries Settlement of 1992, which gave the Ngātiwai Trust Board, a charitable trust, resources to develop a national profile.[70]

We also received evidence of Ngātiwai from Native Land Court records (the court operated in north Auckland from the 1860s). Ngaire Hēnare of Te Waiariki recounted that Te Waiariki assisted Kāwiti's people (Ngāti Hine and others) in the wars against the Crown in the 1840s, with the result that they – Te Waiariki – were regarded as rebels for years afterwards. In the wake of the arrival of the Native Land Court, officials believed that their chief, Mohi Te Peke, would soon lead a rebellion. As a consequence Native Land Court Judge John Rogan is said to have written that if that were the case, kūpapa (neutral or pro-Crown) tribes would sell all of Mohi Te Peke's lands to the Crown. Ngaire Hēnare asserts that this began to come to pass within two months of Rogan's letter.[71]

Probably in reaction to the arrival of the Native Land Court and various disputed sales to the Crown, a declaration of 7 May 1887 signed by 226 members of 'te iwi o Ngatiwai', led by Maihi P Kāwiti, was published in Māori in a newspaper.[72] It declared Ngātiwai lands to be still papatipu lands notwithstanding any 'sales' and objected to the arrival of surveyors and the intrusion of government law. It also declared that this intrusion trampled on the gift of rangatiratanga recognised by the King of England in the Declaration of Independence in 1835, preserved by the Treaty of Waitangi, and confirmed again in section 71 of the Constitution Act 1852. In view of such a ringing declaration of identity and autonomy it is clear to us that Ngātiwai were conscious of themselves as an independent people at least by 1887.[73]

Other evidence shows that at least some of those who signed also regarded themselves as belonging to other descent groups, including Pita Tūnua of Te Whakapiko (no 116) and Māhanga Kurī of Te Waiariki (no 214).[74] No doubt there were others. But, as many claimants pointed out, and as is also implicit in the concept of 'shared' hapū recognised both by the Crown and by the trust board, hapū can belong to several 'large natural groups'. These include populous iwi such as Ngāpuhi, Ngāti Whātua, Te Kawerau, and others. By virtue of the constant cross-hatchings of descent and intermarriage, individuals can also belong to many different iwi and the hapū which

relate to them. However, unlike individuals, the rights and interests of single hapū are not shared across all hapū connected to them by kinship. Rights and interests traditionally belonged to the hapū.[75]

When individuals are discussing the affairs and rights of one descent group and making decisions for that autonomous hapū, they are acting at that time as members of that group and no other. The exception is when there is a pre-existing mutual agreement for different hapū to work together, temporarily but in alliance. Individuals remove their Te Waiariki or Te Whakapiko 'hats' when wearing their 'Ngātiwai hat'. That is why Hōhepa Māhanga could appear before the Native Land Court one day and say, 'I belong to Te Waiariki of the Ngāpuhi Tribe' and the next day in relation to other land could say 'I belong to Ngāti Hau hapū of Ngāpuhi tribe', and the previous day (figuratively speaking) his father, Kurī Māhanga, could sign a declaration as Ngātiwai.[76]

The Te Uri o Makinui claimant Michael Beazley explained that taking part in the governance of autonomous hapū was also a matter of 'ahi kā' (residence). Mr Beazley had descent links to Ngāti Mahuta of Tainui through his greatgrandmother, a daughter of King Tāwhiao. Both father and daughter are buried on Taupiri. Mr Beazley said this descent allowed him to speak on the marae at Ngāruawāhia, but he did not think he could take part in decision-making there as he had not spent much time in the Kīngitanga rohe. It was an ahi kā matter.[77]

Returning to the Ngātiwai petition of 1887, this means that when the 226 people signed as Ngātiwai in 1887 on that occasion, they were not also signing as Te Waiariki, Ngāti Rehua, or Te Whakapiko but as Ngātiwai only. This seems to have been a difficult concept for claimants to articulate. In our hearings, counsel asked questions aimed at getting various claimants to agree that on one occasion or another their ancestors admitted they were Ngātiwai.[78]

This evidence highlights two dynamics of tribal affiliations that are perhaps not unique to Ngātiwai, but are certainly prominent in their affairs. First, it can be the case that individuals with whakapapa to multiple hapū and iwi can and do choose to identify to the various groups they whakapapa to according to the circumstances. It is not a question of either/or when it comes to iwi and hapū affiliation, but both. For this reason, it is of little consequence that some individuals chose to identify as Ngātiwai on certain occasions, as the 226 signatories did in 1887.

Secondly, however, it is also the case that hapū and iwi are their own entities. Each will exercise their tino rangatiratanga, independently but with regard to place, context, and neighbouring relationships The position of hapū and iwi with multiple whakapapa connections and connections to other hapū and iwi cannot be compared to the position of individuals who can pick and choose among their multiple hapū identities according to the occasion. Pēpuere Pene gave us a succinct illustration of this point. He explained how he met Sir James Hēnare in 1981 at Ōtiria Marae to seek his support for Ngātiwai to become a registered iwi. Sir James offered his support. But first, he said: 'When Ngāti Hine is in Whāngaruru we are all Ngātiwai for the day. When Whāngaruru is in Te Orewai we are all Ngāti Hine for the day.'[79]

From this, we observe that it is the right of individuals to choose which group they identify with that is appropriate to their whakapapa, and appropriate to the circumstances; much as it is the right of hapū and iwi to act collectively in a way that is appropriate to the circumstances.

3.4.3 The 'locus of rangatiratanga' within Ngātiwai

The Ngātiwai Trust Board argued that hapū are not the 'sole locus of rangatiratanga' within Ngātiwai,[80] which chose in 1984 to use a marae-based system to organise itself.[81] Although the use of marae in this way is a relatively recent development, we have reviewed the historical evidence in order to better understand the circumstances in which it came about.

It seems that in earlier times Ngātiwai had two centres of population: the second of these was on Aotea (Great Barrier) after its conquest by Te Whāiti of Ngāti Manaia and his son, and by Rehua and his son in the late eighteenth century. The first Ngātiwai centre was at Whangaruru, from where descendants of Manaia II led the invasion of Aotea about 1780.[82] Whangaruru was the source.

The 1887 petition was issued from Whangaruru, and it is clear that Whangaruru with its hapū and marae is and was the 'nexus of Ngātiwai', as Mr MacDonald put it. It was a kāinga for the ancestor Manaia and the birthplace of Te Rangihokaia (whose descendants led the conquest of Aotea).[83] The 1887 petition itself concerned Whangaruru lands.[84]

In his 1869 Ōrākei judgment for the Native Land Court, Chief Judge Fenton called Ngātiwai 'the people of Whangaruru'.[85] Also in the land court, in 1881 Hēnare Te Moananui of Ngātiwai and Ngāpuhi said in evidence concerning Hauturu: 'In Governor Hobson's time [early 1840s] Ngatiwai lived at Big Barrier . . . Ngāti Wai . . . were partly [at that time] at Whangaruru and Big Barrier'.[86]

Various Ngātiwai tūturu hapū, and even some shared hapū like Ngāti Tautahi who originated among Ngāpuhi but had a long history on the east coast, are mainly associated with Whangaruru (although they now have other interests). Their marae are there or near there. There are six marae at Whangaruru and most of them are associated with Te Uri o Hikihiki, the largest tūturu Ngātiwai hapū.[87]

Mr MacDonald described the trust board's origins in Whangaruru in 1945, explaining that 'the first Ngātiwai Trust Board was established to manage the Whāngaruru-Whakatūria 1D9A and 1D10A blocks on behalf of "*the Ngātiwai tribe*"' (emphasis in original).[88]

Mr Beazley agreed that the Ngātiwai Trust Board's origins were in Whangaruru. He said at one time there was a push to alter its structure from marae-based to hapū-based. This failed, he said, 'because the marae up at Whangaruru had control of the [board] at the time and did not want to relinquish control in favour of hapū'.[89]

Mr Edmonds, the trust board chair, discussed his vision for Ngātiwai with the Tribunal. He agreed that the identity of Ngātiwai was 'evolving', and destined to evolve further in the post-settlement era. Hapūtanga was for him another evolving phenomenon.[90] Mr Edmonds discussed the evolution of the trust board from a hapū-based to a marae-based institution. He said that with urbanisation in the early 1980s many people had left the coast, weakening the tribal base. The board had problems with the local council and land retention. Mr Edmonds said these problems were the catalyst of action towards 'a rebuilding of the unity of Ngātiwai'. The rebuilding

> spread throughout the top of Ngātiwai up in Whangaruru and Rawhiti all the way down to the [Great] Barrier [Aotea], and *as we fought our way down for recognition of coast and ourselves as a people* we reaffirmed our whakapapa with each other and strengthened by using the buildings that were available to us and in 1984 a constitution was put together. [Emphasis added.][91]

Mr Edmonds went on to say:

> Because for many generations Ngātiwai has operated as an iwi the settling of lands and return of things to Ngātiwai were always put in the name of Ngātiwai, not in the individual hapū names. So they became for the benefit of all Ngātiwai. So it became more apparent that a Taumata that could help and assist right across the rohe of Ngātiwai would be useful because we would traverse from Bland Bay . . . and from Tuparehuia down to Aotea, from Aotea across . . . and make our way back up the coast. And in all of those villages reaffirming our whakapapa from there.[92]

This vision of the chairperson was an exciting plan for many people and a worthy struggle: the creation in the late twentieth century of a unified Ngātiwai identity for the future out of a disparate collection of hapū spread out in little villages along the coast, and in offshore islands from Aotea back up to the starting point of Whangaruru. It was to be done on marae and by reaffirming the lateral links of intervening hapū (between Whangaruru and Aotea) with Ngātiwai whakapapa. There were plenty of such links to call on. Thus, in introducing the Deed of Mandate, Mr Edmonds writes:

> This is clearly a water-shed period in our history as a tribe and will mark the difference between vague acceptance that Ngātiwai exists as an iwi in its own right and our future development and growth as a strong and united people.[93]

These efforts by the trust board to achieve a united

iwi, it strikes us, form the context within which we need to understand what the other communities – hapū and whānau – have told us about their tino rangatiratanga.

3.4.4 Rangatiratanga is not held only by hapū

The Crown and the Ngātiwai Trust Board told us that, unlike Ngāpuhi, Ngātiwai could not be understood only in terms of strong and autonomous hapū.[94] One question we need to consider is whether the steady focus on hapū rangatiratanga that the Ngāpuhi mandate Tribunal adopted is appropriate to the circumstances before us.

In a statement that, we think, reflects the particular geographical circumstances of Ngātiwai, Ms George told us that Ngātiwai are characterised first by 'whānau rangatiratanga':

> In Ngātiwai we're different. It's whānau rangatiratanga because we're all in our little bays and in our silos, so we enact that as families in our bays, and when we come together around kaupapa that includes everyone, then we do that as a hapū, and then we meet on our marae as well, so it's very much a mixed model of who we are . . .[95]

The characterisation of a 'mixed model' of rangatiratanga and identity within Ngātiwai was endorsed by the Ngātiwai Trust Board in closing submissions. The trust board described Ngātiwai as 'a series of closely-related coastal and island communities, often sharing whakapapa to several Ngātiwai hapū and sometimes drawing little or no distinction between themselves and their neighbouring whanaunga who did not whakapapa to Ngātiwai'.[96]

Ms Lyndon also offered an expansive interpretation of rangatiratanga:

> So while there's iwi, there's hapū, there's us on the kāinga, there's our rohe Whangaruru comes together, but then there's also landowners come together on issues of significance, and then our whānau itself. So I don't believe that it's fixed. I think that it's something that we exercise when there's an issue that we need to resolve.[97]

It is clear to us that the exercise of rangatiratanga today may also legitimately involve the use of structures such as trust boards and marae committees. Pereri Māhanga, who spoke for the Te Waiariki, Ngāti Kororā, and Ngāti Takapari claimants, himself chairs a trust board. Jared Pitman described the Patuharakeke Trust Board as 'a contemporary expression of Patuharakeke rangatiratanga'.[98] Similarly, the Ngātiwai Trust Board suggested that rangatiratanga was reflected in the trust board, and in its Deed of Mandate and advisory bodies.

However, Ngātiwai ki Whangaruru claimant Vicki-Lee Going, of Te Uri o Hikihiki, emphasised Ngātiwai hapū rangatiratanga: 'We the hapu of Ngatiwai, especially those who practice ahi kaa, hold rangatiratanga in our rohe. That's what I've always been taught. Not the marae. Not the Trust Board. The hapu.'[99] Hapū were a point of identification, she said, providing people with the means to 'know who we are, relate to other people, and make decisions'. The rangatiratanga of the people was inherent in the hapū they affiliated to within Ngātiwai. In her view, Ngātiwai rangatiratanga was exercised at hapū level.[100]

Hapū rangatiratanga was asserted most strongly by the Patuharakeke and Te Waiariki, Ngāti Kororā, and Ngāti Takapari claimants. Speaking for the latter group, Mr Māhanga accused the Crown of continued 'mistreatment of our Hapu'.[101] 'Te Waiariki, Ngāti Kororā, Ngāti Taka Pari have not been afforded the rights to exercise our hapū rangatiratanga and decide for ourselves the path that would see the best outcome for Te Waiariki, Ngāti Korora, Ngāti Taka Pari.'[102] Mr Māhanga acknowledged that the exercise of rangatiratanga within the hapū today required flexibility:

> Speaking about rangatiratanga, and Hapu rangatiratanga as we practise it today, it is obviously very different from olden times. Nowadays it is not so much held in one or two people for their lifetimes, but rather it is taken up at certain times and for certain tasks of our Hapu, when our Hapu collectively determine it.[103]

But the hapū would not rest, he said, 'from protecting our sovereignty, our Hapu Rangatiratanga'.[104]

Dr Guy Gudex for Patuharakeke told us the right of the

hapū to self-determination and autonomy was an inherent right. It was also contained in article 2 of the Treaty. Dr Gudex outlined the effort Patuharakeke had made to rebuild itself over the last 50 years, including engaging with the Crown where necessary.[105]

A fundamental plank of its hapū rangatiratanga was the mana whenua Patuharakeke held within its rohe. The hapū acknowleged its links to other hapū and iwi, including Ngātiwai, but those iwi and hapū exercised rights within the rohe only through their ties to the people of Patuharakeke and by acknowledging Patuharakeke as mana whenua.[106]

3.5 Assessing the Crown's Active Protection of Tino Rangatiratanga

As the parties to the inquiry explained their understanding of tino rangatiratanga in the context of mandating decisions, they emphasised the right to retain control over decision-making and the obligation to take account of whanaungatanga relationships.

Mr Pitman expressed clearly the link between Patuharakeke hapū rangatiratanga and the right of the hapū to make their own decisions on matters of mandate:

> The Crown must cease negotiations with Ngatiwai Trust Board and recognise the rangatiratanga of Patuharakeke in its exercise of self-autonomy, to choose how we will be represented in settling Patuharakeke historical grievances. This must be done before further Crown breaches are committed and relationships between members of Patuharakeke and Ngatiwai are put at further risk.[107]

Similarly, counsel for Te Kapotai connected the ability to exercise rangatiratanga with the 'ability to decide':

> The ability to decide is an essential part of rangatiratanga, and it is the ability to decide what representation and options for settlement are appropriate that hapū and claimants seek to preserve in the mandate process.[108]

Among the claimants who did not purport to represent hapū, Ms Lyndon said simply: 'Rangatiratanga to us means the ability to regulate ourselves and determine our own pathways and future.' Matters of Treaty settlement, in her view, were 'wholly' within this realm.[109] Ms Going said the mandating decision was ultimately a question of freedom:

> We should have the freedom to determine how we are going to proceed to settlement, freedom to decide who is going to be our representatives at the negotiation table with the Crown, freedom to determine who we are and what our future might look like.[110]

Speaking for the trust board, Mr MacDonald argued that setting aside the board's established way of decision-making would be a denial of many Ngātiwai communities' right to make their own decisions:

> The other hapū within Ngātiwai can decide how they want to be represented, whether by the status quo or as a hapū. But marae communities should not be forced to reshape themselves to uphold a hapū ideology if it doesn't exist in their reality. These are the tribal dynamics we are faced with today. If our people are happy with the current structure of representation, that must surely be their decision.[111]

It is our view that, on matters of profound importance, collective decision-making is essential. We also accept the point that the exercise of rangatiratanga may depend on particular circumstances and identities. In advancing her 'mixed model' of rangatiratanga and identity for Ngātiwai, Ms George echoed Ms Lyndon in describing rangatiratanga as 'fluid'.[112]

We gained a clear sense that whanaungatanga rights and responsibilities were vital to the routine exercise of tino rangatiratanga by the 'shared' hapū that opposed their inclusion in the mandate. Patuharakeke, and the Te Waiariki, Ngāti Kororā, and Ngāti Takapari claimants, as well as Te Kapotai, expressed particular concern at the damage the mandate process had caused to their ability to maintain their relationships with other groups. Yet those claimants who considered themselves Ngātiwai

also complained of 'massive division' and strained intra-iwi relations as a result of the Crown's mandating process. They gave us the impression that damage to the internal and external relationships of their iwi went to the heart of what it was, for them, to be Ngātiwai.

The Ngātiwai Trust Board, too, placed a high priority on internal relationships within Ngātiwai, acknowledging that damage has occurred and that the effects have been serious. The desire to avoid further division has plainly motivated the board to seek to keep Te Iwi o Ngātiwai together under its mandate.

We are encouraged that this issue is of significant concern for all parties. This suggests to us that careful attention to the whanaungatanga obligations of all concerned may offer a pathway to resolving their differences.

Drawing these themes together, it is clear that, both historically and today, tino rangatiratanga has been exercised on a number of levels among the various communities that affiliate to Ngātiwai. For this reason, when speaking of Ngātiwai, it is not a question of asking whether people operated either as hapū or as iwi, or as whānau or marae, for they work together in these ways in different circumstances. And, while we sympathise with the desire of the trust board for unity under their mantle, this cannot come at the cost of whanaungatanga relationships. In the context of Treaty settlement negotiations, and specifically as the Crown sought to commence negotiations with the Ngātiwai Trust Board, we think the Crown had an obligation to recognise and take account of these essential features of the claimant community.

We consider that, to protect actively the tino rangatiratanga of the Ngātiwai Trust Board, Te Iwi o Ngātiwai, and the hapū and whānau communities that come partially or wholly within the mandate, the Crown had an obligation to protect actively their ability to maintain their whanaungatanga relationships and their right to make their own decisions.

The complexity and diversity of the communities within Ngātiwai who are affected by the mandate make the exercise of the duty of active protection a delicate and complex task. Our assessment of the Crown's performance must be similarly nuanced. We must take into consideration those groups who say they cannot exercise their tino rangatiratanga within the Deed of Mandate and who do not support the deed in its present form. There are also those who chose to vote in favour of the mandate, who view the structure as an appropriate vehicle for the exercise of tino rangatiratanga. However, we reiterate that urgency for this inquiry was granted on the basis that the focus would be the Treaty relationship between the hapū named in the Deed of Mandate and the Crown. Where hapū are central to the social organisation of the community, the active protection of the rangatiratanga of the hapū is the primary Treaty responsibility of the Crown. While the inquiry was framed with the intention that all claimants could be heard on this matter, the extent to which the claimants have been able to demonstrate that their hapū exercise tino rangatiratanga will be an essential element of our analysis.

In this context, we consider the minimum standards established by the Ngāpuhi mandate Tribunal remain relevant to assessing the Crown's performance of its duty of active protection. These standards draw on the findings of previous Tribunals and, in our view, are reasonable measures by which to assess the Crown's conduct in recognising the mandate of any large natural group. To make this assessment, we need to determine who is encompassed within the mandate, the extent to which their consent was required for inclusion within the mandate, and their degree of involvement in decision-making structures. We also need to understand what actions the Crown may or may not have taken in relation to these matters. We analyse these questions in the following two chapters.

Notes

1. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p 55
2. Ibid, p 65
3. Waitangi Tribunal, *Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), pp 111, 113, 118–119
4. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 109
5. Waitangi Tribunal, *The Te Arawa Settlement Process Reports* (Wellington: Legislation Direct, 2007), pp 189, 191

6. Ibid, p 189
7. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 1
8. Ibid, p 2
9. Ibid, p 1
10. Ibid, p 2
11. Ibid, p 6
12. Ibid, p 10
13. Ibid, p 87
14. Ibid, p 101
15. Waitangi Tribunal, *The East Coast Settlement Report* (Wellington: Legislation Direct, 2010), p 1
16. Ibid, pp 61, 63–64
17. Ibid, pp 59–60
18. Ibid, p 67
19. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Wellington: Legislation Direct, 2015), p 10
20. Ibid, p 73
21. Ibid, p 31
22. Ibid, pp 79–80
23. Ibid*t*, p 79
24. Ibid, p 80
25. Ibid, p 82
26. Office of Treaty Settlements, *Ka Tika ā Muri, ka Tika ā Mua/ Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 2015), pp 24–25
27. Waitangi Tribunal, *Ngāpuhi Mandate Inquiry Report*, p 23; Waitangi Tribunal, *Te Arawa Mandate Report: Te Wahanga Tuarua*, p 71
28. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 51; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 3rd ed (Wellington: GP Publications, 1996), p 188
29. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), 664
30. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, pp 36–37, 191, 200; Waitangi Tribunal, *Ngāpuhi Mandate Inquiry Report*, pp 23–24
31. Waitangi Tribunal, *Report on the Orakei Claim*, p 188; Waitangi Tribunal, *Report on the Motunui–Waitara Claim*, p 51
32. Waitangi Tribunal, *Report on the Orakei Claim*, p 189; Waitangi Tribunal, *Report on the Motunui–Waitara Claim*, p 51
33. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p 215; Waitangi Tribunal, *Ngāpuhi Mandate Inquiry Report*, p 24; Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 739
34. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p 30
35. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 738–739
36. Waitangi Tribunal, *Ngāpuhi Mandate Inquiry Report*, pp 23–24
37. Waitangi Tribunal, *Te Whanau o Waipareira Report*, p 25
38. Waitangi Tribunal, *Report on the Orakei Claim*, p 188
39. Waitangi Tribunal, *Ngāpuhi Mandate Inquiry Report*, p 25
40. Hirini Moko Mead, *Tikanga Māori: Living by Māori Values* (Wellington: Huia Publishers, 2003), p 8
41. Waitangi Tribunal, *Te Arawa Settlement Process Reports*, p 189; Waitangi Tribunal, *Ngāpuhi Mandate Inquiry Report*, p 26
42. Mead, *Tikanga Māori*, p 28
43. Waitangi Tribunal, *Tāmaki Makaurau Settlement Process Report*, pp 2, 6
44. Ibid, p 6
45. Transcript 4.1.1, pp 180–182
46. Ibid, p 201
47. Ibid, p 210
48. Document A59, p [7]
49. Submission 3.3.21, p 27
50. Transcript 4.1.1, p 95
51. Document A20(b), pp [18]-[19]
52. Document A8, pp 8–9
53. Ibid
54. Ibid
55. Submission 3.3.17, p 17
56. Document A45(a), p [5]
57. Submission 3.3.19, p 10
58. Document A23(a), exhibit H, p 27
59. Transcript 4.1.1, p 402
60. Submission 3.3.19, pp 12–13
61. Ibid, p 25; doc A24, p 18; transcript 4.1.1, pp 202, 402
62. Document A24, p 18
63. Document A2(a), exhibit B, p 7
64. Document A62, p 7
65. Document A27(a), exhibit C, pp 2–3
66. Document A132, p 188
67. Waitangi Tribunal, *He Whakaputanga Me Te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Paparahi o Te Raki Inquiry*, 2 vols (Wellington: Legislation Direct, 2014), vol 1, p 28
68. Transcript 4.1.3, p 27
69. Document A82, p 7; doc A82(b), pp 7–8
70. Document A14, pp 2, 6
71. Document A21, paras 21, 22
72. A cutting has been presented in evidence but the newspaper is not identified: doc A24(a), exhibit A.
73. Ibid
74. Dcoument A80, p 5; doc A21(a), exhibit A; doc A24(a), exhibit A
75. E T Durie, *Custom Law* (Wellington: Treaty of Waitangi Research Unit, 2013), https://www.victoria.ac.nz/stout-centre/research-units/towru/publications/Custom-Law.pdf, pp 72–73

76. Transcript 4.1.1, pp 39–40, 50
77. Ibid, p 61
78. See, for example, transcript 4.1.1, pp 39–41, 49–51, 118–120.
79. Document A32, p 3
80. Submission 3.3.19, p 5
81. Ibid, p 42
82. Document A68, p 8
83. Document A4, p 6
84. Transcript 4.1.1, pp 39–40
85. *Important Judgements Delivered in the Compensation Court and Native Land Court, 1866–1879* (Papakura: Southern Reprints, 1994), p 85. Fenton was under the impression that Ngātiwai was a new name for the Waiohua.
86. Kaipara Native Land Court, minute book 3, 11 May 1881, fol 411
87. Transcript 4.1.3, p 52; doc A98, pp 5, 6–7. These marae are Mōkau, Ngāiotonga, Ōtetao, Tūparehuia, Ōakura, and Punaruku: doc A98, p 7.
88. Document A24, pp 7–8
89. Document A68, p 11
90. Transcript 4.1.1, pp 434–435
91. Ibid, p 436
92. Ibid, p 437
93. Document A62, p 5
94. Submission 3.3.23, p 36; submission 3.3.19, p 5
95. Transcript 4.1.1, p 213
96. Submission 3.3.19, pp 5–6
97. Transcript 4.1.1, p 180
98. Ibid, pp 80–81
99. Document A70, p 2
100. Ibid, pp 2, 10
101. Document A59, p [9]
102. Document A20(b), p [19]
103. Document A59, p [7]
104. Ibid, p [9]
105. Document A38, p 6
106. Document A8, p 5
107. Ibid, p 9
108. Submission 3.3.20, p 8
109. Document A69, p 10
110. Document A70, p 3
111. Document A98(c), p [3]
112. Transcript 4.1.1, pp 180, 184 (Ms Lyndon), p 202 (Ms George)

CHAPTER 4

IS THE DEED OF MANDATE ADEQUATELY REPRESENTATIVE AND ACCOUNTABLE TO HAPŪ?

4.1 Introduction

In the previous chapter, we discussed the importance to hapū included in the Ngātiwai Deed of Mandate of maintaining their whanaungatanga relationships and making decisions according to their own tikanga. We concluded that the Crown had a duty to protect actively the ability of hapū to exercise their tino rangatiratanga in the mandate process. The Crown has told us that it played only a limited role up to recognition of the mandate, and that its decision to recognise the Ngātiwai Trust Board was reasonable because the trust board has the support of Ngātiwai and is an appropriate body to represent Ngātiwai in settlement negotiations. In the next two chapters we assess the extent to which the Crown actively protected the tino rangatiratanga of hapū in the mandating process.

We begin by discussing the claimant definition and the research used to determine which hapū would be included in the Deed of Mandate. We then examine the structure of the Ngātiwai Trust Board to understand whether it is fit for the purpose of negotiating a Treaty settlement by being representative and accountable to hapū. As foreshadowed by Judge Savage in his directions concerning the central issue in this inquiry,[1] we will consider whether hapū consented to their inclusion in the mandate. We give particular attention to the hapū that are 'shared' with other iwi. Finally, we look at whether the process set out in the Deed of Mandate to withdraw support is workable for hapū.

4.2 Claimant Definition in the Deed of Mandate and the Recognition of Hapū

4.2.1 Does the Deed of Mandate list of hapū really reflect Ngātiwai?

The claimant definition crucially defines the group whose claims will be settled through negotiation between the mandated entity and the Crown. As the claimant definition describes who has conferred the mandate, it also defines who can withdraw it.

For the purpose of achieving a comprehensive settlement of their remaining historical claims, Ngātiwai are defined as the individual members of Ngātiwai who are descended from the identified tūpuna. According to section 12 of the Deed of Mandate, 12 hapū are 'covered' by the mandate.[2] However, the intent of the mandate is to settle the claims of these hapū only so far as they relate to individuals who whakapapa to the identified

Mandate strategy, July 2013	Deed of Mandate at July 2014	Deed of Mandate as amended May 2016
Te Uri o Hikihiki	Te Uri o Hikihiki	Te Uri o Hikihiki
Te Āki Tai	Te Āki Tai	Te Āki Tai
Te Kainga Kurī	Te Kainga Kurī	Te Kainga Kurī
Te Whānau ā Rangiwhakaahu	Te Whānau ā Rangiwhakaahu	Te Whānau ā Rangiwhakaahu
Te Whānau Whero-mata-māmoe	Te Whānau Whero-mata-māmoe*	Te Whānau Whero-mata-māmoe*
Ngāti Toki-ki-te-moana	Ngāti Toki-ki-te-moana*	Ngāti Toki-ki-te-moana*
Ngāti Tautahi	Ngāti Tautahi*	Ngāti Tautahi*
Ngāti Takapari	Ngāti Takapari	Ngāti Takapari*
Ngāti Kororā	Ngāti Kororā*	Ngāti Kororā*
	Te Waiariki*	Te Waiariki*
Patuharakeke	Patuharakeke*	Patuharakeke*
	Ngare Raumati*	Ngare Raumati*
Te Kapotai	Te Kapotai*	
Patu Keha		
Ngāti Kuta		

* The Deed of Mandate describes these as 'shared' or 'related' hapū because they are included in the claimant definitions of other large natural groups.

Hapū in the Ngātiwai Trust Board Deed of Mandate, 2013–16

tūpuna. It is these individual members of Ngātiwai who are said to have conferred a mandate on the Ngātiwai Trust Board through their votes.

The inherent difficulties of reconciling this group with the hapū who are named in the mandate are evident to us in two ways. The first is that eight of the 12 hapū listed in the Deed of Mandate are described as 'shared', because they are included in the claimant definitions of other groups with which the Crown is settling. The second is the number of versions of the deed produced with differing lists of hapū (see the table above). Six versions had been produced by 2013. A seventh version, produced in 2014, was amended in 2015 and again in May 2016.[3]

We heard differing accounts of whether the hapū listed in the Deed of Mandate are all Ngātiwai by descent. Of the hapū claimants before us, Te Waiariki, Ngāti Kororā, and Ngāti Takapari contest that they are Ngātiwai at all; Patuharakeke agree that they have relationships with Ngātiwai through intermarriage, but deny that whanaungatanga so created makes them member-hapū of Ngātiwai. Te Whakapiko, who are listed in section 11 of the Deed of Mandate as a 'historic' hapū (and whose claim is included in the mandate), say that they are Ngāti Manaia, and not Ngātiwai.

As noted in chapter 2, claimants submitted that the Crown's preference for direct negotiations has hampered their ability to carry out research or sufficiently monitor the research that was available. Nor, the claimants said, did the Crown take steps to ensure that the issue of which hapū should be included was settled prior to the mandate

being sought. The hapū included in the mandate have changed several times since the mandate strategy was first advertised, and even since the mandate was confirmed, adding uncertainty about which claims are included. The trust board told us that the claimant definition would need to be further refined during settlement negotiations. We were also told by the trust board that they had no real choice in the claims that were included in the mandate, and that officials had instructed them that it was Crown policy that any claims that fell within the claimant definition had to be included whether claimants agreed or not.

The Crown's position is that it was for the trust board to determine which hapū should be included in the claimant definition; it accepted that the trust board had a reasonable basis for its views. As we set out in more detail in chapter 5, we do not accept that the Crown had such an arms-length involvement.

The trust board has taken an extremely broad and inclusive approach: if an ancestor of Ngātiwai married an ancestor of, say, Ngāpuhi, the resulting descendants are claimed for Ngātiwai and its mandate as well as for Ngāpuhi. Any Ngātiwai whakapapa at all, in the board's opinion, contributes to a fixed, additional identity for the hapū it claims. This is so even if 'shared': identity and customary rights transfer to Ngātiwai. But we understand that rights and identities derive primarily from ancestors (take tūpuna) rather than spouses. As Ngātiwai Trust Board deputy chair Kristan MacDonald said, the children of peacemaking marriages could derive their identity from not just one tupuna but two.[4] But the extent to which Ngātiwai was able to claim customary rights and identity by such means was questioned by claimant Michael Beazley.[5] It seems to us that more research was needed into the nature and circumstances of the various marriages in Ngātiwai traditions to support the trust board's account. However, the issue for us is not which hapū are part of Ngātiwai and which are not, but whether the Crown took reasonable steps to act practically and flexibly in applying its large natural groups policy according to the tikanga and rangatiratanga of the hapū affected.

Most of the hapū who were included in one version or another of the Deed of Mandate or mandate strategy and that include members who now deny they are Ngātiwai are those hapū 'shared' between large natural groups.[6] In the various iterations of the mandate strategy and the Deed of Mandate itself, the lists of active and historical hapū were constantly amended. At one stage, in version 6 of the strategy, there were 44 'historical' groups and 13 'Present-Day Ngātiwai Hapū'. Ngare Raumati, most recently included as an active hapū in the Deed of Mandate, were listed among the historic groups in version 6. In some earlier lists Ngāti Kuta, Patukeha, and Te Kapotai were included; in later lists the first two were removed and replaced with Ngare Raumati. Te Waiariki was added. Ngāti Pare were eventually removed altogether, as were Te Kapotai.[7]

It appears to us that in trying to meet the Crown's comprehensive settlement policy of all Ngātiwai claims the trust board was put in a very difficult situation. But the issue is whether the Crown should reasonably have left it for the trust board to make those decisions about the inclusion of hapū within the large natural group, without assuring itself that the decisions were being made in a way that protected the tikanga and rangatiratanga of the affected hapū. The number of changes made to hapū in the Deed of Mandate indicates a degree of contestability, but hapū were not being asked to consent to their inclusion or even consulted. This was an internal trust board process in consultation with the Crown that did not take into account or protect the tikanga and rangatiratanga of the hapū affected.

We have noted above that not all members of those hapū included in the 'final' version accepted that they were Ngātiwai, and not all claimants or witnesses always agreed with that viewpoint either, as we discuss below. In the past, for various purposes at least, some of those hapū who now deny they are Ngātiwai have accepted this identity. Te Waiariki, Ngāti Taka (Takapari), and Te Patu Horakeke (Patuharakeke), were three of the 18 hapū who were part of the trust created for the 'Ngātiwai Tribe' to administer Whangaroa Ngaiotonga 4A3A. Trustees appointed in 1948 included Ngaronoa Māhanga for Te Waiariki, Paratene Te Manu Werengitana for Ngāti Taka, and Paraire Pirihi for Te Patu Horakeke.[8] This raises the question of whether complaints by hapū that they have

been wrongly identified as Ngātiwai can be said to be a serious misapplication of tikanga when the issue of identity has been fluid in earlier times.

But we reiterate that the position of individuals who can pick and choose among their multiple hapū identities according to the occasion (as explained in chapter 3) cannot be compared to the position of the hapū with multiple whakapapa connections. Hapū can redefine their identity by earlier or later ancestors, or give themselves names which commemorate events rather than ancestors (such as Patuharakeke or Te Kapotai). It is the hapū that declares and defines its wider identity. The hapū is the autonomous group with tino rangatiratanga over its lands and resources, not the individual, as has been held by the Waitangi Tribunal since as far back as the Ōrākei inquiry.[9]

Taking Te Waiariki as an example (two of whose associated hapū are Ngāti Kororā and Ngāti Takapari), there was a difference of opinion concerning their wider iwi associations. Ruiha Collier agreed with many other claimants that Te Waiariki are not a hapū of Ngātiwai, but she said that Te Waiariki are not an iwi in their own right: they are a hapū of Ngāpuhi.[10] Ngaire Hēnare, on the other hand, maintained that Te Waiariki 'is a distinct tribe which occup[ies] the coastal region from Tutukaka to Te Whara. Their rohe also includes the lands through which four rivers flow from Whangarei to the sea, Ngunguru, Horahora, Pataua and Taiharuru.' She traced their origins to Ngāi Tāhuhu and to two rangatira of Hokianga, Karearikiand Uenuku.[11]

As another example, Patuharakeke are a hapū which the Ngātiwai Trust Board described as having affiliations to Ngāpuhi, Ngāti Whātua, Ngāi Tāhuhu, and Ngātiwai. It said that, most importantly, 'Patuharakeke share Ngāti Manaia and Ngāi Tāhuhu descent *with the other hapū of Ngāti Wai*' (emphasis added).[12] However, Patuharakeke themselves asserted a much wider identity: they claim to be derived from Ngāti Manaia, Ngāi Tāhuhu, Ngāti Wharepaia, Ngāti Ruangāio (from Ngāi Tāhuhu and Ngāpuhi), Te Parawhau, and Ngāti Tū. They are a composite hapū from most major iwi in the north, including lines of descent from all those above including Te Uri o Hau, Ngāti Rehua, Ngare Raumati, Te Kawerau a Maki, Ngāti Manuhiri, and a wide range of others.[13]

But not all Patuharakeke whānau have all of these iwi and hapū in their background – especially, in terms of this kaupapa, descent from Ngāti Manaia and Ngātiwai. It depends on their personal whakapapa. As Jared Pitman put it, 'not all Patuharakeke families will consider themselves Ngatiwai but all Patuharakeke families consider themselves Patuharakeke'.[14]

The hapū in section 12 of the Deed of Mandate originally included Te Kapotai, who were removed by the trust board in May 2016.[15] Up until then, the trust board was insisting that Te Kapotai shared Ngāi Tāhuhu, Ngāti Manaia, and Ngāi Tamatea descent 'with the other hapū of Ngātiwai'.[16] The fact that the board now concedes that Te Kapotai are not Ngātiwai underlines the fact that the process of determining the claimant definition was not satisfactory. Had Te Kapotai been consulted earlier, its late withdrawal and the resulting doubt cast on the Deed of Mandate could have been avoided.

The section 11 hapū include 'Te Uri Whakapiko or Te Whakapiko'.[17] It is unclear whether this is one, or two separate groups. Members of the latter are claimants in this urgent inquiry. They deny they are Ngātiwai, but their Wai 156 claim is among those included in the Deed of Mandate. Mr MacDonald acknowledged that the trust board had been confused about the status and identity of Te Whakapiko. Nevertheless, 'Ngāti Manaia/Te Uri Whakapiko' were included in a list of active hapū in an early draft of the mandate strategy.[18]

The confusion surrounding the identity of Te Whakapiko illustrates how the Crown has effectively required the trust board to stretch and redefine tikanga about hapū identity to fit its policy requirements for settlement. While a degree of this is acceptable and inevitable as part of mandating and appears to have been accepted as such by many within Ngātiwai, the key issue for us is whether this was sufficiently serious to breach Treaty standards and thresholds that the Crown should have been well aware of. In particular, we note that there was no provision or requirement by the Crown for the

trust board to consult with hapū about their inclusion in the mandate. In the case of Te Whakapiko there is no evidence that the trust board had direct contact with the persons concerned about the inclusion of the group as a historic hapū. There is no evidence that the Crown made any attempt to inform itself of the tikanga of the affected hapū, or of their processes for group decision-making, which is a threshold standard for the principle of active protection as expressed in the minimum standards for mandating set out by the Ngāpuhi Mandate Tribunal.

4.2.2 The Trust Board research into whakapapa, hapū, and marae for mandate purposes

It is both desirable and necessary that robust research is completed on the claimant definition before a mandate is sought. This is one means by which the Crown can reasonably satisfy itself that hapū have been correctly included in a mandate and that they are settling with the right groups, having regard to the specific circumstances of the claimant community, so as to protect their whanaungatanga. Several claimants alleged that the research carried out by the trust board and relied upon by the Crown was insufficient.[19] Mr MacDonald confirmed to us under cross-examination that it was not the proper role of the trust board to define hapū, whether they are or are not hapū in communities defined by whakapapa.[20] But he went on to describe the board's own work on claimant definition and whakapapa, and outlined what input there was from historians, wānanga whakapapa (research sessions to discuss and study genealogies), kaumātua (elders), and board trustees. He stated that the research the board was relying on in developing the Ngātiwai claimant definition had been initiated 25 to 30 years ago. It had been carried out by Witi McMath concerning Aotea, Hauturu, and their off-shore islands.[21] The board, in consultation with kaumātua and 'historians', had also compiled further work between 1987 and 1998, later collated for purposes related to the fisheries settlement.[22] Further research was collated about 2008 from previous work. We note this later work was carried out at a time when the board was hoping to settle its claims through the Tāmaki Makaurau Collective, following through with Ngāti Rehua and Ngāti Manuhiri.[23] Witi McMath laid much emphasis on Ngāti Rehua as Ngāti Wai ki Aotea, and on Ngāti Manuhiri as Te Kawerau and others, but had little material about the northern hapū.[24]

The whakapapa research in the period from 1997 to 1998 was mainly the work of one historian, Graeme Murdoch. When Mr MacDonald was asked by counsel which other historians were consulted after 1998, he said again, 'mainly Graeme Murdoch.' Asked whether any consultation regarding the whakapapa research had taken place with the hapū listed in the Deed of Mandate, he replied 'not all hapū are organised to consult with.'[25]

Concerning the assistance of wānanga whakapapa, a number of such hui were planned but did not eventuate. Questioned by the presiding officer, Mr MacDonald agreed that one such wānanga had been held, but that those attending had forbidden the use of the resulting information for the claimant definition.[26] He claimed that at that stage the Ngātiwai Trust Board already had a good base of information from research for the fisheries settlement, and at hui would put up the board's whakapapa charts to assist people who knew little about their whakapapa. The purpose of such hui was said to be educative rather than refining the claimant definition. The trust board had since done further research specifically to support 'our Wai claim 244 for the purposes of settling Ngātiwai iwi Treaty settlements', but it would not be made available to the claimant community until after research structures had been set up as part of a future organisation as promised in the Deed of Mandate. Mr MacDonald said the reason for this was that 'we don't know what the claimant community necessarily is. . . . We don't know if we publicly release our research whose hands it falls into and for what purpose so that's why we've controlled it.'[27]

Mr MacDonald also discussed the input of kaumātua to the board's research for the claimant definition. Cross-examined on research, he was asked which kaumātua group the board consulted. He replied that there were various kaumātua groups but that it was 'kaumātua in and around the board' who were consulted. Other kaumātua

were not consulted; they 'were actively working against the board' whereas the board was 'working with those kaumātua that wanted to work with us around the claimant definition'. Counsel suggested this meant that the board only talked to the kaumātua who agreed with what the board was doing. Mr MacDonald denied this and said the 'majority of kaumātua that were involved in the claimant definition wanted to be involved' in its definition. Later, he complained that the kāhui kaumātua, in his opinion, became 'very political rather than a role around, you know, providing advice, direction and support, almost as though the kaumātua were a claimant group'. But he was happy that 'today we've got a very stable kaumātua group, most of them are here supporting and tautoko'ing the Board'.[28]

In our view this account of the research done on whakapapa, hapū, and the claimant definition shows significant deficiencies. We heard that the trust board, and especially its Treaty Claims Committee (TCC), relied on its own work, did not engage further historians after the work of Witi McMath and Graeme Murdoch in the pre-mandate period, and held no wānanga whakapapa until April 2014, after the mandate strategy had been approved by OTS and voting had taken place (in August and September 2013). Only those kaumātua who were in agreement with the board were consulted.

On this basis it is difficult to understand how the Crown could reasonably have satisfied itself that the research provided sufficient information about the circumstances of the claimant community, in particular whether hapū had been correctly included in the mandate, as required in the minimum standards set out by the Ngāpuhi Mandate Tribunal. The question of who is responsible for these deficiencies is examined in the next chapter.

4.3 Representation and Accountability

4.3.1 The trust deed

Although Judge Savage excluded the internal processes of the trust board as a central issue in this inquiry, he also said that these may provide reasons why hapū 'have not and will not' give the trust board their mandate. With this in mind we now turn to consider whether the structure of the trust board and its advisory bodies is sufficiently representative and accountable to the hapū who are included in the Deed of Mandate.

The primary purpose for which the trust is established is set out in section 3.1 of the trust deed:

> to receive, hold, manage and administer the Trust Fund for every Charitable Purpose benefiting Ngatiwai . . . and for every such Charitable Purpose benefiting Maori who are not Members of Ngatiwai and members of the community generally.[29]

Counsel for the trust board submitted that the conduct of Treaty settlement negotiations 'falls squarely within' an ancillary purpose set out in section 3.2(a), which is to:

> promote the cultural, spiritual, educational, health and economic development and advancement of Ngatiwai and its Members including those Members of Ngatiwai residing in the rohe of other Iwi and retain and enhance mana whenua, mana moana, and intellectual property rights between Ranginui and Papatuanuku.[30]

The trust board maintains a register of members (although to be considered a member of Ngātiwai for the purposes set out above it is not necessary to be a registered member). Trustees may require applicants to provide evidence verifying their affiliation to Ngātiwai 'through descent from a primary ancestor of Ngatiwai'. Trustees may decline to register or remove from the register anyone who, in their view, has provided inaccurate or incomplete information 'such that in either case the person concerned does not meet the qualifications required by this Deed for entry of that person in the Members' Register'. Trustees 'may' consult 'the Roopu Kaumatua Kuia' on matters of registration and to 'determine who is the primary ancestor, or are primary ancestors, of Ngatiwai'.[31] In cases of dispute, however, the trustees must seek a recommendation from

> a Roopu Kaumatua Kuia, appointed by the Trustees . . . and comprising three Ngatiwai kaumatua who the Trustees consider are mature persons or elders knowledgeable in Ngatiwai whakapapa and recognised as such by members of Ngatiwai.[32]

Although trustees are elected on a marae basis, section 6 of the trust deed makes explicit where trustees owe their obligations: 'all Trustees represent all the Members of Ngatiwai irrespective of where those Members reside'.[33] Mr MacDonald told us:

> It is important to note that, once elected, all Trustees are required to represent all Members of Ngātiwai, irrespective of where those Members reside (Trust Deed, Schedule 1, para 6). In other words, while Trustees understandably have a role in articulating and advocating for the interests of their marae, they must ultimately act in the best interests of Ngātiwai as a whole.[34]

Eight trustees constitute a quorum for a meeting of the board, which must meet at least six times a year. Decisions may be made by simple majority, although consensus is preferred.[35] Trustees may invite anyone they decide 'will assist with their deliberations'. Section 4.6 gives trustees 'absolute management and entire control' of the trust fund and section 4.5 sets out the powers of trustees to achieve the trust purposes.[36]

Trustees are elected by the adult registered members of Ngātiwai, who choose, for the purpose of voting, to affiliate to one of 14 Ngātiwai marae.[37] Marae elections are convened by the trust, on behalf of marae, to elect trustees. Any adult member of Ngātiwai may put themselves forward for election to a three-year term as trustee, and each marae election chooses one person to hold office on the board. Nominees must be registered members of Ngātiwai, and their nomination must be endorsed by the chairperson of the marae on whose behalf they intend to stand.[38]

Schedule 1 of the trust deed sets out the voting procedure to elect trustees. Nominations may only be made by adult registered members affiliated to the marae where the election is being held, and must be received at least 25 working days before the election. Where only one valid nomination is received, that person will be deemed elected from the date of the general meeting 'constituted, inter alia, for the purpose of Marae Election'. Each marae notifies the trust of the election result, and new trustees are announced at the trust's annual general meeting.[39]

4.3.2 Attempts to change the trust deed

There is wide agreement that the current trust deed has problems. Efforts to improve the trust deed have been going on for some years; longer, in fact, than the mandating process. A review of the trust deed was discussed at the board's Annual General Meetings in 2011 and 2012. Proposed changes to the nomination process and the board's 'authority to prosecute claims' – which we take to mean claims filed in the Waitangi Tribunal – were discussed at length. The meeting expressed a 'strong feeling' that consultation had been insufficient and the chair announced a hui-ā-iwi would be held to discuss proposed changes to the trust deed in depth.[40]

In September 2014, the trust board commissioned a review of submissions on proposed changes to the deed. The report begins: 'NTB's current Trust Deed has an array of problems. There is no question that it requires amendment.'[41] A large number of issues were raised by submitters.

Early in 2015, the board developed and implemented a communication and engagement plan in response to submissions made in 2014 that had opposed the trust board mandate. Although the review of the trust deed and the mandating process were largely carried out separately, objective 3 of the plan was to hold a special general meeting on 28 February 2015 to review the board's trust deed. The meeting took place as scheduled. No resolutions were put to the meeting by the board, in response to 'consistent feedback from Ngātiwai members' that more time was needed to address the issues. The meeting agreed 'on a process to generate a more structured discussion about the Trust Deed'. This entailed forming a focus group to carry out a review, aided by an independent facilitator, followed

by board members reporting back to their marae. This process, we understand, is yet to conclude.[42]

4.3.3 Do marae represent hapū?

The Crown have told us that hapū are adequately represented within the Deed of Mandate by the trust board through marae, a system of representation set up to receive and distribute fisheries settlement allocations. Claimants allege the Crown's approval of the trust board structure is inappropriate because it was not structured in a way that enabled the Crown to properly meet its Treaty obligations to hapū relationships in establishing and recognising a mandate. Fourteen marae are listed in the trust deed and Deed of Mandate. Are they all Ngātiwai marae? Does each marae represent a hapū? It seems to us that there are as many views on the role of the marae named in the Deed of Mandate as there are concerning hapū.

Marae are a meeting and gathering place for the activities of the marae community. As Jared Pitman said concerning his marae:

> when we stand and look to the east our whakapapa is lined up right before our eyes, our identity is visible in a glance. Our marae complex is a hive of activity. Our Kohanga Reo, wharekai and wharehui are constantly busy with the mahi of the day. The facilities themselves cater for a wide range of activity. The place lives and breathes. Our wharehui is in constant use . . . for manaaki manuhiri, tangihanga, kawe mate and waananga. The marae is used to host marriages . . . and memorial services on ANZAC day . . . We care for the place and it cares for us.[43]

Marae committees, can and do make decisions on behalf of the marae community, but they are usually limited to the everyday running of the marae including such matters as the uses of the marae and its buildings, and the tikanga to be observed. But marae committees cannot make decisions for hapū and represent hapū authority. Pereri Māhanga told us that:

> The 'marae' is being put up to effectively supersede Rangatira and Hapu, and the inherent authorities that go with them, which is not correct. A marae is really only a gathering place in modern times. It should not be assumed that it is 'a' or 'the' representative of the political will of the Hapu. A 'place' should not become more important than its people. If that were true then Te Tiriti O Waitangi would say so – but it does not. It speaks to Rangatira me Nga Hapu.[44]

Counsel for Patuharakeke submitted that the purpose of the marae committee representative on the Ngātiwai Trust Board was 'to report back to the marae committee on matters pertinent to Takahiwai Marae, not as a hapū representative for the purpose of Treaty settlements'.[45]

The trust board asserted that the hapū it claims to represent in the Deed of Mandate have 14 marae (including two on Aotea for Ngāti Rehua-Ngātiwai- ki Aotea). They are listed in the trust deed of the board, and in all the iterations of the mandate strategy and the Deed of Mandate. Of the 12 marae on the mainland, Mr MacDonald told us that Ngare Raumati relate to Ngāiotonga and Tūparehuia, Te Uri o Hikihiki relate to six marae including those two and Mōkau, Ngāti Tautahi relate to Mōkau and Ngāiotonga Marae, and so on. Most marae had at least two, and sometimes up to six hapū among its community.[46] He considered that six out of the 12 hapū are 'almost totally localised to their marae.'[47] That is: Te Whānau Whero (at Whananāki, although Te Āki Tai, Ngāti Toki, Ngāti Taka, and Ngāti Rehua also have whānau there), Te Whānau a Rangiwhakaahu (Matapōuri, although Te Āki Tai, Ngāti Toki, and Ngāti Taka have whānau there), Ngāti Takapari and Te Waiariki (at Ngunguru), Ngāti Kororā (at Pātaua), and Te Patuharakeke (at Takahīwai). According to Mr MacDonald, the two latter hapū are the only groups to occupy single marae.[48] Mr MacDonald told us that due to the close correlation between hapū affiliation and marae membership

> the argument that the Board's marae-based elections structure means that it is not representative of hapū is not well-founded, because the evidence shows that the communities of Ngātiwai people the Board's constitution describes as 'marae' very largely overlap with the communities that can otherwise be described as hapū.[49]

We note that his evidence on this matter is based on analysis carried out in June and July 2016, and so could not have informed the Crown's decision to recognise the mandate. We also note the evidence from Te Kapotai that their inclusion in the mandate was outside the marae-based structure because no Te Kapotai marae were included. Conversely, Ngāti Rehua and Ngāti Manuhiri marae were included even while those two hapū are excluded from the mandate. In any case, the trust deed does not allow for one trustee per hapū, responsible for representing hapū as well as marae, and the 14 marae trustees cannot be considered as 'proxies' for hapū, as Mr MacDonald claimed the board has in effect treated them. We do not accept that the marae act as proxy for hapū in matters relating to mandate for Treaty settlement.[50] While in many cases marae and hapū communities significantly overlap, there is simply no evidence to suggest that marae committees or board trustees elected by the marae have any authority to make decisions or speak for hapū on matters involving settlement of Treaty claims. And as discussed further below, the trust deed makes it clear that the trustees' duty is to make decisions on behalf of all Ngātiwai beneficiaries.[51]

Some claimants dispute that all 14 marae are Ngātiwai marae. Pereri Māhanga of Te Waiariki referred us to the second schedule of the trust deed which listed the 'Recognised Marae of Ngātiwai'. Included among them were Ngunguru and Pātaua Marae as if these two were marae of Ngātiwai. In fact, he said, both of these are marae reservations rather than marae.[52] He gave evidence concerning the various blocks in the Ngunguru district to show that his ancestors and elders, including the various people giving evidence in the Native Land Court, claimed the land through Te Waiariki or Ngāti Hau, but never through Ngātiwai.[53] Mr Māhanga explained that the position of Te Waiariki is that these two marae reservations 'in terms of land, and in terms of rohe, belong to and are *of* Te Waiariki. They are not *of* Ngatiwai. Ngatiwai people may use the facilities at Ngunguru marae, but that in my view does not change the fundamental fact that the site itself, is *of* Te Waiariki'.[54]

On the other hand, Sharyn Māhanga, of Te Waiariki, Ngāti Kororā, and Ngātiwai, made no defined hapū distinction between those using these two marae communities. She declared that she was Te Waiariki and Ngātiwai. She stated that 'not all Te Waiariki whānau consider themselves to be Ngātiwai, but my whānau does.' People including Ngātiwai were hosted at Pātaua, even though there was no marae building except an unfinished ablution block. (They used marquees.) Ms Māhanga said she belongs to Pātaua Marae. She was the first trustee on the Ngātiwai Trust Board for Pātaua Marae in the 1980s. There have been members of her whānau on all the iterations of the trust board since the 1940s.[55]

4.3.4 The purpose of the additional advisory bodies

Additional advisory bodies, set out in the Deed of Mandate, are said to be designed to support the trust board in negotiations. Our interest is in whether they are capable of adequately mitigating the shortcomings of representation that we have identified in the trust deed. The Deed of Mandate describes their relationship with the trust board as to 'enable and provide'. To the trust board, enabling means 'to leave the door open for participation' by those who are willing, while providing means 'to make tangible arrangements to accommodate participation which is yet to be determined with willing participants'.[56]

Two new positions are proposed for the Treaty Claims Committee, for individuals with demonstrated skills, experience, and support from among Wai claimants, hapū, or rangatahi. These positions are advisory only. Only the trustee members of this committee, the trust chair, chief executive, and Treaty claims manager can participate in decision-making.[57]

The mandate distinguishes between reporting and advisory roles. Reporting means being accountable to the trust board. In this sense the accountable bodies are the Treaty Claims Committee and the negotiators. The role of the kaumātua group, the hapū/marae representatives group, and the research group is to provide advice to the trust board and enable the board to 'feed back' accurate information to all kaumātua and Ngātiwai members. However, Mr MacDonald told us that the board now recognises a greater role for kaumātua, saying 'we will not go forward unless our kaumātua are happy and give us their support

in terms of direction, tikanga, wisdom and unity. These mechanisms are as powerful as a veto.'[58]

That said, it is clear to us that these groups are still not accountable to the trust board.[59] Nor is the board accountable to them. They are not able to make choices and participate in decision-making. Providing opportunities for hapū, as a particular class of interest to advise on issues of relevance and importance to them, is not the same as providing representation and accountability to those hapū that wish to be so represented.

4.3.5 Is a different structure possible?

The trust board has been unable to arrive at agreement on changes to the trust deed, even though the need for change appears to be broadly accepted. Six years of effort to improve the deed have not yet produced results.

Section 6.1(a) of the trust deed provides that a resolution to change the deed must be approved by a majority comprising at least 75 per cent of adult registered members of Ngātiwai who are entitled to vote and cast a valid vote.[60] In the assessment of trust board legal advisor Wayne Peters, this was simply imprecise language, and the intent of the deed was always that it relate to those present at an annual general meeting or a special general meeting. Altering the deed to make this clear was one of the changes suggested in the 2014 report.[61] Yet, even this more limited interpretation has so far presented a practically insurmountable threshold for change.

Before final adoption by a Special General Meeting, however, any changes to the deed must be approved by Te Ohu Kaimoana.[62] This requirement reflects the prescriptive requirements for a mandated iwi organisation under the Fisheries Act 2004. But in the context of a mandated entity to negotiate the settlement of Treaty claims, this is a significant barrier to ensuring Ngātiwai has an entity that is fit for purpose.

The trust board said the difficulty of changing the trust deed was one reason for proceeding to negotiations under the current trust board structure. The trust board acknowledged that, as a charitable trust, it cannot become a post settlement governance entity (PSGE). It suggested discussions should begin at an early stage around the appropriate form for a PSGE, and that, for example, a greater say for hapū could be one of the things the post-settlement entity could include. Although constructive, the suggestion does not resolve the current issue of representation in negotiations with the Crown. The board appears to acknowledge that the post settlement governance entity will need to better represent the complexity of Ngātiwai. But it does not concede that this is also necessary for negotiations. This will reduce the effectiveness of the negotiations process as the vital first step towards a restored relationship with the Crown, and diminish the rangatiratanga of those whose interests are spoken for in the negotiating process, but who are not adequately represented.

The trust board argued it is the only existing institution capable of taking Ngātiwai though negotiations with the Crown. Haydn Edmonds, chair of the Ngātiwai Trust Board, said it was neither sensible nor sustainable to design a whole new entity for negotiation purposes.[63] Mr Edmonds strongly advocated for unity, saying it was 'very distressing' to the board that the Tribunal might recommend the exclusion of further Ngātiwai hapū from the mandate. This would cause suffering, he said, by subjecting the iwi to 'another artificial sub-division of our whakapapa and tribal identity' and because the resulting groups would not 'have the critical mass necessary to make a settlement viable'.[64]

We agree these issues are distressing: the present inquiry provides ample evidence. We also agree that the size of the settling group has a large impact on the viability of any settlement. In fact, it was apparent to us at our hearing in Whangārei that there is considerable support for the Ngātiwai Trust Board. But this does not mean that change is not possible or necessary.

We are encouraged by the trust board's acknowledgement that Patuharakeke, Te Waiariki, and Te Whakapiko 'have been shown to have genuine issues with respect to the DoM that fall within the terms of the "central theme" of this inquiry'.[65] Mr Edmonds also described what he called a positive and constructive meeting with two

claimants before our hearing, which explored the idea of a 'tribal taumata to maintain oversight over Board decisions'.[66]

The Crown also accepted in closings that it would be 'theoretically' possible to restructure the trust board for negotiation purposes, although this would take 'some time and some money.'[67]

Further, when OTS met submitters opposed to the mandate in October 2014, Rowan Tautari suggested:

> There are two options, either restructure to accommodate hapu within current governance or create to the side an entity which includes representation from trust board. Similar to Tūhoronuku model. Bring the hapu in. Makes sense.[68]

The Patuharakeke claimants suggested the Crown explore the option of a regional settlement for Whangārei-based hapū based on the Whangārei Terenga Paraoa Assembly, while acknowledging that structure was not currently being pursued.[69]

4.3.6 Does the trust board provide adequate representation and accountability to provide for the exercise of hapū rangatiratanga?

The negotiation and settlement of historical Treaty claims is a matter of great responsibility and complexity. However, this purpose is not expressly mentioned in the trust deed. Instead, it comes within the definition of incidental purposes set out in clause 3.2(a). This highlights a fundamental issue with the trust deed. The current deed was drafted to ensure the trustees could protect and administer the trust fund; it was not designed to hold a mandate for negotiation and settlement of Ngātiwai's historical Treaty claims. In our view, the type of structure best suited to each purpose is quite distinct.

The deed is explicit that all trustees represent all the members of Ngātiwai and must act in the best interests of Ngātiwai as a whole. We were also told that a trustee cannot be removed by the marae that elected them; the trustee must resign.[70] In negotiating a Treaty settlement, as the evidence presented in this inquiry shows, many different and potentially competing interests must be advocated for and, to the greatest extent practicable, reconciled. The efforts of the trust board to provide some avenue for hapū, whānau, Wai claims, kaumātua, kuia, and rangatahi within the structure of its mandate demonstrate their awareness of this necessity. The trustees are the only group with decision-making power, as the trust deed currently provides. But it is not the role of the trustees to represent these particular constituencies. Although trustees are elected by marae membership, they cannot be said to represent the interests of their particular marae on the trust board, let alone hapū or other interests.

A further requirement imposed by the trust deed is that trustee nominees must be endorsed by marae committee chairs. This is not merely a formality. Hūhana Lyndon sought nomination as a trustee in December 2013, for an election to be held at Tūparehuia Marae. Her nomination was refused by the chairperson of that marae committee, who was herself standing as a candidate in the election.[71] That an individual marae committee chair, who may have a conflict of interests, can arbitrarily reject competing nominations does raise questions about the accountability of a structure whose purpose should be to represent all voices and interests in the negotiation of a Treaty settlement.

If no nominations are received for a marae trustee, then 'further nominations must be called for until the number of nominees is at least equal to the number of vacancies for Trustee for any Marae'.[72] This appears to require that a trustee *must* be appointed for each marae regardless of whether the marae wishes to appoint a trustee, or the level of support an ultimate nominee might have from the marae community. This requirement appears to us to pose a clear problem for a hapū such as Patuharakeke who do not agree that their marae-elected trustee should represent them on Treaty settlement matters.[73]

The Crown says the trust board operates under a 'marae-based structure' and that this in effect provides for hapū to be represented because marae and hapū are, in essence, the same groups of people. This implies that the interests of each marae community are advanced by

the representative they elect. As we see it, neither assertion is correct. Marae provide a place from which members of Ngātiwai elect people who will represent Ngātiwai. The distinction is important. If trustees do not represent the particular interests of their marae, they cannot represent their hapū. In this way, the trust deed has the effect of obstructing hapū, and in particular shared hapū, from making decisions and maintaining whanaungatanga relationships when it comes to Treaty negotiations.

In being required to act in the common interests of all, trustees cannot act or advocate on behalf of any particular group. Decision-making by trustees is not a process by which the interests and views of particular groups can be balanced. Counsel for the board was clear on this point:

> The Board is not, and has never been, a vehicle for debate and determination of the differing – and potentially competing – interests of hapū, marae or any other groups. Rather, it is a structure premised on the principle of kotahitanga and common interests of all members of Ngātiwai.[74]

The trust board is a unitary body: there are individual registered members, but authority is centralised within a top-down structure. The result is that the authority of all other entities and structures in the Deed of Mandate is limited to the terms defined by the trust board.

The Ngāpuhi Mandate Tribunal stated the Crown's Treaty obligation, when making the decision to recognise a mandate to negotiate historical Treaty claims, to 'recognise that the structure of the mandated entity must allow for hapū interests to be tested and heard'.[75] To us, the Crown expressed the view that:

> the manner in which a claimant community wishes to organise itself for the purposes of mandating representatives to negotiate a Treaty settlement is a choice for the community itself.[76]

The crux of the matter is the question of what defines a claimant community, and it is clear to us that the Ngātiwai claimant community includes hapū and whānau, as well as the individual members who had the opportunity to vote. It was incumbent on the Crown to ensure it was dealing with the right group or groups within Ngātiwai, and to appropriately weigh those interests. We have not received any evidence to demonstrate that the Crown took such steps. In our assessment, the trust board was the 'first cab off the rank' and the Crown looked no further.

Counsel for Patuharakeke was clear that their opposition to the Deed of Mandate

> is not purely on the basis that they seek direct negotiations and nothing less will suffice, but rather that they seek the *right* settlement and that they are afforded the right to decide what settlement is best for them. [Emphasis in original.][77]

According to trust board legal adviser Wayne Peters:

> The Board accepts that the marae-based structure of the Board does not necessarily fully reflect the complexities of Ngatiwai members' society. However, it is the model set down by the current legislative scheme.[78]

In our inquiry, counsel for the trust board drew our attention to the Waitangi Tribunal's recognition of a Treaty right for Māori to develop their resources and technologies, submitting that this right 'must extend to the legal structures and forms through which iwi may choose to operate, and that no one structure or form should therefore be regarded as any more "tika" than another'.[79]

As the trust board acknowledges, 'there is no disputing the rangatiratanga of hapū', although that is only one among several kinds of Ngātiwai rangatiratanga.[80] The hapū, whānau, and marae communities of Ngātiwai, their particular and interconnected whakapapa, lands, identities, and histories of interaction with the Crown, and the representation of these matters, are inextricably bound up with the settlement of historical Treaty claims. It is difficult to see how these various interests can be represented in the current structure without being subsumed by what is perceived as the common interest of Ngātiwai. That is why the Pakakohi and Tangahoe Tribunal commended the 'bottom up' approach that that was undertaken by Ngāti Ruanui, which brought together marae and hapū at

the start of a mandating process to develop a negotiating body.[81]

Our analysis of the trust deed reveals a structure that is severely constrained in its ability to respond to the requirements of representing, and reporting to, the varied groups that have a stake in the outcome of the negotiations the board intends to enter into. The trust board is also severely constrained in its ability to amend the trust deed to respond to the acknowledged issues with its structure. Despite these significant issues, the trust board has chosen to push ahead in the hope that, upon attaining a settlement, they will be able to work these issues out on the other side.

Many, perhaps most, Ngātiwai are content to allow the trust board to represent them in the negotiation of a settlement. But it is equally clear that some groups included within the Ngātiwai large natural group seek to retain the ability to exercise independently their rights and authority. The structure of the Ngātiwai Trust Board makes inadequate provision for hapū interests to be tested or heard, or for hapū to exercise rangatiratanga according to their tikanga, in relation to Treaty settlement negotiations.

4.4 Did Hapū Consent to the Mandate?

4.4.1 Did the vote demonstrate hapū consent?

The mandate was presented at hui and voted on between July and October 2013. Votes could be cast at the hui. A significant majority of the 28 per cent of Ngātiwai members who took part voted in favour of giving the Ngātiwai Trust Board a mandate to negotiate a settlement of the historical Treaty claims of the large natural group defined in the deed. This is important to remember. As the Crown told us, similar majorities in other mandate votes have been acceptable to the Crown and to the Tribunal.[82]

In the Crown's view, the 82 per cent who voted in favour demonstrated a broad base of support and it was reasonable to rely on the vote as indicating that the hapū of Ngātiwai support the trust board's mandate.[83] We do not accept this conclusion can be drawn because there is simply no information to support such a conclusion. It cannot be assumed that the hapū with which those individuals identify also support the mandate. The voting was by individuals and neither hapū nor marae affiliations were asked for. Thus, the vote has nothing to tell us about the hapū that may support or oppose. We do not know, for example, how many Te Waiariki members voted (or did not), nor whether, overall, they were in support or opposition. Also, by not capturing information about hapū affiliations the vote did not acknowledge the reality of shared allegiances that form the identity of many hapū members.

Nor do we know how members of particular marae voted. Take the example of Ngunguru Marae. Mr MacDonald told us 82 per cent of Te Waiariki members who are also registered beneficiaries of the Ngātiwai Trust Board affiliate to Ngunguru. So, too, do between 92 and 98 per cent of Ngāti Takapari trust board beneficiaries.[84] We do not know the size of each hapū group relative to the other, nor how they voted.[85] Claimants who say they are Te Waiariki have argued, variously, that they are stand-alone, Ngāpuhi, or Ngātiwai. Because the vote sought the views of individuals only we cannot know how this equated with levels of hapū or even marae support for the mandate.

When the vote was held, the Te Waiariki claimants had only just been informed that their claims were to be included in the mandate.[86] They had not participated in developing the mandate strategy that was voted on. Members of another hapū, Te Kapotai, were able to participate in the vote yet were later taken out of the mandate, six months after it was recognised by the Crown. The Crown has argued that neither 'the constituent whānau' nor 'the people' of Patuharakeke have been asked to give a mandate to the Patuharakeke Trust Board to negotiate a Treaty settlement.[87] But neither were they asked, under that affiliation, to support the Ngātiwai mandate. Support was sought from individuals, defined as members of Te Iwi o Ngātiwai. Some are also Patuharakeke, but we know neither how many are Patuharakeke, nor how many Patuharakeke voted in support of the mandate. Mr MacDonald told us about 330 registered members of Ngātiwai are Patuharakeke and affiliate to Takahīwai Marae. In his view, many of them were likely to have voted in favour of the Board's mandate.[88] This statement can be no more than a guess.

Crown counsel submitted that the vote (82 per cent of 28 per cent) was an acceptable level of support and within the range previously accepted by the Crown. By any measure, we consider that the vote was a low return, which serves to demonstrate how low the Crown's threshold has become in order to progress settlements.

Crown counsel suggested to us that voting on the mandate was important because settlement would extinguish the right to make claims to the Waitangi Tribunal about historical (pre-1992) matters. Speaking about members of Patuharakeke hapū, Crown counsel argued that if hapū members were no longer to be able to make claims about their historical grievances, then 'every person of Patuharakeke should be given a chance to say who is going to mandate – who is going to represent them in a negotiation'.[89] The vote was open to all Ngātiwai members but not to all of Patuharakeke, and so it did not offer that opportunity. Only those individuals whose whakapapa included the named Ngātiwai tūpuna were able to participate.

We ask: why were hapū included in the Deed of Mandate if they had no significance to the mandating process? None of the hapū listed in the Deed of Mandate have ever been formally asked if they consent to their inclusion. Yet, the hapū who have opposed their inclusion from the outset of the mandate process have been consistent in their opposition, right up to and including seeking an urgent hearing of their claims. During the mandate process, the only opportunity for hapū to express their views to the Crown was by making submissions.

4.4.2 The vote and the submissions process

Based on the support shown by the vote, the trust board formally submitted its Deed of Mandate to OTS in July 2014. OTS then sought public submissions. In terms of gauging levels of support and opposition, this is a very different process to seeking submissions only from Ngātiwai members or trust board members. The Crown told us it was intended to allow all those with concerns to raise them.[90] Of 269 submissions, 144 opposed the mandate and 125 (including late submissions) were in support. We discuss the submissions process further in chapter 5; here, we compare the vote and the submissions for what it can tell us about consent.

The Crown told us that the submissions 'tended to confirm that there remained a level of opposition as was demonstrated through the mandate vote', but 'did not demonstrate any discernable change in the overall attitude of Ngātiwai members' to the mandate.[91]

But at the time the Crown had a high level of concern about the extent of opposition shown by the submissions. Officials described the number of submissions as unprecedented for an iwi of the size of Ngātiwai and were concerned that the threshold for withdrawal from the mandate might be triggered.[92] From this point, the mandate stalled as the Crown consulted with the trust board about how to address issues that had been raised.

While we acknowledge that the submissions process was designed to gather feedback and not demonstrate consent, on the question of hapū support we think the submissions were more informed and informative than the vote, for the following reasons.

First, the submissions process provided the only opportunity for hapū to engage with the Crown and state their support or opposition to the mandate and their reasons. The submissions showed there was significant opposition from three hapū groups: Patuharakeke, Te Kapotai, and Te Waiariki, Ngāti Kororā, and Ngāti Takapari. As already noted, hapū played no role in the vote.

Secondly, submitters were able to consider the changes made to the mandate between the version that was voted on and that submitted to the Crown, some of which were materially significant to the question of hapū consent.

Thirdly, while only adult members of Ngātiwai could vote, the submissions process had no restrictions. The Crown noted that a number of submissions were received by people outside Ngātiwai who had overlapping interests with Ngātiwai.[93] Submissions provided the only opportunity up to that point for those with concerns about the claimant definition, and the extent to which hapū and other groups were partially included in the mandate, to voice their opposition or consent. The question of who is or is not Ngātiwai has been fundamental in this inquiry. Given the lack of clarity as to claimant definition at the

time the vote on the mandate strategy was held, we consider it especially important that submissions were sought as widely as possible.

4.4.3 What obligation did the Crown have to ascertain hapū support for the mandate?

We have concluded that the vote cannot tell us whether the hapū named in the Deed of Mandate support or oppose the mandate of the Ngātiwai Trust Board. However, in the Crown's view the question of 'whether the hapū of Ngātiwai oppose (or do not support) the mandate' is key to the inquiry.[94]

The Crown argued that none of the claimants in the inquiry had succeeded in demonstrating that any hapū of Ngātiwai opposed the trust board's mandate.[95] We now address this question by looking, first, at the claimants who say they speak for hapū, and then at the claimants who do not claim to represent hapū, but who nevertheless oppose the mandate.

Two claims in the inquiry are made on behalf of particular hapū: the Patuharakeke claim (Wai 745 and 1308), and the Te Waiariki, Ngāti Kororā, and Ngāti Takapari claim (Wai 2549). The Te Kapotai claimants (Wai 2548), who participated as an interested party, also say they speak on behalf of their hapū.

The Patuharakeke claim was brought on behalf of the Patuharakeke Trust Board, but the Crown says it is 'unaware of evidence' that Patuharakeke opposes the Ngātiwai Trust Board mandate, drawing a distinction between the hapū Patuharakeke and the Patuharakeke Te Iwi Trust Board. The Crown characterises the Patuharakeke board as 'purporting' to represent Patuharakeke, saying no evidence was provided that that board had asked 'the constituent whānau of Patuharakeke' whether they support or oppose the mandate of the Ngātiwai Trust Board. The Patuharakeke board 'cannot and do not point to any hui or any other mechanism whereby they were given a mandate from the people of Patuharakeke' to oppose the Ngātiwai Trust Board mandate.[96]

According to the original Wai 745 claim made on behalf of the descendants of Te Ika Nui Te Pirihi of Patuharakeke, the claimants were 'mandated to submit our claim in the name of our tupuna, at a Hui a Iwi and in the presence of our Kaumatua and Kuia' on 13 June 1997.[97] As amended in May 2014, the claim is made on behalf of the Patuharakeke Te Iwi Trust Board.[98] At this time, Patuharakeke sought an urgent hearing into a planned sale of State-owned enterprise land at Ruakākā.[99] The Ngātiwai and Patuharakeke boards appear to have agreed to work together on this matter, with Patuharakeke taking the lead as mana whenua.[100] In briefing notes from March 2015, OTS officials stated that Patuharakeke Trust Board 'represents Patuharakeke in matters pertaining to mana whenua, mana moana, and mana tangata and environment and resource management'.[101]

Grant Pirihi was formerly the Ngātiwai Trust Board member elected from Takahīwai marae, the marae of Patuharakeke. Mr Pirihi told us he is a member of Patuharakeke hapū 'born and raised at Takahiwai' and 'as a Pirihi with whakapapa to Ngatiwai, I also hold strong Ngatiwai descent and links'. He continued:

> To my knowledge and understanding Patuharakeke Te Iwi Trust Board (PTB) hold responsibility for our Waitangi Tribunal Claims and have been charged with representing our interests on behalf of Patuharakeke.[102]

We acknowledge the evidence of Rorina Rata, who stated the preference of her Patuharakeke whānau to be 'united under the banner of Ngātiwai', but note that she claims to speak for her whānau, not the hapū. We consider there was sufficient evidence of the standing of the Patuharakeke Trust Board to represent Patuharakeke and saw no evidence to cast doubt on that standing to represent the hapū in advancing their claims.[103]

The Wai 2549 claim was brought on behalf of the Te Waiariki, Ngāti Kororā, Ngāti Taka Pari Hapū Iwi Trust Board. The Crown also does not accept that this trust board 'has authority to represent those three hapū for the purposes of opposing' the Ngātiwai Trust Board mandate.[104]

We consider that – despite the range of hapū identities involved – a similar conclusion as that regarding Patuharakeke can be reached for those who have appeared

before us representing the hapū collective Te Waiariki, Ngāti Kororā, and Ngāti Takapari. Speaking for the Te Waiariki, Ngāti Kororā, Ngāti Taka Pari Hapū Iwi Trust Board, Pereri Māhanga told us he was given authority at a hui-ā-hapū, as chair of the hapū trust, to advance their historical Treaty claims.[105] He told us that hui-ā-hapū are the 'cornerstone' of hapū decision-making and action:

> Every major decision is brought to a hapū hui to inform, debate and decide. And out of that decision it is usually the case that certain persons will be given the authority to represent the view of our hapū.[106]

For the Crown to question his authority, Mr Māhanga said, is to 'challenge the validity of our Hapu hui and therefore the validity of our own tikanga in action'.[107]

However, the position of this hapū group is complex. The Wai 2549 and Wai 2550 claimants each include named claimants for the Wai 620 historical claim. Both groups deny that they are Ngātiwai. The chief difference appears to be that the Wai 2550 claimants say Te Waiariki and Ngāti Kororā are hapū of Ngāpuhi. Indeed, Ruiha Collier told us that links between Ngāti Takapari and Ngātiwai were the reason that hapū was not originally included in the Wai 620 claim: 'Te Waiariki Korora are descendants of Ngapuhi Arikitanga who defend nga uri o Pona Harakeke. Ngati Taka Ngatiwai could therefore never inherit mana whenua kaitiakitanga.'[108]

Although Mrs Collier disputed the capacity of the Te Waiariki, Ngāti Kororā, Ngāti Taka Pari Hapū Iwi Trust Board to represent her hapū, she did not claim to speak for the hapū.[109] She represented her whānau, saying: 'The tikanga is that the whanau uri form the hapu, and all interests are represented by elected whanau.'[110]

In support of the Ngātiwai Trust Board, Paratene Te Manu Wellington told us his whānau 'has always been deeply entrenched in Ngāti Takapari'. His father was the first Ngāti Takapari trustee on the 1945 Whangaruru Trust Board, the forerunner of today's Ngātiwai Trust Board. Although acknowledging links to Ngāpuhi and Ngāti Hine, Mr Wellington emphasised the close bonds among Te Waiariki and Ngāti Takapari at Ngunguru, Horahora, and Pātaua: 'In the end we are all Ngātiwai – we're all one – and we're stronger together.'[111]

We also acknowledge the evidence of Keatley Hopkins, who is a trustee of Ngunguru marae. Mr Hopkins spoke on behalf of his whānau and in support of the Wai 2544 claimants. He said 'when I am at home in Ngunguru, I am Ngati Takapari and Te Waiariki'. But he went on to say: 'The people of Ngunguru marae have never met to say we support the [Ngātiwai Trust Board] in the settlement process. Our hapu should have the ability to do that.'[112]

These three hapū do not present a unified stance in the way that Patuharakeke or Te Kapotai do. This is partly due, no doubt, to the fact that there are distinct hapū identities involved. We accept that the evidence indicates that Mr Māhanga has the support of a significant portion of these hapū.

In our view, the Crown had obligations to inform itself of the level of support or opposition by hapū to the Ngātiwai Deed of Mandate. As already noted, the vote did not provide that information. Yet the Crown now argues that the obligation lay with hapū to demonstrate opposition to the mandate through hui or other mechanisms.

The hapū representatives in this inquiry, in our view, demonstrated that they have gained support from their communities to speak on their behalf. This was done according to their tikanga at hui-ā-hapū.

The Te Whakapiko (Wai 156), Ngātiwai ki Whangaruru (Wai 2544), and Te Uri o Hikihiki (Wai 2546) claimants alleged a range of flaws in the mandate which they said meant it did not provide adequately for hapū rangatiratanga. Elvis Reti (Wai 2557) and Deirdre Nehua (Wai 2545) also argued that the question of hapū consent to the mandate needs to be resolved.

These claimants did not, however, claim a mandate to speak on behalf of their hapū. And, as we established in chapter 3, for at least some Ngātiwai communities hapū rangatiratanga exists and manifests alongside the authority and tikanga of whānau, marae, and iwi. Their opposition was focused on the way support for the mandate was secured, and on the claims that are made for the

representativeness and accountability of the trust board. It became clear during the course of our inquiry that the issues raised by these claimants primarily concerned the ability of Ngātiwai groups to have their issues addressed through the course of the mandating process. Their concern was primarily centred on matters of tikanga.

The Crown points to the nature of these claims as further evidence that hapū have not been shown to oppose the mandate, and that opposition is sourced from a handful of individuals.

Our inquiry was granted urgency on the question of hapū support for the mandate, and the evidence of these claimants is central to the question of whether the mandated body can be appropriately representative of hapū. Therefore, while the claims were not brought on behalf of hapū, it is appropriate for us to consider the issues they have raised in assessing whether the mandate achieved by the Ngātiwai Trust Board, and recognised by the Crown, ensures that the tikanga of hapū claimants has been respected.

Nor are these claimants' views unknown to the Crown. Most if not all of the claimants have been involved in the mandating process. This included claimant participation in the Crown's preferred mechanism for gauging opposition: providing submissions to OTS. The submissions showed significant opposition to the mandate. If questions remained for the Crown as to the extent and strength of this opposition, these were matters for the Crown to take appropriate steps to resolve. We examine whether it did so in chapter 5. First, however, we examine the process laid down in the Deed of Mandate for demonstrating opposition: the mechanism to withdraw consent for the mandate.

4.5 Withdrawal of Consent

4.5.1 The withdrawal mechanism

The ability of the claimant group or large natural group to withdraw support for a mandate is an important mechanism to maintain the accountability of a mandated entity. On this all parties agree. The key difference between the parties is whether sub-groups – especially hapū – should be able to withdraw from the mandate. The view of the Crown and the Ngātiwai Trust Board is that a withdrawal mechanism is a means to ensure that, if the trust board loses the confidence of Ngātiwai, there is a process by which the members of Ngātiwai as a whole can vote to change the terms of the mandate or withdraw their support for the mandate. This is done broadly in the same manner that the mandate was given, by public notice, nationwide hui, and a vote of individual members of Ngātiwai.

The claimants in this inquiry view things differently. They see the large natural group, Ngātiwai, as comprising groups which include hapū with their own rangatiratanga. They say that a hapū should be able to withdraw support if it decides this is necessary.

The Deed of Mandate sets out the process that must be undertaken to achieve amendment or withdrawal of the mandate on behalf of the whole of the claimant community. Claimant community representatives must first write to the chair of the trust board to explain the nature and extent of their concerns and seek a meeting to discuss them. A minimum of 100 adult members of the trust board's tribal register must sign. If the issues cannot be resolved with the board chair, the claimant community must initiate a further process. Claimants 'may organise a series of publicly notified hui'. These hui 'should' follow the same process and procedures that were employed by the trust board to obtain the mandate. These include nationwide advertising in print media and holding nine hui 'both nationwide and within the rohe or Area of Interest'. At these hui, a consistent presentation must explain the issues and parties involved and a detailed paper, similar to the Deed of Mandate itself, must set out alternative proposals or amendments. A vote, on a consistent resolution, must be taken at each hui, and an independent returning officer must be employed to oversee the process and notification of results. An observer from Te Puni Kōkiri must be invited to observe and record the hui.[113]

Once these hui are completed and the result of the vote is known, the claimant community representatives

seeking withdrawal or amendment must write to OTS, setting out the result and seeking to discuss the next steps for the settlement negotiations. 'This may involve some changes to the mandated body or another process to be undertaken as agreed with officials.'[114]

4.5.2 Is the withdrawal mechanism workable?

The withdrawal mechanism requires any group seeking to secure the claimant community's withdrawal of support to adopt the same process followed by the trust board to gain the mandate in the first place. Claimants say the process is costly, onerous, and unworkable.[115]

Hūhana Lyndon acknowledged it would not be difficult to meet the first requirement: sending a letter co-signed by 100 adult registered members.[116] The Crown agreed.[117] From the time that submissions on the mandate were received in September 2014 and the extent of opposition became apparent, OTS officials were concerned there was a reasonable likelihood opponents would initiate steps to withdraw the mandate. But officials did not think an attempt to withdraw support would succeed. The large majority in favour of the mandate among those who voted meant it was unlikely, at that stage, any group seeking mandate withdrawal would gain sufficient support from the 'wider claimant community'.[118]

Ms Lyndon said it was the subsequent steps, including nationwide hui, that would be virtually impossible for a claimant group to achieve. The claimant community, working voluntarily, did not have the capacity, resources, or time to carry out a process of that magnitude.[119] The Crown disagreed, saying the process might sound onerous but that there was no evidence to suggest holding nine hui had to be either expensive or difficult to organise.[120] We think this is disingenuous on the part of the Crown.

Indeed, the potential cost and difficulty of the withdrawal process was acknowledged by Crown officials before the mandate was recognised. In August 2015, OTS advised Te Puni Kōkiri on the difficulty of funding a withdrawal process:

> the costs are likely to be high and this is something the Tribunal has already flagged in respect of the Tūhoronuku mandate – that it's a high bar for opposing members of the claimant community who probably won't have the same resources NTB does.[121]

While in general we do not think it helpful to go into the details of how much was spent to obtain the Deed of Mandate, it is clear the process was expensive. In September 2013, while voting on the mandate was taking place, the trust board advised OTS that it had spent around $300,000, making specific mention of mandate hui.[122]

Emily Owen, for OTS, told us the withdrawal process was not impossible, but 'definitely very challenging'. With regard to funding to seek a withdrawal of mandate, Ms Owen said that was not current Crown policy and a directive from Cabinet would be necessary for any funding to be made available.[123]

The Ngāpuhi Mandate Tribunal also assessed withdrawal provisions that required those wanting withdrawal to use the same general process followed when the mandate was sought. That Tribunal considered the costs involved, whether for the entire claimant community or a single hapū, 'militate against any group using the existing withdrawal provisions'.[124] Based on the evidence we heard in this inquiry, we agree with that view. We acknowledge that the withdrawal process set out in the Ngātiwai Trust Board Deed of Mandate appears not dissimilar to those contained in the Ngāti Hauā Trust Board and Te Mana o Ngāti Rangitihi Trust mandates. As such, even though the process is not hapū specific, it is an improvement on that contained in the Tūhoronuku IMA mandate.[125] Yet, this does not make the withdrawal mechanism more affordable for a group that wishes to initiate withdrawal of the mandate. This is because it is still required to organise, run, and fund nationwide hui to seek the support of the entire claimant community. If the withdrawal process is unaffordable, it cannot be said to be workable.

4.5.3 Mandate funding

In a section of questions and answers about mandating, the 2004 edition of the 'Red Book' of OTS policy guidelines is clear on the risk of Crown funding for a mandating process:

> Funding from the Crown is not available in advance for mandating processes. This is because it could be seen as taking sides before the claimant group has made a decision on who is to represent them.[126]

Once the Crown has recognised a mandate, it will consider providing funding. These statements are repeated in the 2015 edition.[127] We received evidence that the Crown did provide funding before recognising the mandate. A letter to the Ngātiwai Trust Board from OTS, in December 2013, referred to mandate phase funding and pre-mandate funding.[128] In addition, since 2009, Cabinet has delegated authority to the Minister for Treaty of Waitangi Negotiations to approve funding for 'exceptional circumstances'. Further funding was provided to the trust board under this policy in February 2015.[129]

We make two points. First, despite having been updated in 2015, the 'Red Book' is still not an accurate reflection of how the Crown provides funding. Secondly, we see a contrast between, on the one hand, the Crown's funding of groups seeking a mandate, and, on the other, an absence of funding for those seeking to withdraw from a mandate. It is clear to us why this might be understood by some as 'taking sides' or, as the Tāmaki Makaurau Tribunal put it, 'picking winners'.[130]

4.5.4 Hapū withdrawal

In November 2015, the Patuharakeke Trust Board made a formal request that the Crown assist in funding a withdrawal process. OTS replied in July 2016, that 'no funding has been approved for withdrawal from a deed of mandate'. The letter went on to restate the Crown's view that Patuharakeke did not constitute a large natural group for the purpose of settlement negotiations.[131] Given this view, and the clear statement in the Deed of Mandate that withdrawal of mandate must be undertaken on behalf of 'the whole of the claimant community',[132] it is perhaps unsurprising the request for funding was refused.

The withdrawal process set out in the Ngātiwai Deed of Mandate does not and is not intended to enable 'individual hapū or other groups within the wider community' to withdraw from the mandate. This point was emphasised by the trust board in closing submissions. The board's view is that because all Ngātiwai members conferred the mandate, they must all be given the opportunity collectively to withdraw.[133]

In the trust board's view, the lack of any process for hapū or other groups to withdraw from the mandate is a 'necessary consequence' of the Crown's large natural groups and settlement policies. This is because the Crown will not entertain any further separate settlements with any other 'Ngātiwai' hapū, including the eight 'shared' hapū.[134] Certainly, in closings, Crown counsel confirmed it did not wish to negotiate a separate settlement with Patuharakeke.[135]

However, the trust board advanced additional reasons for keeping all remaining Ngātiwai claims within a single settlement. Primarily, it is concerned for the possible impact on the social and cultural dynamics within Ngātiwai, and thus on Ngātiwai unity and identity. 'This includes impacts on the whakapapa and tikanga of further artificial and ad hoc divisions being imposed on the iwi through the settlement process.'[136] The Crown's prior settlements with Ngāti Manuhiri and Ngāti Rehua-Ngātiwai ki Aotea clearly continue to have significant influence in the trust board's assessment of its position and that of Ngātiwai generally. Mr MacDonald told us Ngātiwai simply could not sustain its largest hapū settling separately and the greatest inequity would be faced by the smaller hapū left within Ngātiwai.[137]

The Ngāpuhi Mandate Tribunal discussed the mandate of the Ngāti Tūwharetoa Hapū Forum Trust, which set out a process to be followed if a hapū decided to seek to withdraw from the mandate. We make particular note of the requirements around public notices advertising hui-ā-hapū to discuss a proposal to withdraw. These notices had to explain the consequences of withdrawal, and the explanation had to be repeated before a resolution to withdraw was put to the hui. The explanation had to include a description of the Crown's large natural groups policy and the likelihood that individual hapū would be unable to qualify as a large natural group and so be unable to enter settlement negotiations.[138] A key difference between Ngāti Tūwharetoa and Ngātiwai is that the Ngāti Tūwharetoa

mandate was sought on a hapū by hapū basis. The lack of a workable withdrawal mechanism for hapū serves to compound the problems created by the inability to know whether any hapū agreed to the Ngātiwai mandate in the first place. It also highlights the lack of accountability to hapū within the structure of the mandated entity.

The Crown and the trust board both submitted that because the mandate was conferred by all of Ngātiwai, it should only be withdrawn by the whole Ngātiwai membership. We understand the trust board's desire to keep all remaining Ngātiwai claims within a single settlement, but it faces the difficulty of having agreed to release Te Kapotai from the mandate, as well as the fact of the two hapū which the Crown decided to settle with separately.

Our understanding of the Crown's position, set out in its closing submission, is that the Crown considered it acceptable for the members of Te Kapotai with 'whakapapa connections to Ngātiwai tūpuna' to choose whether or not to have their claims settled by the Ngātiwai Trust Board.[139] For the trust board, Mr MacDonald told us Te Kapotai were included due to 'a push from our trustees who were Te Kapotai' – the Ōakura, Ōtetao, and Ngaiotonga marae trustees. They wanted the Te Kapotai interests of their whānau to be settled by Ngātiwai.[140]

As we see it, the problem with this approach is that the whakapapa of individuals determines the inclusion of a hapū in the Deed of Mandate. We do not see a problem with a hapū belonging to more than one large natural group, for settlement purposes. But this is a matter for the hapū to decide.

When it came to the removal of Te Kapotai from the mandate, the Crown told us it was because the Ngātiwai Trust Board decided to remove them.[141] Trust board chair Haydn Edmonds said the decision to remove Te Kapotai 'had everything to do with whānau'. These whānau debated and resolved 'as a whānau group to take Te Kapotai out'.[142]

The process followed in the lead-up to the board's decision is unclear to us. We saw no evidence that the withdrawal processes set down in the Deed of Mandate were considered. Indeed, the mandate does not appear to contemplate a situation of this kind.

This does not demonstrate consistency or equality of treatment. In our view the trust board has been placed in this impossible situation because of the operation of the Crown's large natural groups and comprehensive settlement policies. In seeking kotahitanga, whanaungatanga has been damaged, through the insistence that hapū be included in the mandate without their explicit consent, and without a workable withdrawal mechanism.

We return to the question of why hapū were included in the Deed of Mandate if they were not to be included in the mandating process. If hapū are named as part of the mandate then our view is that, just as the mandate should provide a mechanism to secure hapū consent, it requires a mechanism which allows them to withdraw. The issue gets to the essence of what the Crown considers hapū to be. The names of hapū were included in the Deed of Mandate to ensure that all hapū claims were included, but the Crown does not appear to accept that hapū need a voice in settlement negotiations.

4.6 Representation, Accountability, and Consent: Conclusion

The Waitangi Tribunal has consistently acknowledged both the right of the Crown to choose who it will negotiate with for the settlement of historical claims and the benefits to Māori communities from achieving larger, more comprehensive, and wide-ranging settlements. This Tribunal endorses the statement of the Pakakohi and Tangahoe Tribunal that the Crown's preference for dealing with large natural groups is one 'with which we have considerable sympathy'.[143] That Tribunal went on to quote the words of the Whanganui River Tribunal, which said: 'While Maori custom generally favours hapu autonomy, it also recognises that, on occasion, the hapu must operate collectively.'[144]

We have located the source of most opposition to the Ngātiwai Trust Board's mandate in the inclusion of groups in the Deed of Mandate without their consent, and without proper mechanisms for their representation and accountability.

In particular, we identified problems with:

- the shifting boundaries and identities within the claimant definition;
- the scope of the research that has been undertaken to support the claimant definition;
- the trust board's structure as set out in its deed;
- the fact that the additional advisory bodies added for settlement purposes will do little to provide hapū with appropriate representation during the negotiations process;
- the limitations of a vote of individual members as a measure of hapū support for the mandate; and
- the absence of a workable system for hapū to withdraw support from the mandate.

What is absent is recognition of hapū tino rangatiratanga. In our view, such recognition is a prerequisite for collective action, because with consent, representation, and accountability comes the responsibility of owning the consequences of decisions.

Tino rangatiratanga is particularly relevant to the hapū Patuharakeke, Te Waiariki, Ngāti Kororā, and Ngāti Takapari (and for Te Kapotai). It provides the basis on which to engage with a group such as Te Whakapiko in order to establish whether they should or should not be part of a settlement, and to assess the concerns of those who are worried that the Ngātiwai claimant definition is too broad.

We observe that the Ngātiwai Trust Board shows obvious signs of having been scarred by its involvement in the settlement process thus far. It is clear that the experience of the two southern hapū being offered separate settlements has been distressing and has strengthened a desire to ensure that Ngātiwai retains its kotahitanga in a post-settlement era. Where hapū, members of hapū, and claimants have sought to ensure their participation in the settlement process, and accountability from a representative entity, the trust board's response has been that Ngātiwai must remain united. Allowing hapū to withdraw their support is seen by the board as damaging that goal. We do not see things that way. The trust board has acknowledged 'that all constituent hapū of Ngātiwai, including Te Waiāriki and Ngāti Kororā, have their own unique origins and identities.'[145] Properly acknowledging these origins and identities, in our view, requires recognition of their tino rangatiratanga, as the basis for building a reciprocal relationship of trust and mutual responsibility between iwi, hapū, and marae.

Notes

1. Memorandum 2.5.2, para 7
2. Document A62, p 10
3. Document A19(a), exhibits M, O; doc A2(a), exhibit B; doc A62
4. Transcript 4.1.3, p 29
5. Submission 3.3.17, pp 8–9
6. They include Te Waiariki, Ngāti Kororā, Ngāti Takapari, Ngāti Kuta, Patukeha, Te Kāpōtai, Ngāti Pare, Patuharakeke, and Te Parawhau: doc A2(a), exhibit I, p 343, exhibit J, pp 363, 364, 365
7. Document A2(a), exhibit B, pp 172, 183, 277, exhibit I, p 343
8. Document A24, exhibit E, p [34]
9. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 3rd ed (Wellington: GP Publications, 1996), pp 211–212
10. Document A83, pp 1–2
11. Document A21, ss 4, 5
12. Document A79, p 10
13. Document A8, p 3
14. Ibid, p 4
15. Document A67(a), p [1]
16. Document A79, p 4
17. Document A62, p 11
18. Document A43(b), exhibit O, p 563
19. Submission 3.3.21, p 25; submission 3.3.25, p 51
20. Transcript 4.1.3, p 74
21. Ibid, pp 38, 40–43, 47–48; doc A98, pp 2–3
22. Ibid, p 38
23. Ibid, pp 48–49
24. Document A98(a), annexure 1, pp 1–2
25. Transcript 4.1.3, pp 38–39
26. The wānanga took place at Whakapaumahara Marae at Whananāki in April 2014: transcript 4.1.3, p 45.
27. Ibid, pp 40–41, 44–47
28. Ibid, pp 41–43, 156–157
29. Submission 3.1.106(a), p 5
30. Submission 3.1.206, pp 3–4; submission 3.1.106(a), p 5
31. Submission 3.1.106(a), pp 17–19
32. Ibid, p 28
33. Ibid, p 38
34. Document A4, p 9
35. Submission 3.1.106(a), pp 11–12; doc A62, p 18
36. Ibid, pp 9–12

37. Schedule 2 to the trust deed sets out 'Recognised marae of Ngatiwai': Tūparehuia, Ngāiotonga, Ōtetao Reti, Ōakura, Mōkau, Whananāki, Matapōuri, Ngunguru, Pātaua, Takahīwai, Ōmaha, Motairehe, Kawa, Punaruku: submission 3.1.106(a), pp 37–38, 42.
38. Document A62, p 16; submission 3.1.106(a), pp 3, 37–41
39. Submission 3.1.106(a), pp 37–39
40. Document A43(b), exhibit J, pp 371, 375, 376
41. Document A9(a), exhibit E, p 26
42. Document A2(a), exhibit K, p 393; doc A4, exhibit A; doc A43, p 35
43. Document A77, p 5. The terms 'manaaki manuhiri', 'tangihanga', 'kawe mate', and 'waananga' can be translated as hosting guests, funerals, and obsequies, conveying (or sharing) grief for deaths, and study, research, or learning sessions.
44. Document A74, para 4
45. Transcript 4.1.1, p 73
46. Document A98, pp 3–8
47. Ibid, p 17
48. Ibid, pp 3–16
49. Ibid, p 18
50. Transcript 4.1.3, p 95
51. Document A4, p 8
52. Document A74, para 4
53. Ibid, paras 9–32
54. Ibid, paras 4, 5
55. Document A93, paras 3, 5, 6, 7
56. Document A62, p 21
57. Ibid, p 19
58. Document A98(c), p [5]
59. Document A62, pp 20–22
60. Submission 3.1.106(a), pp 20–21
61. Document A9(a), exhibit E, pp 70–71
62. Document A43(b), exhibit J, p 371
63. Document A94, pp 4–6; submission 3.3.19, p 41; transcript 4.1.1, pp 438–439
64. Document A94, p 3
65. Submission 3.3.19, p 37
66. Document A94, p 8
67. Submission 3.3.23, p 56
68. Document A127, p 9
69. Submission 3.3.21, pp 33–34
70. Transcript 4.1.3, pp 181–182
71. Document A1(a), exhibit A
72. Document 3.1.106(a), p 40
73. Document A41, p 2; doc A40, pp 9–12; doc A130, para 29
74. Submission 3.3.19, p 10
75. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Wellington: Legislation Direct, 2015), p 38
76. Submission 3.3.23, p 34
77. Submission 3.3.21, p 33
78. Document A9(a), exhibit E, p 38
79. Submission 3.3.19, p 11
80. Ibid, pp 5–6
81. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p 65
82. Submission 3.3.23, pp 4–6
83. Ibid, p 6
84. Document A98, p 17
85. We were given varying information by the board as to its members' affiliations to these hapū: 'just over 100 Te Waiāriki, almost 330 Ngāti Takapari and around 350 Ngāti Kororā – or a minimum of 785 "Te Waiāriki iwi" members' (doc A98, p 15), and 'a significant number of individuals from Te Waiāriki (334) and Ngāti Kororā (110) (as well as the closely-related Ngāti Takapari (195)) are currently Registered Members of the Board' (doc A24 p 9).
86. Document A73(a), exhibit 8, p 97
87. Submission 3.3.23, p 25
88. Document A27, p 8
89. Transcript 4.1.1, p 79
90. Submission 3.3.23, p 7
91. Ibid, p 8
92. Document A39(a), exhibit C, pp 8–9
93. Submission 3.3.23, pp 7–8
94. Ibid, p 28
95. Ibid, pp 6, 17–29
96. Ibid, pp 22–25
97. Wai 745 ROI, claim 1.1, p 1
98. Wai 745 ROI, claim 1.1(c), p [1]
99. Ibid, p 2
100. Transcript 4.1.1, pp 420–423; doc A106(a), exhibit E, p 17
101. Document A39(a), exhibit D, p 10; doc A106(a), exhibit F, p 18
102. Document A40, p 3
103. Document A97, p 4
104. Submission 3.3.23, p 21
105. Document A20(b), paras 17–22
106. Document A59, para 19
107. Ibid, para 21; submission 3.1.28, p 21
108. Document A83, pp 2–5
109. Transcript 4.1.1, p 126
110. Document A83, p 2
111. Document A92, pp 2–3
112. Document A75, p 6
113. Document A2(a), exhibit B, pp 41–42
114. Ibid, p 42
115. Document A34, pp 8–9; doc A46, p 5; doc A76, p 16
116. Document A34, pp 8–9
117. Submission 3.3.23, p 55
118. Document A73(a), exhibit 4, p 36. See also doc A73(a), exhibit 1, p 2, exhibit 2, p 7, exhibit 8, pp 198, 210; doc A39(a), exhibit C, p 8; doc A69(a), pp 11–12.
119. Document A34, pp 8–9
120. Submission 3.3.23, p 55
121. Document A73(a), exhibit 8, p 143
122. Document A39(a), exhibits G–H, pp 53–57
123. Transcript 1.1.1, pp 390–391

124. Waitangi Tribunal, *Ngāpuhi Mandate Inquiry Report*, p 66
125. Ibid, pp 66–67
126. Office of Treaty Settlements, *Ka Tika ā Muri, ka Tika ā Mua/ Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 2004), p 52
127. Office of Treaty Settlements, *Ka Tika ā Muri, ka Tika ā Mua/ Healing the Past Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 3rd ed (Wellington: Office of Treaty Settlements, 2015), p 47
128. Document A39(a), exhibit H, p 55
129. Ibid, exhibit K, p 64
130. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 12
131. Document A10(a), exhibit D, pp 10–11; doc A76(a), exhibit B, p 2
132. Document A62, p 39
133. Submission 3.3.19, pp 24–25
134. Ibid, p 25
135. Submission 3.3.23, p 50
136. Submission 3.3.19, p 25
137. Document A98, pp 18–19
138. Waitangi Tribunal, *Ngāpuhi Mandate Inquiry Report*, p 67
139. Submission 3.3.23, p 49
140. Transcript 4.1.3, pp 98–99
141. Submission 3.3.23, pp 48–49
142. Transcript 4.1.1, p 427
143. Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p 65
144. Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p 13
145. Document A24, p 2

Table Sources

Page 40: Document A19(a), exhibit M, p 69; doc A19(a), exhibit O, p 115; doc A62, p 11

CHAPTER 5

THE CROWN'S ACTIONS IN THE MANDATING PROCESS

5.1 Introduction

The evidence presented to us has demonstrated a number of serious problems with the mandate to settle the historical claims of Ngātiwai. In the previous chapter we concluded that hapū have been constrained in their ability to determine whether and on what basis their claims should be included in the mandate that is held by the Ngātiwai Trust Board. This constraint also means that hapū will have limited ability to participate fully in Treaty settlement negotiations.

In this chapter, we analyse the actions taken by the Crown as it worked towards its decision to recognise the mandate of the Ngātiwai Trust Board to negotiate a settlement of historical Treaty claims. Here, our focus is on identifying whether the Crown's policies and practices have caused (or significantly contributed to) the problems we have identified, or whether they are – as the Crown suggested – matters that were more appropriately left to the people of Ngātiwai to decide.

5.2 The Mandate Strategy and the Vote

5.2.1 The steps taken towards developing a mandate strategy

In 2009, the Crown presented settlement proposals as part of negotiations with claimant groups in Tāmaki Makaurau, Kaipara, and Hauraki. Two hapū of Ngātiwai, Ngāti Manuhiri and Ngāti Rehua, were included in the Tāmaki Makaurau proposals. In response, the Ngātiwai Trust Board wrote to the Minister for Treaty of Waitangi Negotiations in August 2009 'on behalf of all the Ngatiwai Hapu', seeking to initiate a dialogue and begin work towards settling Ngātiwai Treaty claims.[1] The Minister replied that he wanted to settle Ngātiwai claims at the same time as the claims of Ngāpuhi, but could not say when that would be. Direct negotiations with Ngāti Manuhiri and Ngāti Rehua, he said, would 'facilitate the protection of Ngātiwai's interests in Kaipara and Mahurangi'.[2] The trust board responded that, on behalf of Ngātiwai, it had 'enjoyed an autonomous relationship with the Crown' that had not been challenged by other iwi, but the Minister responded that 'working within a wider group' would assist the Crown's wish to negotiate Northland claims 'as expeditiously as possible'.[3]

Although the trust board agreed at the time to support the two hapū in negotiating separate settlements, chair Haydn Edmonds told us that was a decision 'we regret'. 'The reality is that the implications were not well understood by the Board at that time, and it

was not a unanimous decision, but we have learnt from our mistakes and are still experiencing the negative effects of this decision'.[4]

The trust board has expressed deep concern at the damage that the Treaty settlement process has caused to relationships within Ngātiwai. Mr Edmonds told us the board felt forced into supporting the separate settlements in spite of its wish to 'keep the entire iwi together, whanau, hapu, and iwi together'. The decision was 'heaped' on the board by the Crown and had been 'very difficult', a cause of contention that had split the board. His 'issues with the Crown' he would 'save for the Crown', but Mr Edmonds noted that Crown processes tend to 'herd all of us'.[5]

Counsel for the trust board submitted that the division 'imposed on Ngātiwai for settlement purposes' resulted in 'continuing mamae' (pain).[6] Thus, what Mr Edmonds described as 'artificial divisions imposed on Ngātiwai' for settlement purposes became a strong impetus for seeking a unified approach.[7] The decision to pursue direct negotiations with the Crown to achieve a Treaty settlement was explicitly taken to allow Ngātiwai to 'catch up' with its two hapū and rebuild the unity that separate settlement processes threatened.[8]

The Crown has a duty to ensure that the application of its settlement policies to the Ngātiwai mandating process does not cause substantial damage to the whanaungatanga of hapū and other groups including the trust board. The Crown must not create fresh grievances. It seems to us that the early decision by the Crown to settle the two hapū separately has had a damaging impact on relationships, particularly between the trust board and hapū, as the board sought to pursue its kotahitanga approach at the expense of whanaungatanga.

The decision to pursue direct negotiations has had the opposite effect from that intended, and has worsened relationships within Ngātiwai and between Ngātiwai and their neighbours. The Office of Treaty Settlements (OTS) subsequently identified the claimants' preference to have their claims heard by the Waitangi Tribunal before negotiating with the Crown as one of four main reasons for opposition to the mandate.[9] The board has since sought to invoke aroha as a tikanga principle, 'as a medium of healing the breaches that have occurred through this process'.[10]

By June 2012, the Crown had reached a Deed of Settlement with Ngāti Manuhiri. In October that year, during the partial sale process of four Crown-owned energy companies, OTS wrote to the trust board to offer the option of purchasing 'on-account' shares against a future settlement of historical Treaty claims. To be eligible, Ngātiwai needed to be recognised by the Crown as a large natural group (LNG). It also required a representative body that was appropriately accountable to the large natural group, with a recognised mandate to settle Ngātiwai Treaty claims. This chain of events suggests to us that the Crown was placing pressure on the trust board in order to achieve its own settlement goals. The letter also stated the Minister had 'recognised Ngāti Wai Trust Board as an LNG', a conflation of the trust board with the large natural group.[11]

A second letter from OTS in April 2013 confirmed details of the share offer, and set out a process by which large natural groups could 'secure a Crown recognised mandate'. It stated: 'To apply for a recognised mandate your group must submit a completed Mandate Strategy application form by *5pm 30 April 2013*' (emphasis in original).[12] We do not know if the trust board replied, but in May the Minister wrote to the board to inform it of the Crown's 'proposed milestones for Ngātiwai (remaining claims)': achieving terms of negotiation by the end of 2013 and an Agreement in Principle by June 2014. The Minister then encouraged the board to discuss an 'accelerated settlement process' with OTS officials.[13] Rapid settlement of historical Treaty claims had been explicit government policy since 2008, when the government pledged to complete all settlements by 2014.[14]

The trust board appointed a Treaty claims manager at the beginning of 2013, and held three information-sharing hui in March and April in Whangaruru, Whangārei, and Auckland to discuss whether to pursue direct negotiations with the Crown or continue to participate in the Waitangi Tribunal's Te Paparahi o Te Raki inquiry.[15] The trust board's stated intention, as presented at these hui, was for direct negotiation, with 'set goals' of reaching

an Agreement in Principle later that year and a Deed of Settlement in 2014.[16]

A draft mandate strategy, signalling the trust board's intention to represent 'Te Iwi o Ngātiwai' in direct negotiations with the Crown, was released at the conclusion of these hui.[17] Under the heading 'Who are the Crown dealing with/Claimant Definition', the Ngātiwai claimant group was said to include 'all individuals, whanau and hapu of Ngātiwai that trace descent from our founding ancestors Manaia II, Tahuhunuiorangi and Te Rangihokaia'. This would be 'refined and confirmed throughout the course of negotiations'.[18]

Fourteen marae were listed; these were the same as the 14 marae listed in the trust deed and from which the board's members were elected. Lists of present-day and historical Ngātiwai hapū were left blank: 'To be confirmed'. The Ngātiwai claims to be settled by the proposed mandate included 'all remaining claims made at any time (whether or not the claims have been researched, registered and/or notified) by any claimant or anyone representing them that are based on a claimant's affiliation to Ngātiwai and/or one of the listed marae'. Wai 244 and Wai 262 were specifically mentioned along with: 'Others to be confirmed?'[19]

A revised mandate strategy was submitted to the Crown on 19 July 2013. This incorporated changes made in response to concerns and suggestions from iwi members. Thirteen present-day and 44 historical hapū and 32 Wai claims were now listed. The strategy acknowledged that some Ngātiwai hapū and marae were also listed in the claimant definitions of other large natural groups; the trust board would 'seek agreement to the treatment of these hapu and marae with the Crown, following discussions with the relevant groups'.[20] At a meeting with Patuharakeke on 23 July, the board said the strategy was 'built on the requirements of what the Crown wanted'.[21]

Five days later, on 24 July, this revised strategy was endorsed by the Crown.[22] This, as has been subsequently acknowledged by the Crown, was an 'error in Crown process', because it occurred before submissions on the strategy had been received and addressed.[23] For example, counsel for the Patuharakeke Trust Board wrote to OTS on 29 July 2013, the same day the endorsed strategy was made public:

> It has of last week come to the attention of Patuharakeke that the Ngati Wai Trust Board is in the process of submitting its Mandate Strategy to the Crown. Essentially, Patuharakeke did not receive any information about the Ngati Wai Trust Board Mandate Strategy prior to its submission or any information detailing how the claims of Patuharakeke will be affected by any potential settlement of Ngati Wai.[24]

We received no evidence of a reply from OTS.

5.2.2 The Crown's role in the development of the mandate strategy

The evidence shows the Crown's approach to Ngātiwai up until its endorsement of the mandate strategy was driven to a large degree by other policy priorities: completing the settlement in Tāmaki Makaurau, commencing negotiations with Ngāpuhi, implementing the share offer, and its self-imposed 2014 deadline for settling all historical Treaty of Waitangi claims. In turn, the Ngātiwai Trust Board said, it felt pressured into responding to the Crown's timetable and priorities. In the board's view, Ngātiwai's two southern hapū had had to accept a settlement 'imposed' upon them, 'or otherwise miss out'.[25] These early stages of the mandate process set a pattern in which the trust board focused on efforts to maintain cohesion at the expense of involving hapū, whānau, and Wai claimants in its decisions. As a response to the Crown's objective of an 'accelerated process' for settlement, this was understandable. But when the claimant definition included such a high proportion of 'shared' hapū, it was a high-risk strategy.

The Crown's premature endorsement of the mandate strategy meant there was no proper process for hapū or others to provide their views to the Crown before the strategy was endorsed. Officials subsequently described this as causing 'tension and delays in getting to deed of mandate' and noted that it highlighted the need to clarify the claimant definition in the mandate.[26]

We note that the purpose of providing an opportunity to submit on the mandate strategy is twofold. As the East Coast Settlement Tribunal said, it allows claimants 'who have a vested interest in a settlement ample time to comment upon, oppose, or make recommendations on the strategy'. The Crown is then able to identify interested parties and has 'the opportunity to engage with them at an early stage in the process'.[27] Neither of those objectives could be achieved in this case, and the Crown has acknowledged this. However, we think the Crown made two further serious errors.

The first was in relation to the inclusion of further claims in the strategy. After the endorsed mandate strategy was published, the Crown 'instructed' (the word used by OTS) the trust board to include a further 14 Wai claims in the strategy.[28] Trust board representatives travelled to Wellington on 6 August 2013 to meet OTS. The board seems to have had specific concerns with four of these claims, because officials then checked and confirmed by letter the Crown's view that Wai 245, 620, 688, and 887 should be included in the mandate.[29] It was left to the trust board to notify the affected claimants and explain their inclusion. The 14 claims were listed in an addendum to the strategy, which stated that the Crown had 'inadvertently' failed to asked that all claims relating to Ngātiwai be included in the strategy previously endorsed.[30] Officials appear to have considered that this would 'be in keeping with' the Tribunal's suggestion, in the *East Coast Settlement Report*, that OTS should write to all Wai number claimants whose claims might be extinguished if a proposed settlement goes ahead to inform them of this fact.[31] Seven of these claims related to Ngāti Kororā and Ngāti Takapari and became the subject of urgent claims in this inquiry (Wai 620, Wai 1411–1416). A further three claims related to interested parties to this inquiry: Wai 245, Wai 1464, and Wai 1546.

OTS wrote to the named claimants for the additional claims, on 9 August 2013, seeking submissions and feedback as to whether the claims were intended as Ngātiwai claims.[32] The Crown did not, so far as we are aware, acknowledge its mistake to these claimants.[33] Such a basic error indicates to us a lack of due diligence on the part of OTS. Moreover, to then require the trust board to explain these late inclusions to the claimants misapplies the East Coast Settlement Tribunal's suggestion and shows unwillingness to take responsibility for their own mistakes. It also increased the likelihood of souring the trust board's relationships with these claimants. The Crown's witness told us the Crown funded hui so that the trust board could 'explain what had happened'.[34] It is clear to us that this placed the board in an uncomfortable position.

The second serious error made by the Crown concerned its handling of submissions on the strategy. Submissions were sought by OTS over three weeks, between 27 July and 17 August 2013. Of 96 submissions received, 51 were in support and 44 opposed, with one taking a neutral stance.[35] And yet, despite the early endorsement of the strategy, and the fact that OTS had not yet addressed the submissions, officials advised the trust board to move straight on to implement the mandate strategy, which included holding hui and voting. Officials alerted Ministers in November 2013 that this endorsement and advice exposed the Crown to risk of legal challenge in the Waitangi Tribunal.[36]

In our view, the poor advice given by officials to the trust board compounded the earlier faults. At this stage, Te Waiariki were not included among the Ngātiwai hapū listed in the endorsed strategy or in the addendum concerning the additional claims. Notes from the mandating hui show the trust board made it clear the additional Wai claims had been included on the Crown's instruction. On at least one occasion the trust board stated 'Te Waiariki is not a hapū of Ngātiwai'.[37] OTS notes from June 2014 show that by then officials understood Te Waiariki had been 're-included in the mandate without prior notification'.[38] There is no evidence that officials raised this as a concern, either with the trust board or with Te Waiariki.

Mr MacDonald told us that Te Waiariki were 'brought into the mandate as a flow on effect of adding those claims'.[39] His statement avoids clearly attributing responsibility for decision-making, but to be clear, the Crown told the trust board to add the claims. As a result the trust board included the hapū in its mandate, but not until after the vote had been held. Nowhere in this chain of events was the hapū itself consulted.

5.2.3 The vote

Voting on the mandate began on 17 August 2013, the same day submissions on the strategy closed (several late submissions were accepted, up until May 2014). The resolution to be voted on was:

> That the Ngātiwai Trust Board is mandated to represent Te Iwi o Ngātiwai in direct negotiations with the Crown for the comprehensive settlement of all the remaining historical Treaty claims of Ngātiwai including registered and un-registered historical claims.[40]

Between 24 August and 14 September, the trust board presented its mandate at nine hui. Despite the marae-based structure of the trust board (and the mandate it sought), only three hui were held on marae: at Ngaiotonga, Matapōuri, and Ōmaha Marae. Ōmaha Marae is associated with Ngāti Manuhiri but was included to ensure geographical coverage across the Ngātiwai rohe.[41] Six hui were held in major North Island urban centres (one was Whangārei).[42] Three hui were held in Australia (two in Sydney, one in Brisbane). Votes were able to be cast at each of these hui. Another hui was held in Whangārei on 19 October, after the result of the mandate vote was known.[43]

Due to the low turnout, the voting period was extended from 15 September to 13 October. OTS was advised of the vote outcome on 16 October 2013. As noted already, the resolution was supported by a significant proportion (82 per cent) of those who participated in the vote (28 per cent).[44]

In chapter 4 we noted the Crown's view that the extinguishment of historical claims is an important reason for giving claimants a say in who will represent them in negotiations. This is why the Crown needed to take great care to ensure that the hapū whose claims are to be settled and extinguished were given explicit opportunity to decide whether they would consent, or not, to the settlement of their claims in the manner proposed.

Taken together, the events surrounding the Crown's endorsement of the mandate strategy and the subsequent vote leave us with genuine doubt whether the outcome can be said to represent the intent of Ngātiwai members of the 'shared' hapū. We are in no doubt, however, that the outcome failed to acknowledge the authority or represent the intent of those hapū. The time-frame for completing the steps leading up to the vote was compressed, and in their haste, officials made several crucial errors of process, which had compounding consequences. We saw no evidence during this period that the Crown identified tino rangatiratanga and tikanga of hapū as needing to be understood or provided for, or protected.

5.3 Advertising the Mandate and the Submissions Process

5.3.1 The steps taken towards advertising the mandate

The vote demonstrated a clear base of support for the trust board's mandate, but OTS officials were worried that the Crown's premature endorsement of the mandate strategy, together with the advice given to the trust board to hold mandate hui before receiving and addressing submissions on the mandate strategy, exposed the Crown to a risk of legal challenge in the Waitangi Tribunal.[45] To mitigate this risk, the Crown sought to clarify the claimant definition and the affiliations of affected hapū and agreed to fund an information hui for the trust board to provide information on the amendments made to the mandate strategy in converting it to a deed of mandate. This was done, but when the Minister for Treaty of Waitangi Negotiations met trust board members on Waitangi Day, 2014, 'significant issues' remained.[46]

At the information hui, held in December 2013, officials were concerned that the Ngātiwai claimant community had raised issues with the claimant definition. OTS were concerned that the 'ancientness' of the tūpuna in the mandate meant non-members of Ngātiwai were 'technically' included in the claimant community; and the trust board had not explained how it intended to represent the eight hapū it shared with other large natural groups. The second issue was the trust board's opposition to a 'parallel process' whereby Wai claimants could continue to have their claims inquired into by the Waitangi Tribunal's Te Paparahi o Te Raki inquiry.[47]

In May 2014 OTS officials informed the Minister that,

despite the trust board providing further information, the inclusion of 'key hapū' and the extent to which the board would represent them was 'not entirely' justified. It was the understanding of OTS that 'there is no single eponymous ancestor'. All efforts to clarify their inclusion, officials wrote, 'at this stage have been exhausted'. In their view there was 'no further information [the board] can provide that will clarify the inclusion of these hapū'. Mitigating legal risk continued to be a significant objective of Crown action in this period, but officials decided that '[f]urther discussions . . . following submissions . . . will be more effective in mitigating the risk of litigation'.[48]

A June 2014 OTS 'health check' on the Ngātiwai settlement recorded that two 'shared' hapū, Te Kapotai and Te Waiariki, had made urgency applications regarding the Tūhoronuku mandate. Officials expected them to do the same if the Ngātiwai mandate were recognised. Using a 'traffic light' assessment of risk level, this was identified as red (high risk). The mitigation strategy had focused on obtaining information from the trust board that

> will justify the inclusion of these hapū . . . but we are not confident this was successful. There is no single eponymous ancestor for Ngātiwai, which has increased the complexity of developing a claimant definition for Ngātiwai. This is likely to create difficulties throughout negotiations.[49]

This was not the only difficulty these hapū presented to OTS. In a note on initial work towards the historical account that would be included in a deed of settlement, the health check said: 'There is a difficulty in determining breaches in the case of overlapping hapū.'[50]

As we have already described, on 27 June 2014 a full meeting of the Ngātiwai Trust Board resolved to endorse the Deed of Mandate, 'subject to any minor technical amendments', and to submit it for formal approval by the Crown.[51] The deed was advertised on 12 July 2014.[52] Additional bodies and positions were proposed to provide advice to the trust board and its Treaty Claims Committee from kaumātua, hapū, marae, rangatahi, and Wai claimants. The latter was partial acknowledgement of the 'foreclosure' of options available to Wai claimants through the Waitangi Tribunal (and despite OTS encouragement to investigate a parallel process for Wai claimants).[53]

5.3.2 The submissions process

OTS invited submissions on the proposed mandate over eight weeks from 12 July to 6 September 2014. The intent of this submissions round was to allow those with concerns about the 'detail' of the mandate to raise them directly with the Crown. Of 269 submissions, 125 were in favour (including 26 late submissions) and 144 against.[54] This number of submissions, OTS informed its Minister, was 'unprecedented for an iwi of Ngātiwai's size'. The main issues identified were:

a) A perceived lack of communication and engagement from NTB with Wai claimants, whānau, and hapū, as well as a lack of whānau and hapū representation;
b) Wai claimants' preference to have claims heard through the Tribunal;
c) Concerns with the operation of NTB, in areas such as finance and administration; and
d) The inclusion of the following hapū in the Ngātiwai claimant definition:
    i) Te Waiariki, Ngāti Korora, and Ngāti Takapari;
    ii) Patuharakeke; and
    iii) Te Kapotai.[55]

OTS undertook an internal analysis of submissions and described the extent of opposition to the mandate as unprecedented. The common factor in submissions was 'the perceived lack of whānau and hapū involvement in the process'.[56] Officials told the trust board of their concern that the claimant community might initiate steps to withdraw the mandate before it had been recognised and warned that 'without any action from NTB to address submitters' concerns, we cannot recommend the DoM to Ministers for consideration'.[57]

On 18 October 2014, OTS held a series of hui with submitters (among whom were several of the claimants in this inquiry) to understand their concerns, and subsequently formally responded to submitters in writing.[58] A repeated concern was the marae-based structure of the

Ngātiwai Trust Board, which required people to align with a single marae (when many were aligned with more than one marae) and did not allow for hapū governance.[59]

OTS officials appeared to conclude from these hui that opponents of the mandate wanted better engagement from the trust board with them 'as whānau, hapū, and Wai claimants':

> At a debrief meeting with NTB we advised NTB these issues were significant and posed a considerable risk to the mandate if left unaddressed. We advised NTB we considered it necessary for them to develop and implement a plan to strengthen engagement and communication, and that it would be appropriate for NTB to demonstrate it could respond to these concerns without direction from OTS.[60]

Internally, however, officials now considered the trust board's mandate to be 'robust', albeit that 'improved engagement and communication with the claimant community' was necessary. Officials sought approval for 'exceptional circumstances funding' to assist the board to implement its engagement plan.[61]

By the end of 2014, OTS officials appear to have come to a view that the mandate was essentially sound. It is difficult for us to understand how they arrived at this conclusion. We acknowledge that characterising the concerns of submitters as matters of perception, as in the 'perceived lack of whānau and hapū involvement in the process', was because officials were trying to summarise the views provided by submitters.[62] But this language was carried through into the briefing to Ministers recommending mandate recognition, which identified 'perceived lack of communication and engagement' from the trust board, and 'perceived lack of hapū representation' in the Deed of Mandate.[63] Our conclusion is that valid issues were raised concerning the inclusion of the hapū, but the Crown did not treat them as substantive matters and did not take sufficient steps to address them.

5.3.3 The trust board's engagement plan

Between December 2014 and March 2015 the trust board implemented its 'Communications and Engagement Plan' with the goal of assisting 'the transition' to a Crown recognised Deed of Mandate.[64] Five objectives were identified, to address the key concerns raised by a number of submitters and provide a means for improved understanding and engagement in the settlement process set out in the Deed of Mandate:

> ***Objective 1*** Engage with the following people or groups:
> - Individual kaumatua or groups of kaumatua
> - Individual Wai claimants or groups of Wai claimants and key submitters
> - Representatives of whanau, hapu, marae or other local groups.
>
> ***Objective 2*** Release monthly Board summaries via NTB trustees and NTB communication channels (ie website and fb).
>
> ***Objective 3*** Hold a special general meeting to review the NTB Trust Deed on 28 February 2015.
>
> ***Objective 4*** Commence planning to hold a wananga that discusses PSGE [post settlement governance entity] representation after the DoM has been endorsed (date to be confirmed).
>
> ***Objective 5*** Initiate quarterly hui-a-iwi to report back on work of the NTB and TCC [Treaty claims committee] engagement and communications work on 28 March 2015.[65]

In early 2015, OTS had also met with hapū to discuss their concerns with the Deed of Mandate: on 15 March with Te Waiariki and on 8 April with Patuharakeke. Te Kapotai declined to meet.[66]

In July 2015, the board provided OTS with a report outlining its 'position to its Hapū'. The report acknowledged that hapū needed to be 'more involved within the scope of our mandate and ongoing settling of their claims'. The concerns of kaumātua regarding tikanga were valued and respected and the board undertook to 'make every effort in our engagement with our people' consistent with principles of 'Te Kotahitanga, Te Aroha, Te Whakapono, Te Rangimarie and Te Tumanako'. Aroha would be 'a medium of healing the breaches that have occurred through this process'.[67] The report restated the provision in the Deed of Mandate to 'enable and provide' hapū and marae to

provide advice to the trust board 'on their involvement in the negotiations and settlement processes'.[68]

In August 2015, the trust board provided the Crown with further amendments to the Deed of Mandate. Two further advisory roles would be added to the Treaty Claims Committee, for applicants with 'demonstrated skills and experience and support from among Wai claimants, hapū or rangatahi'. The Crown has acknowledged that those who had raised concerns over hapū representation were not asked whether this addressed their issues.[69] Two more claims, Wai 1148 and Wai 1837 were included. (The latter has brought a claim in this inquiry.) Provision for a parallel Waitangi Tribunal process was contemplated, but only if all parties involved 'including all Wai claimants' agreed, and if the trust board and the Crown could agree on the design of the process.[70]

On 7 August 2015, OTS and Te Puni Kōkiri provided a report to their respective Ministers seeking their agreement to recognise the mandate of the Ngātiwai Trust Board to represent Ngātiwai in Treaty settlement negotiations.[71]

5.3.4 Crown efforts to resolve problems identified with the mandate

For almost two years following the vote, up until August 2015, the trust board and OTS expended much time and effort to resolve the problems that persisted with the Deed of Mandate. In the end they were unsuccessful, and the concern among OTS officials that they would face 'litigation' in the Waitangi Tribunal, has proved correct. Indeed, the briefings given to Ministers in 2015, which recommended recognition of the mandate, warned that despite the Crown having taken 'all reasonable steps' litigation was still expected.[72]

But was that assessment accurate? Had the Crown taken all reasonable steps?

To begin to answer this question we use a different lens than that adopted by OTS officials. In our view, while officials were concerned about the risk of litigation, the greater risk was that the Crown's actions would breach the principles of the Treaty of Waitangi. We saw no evidence that OTS viewed its responsibilities in this light, particularly in terms of active protection of hapū.

When OTS met submitters on the mandate in October 2014 it was the first time they had engaged in a serious face-to-face way with the Ngātiwai claimant community. The message they took away was unambiguous: that the trust board structure did not allow for hapū governance.[73]

The Crown submitted that, because the report of the Ngāpuhi Mandate Tribunal was released after OTS had called for, assessed, and responded to submitters' concerns, it was unreasonable to expect that officials should have taken its findings into account: 'the mandating process for Ngātiwai was completed prior to the release of the *Ngāpuhi Mandate Inquiry Report*'.[74] But as we discuss in chapter 3, this was hardly the first time that the Tribunal had made unambiguous statements about the Crown's responsibilties to hapū.

OTS did not appear to consider seriously that hapū should be involved in making decisions about when and how their historical Treaty claims were to be settled. While the Crown was prepared to insist on some changes to the mandate, notably the inclusion of certain claims in August 2013, it had no appetite to require that the underlying problems with the trust board's structure (discussed in chapter 4) be addressed.

OTS acknowledged that governance, and hapū participation in governance, was a key concern for opponents to the mandate, but they concluded that this meant they wanted better 'engagement' from the trust board. The two concepts and their outcomes are very different. Governance in this context is the ability for hapū to make decisions and choices according to their tikanga, yet the officials' solution was to recommend that the trust board needed to communicate and engage better with those opposed to the mandate to settle their claims.

In our assessment, opponents of the mandate generally had a good understanding of the proposed settlement process. They had been engaged, by attending hui, writing to the trust board and OTS, and making submissions, at least since the early days of the mandate strategy.

The lack of a clear conception by the Crown of its

Treaty obligations is apparent in an email from June 2015, when officials advised the newly appointed Chief Crown Negotiator James Willis:

> we don't have any remaining concerns with the draft deed of mandate, we had a good discussion with Ngatiwai regarding providing for hapū voice/role and agree [there] do not need to be any changes to their structure. Ngatiwai are in the next couple of weeks having a meeting with hapū representatives to discuss how/what type of role they can play going forward. It is great that this is happening ahead of mandate recognition as it shows that they are taking positive steps to address concerns raised and may help with any potential Waitangi Tribunal litigation. It is likely a mention of the pro-active response to hapū will be reflected in the DoM document.[75]

It appears to us that the Crown did not have a clear view of its Treaty obligations to the hapū opposed to their inclusion in the mandate, and were therefore not prepared to insist that any substantive changes be made to the Deed of Mandate to address the issues raised. The proposed advisory roles were a superficial response only, which did not deal with the more fundamental issues of hapū representation and a governance role for them.

5.4 The Decision to Recognise the Mandate

The decision to recognise a mandate to settle historical Treaty of Waitangi claims is made by the Minister for Treaty of Waitangi Negotiations and the Minister for Māori Development. OTS and Te Puni Kōkiri provided a joint briefing to the Ministers on 7 August 2015 recommending that the Deed of Mandate be recognised. Ministers raised a number of concerns and questions and consequently changes were made to the briefing over several iterations.[76]

Ministers sought clarity as to the relative importance of the vote and the submissions process. The Minister of Māori Development asked that information about the submissions be put in an annexeure 'so that it is not in the main brief, or at least separate it away from the voting information'. He asked officials to be clear in their briefing that 'the voting process for the Ngātiwai Trust Board is the most important factor to consider in determining whether to recognise the mandate'.[77] In response, OTS agreed to 'set out that importantly, we consider the vote conferred a mandate'. However, they stated:

> We do not consider it appropriate to say that the voting process for the Ngātiwai Trust Board is the most important factor to consider in determining whether to recognise the mandate of the Ngātiwai Trust Board. We consider there are many factors which need to be taken into consideration when making a decision on whether to recognise a mandate.[78]

One reason for officials' caution may have been the lack of clarity at the time the vote was held as to who, exactly, comprised Ngātiwai. At that time it was clear that significant issues remained to be addressed. The vote was concluded in October 2013 but the Crown did not recognise the mandate until 21 October 2015, two years later.

Officials emphasised the work that had been done in response to submissions:

> We consider the work undertaken since submissions were received will have made the mandate stronger and more robust. We consider it important to show that [the] Ngātiwai Trust Board tried to address concerns and that Ministers were aware of these efforts at the time they made their decision . . .[79]

It is not clear to us, though, that the issues of claimant definition that the Crown was so concerned about in June 2014 had been addressed so that the Crown could be reasonably satisfied the definition properly comprised te iwi o Ngātiwai. The final report recommending recognition of the mandate was provided on 15 October 2015. The matter of hapū representation remained 'a complicated issue'. Selecting hapū representatives was difficult because 'besides the entities representing the hapū who oppose their inclusion in the DoM, there are no identifiable representative structures within Ngātiwai from which to choose hapu representatives'. However, all hapū would

be enabled to 'provide advice' to the trust board 'on their involvement in the settlement process'. The report went on to make the following comments:

> In general we do not interfere with the representative structure of entities as we consider this should be based on the tikanga of the claimant community. Some entities may have representatives appointed on a marae basis, others may be appointed on a hapū or iwi-wide basis.
>
> We do not consider it appropriate or practical that NTB change its marae-based structure. We discussed the possibility of hapū-based representatives on the TCC, however, we agree with NTB that this could create logistical problems. Introducing a representative on the TCC for each hapū would make the TCC a considerably large group, which may impact the TCC's effectiveness as a committee leading the Treaty claims work for NTB.
>
> We consider the engagement NTB has had and the establishment of two new roles on the TCC addresses concerns about hapū representation to a suitable extent. We consider the new TCC members will be able to provide a voice for hapū. NTB is aware of the Crown's expectation that it will uphold this commitment and this will be checked as part of mandate maintenance.[80]

The report mentioned the intention to introduce new roles on the Treaty Claims Committee, saying these would address 'concerns about hapū representation to a suitable extent', but not that these roles would be advisory only.

The report then went on to say the trust board was considering different models for a post settlement governance entity (PSGE) and that this demonstrated the board was 'aware of concerns on the matter of hapū and is actively looking at ways to address them'.[81]

The report considered it 'highly likely' the three hapū groups that were opposed to being included in the mandate would file applications for an urgent inquiry into the Crown's recognition of the mandate:

> There is no way of fully mitigating this risk without removing these hapū from NTB's DoM. Removing these hapū would undermine NTB's desire to represent the members of these groups who identify as Ngātiwai as well as the comprehensiveness of a Ngātiwai Treaty settlement. It may also set a precedent for removal of hapū from other claimant definitions based solely on opposition from some members of those hapū.[82]

The concentration on mitigating the Crown's risk may have hindered officials from seeing the inconsistency of their position. We agree that hapū should not be removed from a claimant definition (and a Deed of Mandate) solely because of opposition from some individual hapū members. However, it is equally undesirable to include hapū only because some individual members support it.

Officials had met or sought to meet the hapū to understand their opposition. They had asked the trust board to clarify the extent to which these groups were included in the Deed of Mandate, and the board had done this by signing 'an accord with Ngāpuhi and Ngāti Whātua setting out a cooperative approach to ensure the interests of shared hapū are treated appropriately'.[83]

Ngātiwai Trust Board 'processes' were highlighted as a further area of concern, including the trust deed, however officials considered the trust board 'meets Crown criteria for transparency and accountability to the claimant community'. The trust board had, in officials' view, 'identified the aspects of its internal operations that people are concerned about and taken positive steps to address them'.[84]

Although officials identified a risk that 'opposing members of the claimant community' could seek to withdraw the mandate, they considered the 82 per cent vote in favour of the mandate meant it would be unlikely to succeed.[85]

The mandate of the Ngātiwai Trust Board to settle historical Treaty claims was recognised by the Crown on 21 October 2015, when the Ministers signed a letter to the trust board confirming their decision.[86]

5.5 Crown Actions: Conclusion

The Crown told us it had only a limited role in the mandating process,[87] but the evidence does not support this claim. In our assessment the Crown influenced the timing,

pace, form and scope of this mandate at all stages. As we see it, the Crown used its influence to suit its own settlement priorities and this involvement occurred at all levels, from Ministers down to OTS officials. To summarise:

- The decision to offer separate hapū settlements to Ngāti Manuhiri and Ngāti Rehua impacted on the dimensions of the Ngātiwai large natural group, and impacted negatively on whanaungatanga relationships.
- The Crown's settlement priorities and the pace of settlement influenced the trust board's early efforts to develop a mandate strategy. Little attention was given to the extent of engagement with hapū.
- The Crown's premature recognition of the mandate strategy prevented hapū from adequately engaging with the trust board through the first round of submissions.
- Despite endorsing the mandate strategy before receiving and addressing submissions, and requiring the late inclusion of additional Wai claims, the Crown recommended pushing on with a vote on the mandate.
- In contrast to those earlier actions, the Crown subsequently took only limited steps to assist the trust board to resolve the problems made evident through the main submissions process.
- Having identified governance as a key issue for some hapū, the Crown recommended communication and engagement as the solution.
- The Crown approved inclusion of shared hapū in the claimant definition despite acknowledging there was insufficient research to justify their inclusion.
- The Minister of Māori Development sought to downplay the significance of submissions opposing the mandate.
- The Crown decided to recognise the mandate in the face of acknowledged unresolved issues and despite anticipating claims to be made to the Waitangi Tribunal.

We acknowledge that the Ngātiwai Trust Board sought to take leadership on behalf of Ngātiwai to enter settlement negotiations. We also acknowledge that the Crown was not directly involved in the development of the claimant definition and is not responsible for the structure of the trust board. Nonetheless, the Crown's actions and omissions prevented the board and hapū from early engagement over the issues that have been the focus of this inquiry, and have contributed to the problems evident in this inquiry.

The approach taken by the Crown, in our view, has focused on its desired end result of an early settlement at the expense of ensuring the rights and interests of those affected are properly protected. A succinct example of this approach comes from the Chief Crown Negotiator James Willis, who in January 2015 told the trust board's Treaty Claims Committee:

> the airing of grievances was an important and cathartic process, but that ultimately a Tribunal process culminating in a report does not result in a settlement and does not even necessarily impact a settlement. He said this was not a case of the Government trying to shut down the Tribunal process, but rather the Government focussing on settlements and redress. He said it was up to NTB to communicate this message to its claimant community.
>
> James referred to the issue raised by some submitters in regards to NTB's marae-based constitution. He said he didn't believe this was an issue; hapu are always changing, where marae are constant, focal points for the people. On this basis he believed marae-focussed representation was acceptable for an entity seeking a mandate.[88]

In the *East Coast Settlement Report* the Tribunal quoted a former Treaty settlements Minister, Michael Cullen, who in 2007 said 'the interests of particular iwi, hapu groups or individuals need not be subsumed during the negotiations process. The negotiations framework can allow for these various interests to be addressed'.[89] In the context of the present inquiry, the central question can be framed in this light. Are the interests of hapū, whānau, and individuals being subsumed to those of the iwi, as represented by the Ngātiwai Trust Board?

Our analysis of the structure of the mandated entity in chapter 4, and the way consent was sought for it, showed

that the answer to that question is yes. OTS essentially acknowledged this in its briefing to Ministers, when it said 'every attempt' had been taken to mitigate the risk of hapū seeking redress through the Waitangi Tribunal, short of removing them from the mandate. In saying they 'do not interfere with the representative structure of entities as we consider this should be based on the tikanga of the claimant community', OTS has misunderstood both the meaning of representation and the requirements of tikanga.

We note that 'hapū-based representatives' were considered for the trust board's Treaty Claims Committee, but were rejected because the enlarged size of the committee 'could create logistical problems'.[90] We cannot accept this as a justification not to address the issue of hapū representation and accountability in the Deed of Mandate. Sufficient flexibility is required within the negotiations framework to enable all interests to be addressed. Officials, having identified opposition by some hapū, seem to have decided that any solution would need to involve all hapū. Why this should be is never explained. This kind of thinking seems to have resulted in the idea that 'hapū', 'rangatahi', or 'Wai claimants' as types of interest group needed to have more input into the mandated entity. Practically, in Treaty terms, the Crown should recognise the tino rangatiratanga of all hapū, but especially the hapū who have objected to their inclusion in the Deed of Mandate: Patuharakeke, Te Kapotai, and the Te Waiariki, Ngāti Kororā, and Ngāti Takapari group.

Notes

1. Document A9(a), exhibit I, p 93
2. Document A2(a), exhibit B, p 191; doc A43(b), exhibit J, p 454
3. Document A43(b), exhibit J, pp 458, 460
4. Document A94, pp 2–3
5. Transcript 4.1.1, pp 406–407
6. Submission 3.3.19, p 12
7. Document A94, p 3; submission 3.3.19, p 12
8. Submission 3.3.19, pp 12–13
9. Document A73(a), exhibit 2, p 11
10. Document A23(a), exhibit H, p 27
11. Document A2(a), exhibit B, p 192; LNG status was recognised by the Minister of Māori Affairs and Minister for Treaty of Waitangi Negotiations on 28 August 2012, although we have not seen that letter: see doc A73(a), exhibit 7, p 79); doc A43(b), exhibit J, pp 308–309.
12. Document A43(b), exhibit J, pp 306–307
13. Ibid, p 528
14. By September 2011, the date for completion had been pushed out to 2016: 'Nats Admit Treaty Settlements "Goal" will be Missed', 17 September 2011, http://www.stuff.co.nz/national/politics/5643180/Nats-admit-treaty-settlements-goal-will-be-missed (accessed 8 May 2017).
15. Document A3, p 2
16. Document A99(a), exhibit 1, p 2
17. Document A2(a), exhibit B, pp 27–28; doc A19(a), exhibit L, pp 24–57
18. Document A19(a), exhibit L, p 34
19. Ibid, pp 34–35
20. Ibid, exhibit M, pp 58, 68–70
21. Document A28(a), exhibit 4, pp 20–21
22. Document A73(a), exhibit 7, p 77; doc A19(a), exhibit M, pp 58–93
23. Document A73(a), exhibit 7, p 77; submission 3.3.23, p 45
24. Document A28(a), exhibit 11, p 62
25. Document A99(a), exhibit 1, pp 2, 18
26. Document A73(a), exhibit 7, p 77, exhibit 8, p 93
27. Waitangi Tribunal, *The East Coast Settlement Report* (Wellington: Legislation Direct, 2010), p 67
28. Document A19(a), exhibit N, p 97
29. Ibid, pp 97–99
30. Ibid, p 95
31. Ibid, p 98
32. See, for example, document A23(a), exhibit A, p 1.
33. Transcript 4.1.1, p 261
34. Ibid, pp 261–262
35. Document A62, p 35. A February 2014 OTS briefing to its Minister noted 93 submissions, with 49 in support, 43 opposed, and one neutral: doc A73(a), exhibit 7, p 77.
36. Document A38(a), exhibit F, pp 58–59
37. Document A99(a), exhibit 3, p 39
38. Document A73(a), exhibit 8, p 97
39. Transcript 4.1.3, p 216
40. Document A62, p 34
41. Document A28(a), exhibit 4, p 21
42. Ibid, exhibit 1, p 3; doc A19(a), exhibit M, p 88
43. Document A62, pp 29–34; doc A91, p 6
44. Document A91, pp 6–7
45. Document A38(a), exhibit F, p 59
46. Ibid, exhibit E, p 50
47. Ibid, pp 50–51
48. Document A73(a), exhibit 7, p 84
49. Document A106(a), exhibit C, p 11
50. Ibid, p 14
51. Document A62, p 41
52. Document A28, p 20
53. Document A19(a), exhibit O, pp 124–126
54. Document A91, pp 7–8
55. Document A69(a), p 1

56. Document A73(a), exhibit 8, pp 196, 198
57. Document A39(a), exhibit C, p 8
58. Document A91, p 9; doc A2(a), exhibit L, pp 405–406
59. Document A127, pp 2–5, 8–9
60. Document A73(a), exhibit 8, p 87
61. Ibid, exhibit 1, p 2, exhibit 8, p 87
62. Ibid, exhibit 8, p 198
63. Document A91(a), exhibit F, p 36
64. Document A2(a), exhibit H, pp 319–328
65. Ibid, exhibit H, p 322
66. Document A2, p 6
67. Document A23(a), exhibit H, p 27
68. Ibid, exhibit H, p 39
69. Transcript 4.1.1, p 294
70. Document A91, p 12; doc A2(a), exhibit B, pp 15–16, 21, 24. Te Puni Kōkiri's advice to its Minister was that the criteria for a parallel process were requirements of the Crown rather than the trust board: doc A128, p 19.
71. Document A91(a), exhibit F, pp 35–58
72. Ibid, exhibit I, p 127
73. Document A2(a), exhibit G, pp 309–310
74. Submission 3.3.23, p 38
75. Document A73(a), exhibit 8, p 239
76. Document A91(a), exhibits F–I, pp 35–156
77. Document A128, p 22
78. Ibid, p 21
79. Ibid, p 21
80. Document A73(a), exhibit 6, p 69; doc A91(a), exhibit I, p 133
81. Document A73(a), exhibit 6, p 69
82. Ibid, p 71
83. Ibid
84. Ibid, p 70
85. Ibid, p 72
86. Document A2(a), exhibit A, p 1
87. Submission 3.3.23, p 44
88. Document A73(a), exhibit 8, p 242
89. Waitangi Tribunal, *East Coast Settlement Report*, p 66
90. Transcript 4.1.1, p 269

CHAPTER 6

FINDINGS AND RECOMMENDATIONS

6.1 Introduction

Ngātiwai is a relatively small coastal iwi bordered by its larger neighbours; to the north Ngāpuhi, to the south Ngāti Whātua. Its core group of hapū around Whangaruru and Whananāki traditionally travelled widely and regularly across the outer Hauraki Gulf, forming close kinship bonds with other coastal communities. These extend into the Bay of Islands to the north, east to Aotea (Great Barrier Island), and south to Mahurangi. The whakatauki 'ngā kōpikopikotanga maha o Ngātiwai' speaks to this overlapping interconnectedness and constant sea journeying as the defining feature of what it is to be Ngātiwai.

The origins of Ngātiwai are diverse, resulting in a wide network of relationships and whakapapa connections. There is no eponymous ancestor as Rāhiri is to Ngāpuhi, yet descent from the tūpuna Manaia I and Manaia II and their descendants is said to form a unique Ngātiwai heritage. But most Ngātiwai hapū – eight out of 12, according to the Ngātiwai Deed of Mandate – are 'shared' and affiliate to other iwi, primarily Ngāpuhi but also Ngāti Whātua.

The core Ngātiwai hapū exercise ahi kā within their small coastal communities. Since the mid-1980s, marae have been to the fore in these communities, and perhaps for this reason these hapū have not developed their own separate governance structures. But the larger shared hapū, including the hapū claimants in this inquiry, Patuharakeke and the Te Waiariki cluster, have continued to organise and to make their own decisions. They have structures to represent their interests with groups such as the Crown, the Ngātiwai Trust Board, and Tūhoronuku. Their histories show that hapū remain an essential source of identity and organisation in the inquiry district.

The Crown has recognised the mandate of the Ngātiwai Trust Board to represent Te Iwi o Ngātiwai in negotiating a settlement of all the remaining historical Treaty claims of Ngātiwai. To the extent the claims of the hapū included in the mandate relate to Ngātiwai tūpuna, the settlement of these claims will be negotiated by the trust board. The central question we must determine in this urgent inquiry is whether the Crown has breached the principles of the Treaty of Waitangi by recognising this mandate without the support or consent of the hapū named in it.

6.2 Principles of the Treaty – Active Protection

It is the Tribunal's long-standing assessment that the Crown has a duty to protect actively the tino rangatiratanga of Māori communities. We have examined what the parties told

us about their exercise of tino rangatiratanga in the context of Ngātiwai and of Treaty settlement negotiations. Two aspects stood out: first, the importance of ensuring collective decision-making according to tikanga, and secondly that whanaungatanga obligations can be maintained. It was emphasised to us that tino rangatiratanga was not only exercised by hapū, but also by whānau, iwi, marae, and trust boards at certain times and according to their particular circumstances. In chapter 3, we concluded that the Crown had an obligation to take account of this feature of the 'Ngātiwai claimant community' as it sought to enter Treaty settlement negotiations.

Neither the Crown nor the Tribunal has previously maintained that hapū consent is a requirement to achieve a mandate.[1] In situations where hapū play a central role in the social and political life of their communities, however, the Crown has obligations to ensure that hapū can determine how and by whom they will be represented in settlement negotiations and are able to make decisions according to their tikanga. In this inquiry the hapū claimants have asserted their tino rangatiratanga and we accept that hapū are an essential source of identity and organisation within Ngātiwai. This is particularly so for the shared hapū.

As we set out in chapter 3, we consider the minimum standards established by the Ngāpuhi mandate Tribunal provide the appropriate test of the Crown's duty of active protection in this urgent inquiry.

In the context of its decision to recognise a mandate, the Crown has obligations to:

- ensure that it is dealing with the right Māori group or groups, having regard to the circumstances specific to that claimant community so as to protect its intra-tribal relationships;
- practically and flexibly apply the large natural groups policy according to the tikanga and rangatiratanga of affected groups;
- allow for an appropriate weighing of interests of groups in any recognised mandated entity, one that takes into account factors including the number and size of hapū, the strength of affected hapū, and the size and location of the population; and
- recognise that the structure of the mandated entity must allow for hapū interests to be tested and heard.

An assessment against these standards provides the basis for protecting actively the rangatiratanga and tikanga of hapū that are opposed to their claims being negotiated by the mandated entity. The protection of hapū interests must then be weighed with that of non-hapū interests in the modern context.[2]

The hapū claimants in this inquiry, Patuharakeke, Te Waiariki, Ngāti Kororā, and Ngāti Takapari, and the interested party Te Kapotai, were also claimants in the Ngāpuhi mandate inquiry, and our assessment of their strength or importance to their communities does not change just because we are examining a different mandate. The Crown was in a position to consider the Ngāpuhi standards given the timing of the report's release, and it had the opportunity to pause and consider that Tribunal's findings, and apply the standards. We consider that, had the Crown applied these standards to Ngātiwai, this would have confirmed its duty to protect actively the tino rangatiratanga of the hapū.

In recognising the mandate of the Ngatiwai Trust Board, the Crown should have been sufficiently familiar with the particular circumstances and tikanga of Ngātiwai and its affiliated groups in order to meet its active protection obligations. We do not consider that the Crown took the steps necessary to reasonably inform itself, so it could properly make this assessment.

In recognising the mandate of the Ngātiwai Trust Board to negotiate a settlement of the historical Treaty claims of Te Iwi o Ngātiwai, the Crown failed to protect actively the tino rangatiratanga of the hapū included in the Deed of Mandate. We now set out the ways in which the Crown has failed to discharge its duty.

6.2.1 Accelerated settlement prioritised over active protection

The Crown told us that its role is to recognise mandates, not to confer them, and that it had only limited involvement in the development of the trust board mandate. But the evidence presented in this inquiry does not support this claim.

The Crown played a significant and determinative role in the events leading up to the vote on the trust board's mandate. This included influencing the timing and pace, as well as the form and scope of the mandate. In 2009, the Crown decided to seek separate settlements for the historical Treaty claims of Ngāti Rehua and Ngāti Manuhiri, two hapū of Ngātiwai. Although the Ngātiwai Trust Board agreed to this approach, it was not without misgivings. Agreement constituted a significant demonstration of good faith by the board. The board's subsequent single-minded focus on attempting to maintain the unity of the iwi during mandating was a direct consequence of these settlements.

Until 2012, the Crown sought to include Ngātiwai within a larger Northland settlement, but then changed its approach and decided to recognise Ngātiwai as a distinct group for settlement purposes as part of an accelerated settlement process. The deadlines which were set for the Ngātiwai Trust Board to seek a mandate to represent the iwi were timed to meet other policy priorities: the government's goal to achieve all Treaty settlements by 2014, and also the requirements of the government's asset sales programme.

Clearly, in 2013 the trust board was not ready: it had not yet researched nor decided which of Northland's East Coast hapū were Ngātiwai and which were not. The various iterations of the Deed of Mandate that the trust board produced responded to the requirements laid down by the Office of Treaty Settlements. OTS did not insist on further research to settle questions of claimant definition or which claims would be settled, before allowing the process to proceed.

In fact, the Crown pre-empted proper consideration of those encompassed by the trust board's mandating strategy, by endorsing the strategy in July 2013 before considering submissions and then advising the board to proceed to a vote. The claimant definition was to be refined and confirmed *during* settlement negotiations, requiring voters to endorse a nebulous entity of which some were only potentially a part. At the same time, Crown settlement practice and in particular the Crown's understanding of whakapapa relationships were behind its instruction to include additional Wai claims in the mandate. In this way Te Waiariki was brought within the mandate by Crown direction and without proper consultation or provision for hapū decision-making.

The evidence of the Ngātiwai Trust Board made clear to us the extent to which the form and content of the Deed of Mandate responded to Crown priorities rather than the tikanga of included hapū. The board also felt constrained by Crown policy when it sought to respond to concerns that were raised with the mandate.

The Crown's own aims for robust and equitable settlements, as expressed in the Office of Treaty Settlements' *Red Book* guide to settlement negotiations,[3] have been subsumed by its settlement priorities. This leads us to question the effectiveness of the policies setting out the Crown's approach to negotiating Treaty settlements.

6.2.2 Crown errors damaged whanaungatanga

The Crown has a duty to ensure it is dealing with the right Māori group or groups, having regard to the circumstances specific to that claimant community, so as to protect its intratribal relationships. The claimants in this inquiry agreed with the Ngātiwai Trust Board that the mandating process has been hugely destructive of relationships. Whanaungatanga has been damaged.

Whanaungatanga is a principle that underpins tikanga. Therefore, to avoid damage to whanaungatanga the Crown needs to ensure that hapū – and other groups – are able to make decisions and resolve disputes according to their tikanga. In the context of developing and agreeing to the mandate, the lack of proper representation and provision for hapū decision-making within the mandated entity meant this was not achieved. Harm to whanaungatanga also resulted from the uncertainty as to who is included within the mandate, and on what basis.

We note that the Tribunal has previously made a number of findings emphasising the need for the Crown to respect tikanga during mandating. The Te Arawa settlement process Tribunal in its 2007 report stressed the importance of the Crown knowing and understanding 'the tikanga that gives practical expression to the cultural preferences underpinning the exercise of tino rangatiratanga,

kaitiakitanga, mana, and Māori social organisation'.[4] It appears to us that Crown practices still have not sufficiently evolved to take full account of the range of interests at play in settlement negotiations.

The Crown's early actions in determining the pace, scope, and form of the mandate, set out above, were the major contributing factor to the rifts that now exist among the groups involved in the mandate. Further, Crown officials acknowledged that the Crown's premature endorsement of the mandate strategy was likely to provoke increased opposition and risk of litigation against the Crown. This duly occurred, but the Crown's response focused on minimising risk to its position rather than any consideration or effort to minimise damage to whanaungatanga.

6.2.3 Ngātiwai Trust Board structure not fit for purpose

The Crown has an obligation to recognise that the structure of the mandated entity must allow for hapū interests to be tested and heard. The Ngātiwai Trust Board is appropriately structured for its current primary purpose under the Māori Fisheries Act 2004 of administering the trust fund. It should not have been recognised by the Crown as fit to negotiate a Treaty settlement representing a population with such a large proportion of 'shared' hapū, that is, hapū associated with multiple iwi. As a unitary body with control and decision-making concentrated at the top, in the board, the structure has struggled to respond to the concerns raised about its ability to represent and be accountable to its members effectively in the context of settlement negotiations. The trustees do not in fact represent any Ngātiwai hapū, let alone the 'shared' hapū, nor the marae they utilise: the trust deed restricts the trustees to managing the interests of all Ngātiwai beneficiaries in relation to the trust fund.

Trustees are elected from marae and the Crown suggested that this meant they were adequately representative of particular communities. In some cases the marae and hapū communities significantly overlap, but there is no evidence that marae committees or trustees have any authority to make decisions or speak for hapū on the settlement of Treaty claims. Nor, for some marae communities, is a marae representative elected for any purpose appropriate to the circumstances of Treaty settlement. More fundamental, however, is that trustees, however they are chosen, are accountable to the entire group and not to the community that selected them.

After the mandate was formally submitted to the Crown for recognition by Ministers, OTS undertook a public submissions process. The issues we have identified with the structure of the trust board were raised in these submissions. In particular, the Crown was aware that the lack of proper hapū representation was of particular concern. In this context, we note the evidence presented that the Minister of Māori Development sought to downplay the significance of submissions opposing the mandate when deciding whether to confirm the mandate in favour of the trust board.

The Crown responded by treating the issue of hapū representation as a matter of perception. It suggested a process of communication and engagement as an appropriate response. Submitters were not asked if this would allay their concerns. Nor were they invited to contribute to a solution.

In addition, the trust board proposed several advisory bodies and roles, intended to provide a place for hapū, kaumātua, Wai claimants, and rangatahi to advise the trust board during the negotiation process. These proposals amount to an acknowledgement that the trust board, on its own, is unable to provide meaningful representation of these groups. But the proposed advisory bodies and roles do not offer meaningful representation of these groups either, as advisory groups cannot make choices and participate in decision-making.

The trust board has encountered great difficulties in attempting to reform its governing deed. These possible changes do not appear to address the capacity and suitability of the board to represent Ngātiwai in settlement negotiations. The board told us its preference is to focus on ensuring a post-settlement governance entity can be appropriately structured to meet the needs of its community. That is certainly a matter of great importance. However, as Ngātiwai begin to restore their relationship with the Crown – a fundamental aim of the settlement

process – questions of representation and accountability are too important to be left for later. The structure of the trust board is a matter for the trustees and beneficiaries. Its deficiencies do not amount to an action or omission of the Crown. However, the board's insistence on kotahitanga or unity, and its evident reluctance to consider alternatives that would provide better 'flax roots' representation, seem to us to stem in part from the harm it perceives has been caused by the two earlier hapū settlements.

We conclude as a matter of fact that the trust board is incapable of representing the interests of hapū in negotiations as presently structured. In recognising the mandate of the trust board, the Crown has not met its obligation to recognise that the structure of the mandated entity must allow for hapū interests to be tested and heard.

6.2.4 Hapū did not consent to inclusion; no workable withdrawal mechanism

We have already stated our concern at the adequacy of research available concerning the claimant definition, especially prior to the vote on the mandate strategy. No new, generally agreed research had been carried out to inform and clarify issues concerning claimant definition. Open, hapū-managed wānanga for whakapapa were not insisted upon nor facilitated by the Crown prior to recognising the mandate. The research relied on by the trust board showed many deficiencies. The process of determining the claimant definition for the mandate was unsatisfactory and incomplete at the time the mandate was voted on. Two years later when the mandate was recognised by the Crown, problems remained. This is evident from the fact that Te Kapotai and their Treaty claims were removed from the mandate after it had gained Crown recognition.

Hapū, whānau, and their kaumātua were not properly informed or consulted in hui-ā-hapu or other processes conducted according to tikanga about their inclusion in the Deed of Mandate. Nor was their consent sought to the mandate.

Voting on the mandate strategy took place from August to September 2013, at the same time as information hui were held and submissions were called for. The Crown points to the significant proportion who voted in favour of the strategy (82 per cent of participants) as the basis for its position that the mandated body is essentially sound and has broad support.

But, the Deed of Mandate did not include any mechanism to gain hapū consent to the mandate. Voting papers did not require voters – whether registered with the trust board or not – to state their hapū or marae. The voting papers were framed in such a way that support or consent from hapū or marae for the mandate strategy could not be assessed: there is no way to verify the Crown's assertion that marae can represent hapū.[5] Nor did the vote reveal which hapū support or oppose the mandate.

The submissions process was the only way that hapū were able to inform the Crown of their support or opposition to inclusion in the Deed of Mandate. This was not, however, designed as a process of securing consent but as a means of gathering feedback.

Hapū cannot withdraw from the mandate. Only the entire group, 'Te Iwi o Ngātiwai', can withdraw support. And whereas the trust board received substantial funding during the mandating process, no funding is available to any group wishing to initiate a process for withdrawal of the mandate from the trust board. The costs for any individual hapū or group of hapū attempting such a process would be prohibitive and therefore unworkable, rendering empty the provision of the withdrawal mechanism as offered.

The reasons why Te Kapotai were removed from the Deed of Mandate are unclear to us, as is the process that was followed. We saw no evidence that the withdrawal processes in the Deed of Mandate were considered. What is clear is that the hapū had no say in the decision. The lack of provision for hapū decision-making is of particular concern to us when Patuharakeke have asked but find themselves unable to withdraw, while other Ngātiwai hapū have been offered separate settlements. The Crown's approach has been inconsistent at best and challenges the principle of equal treatment.

We acknowledge that many of these matters are within the decision-making power of the trust board, but we also view them in the context of Crown policy and actions that dictated an initially rushed process which saw errors

committed that were not corrected, and the imposition of a claimant definition for a grouping that was large, but neither natural nor flexible.

6.3 Findings

The Crown does not confer a mandate to negotiate settlement of Treaty claims – it is the right of Ngātiwai and its associated communities to determine how they will be represented. The Crown's role is to ensure that it is dealing with an entity that has been properly consented to and authorised by those whom it should be representing. Also, the Crown should ensure that the entity is properly representative and fit for the purpose of representing 'Te Iwi o Ngātiwai', including those shared hapū that agree to be included, in settlement negotiations.

Under section 6 of the Treaty of Waitangi Act 1975, our jurisdiction is to inquire into claims submitted by Māori and to determine whether they are well-founded. We must determine whether the Crown acts or omissions that are complained of are inconsistent with the principles of the Treaty and, if so, whether they have caused or are likely to cause prejudice. Where a claim is well-founded, the Tribunal may recommend to the Crown that action be taken to remove the prejudice or to prevent other persons from being similarly affected in the future. Recommendations may be in general or specific terms and should be practical.[6]

Our findings in relation to Crown actions are:

- The Crown improperly pressured the trust board into responding to the government's timetable and settlement policies.
- The process of determining the claimant definition was unsatisfactory and incomplete at the time the Deed of Mandate was recognised by the Crown.
- The Crown recognised a Deed of Mandate that:
  - does not include mechanisms for individual hapū to consent to the mandate, nor to withdraw from it; empowers an entity, the Ngātiwai Trust Board, that as presently structured is not 'fit for purpose' to represent the hapū named in the Deed of Mandate, including the shared hapū; and
  - proposes supporting structures or advisory bodies that do not provide meaningful representation of hapū.
- There has been unequal treatment of hapū. Some were settled separately or released from the Deed of Mandate, as compared to other hapū who remain within the Deed of Mandate and have no mechanism to withdraw.
- There is no clear and robust Crown policy for dealing with the range of interests, including 'shared' interests, that need to be accounted for in Treaty settlement mandates.
- Crown policy has had the effect of sharing hapū claims among mandated entities without ensuring that hapū are able to exercise tino rangatiratanga.

Our findings above show that, in recognising the mandate of the Ngātiwai Trust Board to negotiate a settlement of the historical Treaty claims of Te Iwi o Ngātiwai without the support or consent of the hapū named in it, the Crown has breached the Treaty principle of partnership and the duty of active protection by failing to protect actively the tino rangatiratanga of the hapū included in the Deed of Mandate. We also find a breach of the principle of equal treatment in relation to the hapū who remain within the mandate and have no realistic prospect of being able to withdraw, vis a vis those hapū earlier allowed by the Crown to settle separately or that have been released from the mandate without explanation.

6.4 The Prejudice

In our account of the mandating process, and in this chapter, we have pointed out the flaws and errors in the Crown's actions. We have also considered the Ngātiwai Trust Board's processes and structure, in order that we might understand why hapū were reluctant to consent to being included in the Deed of Mandate. We must now determine whether the flaws and errors we have identified not only breached the Treaty but also caused prejudice to

the claimants and are therefore well-founded claims. We heard evidence and submissions from all claimants on the central theme of this urgent inquiry concerning the consent and support of those hapū named in the Deed of Mandate. But our findings of prejudice must now focus on the hapū claimants in this inquiry: Patuharakeke, the claimants from within Te Waiariki, Ngāti Kororā, and Ngāti Takapari, and also Te Whakapiko.

We find that the principal prejudice arises from the Crown's failure to actively protect hapū rangatiratanga in its decision to confirm the mandate of the Ngātiwai Trust Board without the support or consent of the hapū named in the Deed of Mandate. This prejudice has manifested in the following ways:

- Hapū are excluded from decisive representation in the Deed of Mandate.
- Consent to the Deed of Mandate was obtained by a vote of individual members of Ngātiwai, which privileged individuals over hapū.
- Hapū will be represented in settlement negotiations by an entity that they have not endorsed.
- The historical Treaty claims of hapū will be negotiated, settled, and extinguished without their consent.
- The Crown has imposed its large natural groups policy on the groups and individuals who are included within the Deed of Mandate in a way that is designed to fit the Crown's settlement programme, as opposed to being flexible and reflecting the tikanga of those involved.
- The Treaty relationship with the Crown has been damaged because whanau, hapū, and the Ngātiwai Trust Board have lost confidence in the Crown and its agencies.
- Whanaungatanga relationships among hapū, and between hapū and the trust board, have been damaged.

We have considered that those within Ngātiwai who support the Deed of Mandate of the Ngātiwai Trust Board could suffer prejudice through further delay to settlement negotiations, uncertainty, extra cost, and lost opportunity if we find these claims to be well-founded. We acknowledge that these risks exist, but we must weigh them against the risk that, if the protesting hapū are included in the negotiations through the Deed of Mandate as it is presently structured, then irreparable harm and prejudice to whanaungatanga, and to the relationship with the Crown, will result. The opportunity must be taken now to address the issues we have identified so that Ngātiwai and the hapū named in the Deed of Mandate can move together to settlement.

6.5 Recommendations

This has been a complex urgent inquiry and recommending the proper course from here on to resolve these well-founded claims is no easy task. In spite of its inherent problems we strongly support the Crown's policy of settling with large natural groups, so long as the policy is applied flexibly, with an understanding of the tikanga of the affected groups, and with the support and consent of the hapū concerned. We are conscious that, should we recommend that hapū be able to withdraw from the mandate, it is highly likely that any hapū who do so will have to wait a very long time to settle because the Crown will move on with other priorities. The Crown told us it does not wish to negotiate a separate settlement with Patuharakeke.[7] The Ngātiwai Trust Board told us the Crown had refused to entertain any further separate settlements with Ngātiwai hapū.[8]

One option is to recommend that the present mandate be withdrawn, that another entity such as a rūnanga or taumata be established, and that fresh negotiations commence with the Crown. We have carefully considered this option, but we are reluctant to recommend this because our remit is to find practical solutions: this option would cause prolonged further delay, perhaps lasting years. Even though those who voted in favour of the trust board's mandate are only a small proportion of Ngātiwai, they nevertheless participated in the vote. Those who favoured the mandate made up a minority of submissions, but they were a significant minority. It would be unfair to those individuals to deprive them of a timely settlement.

Fundamentally, though, we do not believe Ngātiwai was ready to settle when the trust board commenced the mandating process. The Crown must now give Ngātiwai an opportunity to debate and work through the issues we have identified. At our hearings we discerned genuine goodwill and willingness among all parties – trust boards, hapū, and whānau – to seek a durable and mutually acceptable outcome that is tika, that repairs the damage to whanaungatanga, and that respects the rangatiratanga of all involved.

We recommend that the negotiations process be paused so that the following matters can be attended to.

6.5.1 Mediation

We recommend that mediation or facilitated discussions take place to debate the unsatisfactory elements of the Deed of Mandate that we have set out. There should be an agreed number of hui involving all parties, including the trust board, conducted by an agreed mediator, mediators, or facilitators, to seek agreed formulae or acceptable solutions. Because we consider that the Crown is primarily responsible for the poor outcome of the first mandating process, it should fund this reconciliation process.

If agreement is reached on a pathway forward, then re-engagement with the Crown will be required to seek the Crown's agreement to any changes proposed to the Deed of Mandate. If successful, the Deed of Mandate should be amended and re-submitted to the parties, including the 12 hapū listed in section 12, for endorsement or rejection.

6.5.2 The longer route

In the event of rejection by the parties, we recommend withdrawal of the mandate and the setting up of a new entity such as a rūnanga or taumata, named and organised more inclusively and able to represent all hapū and groups in the inquiry district, whether or not they are Ngātiwai. We consider that, if it is required, the Crown should also fund this second process.

6.5.3 Matters to resolve

In either case, the matters to resolve through debate would be as follows:

- the claimant definition;
- an acceptance by the negotiating body that it represents Ngātiwai *and other iwi or hapū* of the takiwā;
- the representation of hapū including kaumātua on the negotiating entity;
- decision-making powers for hapū/kaumatua representatives;
- a non-exclusive name for the revised negotiating body;
- an agreed withdrawal mechanism for single hapū or groups of hapū;
- a disputes resolution mechanism; and
- a generally accepted model for the post settlement governance entity.

We suggest that the trust board could investigate the option of applying to the High Court for directions, or for a variation of the trust deed, to facilitate agreed changes to their structure where the thresholds for approval are unrealistically high.

We also suggest that any hapū or group of hapū that has participated in this process in good faith, and still wishes to withdraw at the end of it, should be assisted by the Crown to settle their Treaty claims as soon as possible, including assistance to collectivise into large natural groups and to obtain mandate(s) from their members.

6.5.4 Finally

The Crown needs to take steps to ensure that its policies concerning 'shared interests' in negotiations are robust enough to avoid the situation that has arisen in this inquiry, where hapū claims are shared among mandated entities without ensuring that hapū are able to exercise tino rangatiratanga within any mandate.

The Crown also needs to ensure that the application of its settlement policies meets its objective which is to achieve robust, durable, and fair settlements, and a restoration of its Treaty relationship with Māori.

Notes

1. Submission 3.3.23, pp 29–30
2. Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Wellington: Legislation Direct, 2015), p 31

3. Office of Treaty Settlement, *Ka Tika ā Muri, ka Tika ā Mua/Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 2015), pp 24–25
4. Waitangi Tribunal, *The Te Arawa Settlement Process Reports* (Wellington: Legislation Direct, 2007), p 22
5. Document 3.3.22, pp 38–40
6. See Treaty of Waitangi Act 1975, preamble, s 6(4).
7. Submission 3.3.23, p 50
8. Submission 3.3.19, p 25

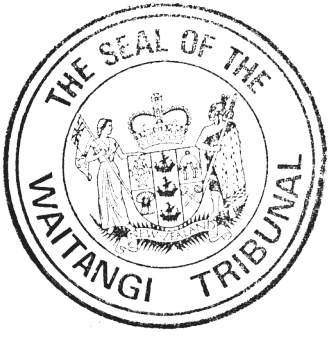
Dated at Wellington this 26th day of October 2017

Judge Sarah Reeves, presiding officer

Dr Angela Ballara, member

Dr Rawinia Higgins, member

Dr Hauata Palmer, member



APPENDIX

SELECT RECORD OF INQUIRY

SELECT RECORD OF PROCEEDINGS

1. Statements

1.1 Statements of claim

Wai 156

1.1

(c) Marie Tautari on behalf of Te Whakapiko hapū of Ngāti Manaia, statement of claim, 7 December 2015

Wai 745, Wai 1308

1.1

(g) Paki Pirihi on behalf of the Patuharakeke Te Iwi Trust Board and Ngawaka Pirihi on behalf of the owners of the Pukekauri and Takahīwai blocks, statement of claim, 4 December 2015

Wai 2181

1.1.1

(d) William Kapea and Michael Beazley on behalf of Te Uri o Makinui, amended statement of claim, 23 December 2015

Wai 2337

1.1.2 Mira Norris and Marina Fletcher on behalf of Te Parawhau on behalf of the descendants of Tiakiriri, Te Parawhau and Ngā Hapū o Whangārei, statement of claim, 7 December 2015

Wai 2544

1.1.1 George Davies and Hūhana Lyndon on behalf of the whānau of Ngātiwai ki Whangaruru, statement of claim, 20 November 2015

Wai 2545

1.1.1 Deirdre Nehua on behalf of herself and her whānau who are of Ngāti Hau and Ngātiwai, statement of claim, 7 December 2015

Wai 2546

1.1.1 Mylie George, Carmen Hetaraka, Mike Leuluai, and Ngaio McGee on behalf of Te Uri o Hikihiki, statement of claim, 7 December 2015

Wai 2548
1.1.1 Te Riwhi Reti, Hau Hereora, and Romana Tarau for Te Kapotai, statement of claim, 11 December 2015

Wai 2549
1.1.1 Pereri Māhanga, Mitai Paraone-Kawiti, Violet Sade, Ngaire Brown, and Winiwini Kingi on behalf of Te Waiariki, Ngāti Kororā, and Ngāti Takapari, statement of claim, 10 December 2015

Wai 2550
1.1.1 Ruiha Collier and Haki Māhanga on behalf of Te Waiariki and Ngāti Kororā, statement of claim, 3 December 2015

Wai 2557
1.1.1 Elvis Reti, statement of claim, 3 March 2016

2. Tribunal Memoranda, Directions, and Decisions

2.5.2 Judge Patrick Savage, memorandum of deputy chairperson advising further decision on formulation of central theme for Ngātiwai mandate inquiry, 26 May 2016

2.5.4 Judge Patrick Savage, memorandum of deputy chairperson concerning new applications for urgency and granting leave for addition of interested parties, 14 December 2015

2.5.7 Judge Patrick Savage, memorandum of deputy chairperson granting leave for addition of interested party, 29 March 2016

2.5.8 Judge Patrick Savage, memorandum of deputy chairperson concerning decision on applications for urgent hearings, 2 May 2016

2.5.9 Chief Judge Wilson Isaac, memorandum of chairperson appointing presiding officer and Tribunal panel, 15 June 2016

2.5.10 Judge Sarah Reeves, memorandum of presiding officer concerning preparatory steps for hearing, 16 June 2016

3. Submissions and Memoranda of Parties

3.1 Pre-hearing stage, including judicial conferences

3.1.2 David Stone and Chelsea Terei for Wai 1544, Wai 1677, Wai 1961, and Wai 1973, memorandum filing application for urgency, 20 November 2015

3.1.5 Bryan Gilling, J Sarich, and S Gunatunga for Wai 1148, memorandum seeking inclusion of Ngāti Hau, Ngāti Wai, and Te Uri o Hikihiki as interested party, 7 December 2015

3.1.6 Tavake Afeaki, Rebekah Jordan, and Neuton Lambert for Wai 619, memorandum seeking inclusion of Ngāti Kahu o Torongare me Te Parawhau as interested party, 7 December 2015

3.1.7 Darrell Naden for Wai 2063, memorandum seeking inclusion of Ngāti Taimanawaiti as interested party, 8 December 2015

3.1.8 Leo Watson for Wai 245, memorandum seeking inclusion of Hori Parata and children of Hinetapu Maihi Māhanga as interested party, 8 December 2015

3.1.28 Andrew Irwin and Clare Tattersall, memorandum responding to urgency applications, 27 January 2016

3.1.33 Bryce Lyall for Wai 2368, memorandum seeking inclusion of Ngāti Kahu as interested party, 29 January 2016

3.1.89 Season-Mary Downs and Heather Jamieson for Wai 2548, memorandum concerning inclusion of Te Kapotai in Ngātiwai Trust Board Deed of Mandate, 24 June 2016

3.1.91 Gregory McDonald, memorandum seeking inclusion as interested party, 3 June 2016

3.1.94 Season-Mary Downs and Heather Jamieson for Wai 1464, Wai 1546, and Wai 2548, memorandum concerning removal of Te Kapotai from Ngātiwai Trust Board Deed of Mandate, 30 June 2016

3.1.106
(a) Ngātiwai Trust Board Trust Deed, 26 July 2016

3.1.206 Justine Inns for Ngātiwai Trust Board, memorandum concerning Ngātiwai Trust Board Trust Deed, 29 September 2016

3.3 Opening, closing, and in reply

3.3.4 Winston McCarthy and Neuton Lambert, opening submissions for Wai 2546, 30 September 2016

3.3.12 Moana Tuwhare, opening submissions for Wai 2337, 2 October 2016

3.3.13 Moana Tuwhare, opening submissions for Wai 156, 2 October 2016

3.3.14 Chelsea Terei, closing submissions for Wai 2544, 23 December 2016

3.3.15 Moana Sinclair and Chris Beaumont, closing submissions for Wai 2545, 23 December 2016

3.3.16 Linda Thornton and Bryce Lyall, confidential closing submissions for Wai 2181, 23 December 2016

3.3.17 Linda Thornton and Bryce Lyall, closing submissions for Wai 2181, 23 December 2016

3.3.18 John Kahukiwa and Julia Harper-Hinton, closing submissions for Wai 2549, 23 December 2016

3.3.19 Justine Inns, closing submissions for Ngātiwai Trust Board, 23 December 2016

3.3.20 Season-Mary Downs and Heather Jamieson, closing submissions for Wai 1464, Wai 1546, and Wai 2548, 23 December 2016

3.3.21 Kelly Dixon and Alisha Castle, closing submissions for Wai 745 and Wai 1308, 23 December 2016

3.3.23 Andrew Irwin and Clare Tattersall, closing submissions for the Crown, 23 December 2016

3.3.24 Janet Mason, closing submissions for Wai 2550, 19 January 2017

3.3.25 Janet Mason, closing submissions for Wai 2557, 16 January 2017

4. Transcripts

4.1.1 First hearing week, Toll Stadium, Whāngārei, 4–6 October 2016

4.1.3 Second hearing week, Waitangi Tribunal, Wellington, 1–2 December 2016

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A Inquiry Documents

A1

(a) Hūhana Lyndon, comp, supporting documents to document A1, various dates
Exhibit A: Kathy Pita to Hūhana Lyndon, 12 December 2013

A2 Emily Owen, first brief of evidence, 7 December 2015

(a) Emily Owen, comp, supporting documents to document A2, various dates
Exhibit A: Ministers for Treaty of Waitangi Negotiations and Māori Development to Haydn Edmonds, 21 October 2015
Exhibit B: Ngātiwai Trust Board Deed of Mandate and attachments, 8 July 2014 (amended 7 August 2015)
Exhibit G: Office of Treaty Settlements to Robert Carpenter, 6 November 2014
Exhibit L: Office of Treaty Settlements to Hūhana Lyndon, 7 August 2015

A3 Tania McPherson, brief of evidence, 7 December 2015

A4 Kristan MacDonald, first brief of evidence, no date
Exhibit A: Ngātiwai Trust Board, chairman's address to special general meeting, 28 February 2015

A5

(a) Te Raa Nehua, brief of evidence, 21 December 2015

A8 Jared Pitman, brief of evidence, 2 December 2015

A9

(a) Guy Gudex, comp, supporting documents to document A9, various dates
Exhibit E: Wayne Peters and Jo Welson, 'Review of Trust Deed: Analysis of Submissions, A Report for the Ngatiwai Trust Board', September 2014

A9—*continued*
(a)—*continued*
Exhibit I: Ngātiwai Trust Board to Minister for Treaty of Waitangi Negotiations, 18 August 2009

A10
(a) Ani Pitman, comp, supporting documents to document A10, various dates
Exhibit D: Patuharakeke Te Iwi Trust Board to Office of Treaty Settlements, 11 November 2015

A11 Marina Fletcher, brief of evidence, 7 December 2015

A12 Mira Norris, brief of evidence, 7 December 2015

A14 Marie Tautari, brief of evidence, 7 December 2015

A17 Sonny George, brief of evidence, 9 December 2015

A19
(a) Willow-Jean Prime, comp, supporting documents to document A19, various dates
Exhibit L: Draft Ngātiwai Trust Board Mandate Strategy, version 3, 13 April 2013
Exhibit M: Ngātiwai Trust Board Mandate Strategy, version 6, 19 July 2013
Exhibit N: Ngātiwai Trust Board Mandate Strategy, supplementary, 8 August 2013
Exhibit O: Ngātiwai Trust Board Deed of Mandate, 8 July 2014

A20
(b) Pereri Māhanga, brief of evidence, 17 December 2015

A21 Ngaire Henare, brief of evidence, December 2015
(a) Ngaire Henare, comp, supporting documents to document A21 various dates
Exhibit A: whakapapa chart

A23
(a) Emily Owen, comp, supporting documents to document A23, various dates
Exhibit A: Office of Treaty Settlements to Ruiha Collier, 9 August 2013
Exhibit H: Ngātiwai Trust Board, draft hapū response report, July 2015

A24 Kristan MacDonald, second brief of evidence, no date
(a) Kristan MacDonald, comp, supporting documents to document A24, various dates
Exhibit A: unidentified newspaper clipping, circa May 1887
Exhibit E: documents concerning Whangaroa Ngaiotonga 4A3A and establishment of Whangaruru-Ngātiwai Trust Board, various dates

A27 Kristan MacDonald, third brief of evidence, no date
(a) Kristan MacDonald, comp, supporting documents to document A27, various dates
Exhibit C: Taipari Munro, brief of evidence, 7 October 2013
Exhibit G: Ngātiwai Trust Board to Season-Mary Downs, 12 January 2016

A28 Tania McPherson, third brief of evidence, no date
(a) Tania McPherson, comp, supporting documents to document A28, various dates
Exhibit 1: Ngātiwai Trust Board, chronology of activities during mandating and hui process
Exhibit 4: notes of hui with Patuharakeke Te Iwi Trust Board representatives, 23 July 2013
Exhibit 11: Patuharakeke Te Iwi Trust Board, submission, 29 July 2013

A32 Pepuere Pene, brief of evidence, no date

A34 Hūhana Lyndon, brief of evidence, 17 February 2016

A38 Guy Gudex, brief of evidence, 23 February 2016
(a) Guy Gudex, comp, supporting documents to document A38, various dates
Exhibit E: Office of Treaty Settlements, notes on meeting with Ngātiwai Trust Board, 3 February 2014
Exhibit F: Office of Treaty Settlements, report on Ngātiwai Trust Board mandating process, 18 November 2014

A39
(a) Ani Pitman, comp, supporting documents to document A39, various dates
Exhibit C: Office of Treaty Settlements, 'Talking Points: Telecon with Ngātiwai Trust Board Treaty Claims Committee', no date
Exhibit D: Office of Treaty Settlements, briefing notes on Patuharakeke, 27 March 2015
Exhibit G: Ngātiwai Trust Board, notes of phone conference with Office of Treaty Settlements, 19 September 2013

Exhibit H: Office of Treaty Settlements to Haydn Edmonds, 6 December 2013
Exhibit K: Office of Treaty Settlements memorandum, 26 February 2015

A40 Ngawaka Pirihi, brief of evidence, 12 February 2016

A41 Bronwyn Mackie, brief of evidence, 12 February 2016

A43 Rowan Tautari, brief of evidence, February 2016
(b) Rowan Tautari, comp, supporting documents to document A43, various dates
Exhibit J: Ngātiwai Trust Board, appendices to mandate strategy, 19 July 2013
Exhibit O: Ngātiwai Trust Board, draft strategy, version 1, pp 7–8, 27 February 2013

A45 Carmen Hetaraka, brief of evidence, 22 February 2016

A45
(a) Carmen Hetaraka, brief of evidence, 28 January 2015

A46 Mylie George, brief of evidence, 19 February 2016

A59 Pereri Māhanga, brief of evidence, 16 June 2016

A62 Ngātiwai Trust Board, Deed of Mandate, 8 July 2014, amended 27 May 2016

A67
(a) Willow-Jean Prime, comp, supporting documents to document A67, various dates
p 1: Justine Inns to Season-Mary Downs and Heather Jamieson, 8 June 2016

A68 Michael Beazley, brief of evidence, 17 August 2016
(a) Michael Beazley, comp, supporting documents to document A68, various dates
Exhibit M: Minister for Treaty of Waitangi Negotiations to Ngātiwai Trust Board, no date

A69 Hūhana Lyndon, brief of evidence, 17 August 2016
(a) Hūhana Lyndon, comp, supporting documents to document A69, various dates
p 1: Office of Treaty Settlements, memorandum to Minister for Treaty of Waitangi Negotiations, 'Meeting with Submitters on Ngātiwai Mandate', 8 October 2014
pp 11–12: Office of Treaty Settlements, 'Talking Points: Telecon with Ngātiwai Trust Board Treaty Claims Committee', no date

A70 Vicki-Lee Going, brief of evidence, 17 August 2016

A73
(a) Mylie George, comp, supporting documents to document A73, various dates
Exhibit 1: Office of Treaty Settlements memorandum, 26 February 2015
Exhibit 2: Office of Treaty Settlements and Te Puni Kōkiri memorandum on Ngātiwai recognition of mandate, 7 August 2015
Exhibit 4: Office of Treaty Settlements and Te Puni Kōkiri memorandum on Ngātiwai recognition of mandate, 10 September 2015
Exhibit 6: Office of Treaty Settlements and Te Puni Kōkiri memorandum on Ngātiwai recognition of mandate, 15 October 2015
Exhibit 7: Office of Treaty Settlements, 'Meeting with the Ngātiwai Trust Board', 3 February 2014
Exhibit 8, p 97: Office of Treaty Settlements memorandum, no date
p 143: Te Puni Kōkiri email to Office of Treaty Settlements, 6 August 2015
p 198: Office of Treaty Settlements memorandum, 22 September 2014
p 210: Office of Treaty Settlements file note, 14 October 2014

A74 Pereri Māhanga, brief of evidence, 18 August 2016

A75 Keatley Hopkins, brief of evidence, 18 August 2016

A76 Guy Gudex, brief of evidence, 22 August 2016
(a) Guy Gudex, comp, supporting documents to document A76, various dates
Exhibit B: Office of Treaty Settlements to Patuharakeke Te Iwi Trust Board, 15 July 2016

A77 Jared Pitman, brief of evidence, 22 August 2016

A79 Ngātiwai Trust Board, draft hapū response report on mandate process to Office of Treaty Settlements, July 2015

A80 Marie Tautari, brief of evidence, 29 August 2016

A82 Rowan Tautari, brief of evidence, 29 August 2016
(b) Rowan Tautari, amended brief of evidence, 30 August 2016

A83 Ruiha Collier, brief of evidence, 29 August 2016

A91 Emily Owen, brief of evidence on behalf of the Crown, 9 September 2016
(a) Emily Owen, comp, supporting documents to document A91, various dates
Exhibit F: Office of Treaty Settlements and Te Puni Kōkiri, briefing to Ministers, 7 August 2015
Exhibit G: Office of Treaty Settlements and Te Puni Kōkiri, briefing to Ministers, 10 September 2015
Exhibit H: Office of Treaty Settlements and Te Puni Kōkiri, briefing to Ministers, 2 October 2015
Exhibit I: Office of Treaty Settlements and Te Puni Kōkiri, briefing to Ministers, 15 October 2015

A92 Paratene Wellington, brief of evidence, 9 September 2016

A93 Sharyn Māhanga, brief of evidence, 9 September 2016

A94 Haydn Edmonds, brief of evidence, 12 September 2016

A97 Rorina Rata, brief of evidence, 9 August 2016

A98 Kristan MacDonald, fourth brief of evidence, 12 September 2016
(a) Kristan MacDonald, comp, supporting documents to document A98, various dates
Annexure 1: Te Witi McMath, 'Investigation of Title to the Offshore Islands, Islets and Rocks off the Coastline of Aotea (Great Barrier Island)', 14 September 1995
(c) Appendix A: Response to questions for Ngātiwai Trust Board witness Kris MacDonald from Judge S F Reeves, 15 December 2016

A99
(a) Tania McPherson, comp, supporting documents to document A99, various dates
Exhibit 1: Ngātiwai Trust Board, minutes of a Treaty settlement information-sharing hui at Te Puna o Te Mātauranga Marae, Whāngārei, 6 April 2013, and at Waipuna Hotel, Auckland, 13 April 2013
Exhibit 3: Ngātiwai Trust Board, minutes of Ngātiwai Trust Board mandate hui, Ngaiotonga Marae, 24 August 2013
Ngātiwai Trust Board, minutes of Ngātiwai Trust Board mandate hui, Te Puna o Te Mātauranga Marae, Whāngārei, 7 September 2013

A106
(a) Guy Gudex, comp, supporting documents to document A106 various dates
Exhibit C: Office of Treaty Settlements, 'Health Check', 17 June 2014
Exhibit F: Office of Treaty Settlements memorandum, 'Briefing notes on Patuharakeke', no date

A127 Draft notes of hui with submitters at Te Puna o Te Mātauranga Marae, Whāngārei, on 18 October 2014

A128 Crown supporting documents, various dates
pp 18–20: Te Puni Kōkiri to Minister for Māori Development, concerning Ngātiwai Trust Board mandating process, 25 September 2015
pp 21–22: Emails between Office of Treaty Settlements and private secretary for the Minister for Treaty of Waitangi Negotiations, 1–2 October 2015

A130 Ani Pitman, brief of evidence, 16 November 2016

A132 Kristan MacDonald, comp, supporting documents, various dates
pp 25–79: Te Witi McMath, 'Investigation of Title to the Offshore Islands, Islets and Rocks off the Coastline of Aotea (Great Barrier Island)', 14 September 1995
pp 186–196: 'Archaeology and History of Human Occupation', in Auckland Regional Council, *Shakespear Regional Park Management Plan* (Auckland: Auckland Regional Council, 1991)