

**IN THE WAITANGI TRIBUNAL**

Wai 2544, Wai 156, Wai 745,  
Wai 2181, Wai 2337, Wai 2545,  
Wai 2546, Wai 2548, Wai 2549,  
Wai 2550 and Wai 2557

**CONCERNING**

the Treaty of Waitangi Act 1975

**AND**

applications for urgent hearings  
from the claimants for Wai 2544,  
Wai 156, Wai 745, Wai 2181,  
Wai 2337, Wai 2545, Wai 2546,  
Wai 2548, Wai 2549, Wai  
2550 and Wai 2557

---

**DECISION OF THE DEPUTY CHAIRPERSON**  
**ON APPLICATIONS FOR URGENT HEARINGS**

2 May 2016

---

## Introduction

1. This decision concerns eleven applications for urgent hearings regarding the Crown's recognition of the Ngātiwai Trust Board's (NTB) Deed of Mandate on 21 October 2015.

## Background

2. On 20 November 2015, the Tribunal received a statement of claim<sup>1</sup> and an application for an urgent hearing<sup>2</sup> from George Davies, Huhana Seve, David Carpenter and Robert Carpenter. The claim was accompanied by the affidavit of Huhana Seve,<sup>3</sup> and registered as Wai 2544, the Ngātiwai Trust Board Deed of Mandate claim, on 24 November 2015.<sup>4</sup>
3. On 24 November 2015, I directed the Crown and any interested parties to file submissions and evidence responding to this application for urgency by 7 December 2015.<sup>5</sup>
4. Since that date the Tribunal has received the following applications for urgent hearings concerning the NTB Deed of Mandate:
  - a. Wai 156, the Oriwa Block claim,<sup>6</sup> lodged on behalf of Marie Tautari and Rowan Tautari, and received on 7 December 2015;
  - b. Wai 745, the Patuharakeke Hapū Lands and Resources claim,<sup>7</sup> lodged on behalf of Paki Pirihi, Ngawaka Pirihi and others, and received on 4 December 2015;<sup>8</sup>
  - c. Wai 2181, the Ngā Uri o Maki-nui Lands (Kapea and Beazley) claim,<sup>9</sup> lodged on behalf of William Kapea and Michael Beazley, and received on 23 December 2015; and
  - d. Wai 2337, the Hapū o Whangārei Terenga Paraoa (Norris and Fletcher) claim,<sup>10</sup> lodged on behalf of Mira Norris and Marina Fletcher, and received on 7 December 2015.
5. The Tribunal has also received the following new claims, which were accompanied by applications for urgent hearings:
  - a. Wai 2545, the Ngātiwai Trust Board Deed of Mandate (Nehua) claim,<sup>11</sup> lodged on behalf of Deirdre Nehua on 7 December 2015, and registered on 9 December 2015;

---

<sup>1</sup> Wai 2544, #1.1.1.

<sup>2</sup> Wai 2544, #3.1.2.

<sup>3</sup> Wai 2544, #A1.

<sup>4</sup> Wai 2544, #2.1.1.

<sup>5</sup> Wai 2544, #2.5.1.

<sup>6</sup> Wai 156, #1.1(c).

<sup>7</sup> Wai 745, #1.1(g).

<sup>8</sup> This application was also lodged with respect to Wai 1308, the Patuharakeke Hapū ki Takahiwai claim. For the sake of simplicity, these applications will be referred to as Wai 745 only throughout this decision.

<sup>9</sup> Wai 2181, #1.1.1(d).

<sup>10</sup> Wai 2337, #1.1.2.

- b. Wai 2546, the Ngātiwai Trust Board Deed of Mandate (George and others) claim,<sup>12</sup> lodged on behalf of Mylie George, Carmen Hetaraka, Mike Leuluai and Ngaio McGee on 7 December 2015, and registered on 9 December 2015;
  - c. Wai 2548, the Ngātiwai Trust Board Deed of Mandate (Reti and others) claim,<sup>13</sup> lodged on behalf of Te Riwhi Whoa Reti, Hau Tautari Hereora, Romana Tarau and Edward Cook on 10 December 2015, and registered on 14 December 2015;
  - d. Wai 2549, the Ngātiwai Trust Board Deed of Mandate (Mahanga and others) claim,<sup>14</sup> lodged on behalf of Pereri Mahanga, Mitai Paraone-Kawiti, Violet Sade, Ngaire Brown and Winiwini Kingi on 11 December 2015, and registered on 14 December 2015;
  - e. Wai 2550, the Ngātiwai Trust Board Deed of Mandate (Collier and Mahanga) claim,<sup>15</sup> lodged on behalf of Ruiha Collier and Haki Mahanga, received on 3 December 2015, and registered as a new claim on 16 December 2015 (in early directions this claim was referred to as Wai 620. However, once it was registered as a new claim it was referred to in directions by the new Wai number); and
  - f. Wai 2557, the Ngātiwai Trust Board Deed of Mandate (Reti) claim,<sup>16</sup> lodged on behalf of Elvis Reti, received on 3 Mar 2016, and registered as a new claim on 29 March 2016.
6. The Tribunal also received several requests to be added to the Wai 2544 application for urgency as interested parties:
- a. Arthur Harawira and Te Raa Nehua, the named claimants for Wai 1148, supporting the application for urgency, received on 7 December 2015;<sup>17</sup>
  - b. Waimarie Bruce, Chas Pēpene, Sandra Rīhari and others on behalf of Wai 619, supporting the application for urgency, received on 7 December 2015;<sup>18</sup>
  - c. Jasmine Cotter-Williams, named claimant for Wai 2063, supporting the application for urgency, received on 7 December 2015;<sup>19</sup>
  - d. Hori Parata and the children of Hinetapu Maihi Mahanga on behalf of Wai 245, supporting the application for urgency, received on 8 December 2015;<sup>20</sup>
  - e. Counsel for the Ngātiwai Trust Board, opposing the application for urgency, received on 7 December 2015;<sup>21</sup> and

---

<sup>11</sup> Wai 2545, #1.1.1 and #3.1.1.

<sup>12</sup> Wai 2546, #1.1.1 and #3.1.1.

<sup>13</sup> Wai 2548 #1.1.1 and #3.1.1.

<sup>14</sup> Wai 2549, #1.1.1 and #3.1.1.

<sup>15</sup> Wai 2550, #1.1.1 and #3.1.1.

<sup>16</sup> Wai 2557, #1.1.1 and #3.1.1.

<sup>17</sup> Wai 2544, #3.1.5.

<sup>18</sup> Wai 2544, #3.1.6.

<sup>19</sup> Wai 2544, #3.1.7.

<sup>20</sup> Wai 2544, #3.1.8.

<sup>21</sup> Wai 2544, #3.1.4.

- f. Lydia Karaitiana on behalf of Wai 2368, supporting the application for urgency, received on 29 January 2016.<sup>22</sup>

## **Procedural Overview**

- 7. On 7 December 2015 the Crown filed its submissions in response to the Wai 2544 application for urgency.<sup>23</sup> Also on 7 December 2015, counsel for the NTB filed submissions in response to the Wai 2544 application for urgency.<sup>24</sup> These submissions will be discussed in detail below.
- 8. On 14 December 2015 I set the following filing deadlines in relation to several of the applications for urgency:<sup>25</sup>
  - a. The Crown and interested parties in opposition were directed to file submissions and evidence in response to the Wai 745, Wai 2337, Wai 156, Wai 2545, Wai 2546, Wai 2548 and Wai 2549 applications for urgency by 22 January 2016;
  - b. The Crown and interested parties in opposition were directed to file submissions and evidence in response to the Wai 2550 application for urgency (which at that time was the Wai 620 application for urgency) by 15 January 2016;
  - c. The claimants for Wai 2544, Wai 745, Wai 2337, Wai 156, Wai 2545, Wai 2546, Wai 2548 and Wai 2549, and any interested parties in support, were directed to file submissions and evidence in reply to those of the Crown and interested parties in opposition by 12 February 2016; and
  - d. The Wai 2550 claimants were directed to file submissions and evidence in response to the Crown and interested parties by 5 February 2016.
- 9. After a request for a filing extension from counsel for the NTB, the Chairperson set the following filing deadlines on 19 January 2016:<sup>26</sup>
  - a. The Crown and counsel for the NTB were directed to file submissions and evidence in response to the Wai 745, Wai 2337, Wai 156, Wai 2545, Wai 2546, Wai 2548 and Wai 2549 applications for urgency by 27 January 2016; and
  - b. The claimants for Wai 2544, Wai 745, Wai 2337, Wai 156, Wai 2545, Wai 2546, Wai 2548 and Wai 2549 were directed to file submissions and evidence in reply to those of the Crown and the NTB by 17 February 2016.
- 10. On 17 February 2016 I granted a further filing extension via email from the Registrar for the filing of submissions in reply from the various claimants. Parties were directed to file reply submissions by 18 February 2016.

---

<sup>22</sup> Wai 2544, #3.1.33.

<sup>23</sup> Wai 2544, #3.1.3.

<sup>24</sup> Wai 2544, #3.1.4.

<sup>25</sup> Wai 2544, #2.5.2.

<sup>26</sup> Wai 2544, #2.5.3.

11. On 29 March 2016 I directed the Crown and any interested parties to file submissions and evidence in response to the Wai 2557 application for urgency by 1 April 2016.<sup>27</sup>
12. On 1 April 2016 I granted a further filing extension via email from the Registrar for the filing of submissions from the Crown and the NTB in response to the Wai 2557 application for urgency.

## Overview of claims

### **Wai 2544 – the Ngātiwai Trust Board Deed of Mandate claim**<sup>28</sup>

13. This claim concerns the Crown's decision to recognise the NTB's Deed of Mandate to negotiate the settlement of Ngātiwai's outstanding historical Treaty of Waitangi claims.<sup>29</sup>
14. The claimants submit that the Crown is required to ensure that the mandating process is open, fair and robust. The claimants allege that the Crown has not ensured that the NTB carried out an open, fair and robust process.<sup>30</sup> The claimants also allege that there are significant issues surrounding the election of marae representatives who make up the NTB. The claimants further submit that the structure of the NTB does not represent the people of Ngātiwai.<sup>31</sup>
15. In terms of mandate hui, the claimants allege that the Crown did not require the NTB to conduct mandate hui in a way that allowed all Ngātiwai to speak freely and openly.<sup>32</sup> The claimants also submit that the Crown did not seek to engage with the claimants when they raised concerns over the Deed of Mandate,<sup>33</sup> and so the claimants were forced to converse with the NTB at all times.
16. The claimants submit that the structure of the NTB does not represent the people of Ngātiwai,<sup>34</sup> and does not provide for adequate hapū representation.<sup>35</sup> In particular, the claimants note that of the fourteen marae which make up the NTB, and from which NTB trustees are appointed, three marae do not exist, but are instead marae reservations which are undeveloped.<sup>36</sup>
17. The claimants also submit those hapū that are not adequately represented on the NTB will lose any ability to speak for themselves or address any issue directly concerning them.<sup>37</sup>

---

<sup>27</sup> Wai 2544, #2.5.4.

<sup>28</sup> Wai 2544, #3.1.2.

<sup>29</sup> At [3].

<sup>30</sup> At [7].

<sup>31</sup> At [8].

<sup>32</sup> At [10].

<sup>33</sup> At [11].

<sup>34</sup> At [8].

<sup>35</sup> At [14].

<sup>36</sup> At [20].

<sup>37</sup> At [16].

18. The claimants submit that the prejudice in this instance is both significant and irreversible, and note that once settlement legislation is enacted the claimants will have no further access to redress.<sup>38</sup> The claimants also submit that there is no alternative remedy available to them that they can reasonably seek,<sup>39</sup> and that they are ready to proceed to an urgent hearing.
19. In her affidavit,<sup>40</sup> claimant Huhana Seve outlines her links to Ngātiwai, and her involvement so far with the NTB. Ms Seve also details her difficulty in trying to secure support for her nomination as a trustee on the NTB by her Marae chairperson, and the flaws in the NTB Trust Deed. Ms Seve submits that these flaws allow the chairperson of a marae to:
- a. Determine the beneficiaries of a marae; and
  - b. Veto candidate nomination forms by not providing a signature.
20. Ms Seve submits that this allows the chairperson of a marae to control who affiliates to their marae, including who is eligible to vote in NTB elections.

Crown response to the Wai 2544 application for urgency<sup>41</sup>

21. The Crown opposes this application for urgency for the following reasons:<sup>42</sup>
- a. The claimants have failed to show how they will suffer significant and irreversible prejudice. Mandate recognition is not prejudicial, and any prejudice alleged is not imminent. The terms of negotiation have yet to be agreed upon;
  - b. There are at least four alternative remedies that are available to the claimants:
    - i. The claimants can participate in the various structures put in place for Ngātiwai to assist and advise the NTB in the negotiation process;
    - ii. There is a dispute resolution process in the Deed of Mandate if disagreements arise;
    - iii. The claimants may collect 100 signatures and apply for mandate withdrawal; and
    - iv. The claimants will be able to vote to ratify or reject any post-settlement governance entity and settlement which is proposed; and
  - c. The NTB has the support of Ngātiwai. Those Ngātiwai who did vote overwhelmingly favoured granting a mandate to the NTB. Although the claimants have raised concerns about the governance of the NTB, the Crown submits that it is not for the Crown to dictate how the NTB governs itself.

---

<sup>38</sup> At [21].

<sup>39</sup> At [24].

<sup>40</sup> Wai 2544, #A1.

<sup>41</sup> Wai 2544, #3.1.3.

<sup>42</sup> At [4].

22. The Crown's response was accompanied by the affidavit of Emily Owen, the Settlement Development Manager at the Office of Treaty Settlements (OTS), which outlined the background of the mandate recognition process, as well as the standard course of treaty settlement negotiations.<sup>43</sup>
23. The Crown submissions outlined the major events and milestones that lead up to the recognition of the NTB's Deed of Mandate:
- a. In seeking its mandate, the NTB held ten hui throughout the North Island, and three in Australia, covering areas where there are significant population of Ngātiwai. The hui and voting processes were promoted through newspapers, television, radio, on the NTB website, and on social media, and were well attended.<sup>44</sup>
  - b. Te Puni Kokiri (TPK) officials were invited to attend the hui as independent Crown observers. They provided observer's reports to OTS and the NTB.<sup>45</sup>
  - c. The voting results were 82.38% in favour of granting the NTB a mandate, with a participation rate of 28.2%. The Crown submits that this is within the normal range of other successful mandate votes.<sup>46</sup>
  - d. Following the mandate vote, there was an open submissions process. In response to submissions, OTS officials sought to meet with as many submitters as possible.<sup>47</sup>
  - e. OTS suggested that the NTB develop and implement a plan to engage further with the claimant community. This was in response to concerns raised about the NTB's communications.<sup>48</sup>
  - f. The NTB commissioned an independent analysis of the mandate process to assess whether it was fair, open and transparent. In three separate reports, the reviewer concluded that the process was fair, open and transparent.<sup>49</sup>
24. In terms of there being no significant and irreversible prejudice, the Crown makes the following submissions:
- a. The claimants have not put forward any evidence of imminent prejudice that is both significant and irreversible. Rather, they have pointed to the mandate process, which they say was flawed, and allege that they are being prejudiced by being represented by the NTB as a result.<sup>50</sup>

---

<sup>43</sup> Wai 2544, #A2.

<sup>44</sup> Wai 2544, #3.1.3 at [7].

<sup>45</sup> At [8].

<sup>46</sup> At [9].

<sup>47</sup> At [10].

<sup>48</sup> At [11].

<sup>49</sup> At [12].

<sup>50</sup> At [27].

- b. The Tribunal has previously found that being unhappy with a mandated body does not necessarily give rise to significant and irreversible prejudice.<sup>51</sup>
- c. Claims concerning mandates are often in reality internal group disputes. In such situations the Tribunal should tread carefully, and not interfere in mandate decision except in clear cases of error in process, misapplication of tikanga Māori, or apparent irrationality.<sup>52</sup>
- d. The Crown has concluded that the NTB's mandating process was conducted in an open, transparent and fair manner. Furthermore, the vote was overwhelmingly in favour of granting the NTB a mandate.<sup>53</sup>
- e. The Tribunal has previously found that having one's claims settled in a manner that is different to how the claimant wished does not necessarily result in significant and irreversible prejudice. This is particularly true where concerned individuals have opportunities to participate in the mandating process, to vote in the ratification process, and to benefit from the settlement.<sup>54</sup>
- f. Although the claimants object to being represented by the NTB, that itself is not irreversible.<sup>55</sup>

25. The prospect of settlement legislation is in no way imminent.<sup>56</sup>

*Ngātiwai Trust Board response to the Wai 2544 application for urgency*<sup>57</sup>

- 26. On 7 December 2015 counsel for the NTB filed submissions in response to the Wai 2544 application for urgency. This was accompanied by the affidavit of Tania McPherson<sup>58</sup> and the affidavit of Kristan MacDonald.<sup>59</sup>
- 27. The NTB opposes the application for urgency on the basis that the claimants cannot demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown action.<sup>60</sup>
- 28. The NTB notes that the application for urgency asserts that the Deed of Mandate fails to accurately represent the diverse interest groups it purports to represent, which the claimants submit is significantly prejudicial. However, the NTB does not accept this position.<sup>61</sup>
- 29. The NTB notes that the Crown's recognition of the NTB's Deed of Mandate is only the first step in a negotiation and settlement process that will take several years to

---

<sup>51</sup> At [28].

<sup>52</sup> At [29].

<sup>53</sup> At [30].

<sup>54</sup> At [31].

<sup>55</sup> At [33].

<sup>56</sup> At [34].

<sup>57</sup> Wai 2544, #3.1.4.

<sup>58</sup> Wai 2544, #A3.

<sup>59</sup> Wai 2544, #A4.

<sup>60</sup> Wai 2544, #3.1.4 at [3].

<sup>61</sup> At [12].



complete. Any prejudice to the claimants will not be irreversible until settlement legislation is enacted.<sup>62</sup>

30. Throughout the lengthy negotiations process, the NTB will have to take steps to ensure that Ngātiwai individuals, whānau and hapū are informed of, and engaged with, the process. Furthermore, the NTB has committed, in the Deed of Mandate, to establishing several special purposes structures to assist it in doing so.<sup>63</sup>
31. In terms of alternative remedies, the NTB submits that there are several other ways the claimants can influence the manner in which the negotiations process is conducted, including:
  - a. Seeking appointment to the NTB's Treaty Claims Committee;<sup>64</sup>
  - b. Seeking appointment to the NTB's Kaumatua advisory group;<sup>65</sup>
  - c. Participating in the mechanism for hapū and marae to advise the NTB;<sup>66</sup>
  - d. Participating in the research group, along with other claimants and claim researchers;<sup>67</sup>
  - e. Continuing to advance their claims before the Tribunal, and seeking an early report from the Wai 1040 Te Paparahi o Te Raki Tribunal;<sup>68</sup>
  - f. Seeking to be a part of the selection panel to advise the NTB on the appointment of negotiators;<sup>69</sup>
  - g. Utilising the dispute resolution process;<sup>70</sup>
  - h. Undertake the process provided in the Deed of Mandate to amend or withdraw the NTB's mandate;<sup>71</sup> and
  - i. Vote against an initialled Deed of Settlement and post-settlement governance entity.<sup>72</sup>
32. The NTB submits that the claimants do not represent a substantial segment of the Ngātiwai community.<sup>73</sup>

---

<sup>62</sup> At [14].

<sup>63</sup> At [16].

<sup>64</sup> Wai 2544, #A3 at [10].

<sup>65</sup> At [11].

<sup>66</sup> At [16].

<sup>67</sup> At [17].

<sup>68</sup> At [19] – [21]

<sup>69</sup> At [24].

<sup>70</sup> At [27].

<sup>71</sup> At [28].

<sup>72</sup> At [37].

<sup>73</sup> Wai 2544, #3.1.4 at [21] – [24].

33. Finally, the NTB notes that iwi mandate decisions are seldom, if ever, unanimous. Most are supported by a significant majority, and opposed by a small but vocal minority. The NTB submits that this is so in the current case.<sup>74</sup>

*Claimants' reply submissions for Wai 2544*<sup>75</sup>

34. On 17 February 2016, the Tribunal received the reply submissions for Wai 2544. This was accompanied by the second affidavit of Huhana Seve.<sup>76</sup>
35. The claimants submit that the Crown is obliged to uphold the principles of Te Tiriti o Waitangi, including the principle of partnership.<sup>77</sup> The claimants submit that the NTB is not the Crown's treaty partner; the Ngātiwai people are. They submit that the NTB Deed of Mandate is being pursued at the expense of Ngātiwai people, and by people who do not have a full understanding of what the NTB are trying to do.<sup>78</sup>
36. The claimants also note the difficulty of preparing for this urgency application while they also prepare to present evidence for the Wai 1040 Te Paparahi o Te Raki Inquiry.<sup>79</sup>
37. The claimants submit that the negotiation and settlement process cannot be decided unilaterally by a single Te Tiriti partner. They say that this has happened in the present case because Ngātiwai did not fully understand and know what was happening in the Deed of Mandate process.<sup>80</sup>
38. The claimants submit that the Crown has failed to act in a fair and impartial manner.<sup>81</sup> They question whether the NTB can actually represent Ngātiwai when, in some instances, representation and accountability is through marae that do not physically exist.<sup>82</sup>
39. The claimants reiterate that affiliation to Ngātiwai marae must be approved by the Chairperson of that marae, who can simultaneously serve as a NTB trustee. The claimants submit that this means that the NTB is able to control who can vote, and who can run for appointment to the NTB, which they submit is unconscionable. The claimants submit that by recognising the Deed of Mandate the Crown has breached the duty of fairness it owes to the Ngātiwai people.<sup>83</sup>
40. Although NTB trustee Kristan MacDonald has noted that the nomination process for the NTB is being reviewed, the claimants submit that the NTB lacks the credibility to do so effectively.<sup>84</sup>

---

<sup>74</sup> At [28].

<sup>75</sup> Wai 2544, #3.1.40.

<sup>76</sup> Wai 2544, #A34.

<sup>77</sup> Wai 2544, #3.1.40 at [6] – [7].

<sup>78</sup> At [10] – [11].

<sup>79</sup> At [12].

<sup>80</sup> At [15].

<sup>81</sup> At [18].

<sup>82</sup> At [20].

<sup>83</sup> At [21].

<sup>84</sup> At [22].

41. The claimants submit that the Crown cannot evade its obligations under the Treaty by conferring its authority on some other body, including the NTB.<sup>85</sup> They note that despite trying to distance itself from the actions of the NTB, the Crown has continued to be actively involved by funding the NTB and its operations.<sup>86</sup>
42. In terms of the independent observers, the claimants state that before a process can be determined to be fair and impartial the independent observer should be agreed upon by both parties. They state that this did not happen, and therefore the independent reports should be rejected.<sup>87</sup>
43. In terms of parallel process, the claimants note that they have lost Crown Forestry Rental Trust (CFRT) funding since the mandate was recognised, which has hindered their ability to access support for hearing preparation.<sup>88</sup>
44. The claimants highlight the Crown's duty to preserve amicable tribal relations, which was discussed in *The Ngāti Awa Settlement Cross-Claims Report*.<sup>89</sup>
45. In terms of the Crown's submission that there are alternative remedies available, the claimants make the following submissions:
  - a. The Kaumatua advisory group that will be set up under the Deed of Mandate is advisory only, and has no decision making powers;<sup>90</sup>
  - b. The Crown's submissions that the claimants can participate in an advisory role for hapū and marae to provide advice to the NTB must be rejected because issues concerning accountability and transparency remain unresolved;<sup>91</sup>
  - c. The proposal that the claimants can participate by joining the treaty claims committee (TCC) does not address the underlying reasons for the application for urgency.<sup>92</sup> Furthermore, the two successful claimants for the TCC will act in an advisory rather than a reporting capacity, which limits the function of their role;<sup>93</sup>
  - d. The proposal to join the research group comes too late for it to be meaningful;<sup>94</sup>
  - e. The suggestion that the claimants can be a part of the selection panel for the appointment of negotiators does not address concerns with the Crown's recognition of the Deed of Mandate in the first place;<sup>95</sup>
  - f. The dispute resolution clause says that the NTB agrees to act in good faith and for the advancement of the settlement itself. It is not framed as a means to

---

<sup>85</sup> At [24] – [25].

<sup>86</sup> At [28].

<sup>87</sup> At [32].

<sup>88</sup> At [34].

<sup>89</sup> At [38].

<sup>90</sup> At [50].

<sup>91</sup> At [52].

<sup>92</sup> At [56].

<sup>93</sup> At [58].

<sup>94</sup> At [60].

<sup>95</sup> At [63].

address disputes, differences or questions.<sup>96</sup> The claimants also note that the clause provides for the NTB to endeavour to agree on a process for dispute resolution, meaning that the NTB can decide on a process without the involvement of the claimants;<sup>97</sup>

- g. The mandate withdrawal process is too onerous for the claimants or any group to comply with, and should be rendered unrealistic and unachievable;<sup>98</sup> and
- h. Voting to reject any post-settlement governance entity will come too late down the pathway to negotiations to effectively help the claimants deal with their issues.<sup>99</sup>

46. Finally, the claimants submit that the NTB does not have the support of Ngātiwai in terms of its Deed of Mandate. They note that they have collected over 500 signatures of people who oppose the Deed of Mandate.<sup>100</sup>

#### **Wai 156 – the Oriwa Block claim**<sup>101</sup>

47. This claim concerns the Crown's recognition of the NTB's Deed of Mandate to negotiate the settlement of Ngātiwai's historical Treaty claims, including the settlement of Wai 156. This claim was accompanied by the affidavit of Marie Tautari.<sup>102</sup>

48. This claim was filed on behalf of Te Whakapiko hapū of Ngāti Manaia. The claimants are descendants of Pita Tunua, who was a member of Te Whakapiko hapū. The claimants allege that the Deed of Mandate's claimant definition does not recognise Te Whakapiko hapū as an active hapū. The claimants submit that this allows the NTB to overlook the need for hapū representation for Te Whakapiko.<sup>103</sup>

49. The claimants submit that Te Whakapiko hapū has never given its support or mandate to the NTB to settle its historical Treaty grievances.<sup>104</sup> The claimants also assert that there was inadequate engagement and consultation during the pre-mandate phase.<sup>105</sup>

50. The claimants submit that the Crown did not require the NTB to conduct hui in a way that allowed participants to participate freely and openly.<sup>106</sup>

51. The claimants note that when concerns were raised with the Crown, they were advised to raise these concerns with the NTB directly.<sup>107</sup>

---

<sup>96</sup> At [64] – [65].

<sup>97</sup> At [67] – [68].

<sup>98</sup> At [73].

<sup>99</sup> At [78].

<sup>100</sup> At [80] – [83].

<sup>101</sup> Wai 156, #2.4.

<sup>102</sup> Wai 156, #A1.

<sup>103</sup> Wai 156, #2.4 at [8].

<sup>104</sup> At [15].

<sup>105</sup> At [18].

<sup>106</sup> At [19].

<sup>107</sup> At [21].

52. The claimants allege that OTS has allowed the NTB to withhold relevant mandate information from claimants, creating an environment of mistrust, which undermines kotahitanga.<sup>108</sup>

Crown response to the Wai 156 application for urgency<sup>109</sup>

53. The Crown submits that neither Marie Tautari nor Te Whakapiko hapū have shown how they will suffer any prejudice.<sup>110</sup>
54. If Ms Tautari is a member of Ngātiwai, through descent from a Ngātiwai tūpuna, she will be able to engage with the NTB through her marae.<sup>111</sup>
55. The Crown submits that Te Whakapiko hapū is represented in the NTB structure through Whananaki Marae.<sup>112</sup> Furthermore, the NTB will be establishing an advisory role for hapū and marae to provide advice to the NTB,<sup>113</sup> and there will be options for Ngātiwai to determine what role hapū will play in the post-settlement governance entity for Ngātiwai.<sup>114</sup>
56. In terms of the other issues raised by Ms Tautari, the Crown relies on its response to the Wai 2544 application, and asserts that it is not the role of the Crown to dictate how the NTB governs itself.<sup>115</sup>

Ngātiwai Trust Board specific response to the Wai 156 application for urgency<sup>116</sup>

57. The NTB notes that although the claimant has raised a large number of issues, her essential position is opposition to the NTB's mandate to negotiate the settlement of her claim.<sup>117</sup> The claimant acknowledged that any prejudice will not occur until much later in the negotiations process.<sup>118</sup> Furthermore, the claimant has not presented evidence that she represents a substantial segment of the Ngātiwai claimant community.<sup>119</sup>
58. Notwithstanding this opposition, the NTB notes that it continues to seek constructive korero with the claimant.<sup>120</sup>

Claimants' reply submissions for Wai 156<sup>121</sup>

59. On 18 February 2016, the Tribunal received the affidavit of Rowan Tautari in reply to the submissions of the Crown and of the NTB, with an amended brief of evidence and appendices filed on 17 March 2016.

---

<sup>108</sup> At [36].

<sup>109</sup> Wai 2544, #3.1.28 at [8] – [16].

<sup>110</sup> At [12].

<sup>111</sup> At [14].

<sup>112</sup> At [15.1].

<sup>113</sup> At [15.2].

<sup>114</sup> At [15.3].

<sup>115</sup> At [16].

<sup>116</sup> Wai 2544, #3.1.30 at [57] – [60].

<sup>117</sup> At [57].

<sup>118</sup> At [58].

<sup>119</sup> At [59].

<sup>120</sup> At [60].

<sup>121</sup> Wai 2544, #A43.

60. In reply to the general assertion that a parallel process is available, Ms Tautari submits that the NTB's position was that it would not support a parallel process unless the claimants also supported the NTB's mandate.<sup>122</sup>
61. Ms Tautari submits that the Crown has undermined their ability to properly prepare the Wai 156 claim to be heard.<sup>123</sup>
62. Ms Tautari alleges that the Crown has created a mandating process that has circumvented the truth-telling necessary to acknowledge its abusive behaviour and restore damaged relationships.<sup>124</sup>
63. Ms Tautari opposes the NTB's Deed of Mandate due to the Crown's failure to recognise the existence of Te Whakapiko hapū throughout the mandating process, and in the Deed of Mandate.<sup>125</sup> She also states that Te Whakapiko are in the contradictory position of having their claim included for settlement while having others determine that Te Whakapiko do not exist.<sup>126</sup>
64. Ms Tautari submits that the Crown has rendered Te Whakapiko invisible, and relied on people within the NTB to determine and define Te Whakapiko rather than engaging with Te Whakapiko directly.<sup>127</sup> She states that it seems the Crown has reserved the right to define what an active hapū is, and has supported and recognised a definition that excludes Te Whakapiko.<sup>128</sup>
65. Ms Tautari states that the Crown failed to inform the Wai 156 claimants prior, during or after their participation in the mandating process whether they were required to provide proof of Te Whakapiko existence. Furthermore, Te Whakapiko remain unaware of the Crown's definition of historic or active hapū, and the threshold required to validate this.<sup>129</sup>
66. Ms Tautari notes that until the Deed of Mandate was finalised Te Whakapiko were unaware that the Crown did not accept their history or current status. Also, at no stage did OTS request information concerning Te Whakapiko identity.<sup>130</sup>
67. Ms Tautari provides evidence relating to whakapapa being used by the NTB to define Ngātiwai.<sup>131</sup>
68. Ms Tautari notes that during the three year mandate process the NTB did not engage with any Whangārei claimants participating in the Wai 1040 Te Paparahi o Te Raki inquiry.<sup>132</sup>

---

<sup>122</sup> At [7] – [8].

<sup>123</sup> At [9].

<sup>124</sup> At [16].

<sup>125</sup> At [23].

<sup>126</sup> At [25].

<sup>127</sup> At [27].

<sup>128</sup> At [28].

<sup>129</sup> At [29].

<sup>130</sup> At [30].

<sup>131</sup> At [73].

<sup>132</sup> At [121].

69. In terms of consultation, Ms Tautari submits that consultation takes place on the Crown's terms, with the Crown playing the conflicting roles of adviser and monitor.<sup>133</sup> Ms Tautari also notes that the Crown's influence can be seen in the engagement and communications plan created and implemented by the NTB between December 2014 and March 2015.<sup>134</sup> She notes that the NTB conducted hui as a box-ticking exercise, and had no intention of listening to the suggestions or concerns of the claimants.<sup>135</sup>
70. Ms Tautari notes that information from the NTB was not readily available, and challenges the accuracy of some of this information.<sup>136</sup>

**Wai 745 – the Patuharakeke Hapū Lands and Resources claim**<sup>137</sup>

71. This claim concerns the Crown's recognition of the NTB's Deed of Mandate to negotiate the settlement of Ngātiwai's historical Treaty claims, including the claims of Patuharakeke. This claim was accompanied by the affidavits of Jared Pitman,<sup>138</sup> Dr Guy Gudex<sup>139</sup> and Ani Pitman.<sup>140</sup>
72. The claimants say that the Crown has failed in its duties to act fairly and in good faith by:<sup>141</sup>
- a. Failing to act impartially in its recognition of the NTB's Deed of Mandate;
  - b. Failing to adequately address and respond to the claimants' concerns over the application of the Crown's large natural grouping policy;
  - c. Failing to address or resolve concerns relating to the Ngātiwai mandating process, including hui and voting processes;
  - d. Failing to have due regard to the opposition of the claimants to the mandate process, and their inclusion in the NTB's Deed of Mandate; and
  - e. Failing to carry out a fair process leading up to its recognition of the NTB's Deed of Mandate, and failing to ensure that the mandate was not pre-determined.
73. The claimants submit that the Crown has not allowed them to decide who will hold the mandate to settle their historical treaty claims without Crown interference.<sup>142</sup> The claimants also submit that the Crown did not make appropriate changes to the NTB's

---

<sup>133</sup> At [131].

<sup>134</sup> At [132].

<sup>135</sup> At [138].

<sup>136</sup> At [147].

<sup>137</sup> Wai 745, #2.64.

<sup>138</sup> Wai 745, #A13.

<sup>139</sup> Wai 745, #A14(b).

<sup>140</sup> Wai 745, #A15(b).

<sup>141</sup> Wai 745, #2.64 at [4].

<sup>142</sup> At [6b].

Deed of Mandate following the receipt of the claimants' submissions opposing the mandate.<sup>143</sup>

74. The claimants note that they have never indicated support for, or voted in favour of, the Ngātiwai mandate process. They also submit that a collective mandate has never been given to any group other than the Patuharakeke Te Iwi Trust Board (PTB).<sup>144</sup>
75. The claimants submit that they have not been able to focus on preparations for their Waitangi Tribunal hearings without substantial interference from the Crown mandate processes such as that of Ngātiwai.<sup>145</sup> They also submit that the present settlement negotiations threaten their funding and rights to a full Waitangi Tribunal inquiry.<sup>146</sup>
76. In terms of tribal relations, the claimants note that they are in a position where at least three settlement entities have been given notice that they do not have a mandate to settle Wai 745 and Wai 1308.<sup>147</sup>
77. The claimants submit that they are now in a position where they are forced to withdraw from the NTB's Deed of Mandate. However, the claimants submit that the withdrawal process is significantly onerous and costly.<sup>148</sup> The claimants submit that they are prejudiced as they are not in a financial position where they can fund a process to withdraw from the NTB's Deed of Mandate.<sup>149</sup>
78. Finally, in terms of the NTB's polling process when securing its mandate, the claimants submit that given the low percentage of votes cast the results are not reliable enough to demonstrate that there is majority support of the Deed of Mandate.<sup>150</sup>

Crown response to the Wai 745 application for urgency<sup>151</sup>

79. The Crown at the outset notes that Ngawaka Pirihi, who is a named claimant for Wai 1308, filed a submission dated 4 September 2014 with OTS about the NTB mandate. That submission noted that Mr Pirihi supported the NTB mandate.<sup>152</sup> The Crown submits that this submission is consistent with submissions made by other individuals within Patuharakeke who also supported the NTB mandate.<sup>153</sup>
80. The Crown submits that Patuharakeke are properly within the NTB mandate to the extent that Patuharakeke descend from Ngātiwai tūpuna.<sup>154</sup> This position was set out in a letter from Emily Owen to the Patuharakeke Te Iwi Trust Board (PTB) in August of 2015.<sup>155</sup>

---

<sup>143</sup> At [6c].

<sup>144</sup> At [6d].

<sup>145</sup> At [6f].

<sup>146</sup> At [6h].

<sup>147</sup> At [6k].

<sup>148</sup> At [6l].

<sup>149</sup> At [6m].

<sup>150</sup> At [6p].

<sup>151</sup> Wai 2544, #3.1.28 at [17] – [30.9].

<sup>152</sup> At [18].

<sup>153</sup> At [19].

<sup>154</sup> At [26].

<sup>155</sup> At [27].



81. The Crown also submits that, far from suffering prejudice by being included in a Ngātiwai settlement, the people of Patuharakeke would suffer prejudice if they were excluded from a Ngātiwai settlement.<sup>156</sup>
82. In terms of representation on the NTB, the Crown notes that the NTB representative for Takahiwai Marae is Ngawaka Pirihi.<sup>157</sup>
83. Finally, the Crown submits that it has appropriately engaged with Patuharakeke, noting specific examples, including:
  - a. A submission from PTB dated 21 August 2014 opposing the NTB mandate. OTS responded to the submissions by email and telephone calls seeking a meeting with the PTB;<sup>158</sup>
  - b. A letter from OTS to PTB dated 2 September 2014 seeking a meeting with all submitters from Patuharakeke;<sup>159</sup>
  - c. Submissions from a number of individuals from Patuharakeke in support of the NTB mandate, from 3 and 4 September 2014;<sup>160</sup>
  - d. A letter from OTS to Ani Pitman, a trustee of PTB, dated 6 November 2014 providing a summary of a hui held on 18 October 2014;<sup>161</sup>
  - e. An email from OTS to Ms Pitman responding to PTB's request to have a meeting with OTS in late November 2014;<sup>162</sup>
  - f. A meeting between OTS and PTB on 8 April 2015 to discuss Patuharakeke's aspirations, including PTB's view that NTB does not appropriately represent Patuharakeke;<sup>163</sup>
  - g. An email from OTS to Ms Pitman, dated 11 April 2015, thanking PTB for the meeting;<sup>164</sup>
  - h. A letter from OTS to Ms Pitman, dated 6 August 2015, following up on the April meeting;<sup>165</sup> and
  - i. A letter from PTB to OTS, dated 11 November 2015, rejecting the mandate recognition and seeking resources to assist with their removal from the mandate.<sup>166</sup>

---

<sup>156</sup> At [28].

<sup>157</sup> At [29].

<sup>158</sup> At [30.1].

<sup>159</sup> At [30.2].

<sup>160</sup> At [30.3].

<sup>161</sup> At [30.4].

<sup>162</sup> At [30.5].

<sup>163</sup> At [30.6].

<sup>164</sup> At [30.7].

<sup>165</sup> At [30.8].

<sup>166</sup> At [30.9].

Ngātiwai Trust Board specific response to the Wai 745 application for urgency<sup>167</sup>

84. The NTB believes that these claimants will not suffer prejudice as a result of their Ngātiwai claims being represented by the NTB.<sup>168</sup> The NTB also notes that there are further alternative remedies available to Patuharakeke to safeguard their interests.<sup>169</sup>
85. In respect to the claimants assertion that the process provided in the Deed of Mandate for withdrawal is unduly onerous, the NTB notes that the independent review commissioned by the NTB found that the process contains numerous checks and balances to protect the interests of the Ngātiwai community, and is appropriately rigorous as it mirrors steps taken by the NTB to obtain the mandate.<sup>170</sup>
86. The NTB notes that the Wai 745 claimants can continue to progress their claims in the Wai 1040 Te Paparahi o Te Raki Inquiry.<sup>171</sup>
87. Finally, the NTB questions whether or not the PTB actually represents a substantial part of the Patuharakeke community.<sup>172</sup>

Claimants' reply submissions for Wai 745<sup>173</sup>

88. On 18 February 2016, the Tribunal received the reply submissions of the Wai 745 and Wai 1308 claimants. This was accompanied by the second affidavit of Dr Guy Gudex,<sup>174</sup> the second affidavit of Ani Pitman,<sup>175</sup> the affidavit of Ngawaka Pirihi,<sup>176</sup> and the affidavit of Bronwyn Mackie,<sup>177</sup> and accompanying appendices. This was also accompanied by the report of handwriting expert Michael Maran.<sup>178</sup>
89. The claimants at the outset respond to the Crown statement that Ngawaka Pirihi made a submission supporting the NTB Deed of Mandate.<sup>179</sup> The claimants submit that the handwriting of that submission is not Mr Pirihi's handwriting.
90. Mr Pirihi asserts in his affidavit that he did not write the submission. The claimants also attach a letter from a handwriting expert who indicates that it is highly probable that the submission was written by NTB trustee Tania McPherson. The claimants submit that this issue brings into question the credibility and reliability of the NTB's mandating process.<sup>180</sup>

---

<sup>167</sup> Wai 2544, #3.1.30 at [48] – [54].

<sup>168</sup> At [48].

<sup>169</sup> At [50].

<sup>170</sup> At [50].

<sup>171</sup> At [51].

<sup>172</sup> At [52].

<sup>173</sup> Wai 2544, #3.1.47.

<sup>174</sup> Wai 2544, #A38.

<sup>175</sup> Wai 2544, #A39.

<sup>176</sup> Wai 2544, #A40.

<sup>177</sup> Wai 2544, #A41.

<sup>178</sup> Wai 2544, #A37.

<sup>179</sup> Wai 2544, #3.1.47 at [2].

<sup>180</sup> At [6].

91. The claimants submit that this raises questions over whether any other submissions have been tampered with. They also submit that this whole ordeal has caused a great deal of humiliation and whakamā for Mr Pirihi and his whānau.<sup>181</sup>
92. The claimants assert that the submission in question should be declared to be invalid.<sup>182</sup> They also submit that the acts of misleading justice and the fabrication of evidence are serious matters that are set out in sections 108 and 113 of the Crimes Act 1961.<sup>183</sup> The claimants seek a declaration from the Tribunal that the submission in question is deemed inadmissible, and that any reference to the submission are removed as evidence from these proceedings.<sup>184</sup>
93. In terms of the Crown's assertion that the claimants will not suffer significant and irreversible prejudice because of its recognition of the NTB's Deed of Mandate, the claimants submit that the failure of the Crown to adequately protect hapū rangatiratanga will continue to cause significant and irreversible prejudice.<sup>185</sup>
94. The claimants submit that the issue of hapū rangatiratanga, which was a consideration in the Wai 2490 Ngāpuhi Mandate Inquiry, is a relevant consideration in the current case.<sup>186</sup> The claimants assert that marae representation is not an equivalent representational structure to replace hapū, and it is the Crown that has failed to uphold its obligations, particularly in light of the *Ngāpuhi Mandate Inquiry Report*.<sup>187</sup>
95. The claimants submit that the Crown's submissions deliberately avert attention away from the real issue of how hapū are treated with and by the Crown. They submit that the Crown picks and chooses when it wants to involve or engage with hapū, and it is convenient for the Crown to portray hapū rangatiratanga issues as disputes about whakapapa.<sup>188</sup>
96. The claimants state that the Crown, under the guise of its LNG policy, is willing to recognise a structure that draws on its own whakapapa experts to form a claimant definition, and by default evolves into a LNG that will have significant and irreversible impact on hapū.<sup>189</sup>
97. In terms of the NTB's assertion that it is not for the Crown or the Tribunal to pass judgement on the detail of how the NTB will engage with iwi members, the claimants submit that the Crown must inquire into the intricacies of the Deed of Mandate.<sup>190</sup>
98. In terms of the Crown's question as to whether or not the claimants represent a substantial part of the Patuharakeke community, the claimants note that both the Takahiwai Marae Committee and the Takahiwai Marae trustees have repeatedly expressed their support of PTB. The claimants also note that the NTB has relied on

---

<sup>181</sup> At [8].

<sup>182</sup> At [11].

<sup>183</sup> At [13].

<sup>184</sup> At [14].

<sup>185</sup> At [16].

<sup>186</sup> At [18].

<sup>187</sup> At [22].

<sup>188</sup> At [24].

<sup>189</sup> At [27].

<sup>190</sup> At [29].

correspondence and meetings with the PTB as evidence of engagement with Patuharakeke.<sup>191</sup>

99. In response to the Crown's submission that it had engaged with Patuharakeke in a meaningful way, the claimants rely on the Tribunal's findings in the *Tāmaki Makaurau Settlement Process Report*. They submit that the Crown, in its engagement, simply stated its position, but failed to consider how it could meaningfully engage with Patuharakeke.<sup>192</sup>
100. The claimants submit that merely making contact or attending a meeting does not constitute the level of engagement expected of a Treaty partner, and in reality falls well short. This is particularly so when the Crown places such weight on its purported engagement in an attempt to satisfy the Tribunal. They submit that it is clear from the evidence that the Crown's actions do not qualify as engagement.<sup>193</sup>
101. Furthermore, the claimants submit that the Crown has given the impression that settlement is not imminent. However, the documents released under the Official Information Act 1982 that are attached to Dr Gudex's affidavit show that the Crown's intention is to have stream-lined terms of negotiation, and a very quick turn-around between recognising the Deed of Mandate and confirming terms of negotiation.<sup>194</sup>
102. The claimants state that the Crown's decision to divert the attention from themselves in this mandate process has been deliberate. By doing so, the Crown has exacerbated the division among hapū and whānau.<sup>195</sup> The claimants submit that the strain this process has caused on whanaungatanga is significant.<sup>196</sup>
103. In response to the Crown's submission that withdrawal is available as an alternative remedy, the claimants submit that even though they did not consent to the inclusion of their hapū's claims their claims have nevertheless been included in the Deed of Mandate. They note that the Crown has advised that in order to withdraw they must go through a very onerous and costly process. Furthermore, there is no hapū withdrawal mechanism.<sup>197</sup>
104. The claimants also submit that the Crown has refused to provide funding assistance to those groups who seek to conduct a withdrawal process, and Patuharakeke, like many other hapū, do not have sufficient resources to carry out such a process.<sup>198</sup> The claimants allege that Crown policy relating to pre-mandate and 'exceptional circumstances funding' causes significant prejudice to the claimants.<sup>199</sup>

---

<sup>191</sup> At [31].

<sup>192</sup> At [33].

<sup>193</sup> At [34].

<sup>194</sup> At [35].

<sup>195</sup> At [36].

<sup>196</sup> At [37].

<sup>197</sup> At [39].

<sup>198</sup> At [41].

<sup>199</sup> At [43].

105. In terms of accountability, the claimants submit that the measures provided for in the Deed of Mandate are not adequate. They also submit that the withdrawal process outlined in the Deed of Mandate is onerous, costly, and outrageous.<sup>200</sup>
106. Finally, the claimants submit that Patuharakeke is a casualty of the Crown's plan to achieve minimal settlements in the north.<sup>201</sup> They submit that the Crown, by recognising the NTB's flawed mandate, has failed in its duty to protect the hapū rangatiratanga of the claimants.<sup>202</sup>

**Wai 2181 – the Ngā Uri o Maki-nui Lands (Kapea and Beazley) claim**<sup>203</sup>

107. This claim concerns the Crown's recognition of the NTB's Deed of Mandate to negotiate the settlement of Ngātiwai's outstanding historical Treaty of Waitangi claims. This claim was accompanied by the affidavit of Michael Beazley.<sup>204</sup>
108. The claimants note that Te Uri o Makinui tribes are of the Kawerau confederation. They submit that the Crown seeks the settlement of Ngātiwai claims within the Kawerau tribal rohe, and does so without consulting the Kawerau people, including the claimants.<sup>205</sup>
109. The claimants also submit that the NTB's Deed of Mandate:<sup>206</sup>
- a. Fails to acknowledge the existence of Kawerau interests in the area where Ngātiwai claims are to be settled;
  - b. Wrongly includes Kawerau hapū as historic hapū of Ngātiwai; and
  - c. Was developed without consultations with the claimants or other Kawerau people.

**Crown response to the Wai 2181 application for urgency**<sup>207</sup>

110. On 29 January 2016, the Crown filed its response to the Wai 2181 application for urgency.
111. The Crown again asserts its reliance on the submissions in response to the other urgency applications mentioned above.<sup>208</sup>
112. In response to the specific issues raised by the Wai 2181 claimants, the Crown submits that there is no basis to three of the alleged grounds of prejudice:

---

<sup>200</sup> At [44].

<sup>201</sup> At [48].

<sup>202</sup> At [49].

<sup>203</sup> Wai 2181, #3.1.35.

<sup>204</sup> Wai 2181, #A3.

<sup>205</sup> Wai 2181, #3.1.35 at [4].

<sup>206</sup> At [6].

<sup>207</sup> Wai 2544, #3.1.31.

<sup>208</sup> At [5].

- a. The NTB's Deed of Mandate sets out the area of interest for Ngātiwai. The purpose of that area of interest is not to set out where other groups have interests; it is to set out where Ngātiwai has interests. It is correct that the Deed of Mandate does not expressly refer to Kawerau interests within the Ngātiwai area of interest. There is no prejudice from that omission.<sup>209</sup>
- b. The Deed of Mandate includes a 'Background Hapū Context' section which lists a number of Ngātiwai and Ngātiwai-related hapū. That list includes Ngāti Rongo, a Kawerau hapū. However, Ngāti Rongo has not been included in the section 'Hapū included in the Deed of Mandate'.<sup>210</sup>
- c. It is clear that Ngāti Rongo is not considered a hapū of Ngātiwai for the purpose of settlement. No material prejudice arises from the listing of Ngāti Rongo or any other Kawerau hapū as a Ngātiwai related hapū in the Deed of Mandate.<sup>211</sup>
- d. The NTB's Deed of Mandate was not prepared in consultation with the Wai 2181 claimants, or other Kawerau people. There is no reason why that should have happened.<sup>212</sup>

*Ngātiwai Trust Board response to the Wai 2181 application for urgency*<sup>213</sup>

113. On 29 January 2016, the NTB filed its response to the Wai 2181 application for urgency. This was accompanied by the affidavit of Haydn Edmonds.<sup>214</sup>
114. The NTB notes the concern that the Ngātiwai area of interest includes areas in which Ngātiwai does not have exclusive interests.<sup>215</sup> The NTB also points out that the map contained in the Deed of Mandate notes that the Ngātiwai area of interest does not delineate exclusive iwi boundaries. The NTB will only settle those aspects of claims located within the area of interest insofar as they relate to Ngātiwai interests.<sup>216</sup>
115. In terms of the concern that Ngāti Rongo is listed as an historical hapū, the NTB submits that this is based on historic evidence. The NTB does not consider Ngāti Rongo to be an active hapū, and so it is listed as an historic hapū.<sup>217</sup> The NTB accepts that the claimants are entitled to take a different view of history from that held by the NTB. However, no prejudice is suffered by them as a result.<sup>218</sup>
116. In terms of the current status of Wai 2181, the NTB notes that this claim has been included within the definition of historical claims in two pieces of settlement legislation – the Ngāti Whātua o Kaipara Claims Settlement Act 2013, and the Ngāti Manuhiri

---

<sup>209</sup> At [6.1].

<sup>210</sup> At [6.2].

<sup>211</sup> At [6.3].

<sup>212</sup> At [6.3].

<sup>213</sup> Wai 2544, #3.1.32.

<sup>214</sup> Wai 2544, #A33.

<sup>215</sup> Wai 2544, #3.1.32 at [7].

<sup>216</sup> At [10].

<sup>217</sup> At [14].

<sup>218</sup> At [16].

Claims Settlement Act 2012.<sup>219</sup> The NTB submits that it is therefore unclear whether unsettled elements remain in the Wai 2181 claim.<sup>220</sup>

117. Even assuming that some aspects of the Wai 2181 claim remain unsettled, and lie within the Ngātiwai area of interest, the Ngātiwai settlement will not prejudice the claimants.<sup>221</sup>
118. Finally, the NTB notes that the claimants have not filed evidence to show that they represent a substantial segment of the Ngātiwai claimant community, or any other group that could potentially be affected by the NTB Deed of Mandate.<sup>222</sup>

Claimants' reply submissions for Wai 2181<sup>223</sup>

119. On 18 February 2016, the Tribunal received the reply submissions for Wai 2181. This was accompanied by the second affidavit of Michael Beazley.<sup>224</sup>
120. The claimants note that the NTB has suggested that Wai 2181 has nothing left to settle, having been partially settled in the Ngāti Manuhiri and Ngāti Whātua ki Kaipara settlements. The claimants also note the NTB's reference to several other applications for urgency lodged by the Wai 2181 claimants which were declined by the Tribunal.<sup>225</sup>
121. The claimants submit that the Wai 2181 claim remains active, and is being prosecuted as part of the Wai 1040 Te Paparahi o Te Raki Inquiry.<sup>226</sup> The claimants assert that Ngātiwai do not have rights in the Kawerau Mahurangi rohe.<sup>227</sup> They also submit that the assertion from the NTB that it will negotiate its rights with its neighbours is unsatisfactory.<sup>228</sup>
122. In terms of the assertion from both the Crown and the NTB that neither the Crown nor the Tribunal resolve whakapapa disputes, the claimants submit that this is not correct. They submit that in making findings of Treaty breach, the Tribunal will often address who had customary rights, thus determining whakapapa issues.<sup>229</sup>
123. The claimants submit that the methodology for identifying Ngāti Rongo as an historical Ngātiwai hapū lacks legitimacy.<sup>230</sup> The claimants also submit that the Crown is making assertions that are unfounded and not based on research, which in turn is creating disputes within hapū.<sup>231</sup>
124. In terms of the numbers of support for the Wai 2181 application for urgency, the claimants note that thousands of dollars have been spent assisting the NTB to obtain

---

<sup>219</sup> At [17].

<sup>220</sup> At [18].

<sup>221</sup> At [21].

<sup>222</sup> At [22].

<sup>223</sup> Wai 2544, #3.1.52.

<sup>224</sup> Wai 2544, #A44.

<sup>225</sup> Wai 2544, #3.1.52 at [3].

<sup>226</sup> At [4] – [6].

<sup>227</sup> At [7].

<sup>228</sup> At [8].

<sup>229</sup> At [9].

<sup>230</sup> At [10].

<sup>231</sup> At [11].

its mandate, but no funding has been provided to aid Ngāti Maraeariki and Ngāti Rongo to develop an entity or membership roll.<sup>232</sup>

125. The claimants assert that in *Haronga v Waitangi Tribunal*<sup>233</sup> (the *Haronga* case) the Supreme Court held that claimants have a right to be heard, and may withdraw from a mandate at any time.<sup>234</sup>
126. In terms of Crown conduct, the claimants submit that the Crown has funded a group against its own policy before a mandate was recognised. They state that documents released under the Official Information Act (the OIA documents) show that over \$150,000 was paid to the NTB to promote the mandate before it was in a position to be recognised by the Crown. The claimants also note that no such funding was provided to any other group who oppose the mandate, or who wish to promote their own mandate.<sup>235</sup>
127. The claimants submit that in terms of mandating, the Crown cannot pick one group to support to the exclusion of others, which is in line with the Tribunal's findings in the *Ngāpuhi Mandate Inquiry Report*.<sup>236</sup>
128. In terms of the OIA documents, the claimants submit that these documents highlight defects in the Crown's process of recognising the NTB's Deed of Mandate.<sup>237</sup> The claimants seek a discovery order from the Tribunal to release documents withheld under section 9(2) of the Official Information Act 1982.<sup>238</sup>
129. In terms of the inability for hapū to withdraw from the NTB's Deed of Mandate, the claimants again refer to the *Haronga* case and the *Ngāpuhi Mandate Inquiry Report*. The claimants submit that the Ngāpuhi Mandate Tribunal held that hapū cannot be involuntarily held in a mandate.<sup>239</sup>

**Wai 2337 – the Hapū o Whangārei Terenga Paraoa (Norris and Fletcher) claim**<sup>240</sup>

130. This claim concerns the Crown's recognition of the NTB's Deed of Mandate to negotiate the settlement of Ngātiwai's outstanding historical Treaty of Waitangi claims. This claim is lodged on behalf of ngā hapū o Whangārei, including Parawhau, and was accompanied by the affidavits of Mira Norris<sup>241</sup> and Tamihana Paki.<sup>242</sup>

---

<sup>232</sup> At [15].

<sup>233</sup> *Haronga v Waitangi Tribunal* [2011] NZSC 53.

<sup>234</sup> At [16].

<sup>235</sup> At [18].

<sup>236</sup> At [21].

<sup>237</sup> At [22] – [25].

<sup>238</sup> At [26].

<sup>239</sup> At [29].

<sup>240</sup> Wai 2337, #1.1.2.

<sup>241</sup> Wai 2337, #A2.

<sup>242</sup> Wai 2337, #A3.



131. The claimants submit that the Deed of Mandate includes Whangārei Harbour and Parawhau lands.<sup>243</sup> The claimants also note that the Deed of Mandate includes Wai 688, which they submit is a Parawhau claim, and should not be included.<sup>244</sup>

Crown response to the Wai 2337 application for urgency<sup>245</sup>

132. The Crown notes that the NTB mandate does not include Te Parawhau as a hapū of Ngātiwai. However, the inclusion or exclusion of Te Parawhau from the Ngātiwai mandate is not raised as an issue by the claimants.<sup>246</sup>

133. The Crown notes that the NTB's Deed of Mandate outlines an area of interest that overlaps with other iwi or large natural groupings.<sup>247</sup> Furthermore, the challenge to the inclusion of certain lands in an area of interest is one that occurs in almost every treaty settlement process. It is rare for any iwi to have no overlapping interests with any other groups.<sup>248</sup> The Crown submits that such an overlap is not in itself prejudicial.<sup>249</sup>

134. As such, the Crown submits that the Wai 2337 claimants will not suffer any prejudice from the inclusion of the Whangārei area within Ngātiwai's area of interest.<sup>250</sup>

135. Finally, in terms of the Wai 688 claim, the Crown notes that this claim has been removed from the NTB's Deed of Mandate.<sup>251</sup>

Ngātiwai Trust Board specific response to the Wai 2337 application for urgency<sup>252</sup>

136. The NTB notes that historical evidence has been submitted which provides examples of Ngātiwai tūpuna in areas which overlap with those of the claimants.<sup>253</sup> Also, the NTB's commitment to working with other hapū, iwi and LNG's with respect to overlapping claims is articulated in section 16 of the Deed of Mandate.<sup>254</sup>

Claimants' reply submissions for Wai 2337<sup>255</sup>

137. On 19 February 2016 the Tribunal received the second affidavit of Marina Fletcher, as well as the affidavit of Tamihana Paki.<sup>256</sup>

138. Ms Fletcher notes in her affidavit the history and whakapapa of Te Parawhau in the Whangārei area.<sup>257</sup> She is concerned by the inclusion of Te Parawhau lands in the Ngātiwai area of interest.<sup>258</sup>

---

<sup>243</sup> Wai 2337, #1.1.2 at [16a].

<sup>244</sup> At [17].

<sup>245</sup> Wai 2544, #3.1.28 at [31] – [38].

<sup>246</sup> At [32].

<sup>247</sup> At [34].

<sup>248</sup> At [35].

<sup>249</sup> At [36].

<sup>250</sup> At [37].

<sup>251</sup> At [38].

<sup>252</sup> Wai 2544, #3.1.30 at [55] – [56].

<sup>253</sup> At [55].

<sup>254</sup> At [56].

<sup>255</sup> Wai 2577, #A47.

<sup>256</sup> Wai 2544, #A48.

<sup>257</sup> Wai 2544, #A47 at [1] – [92].

139. In terms of the Wai 688 claim being removed from the Deed of Mandate, Ms Fletcher states that her objection was not about the wrongful inclusion of claims, but the wrongful inclusion of Whangārei lands in the Ngātiwai area of interest.<sup>259</sup>
140. Ms Fletcher does not agree that Te Parawhau have an overlapping area of interest with Ngātiwai.<sup>260</sup> She submits that the whakapapa chart included in NTB trustee Kathleen Pita's evidence<sup>261</sup> is wrong, and is challenged by Te Parawhau.<sup>262</sup>
141. In his affidavit Tamihana Paki also notes the whakapapa and history of Te Parawhau and Patuharakeke.<sup>263</sup> He objects to the inclusion of Wai 504 in the NTB's Deed of Mandate, which he states is a Te Parawhau claim.<sup>264</sup> He also states that Patuharakeke is a hapū of Te Parawhau.<sup>265</sup>

**Wai 2545 – the Ngātiwai Trust Board Deed of Mandate (Nehua) claim**<sup>266</sup>

142. This claim concerns the Crown's recognition of the NTB's Deed of Mandate to negotiate the settlement of Ngātiwai's outstanding historical Treaty of Waitangi claims, including the potential settlement of Wai 1837. This claim was accompanied by the affidavit of Deirdre Nehua.<sup>267</sup>
143. The claimant submits that the Crown's essential requirement for mandates to be accepted is that the process undergone is open, fair and robust. However, the claimant alleges that the Crown has not upheld that standard.<sup>268</sup>
144. The claimant notes that the Crown has not allowed her to decide who will hold the mandate to settle her claim without interference. Instead, the Crown has dealt directly with the NTB, and has not resourced any other group to develop an alternative model, or a model more appropriate for Ngātiwai.<sup>269</sup>
145. The claimant states that she has raised concerns with the NTB through written correspondence, at hui held by the NTB, and in submissions on the Deed of Mandate.<sup>270</sup> However, she submits that nothing eventuated from her input, and her concerns were ignored.<sup>271</sup>

---

<sup>258</sup> At [98] – [100].

<sup>259</sup> At [104].

<sup>260</sup> At [110].

<sup>261</sup> Wai 2544, #A29.

<sup>262</sup> Wai 2544, #A47 at [111].

<sup>263</sup> Wai 2544, #A48 at [4] – [5].

<sup>264</sup> At [7].

<sup>265</sup> At [9].

<sup>266</sup> Wai 2545, #3.1.1.

<sup>267</sup> Wai 2545, #A1.

<sup>268</sup> Wai 2545, #3.1.1 at [6a].

<sup>269</sup> At [6b].

<sup>270</sup> At [6c].

<sup>271</sup> At [6d].

146. The claimant submits that the process the NTB has used to consult with Ngātiwai has not been consistent with Ngātiwai tikanga.<sup>272</sup> She submits that the process required by the Crown and undertaken by the NTB has not allowed Ngātiwai to freely express their concerns in an open forum.<sup>273</sup> Finally, she alleges that the Crown encouraged the NTB to claim areas which are not within the mana whenua of Ngātiwai.<sup>274</sup>

Crown response to the Wai 2545 application for urgency<sup>275</sup>

147. The Crown notes that the only evidence filed in support of this application for urgency is the two paged affidavit of Deirdre Nehua. That affidavit contains general statements opposing the NTB Deed of Mandate.<sup>276</sup>

148. In particular, the Crown notes that there is no evidence of:

- a. Details of the process conducted by the NTB in seeking its mandate, or of the applicant's involvement in the process, or the Crown's involvement;<sup>277</sup>
- b. The extent to which the applicant made her concerns known to the Crown, and how the Crown engaged with those concerns;<sup>278</sup> nor
- c. How the NTB's process was inconsistent with Ngātiwai tikanga, or how people were prevented from airing their views in any open forum, or how the Crown encouraged the NTB to claim exclusive areas beyond its mana whenua.<sup>279</sup>

149. Finally, the Crown submits that Wai 1837 is a contemporary claim rather than a historical claim. The Crown has expressed its opinion to the NTB, and expects that the Wai 1837 claim will be excluded from future negotiations.<sup>280</sup>

Ngātiwai Trust Board specific response to the Wai 2545 application for urgency<sup>281</sup>

150. The NTB notes the Crown's view that Wai 2337 is a contemporary treaty claim, and therefore outside of the NTB's mandate. The NTB notes that it is yet to review the relevant material, but that it accepts the Crown's view in principle.<sup>282</sup>

Claimants' reply submissions for Wai 2545<sup>283</sup>

151. On 18 February 2016, the Tribunal received the reply submissions for Wai 2545, accompanied by the second affidavit of Deirdre Nehua.<sup>284</sup>

---

<sup>272</sup> At [6f].

<sup>273</sup> At [6g].

<sup>274</sup> At [6h].

<sup>275</sup> Wai 2544, #3.1.28 at [39] – [42].

<sup>276</sup> At [41].

<sup>277</sup> At [41.1].

<sup>278</sup> At [41.2].

<sup>279</sup> At [41.3].

<sup>280</sup> At [42].

<sup>281</sup> Wai 2544, #3.1.30 at [61] – [63].

<sup>282</sup> At [61] – [63].

<sup>283</sup> Wai 2544, #3.1.44.

<sup>284</sup> Wai 2544, #A35.

152. The claimant submits that the Wai 1837 claim is an historical treaty claim, in spite of the Crown assertion that it is a contemporary claim.<sup>285</sup> The claimant submits that the historical issues of Wai 1837 will still be settled by any Ngātiwai settlement.<sup>286</sup>
153. The claimant submits that she and her whānau do not wish to be involved in the Ngātiwai settlement, and they have sought the removal of their claim from the Deed of Mandate.<sup>287</sup>
154. The claimant also states that she did not attend NTB hui because she was informed by the NTB that Wai 1837 was not included in the Deed of Mandate.<sup>288</sup>

**Wai 2546 – the Ngātiwai Trust Board Deed of Mandate (George and others) claim**<sup>289</sup>

155. This claim concerns the Crown's recognition of the NTB's Deed of Mandate to negotiate the settlement of Ngātiwai's outstanding historical Treaty of Waitangi claims. This claim was accompanied by the affidavit of Mylie George.<sup>290</sup>
156. The claimants allege that the Crown's recognition of the NTB Deed of Mandate will significantly and irreversibly prejudice their whānau and Ngātiwai generally.<sup>291</sup>
157. The claimants allege that the Crown has and will cause them prejudice by:<sup>292</sup>
- a. Recognising the NTB's Deed of Mandate without adequate consultation; and
  - b. Recognising a mandate which:
    - i. does not have adequate accountability measures;
    - ii. is not representative of Ngātiwai;
    - iii. does not allow for hapū to exercise rangatiratanga;
    - iv. treats Ngātiwai hapū disparately; and
    - v. fundamentally misapplies Ngātiwai tikanga.

**Crown response to the Wai 2546 application for urgency**<sup>293</sup>

158. The Crown notes that many of the allegations in the Wai 2546 application for urgency are against the NTB and not against the Crown. However, it submits that the aspects

---

<sup>285</sup> Wai 2544, #3.1.44 at [12].

<sup>286</sup> At [15].

<sup>287</sup> At [17].

<sup>288</sup> At [23].

<sup>289</sup> Wai 2546, #3.1.1.

<sup>290</sup> Wai 2546, #A1.

<sup>291</sup> Wai 2546, #3.1.1 at [6].

<sup>292</sup> At [6].

<sup>293</sup> Wai 2544, #3.1.28 at [43] – [51].

of the Wai 2546 claim that do challenge the Crown's role in the mandating process are responded to in the third affidavit of Emily Owen.<sup>294</sup>

159. Wai 2546 claimant Mylie George alleges that the late arrival of OTS to a hui in December 2013 hampered the ability of OTS officials to understand the claimants' concerns and was unprofessional.<sup>295</sup>
160. Ms Owen submits that the hui in question was organised and held by the NTB. OTS did not convene the meeting, and was invited to attend in an observing capacity only.<sup>296</sup>
161. Although Ms George states that further meetings were to be held with OTS after a hui on 18 October 2014 but never eventuated, Ms Owen's evidence is that OTS did not commit to meeting with every submitter individually, but would do its best to meet with people.<sup>297</sup>
162. Ms George refers to, but did not provide, a letter from OTS to her from 7 August 2015. Ms George says that OTS advised that it considered the issues raised were being sufficiently dealt with.<sup>298</sup>
163. Ms Owen has provided a copy of the letter, which the Crown submits is important.<sup>299</sup> The letter sets out in detail four concerns raised at the hui on 18 October 2014, as well as OTS's response to those concerns:
  - a. The first concern was the perceived lack of communication and engagement from the NTB. OTS noted in response that the NTB had developed and implemented an engagement and communication plan from December 2014 to March 2015. Although OTS has not yet met all of the objectives it set itself as part of the engagement plan, it was still working to achieve them. This included the appointment of a permanent Communications Person, and a review of its current database function.<sup>300</sup>
  - b. The second concern was the perceived lack of hapū representation. OTS responded by saying it did not consider it appropriate or practical for the Crown to dictate that NTB change its marae-based constitution. NTB's marae-based structure was long-established and OTS considered this proved the robustness of NTB's constitution. However, OTS agreed with NTB that hapū representation was an important issue that required addressing. As such, the NTB had agreed to establish two new advisory roles for its Treaty Claims Committee, which required support from claimants, rangatahi and hapū. In addition, the Deed of Mandate states that the NTB will provide for hapū and marae to provide advice

---

<sup>294</sup> Wai 2544, #A26.

<sup>295</sup> Wai 2546, #A1 at [8] – [9].

<sup>296</sup> Wai 2544, #3.1.28 at [46].

<sup>297</sup> At [47].

<sup>298</sup> At [48].

<sup>299</sup> At [49].

<sup>300</sup> At [49.1].

on their involvement in the settlement process. Also, OTS noted that the post-settlement governance entity could also address hapū representation.<sup>301</sup>

- c. The third concern was the NTB's internal process. OTS noted that it was inappropriate for it to involve itself too deeply in the way the NTB conducts itself as a trust. OTS noted that the NTB had met the Crown's criteria for transparency and accountability. OTS also concluded that the NTB was taking positive steps to address concerns with its internal processes.<sup>302</sup>
- d. The fourth concern was about the impact negotiations might have on the ability of the claimants to pursue their claims in the Waitangi Tribunal, given the CFRT policy to fund either Tribunal hearings or direct negotiations but not both. Amongst other things, OTS noted that the NTB would request that CFRT provide the same dual funding that it has to Ngāpuhi, namely funding for both Tribunal hearings and direct negotiations.<sup>303</sup>

164. Finally, the Crown notes that it has appropriately engaged with the Wai 2546 claimants, noting specific examples, including:

- a. A signed standard form submission from claimant Mike Leuluai opposing the NTB mandate from 21 August 2014;<sup>304</sup>
- b. An individual submission from Ms George to OTS on the NTB's Deed of Mandate from 5 September 2014;<sup>305</sup>
- c. A hui between OTS and various submitters on the NTB's Deed of Mandate held on 18 October 2014;<sup>306</sup>
- d. Letters to Ms George, Mr Leuluai and claimant Ngāio McGee following the October hui summarising concerns that were raised at the hui;<sup>307</sup> and
- e. Further letters to Ms George, Mr Leuluai and Ms McGee showing how the NTB had addressed concerns that had been raised, dated 7 August 2015.<sup>308</sup>

Ngātiwai Trust Board specific response to the Wai 2546 application for urgency<sup>309</sup>

165. The NTB's position in relation to this claim is the same as that set out for Wai 156.

---

<sup>301</sup> At [49.2].

<sup>302</sup> At [49.3].

<sup>303</sup> At [49.4].

<sup>304</sup> At [50.1].

<sup>305</sup> At [50.2].

<sup>306</sup> At [50.3].

<sup>307</sup> At [50.4].

<sup>308</sup> At [50.6].

<sup>309</sup> Wai 2544, #3.1.30 at [64].

Claimants' reply submissions for Wai 2546<sup>310</sup>

166. On 19 February 2016, the Tribunal received the reply submissions for Wai 2546, accompanied by the affidavit of Mylie George<sup>311</sup> and the affidavit of Carmen Hetaraka.<sup>312</sup>
167. In terms of the Crown's submission that the claimants will not suffer significant or irreversible prejudice, the claimants make the following submissions:
- a. They are being represented in negotiations with the Crown by an entity that is not accountable to Ngātiwai. They submit that the amendments made to the Ngātiwai Deed of Mandate do not ameliorate the prejudice. Further, the only accountability measures available are the withdrawal mechanism, or the marae trustee election process;<sup>313</sup>
  - b. They are being represented in negotiations with the Crown by an entity that is not representative of Ngātiwai;<sup>314</sup> and
  - c. The Crown's process fails to account for or support the Ngātiwai tikanga of hapū rangatiratanga.<sup>315</sup>
168. In terms of consultation, the claimants assert that the level of engagement was inadequate.<sup>316</sup>
169. In terms of the Crown's submission that there are alternative remedies available, the claimants make the following submissions:
- a. None of the alternative remedies proposed by the Crown remove the prejudice alleged by the claimants;<sup>317</sup>
  - b. The dispute resolution clause is not helpful when the claimants are concerned with the adequacy of the NTB's structure itself;<sup>318</sup>
  - c. In terms of the 100 signatures needed to initiate the withdrawal process, the claimants cannot facilitate this in an urgent manner without the funding and resources similar to that which were available to the NTB;<sup>319</sup> and
  - d. A vote to reject any proposed post-settlement governance entity is too distant to be of any use to the claimants.<sup>320</sup>
170. Finally, the claimants submit that the NTB does not have the support of Ngātiwai.<sup>321</sup>

---

<sup>310</sup> Wai 2544, #3.1.54.

<sup>311</sup> Wai 2544, #A46.

<sup>312</sup> Wai 2544, #A45.

<sup>313</sup> Wai 2544, #3.1.54 at [4a].

<sup>314</sup> At [4b].

<sup>315</sup> At [4c].

<sup>316</sup> At [6] – [9].

<sup>317</sup> At [11].

<sup>318</sup> At [12].

<sup>319</sup> At [13].

<sup>320</sup> At [14].

**Wai 2548 – the Ngātiwai Trust Board Deed of Mandate (Reti and others) claim**<sup>322</sup>

171. This claim concerns the Crown’s recognition of the NTB’s Deed of Mandate to negotiate the settlement of Ngātiwai’s outstanding historical Treaty of Waitangi claims, including the claims of Te Kapotai. This claim was accompanied by the affidavits of Sonny George,<sup>323</sup> Patu Hohepa<sup>324</sup> and Willow-Jean Prime.<sup>325</sup>
172. The claimants submit that the Crown has wrongfully included Te Kapotai as a hapū of Ngātiwai in the NTB’s Deed of Mandate, and that there is no basis for this inclusion.<sup>326</sup>
173. The claimants submit that the Crown and the NTB cannot demonstrate a mandate under tikanga, or Crown policy, to include Te Kapotai in the Deed of Mandate, or to represent Te Kapotai in discussions concerning the settlement of their claims.<sup>327</sup> The claimants also submit that the Crown has failed to protect them as a hapū and as a Te Tiriti o Waitangi partner.<sup>328</sup>
174. The claimants note that they have made numerous attempts to resolve these issues with the Crown, and since 2013 have sought to be removed from all mandate documents. However, they submit that all attempts have failed, and both the Crown and the NTB refuse to remove Te Kapotai from the NTB Deed of Mandate.<sup>329</sup>
175. The claimants make the following specific allegations with regards to Crown actions:<sup>330</sup>
- a. The Crown has failed to actively protect the mana, rangatiratanga and tikanga of Te Kapotai in that;
    - i. The Crown has failed to remove Te Kapotai from the NTB’s Deed of mandate;
    - ii. The Crown has not ensured that it is dealing with the right Māori group or groups so as to protect the inter-tribal relationships and authority of hapū, specifically Te Kapotai; and
    - iii. The Crown has failed to practically and flexibly apply its ‘large natural groups’ policy in accordance with Te Kapotai’s mana, rangatiratanga and tikanga;
  - b. The Crown has not received a mandate from Te Kapotai;

---

<sup>321</sup> At [15] – [19].

<sup>322</sup> Wai 2548, #3.1.1.

<sup>323</sup> Wai 2548, #A1.

<sup>324</sup> Wai 2548, #A2.

<sup>325</sup> Wai 2548, #A3.

<sup>326</sup> Wai 2544, #3.1.1 at [4].

<sup>327</sup> At [5].

<sup>328</sup> At [6].

<sup>329</sup> At [8].

<sup>330</sup> At [21].



- i. Te Kapotai were not included in any discussions or correspondence between the NTB and the Crown until the conclusion of the first phase of consultation in July 2013; and
    - ii. On 9 August 2013 Te Kapotai's position on the Ngātiwai settlement was made clear at a meeting with Crown officials and the NTB. In particular, Te Kapotai set out their emphatic rejection of the inclusion of Te Kapotai as a hapū of Ngātiwai;
  - c. The Crown failed to take a traditional, hapū driven approach consistent with tikanga Māori;
    - i. The claimants assert that Te Kapotai practices hapū-based decision making based on tikanga, and had exercised that tikanga in determining their opposition to the Crown and the NTB's Deed of Mandate; and
    - ii. The NTB's Deed of Mandate asserts mana whenua in areas that are outside the takiwā of Ngātiwai;
  - d. The Crown failed to act impartially;
    - i. The Crown has not ensured that an open, fair and robust process was followed by the NTB; and
    - ii. The Crown has not allowed Te Kapotai to decide who will hold the mandate to settle Te Kapotai's treaty claims without Crown interference; and
  - e. The Crown failed to remove Te Kapotai hapū, and the Wai 1464/1546 treaty claims, from the mandate process.
176. In terms of significant and irreversible prejudice, the claimants make the following submissions.<sup>331</sup>
- a. Te Kapotai mana, rangatiratanga and tikanga has and will continue to be undermined and breached by the Crown failing to resolve the mandate and representation issues in the NTB mandating process;
  - b. Te Kapotai identity and whakapapa is being subsumed and redefined by the mandate process that has been undertaken;
  - c. Te Kapotai's mana whenua is being encroached upon by the NTB's attempts to claim customary interests in the Te Kapotai takiwā;
  - d. Te Kapotai are being represented in settlement negotiations by an entity that they have never mandated, and that they do not wish to represent them;
  - e. Te Kapotai are being deprived of their right to a full inquiry into their claims;

---

<sup>331</sup> At [22].

- f. Te Kapotai are suffering from significant inter-tribal and intra-tribal conflict;
- g. Te Kapotai do not have the capacity or resourcing to continue to oppose the NTB's Deed of Mandate;
- h. Te Kapotai will not receive a fair, robust and enduring settlement of their treaty claims; and
- i. The issues arising out of the Ngātiwai mandate process are threatening the ability of Te Kapotai to resolve engagement issues with the Crown in the Ngāpuhi mandate process.

177. The claimants submit that there are no alternative remedies that are reasonable in the circumstances for them to take.<sup>332</sup> In particular, the claimants note that for over two years Te Kapotai have attempted to reach an agreement with the Crown and the NTB to be removed from the NTB Deed of Mandate. However, all attempts have been unsuccessful.<sup>333</sup>

Crown response to the Wai 2548 application for urgency<sup>334</sup>

178. The Crown makes four submissions in response to this application for urgency:

- a. It is not for the Crown to determine the debate between the claimants and the NTB as to whether, and to what extent, Te Kapotai is a hapū of Ngātiwai.<sup>335</sup>
- b. Reference to Te Kapotai as a shared hapū in the Deed of Mandate does not amount to significant and irreversible prejudice to the claimants.<sup>336</sup>
- c. The claimants have a realistic alternative remedy available to them – to continue the dialogue with the NTB.<sup>337</sup>
- d. The claimants have not shown that they represent all of Te Kapotai, particularly those wishing to be involved in the Ngātiwai settlement.<sup>338</sup>

179. The Crown submits that the claimants have characterised the NTB as claiming the entirety of Te Kapotai.<sup>339</sup>

180. The Crown understands the NTB's position on Te Kapotai to be as follows:

- a. The NTB recognises that Te Kapotai's ancestor is Whiti. Ngātiwai do not claim descent through Whiti. In this respect Te Kapotai is clearly a hapū of Ngāpuhi.<sup>340</sup>

---

<sup>332</sup> At [29].

<sup>333</sup> At [30].

<sup>334</sup> Wai 2544, #3.1.28 at [52] – [70].

<sup>335</sup> At [53.1].

<sup>336</sup> At [53.2].

<sup>337</sup> At [53.3].

<sup>338</sup> At [53.4].

<sup>339</sup> At [55].

<sup>340</sup> At [56.1].

- b. The NTB acknowledges that Waikare marae is a marae of Te Kapotai. The Deed of Mandate does not include Waikare marae as a Ngātiwai marae.<sup>341</sup>
  - c. The NTB considers there to be various links between Te Kapotai and Ngātiwai. There are key tūpuna who signed the Treaty of Waitangi and who identified as both Te Kapotai and Ngātiwai. There is also a complex inter-weaving of other whakapapa lines.<sup>342</sup>
  - d. Although many Te Kapotai cannot trace whakapapa to Ngātiwai tūpuna, and are therefore not Ngātiwai, there are some who can, and who choose to do so.<sup>343</sup>
  - e. The NTB says that in this way Te Kapotai is, in part, a hapū of both Ngāpuhi and Ngātiwai.<sup>344</sup>
181. The Crown notes that in the Deed of Mandate Te Kapotai is a shared hapū that is included in the claimant definition of other large natural groups.<sup>345</sup>
182. The Crown reiterates that it is not for the Crown to resolve competing views about whakapapa through any mandating process.<sup>346</sup>
183. In terms of significant and irreversible prejudice, the Crown submits that it is important to understand what follows from the Deed of Mandate's reference to Te Kapotai:
- a. OTS has explained that in most settlements hapū are listed for the purpose of clarity. In this case, membership of Ngātiwai is not dependent on membership to any hapū. Rather, it is dependent on descent from a Ngātiwai ancestor. This means that whether or not the Deed of Mandate makes express reference to a list of Ngātiwai hapū does not affect whether individuals will have their claims settled.<sup>347</sup>
  - b. The Crown submits that there is therefore no demonstrable prejudice to the Wai 2548 claimants from the Deed of Mandate's reference to Te Kapotai.<sup>348</sup>
184. In terms of alternative remedies available, the Crown submits that the Wai 2548 application was filed before the NTB and the Wai 2548 claimants had a chance to resolve their discussions.<sup>349</sup> The Crown notes the following significant dates:
- a. On 27 November 2015, OTS, the NTB and the claimants met to discuss this issue.<sup>350</sup>

---

<sup>341</sup> At [56.2].

<sup>342</sup> At [56.3].

<sup>343</sup> At [56.4] – [56.5].

<sup>344</sup> At [56.6].

<sup>345</sup> At [57].

<sup>346</sup> At [58].

<sup>347</sup> At [60].

<sup>348</sup> At [61].

<sup>349</sup> At [63].

<sup>350</sup> At [64.1].

- b. NTB followed up on the meeting with an email to the Wai 2548 claimants, but the issue was unresolved.<sup>351</sup>
- c. In early January 2016, NTB wrote to the Wai 2548 claimants explaining how and why the NTB consider Te Kapotai, in part, has whakapapa links to Ngātiwai tūpuna, and seeking to continue the dialogue.<sup>352</sup>

185. The Crown submits that the most appropriate way forward is to continue the dialogue. The Crown also submits that the claimants do not appreciate the nuanced way in which the NTB sees Te Kapotai as having whakapapa links to Ngātiwai tūpuna.<sup>353</sup>

186. In terms of representation of Te Kapotai, the Crown highlights a statement Ms Prime makes in her affidavit<sup>354</sup> that their mandate to speak on behalf of Te Kapotai comes directly from their marae. The Crown submits that this shows that the claimants do not speak for those of Te Kapotai who do not affiliate with Waikare marae. The Crown submits that this is important because the NTB says that it has received its mandate from such people of Te Kapotai.<sup>355</sup>

Ngātiwai Trust Board specific response to the Wai 2548 application for urgency<sup>356</sup>

187. The NTB acknowledges the view of the claimants that Te Kapotai is in no way a Ngātiwai hapū. However, the NTB notes that there is a contrary view that a segment, perhaps only a small segment, of Te Kapotai shares whakapapa with Ngātiwai.<sup>357</sup>

188. The NTB submits that it has never asserted that Te Kapotai is wholly a Ngātiwai hapū. Rather, it maintains that the inclusion of Te Kapotai in the Deed of Mandate simply reflects the views of those who see themselves as Ngātiwai / Te Kapotai. Furthermore, the NTB seeks to work with the claimants and other Te Kapotai to ensure that those members of the Ngātiwai claimant community are properly represented.<sup>358</sup>

189. In these circumstances, the NTB does not accept that the claimants are prejudiced by the Crown's recognition of the Deed of Mandate.<sup>359</sup>

Claimants' reply submissions for Wai 2548<sup>360</sup>

190. On 19 February 2016, the Tribunal received the reply submissions for Wai 2548. This was accompanied by the second affidavit of Willow-Jean Prime<sup>361</sup> and the second affidavit of Patu Hohepa.<sup>362</sup>

---

<sup>351</sup> At [64.2].

<sup>352</sup> At [64.3].

<sup>353</sup> At [65].

<sup>354</sup> Wai 2548, #A3.

<sup>355</sup> At [70].

<sup>356</sup> Wai 2544, #3.1.30 at [65] – [67].

<sup>357</sup> At [65].

<sup>358</sup> At [66].

<sup>359</sup> At [67].

<sup>360</sup> Wai 2544, #3.1.57.

<sup>361</sup> Wai 2544, #A42.

<sup>362</sup> Wai 2544, #A49.

191. The claimants note that the Tribunal, in the Wai 2490 Ngāpuhi Mandate Inquiry, concluded that it is essential that hapū rangatiratanga and hapū tikanga are respected, protected and enhanced in the mandating process.<sup>363</sup>
192. The claimants submit that the fundamental question for the Tribunal is whether or not the Crown has respected, protected and enhanced the mana, tikanga and rangatiratanga of Te Kapotai in its conduct throughout the NTB mandate process.<sup>364</sup> The claimants submit that the Crown has not done so.<sup>365</sup>
193. The claimants submit that the Crown's recognition of the NTB's Deed of Mandate was a decisive step in redefining Te Kapotai as a hapū of Ngātiwai when it is not. The net effect is that the NTB will be negotiating and settling claims that are outside the scope of its mandate, which will create a further grievance for Te Kapotai.<sup>366</sup>
194. The claimants submit that the Crown's actions have directly undermined the mana, tikanga and rangatiratanga of Te Kapotai, who have chosen not to be involved in the NTB's Deed of Mandate process. They submit that this has caused, and will continue to cause, Te Kapotai significant and irreversible prejudice.<sup>367</sup>
195. The claimants submit that the circumstances, timing and issues of the NTB's Deed of Mandate process are so closely connected to Te Kapotai's experience in the Tūhoronuku Deed of Mandate process that the prejudice is exacerbated. They submit that the overlap in the two processes is so apparent that the Crown should have had a deeper understanding and appreciation of the prejudice that Te Kapotai suffered.<sup>368</sup> They also submit that the Crown is displaying a pattern of behaviour that is repeatedly undermining the mana and rangatiratanga of Te Kapotai.<sup>369</sup>
196. The claimants submit that in opposing Te Kapotai's application for urgency the Crown has attempted to portray that:<sup>370</sup>
- a. Te Kapotai is a hapū, at least in part, of Ngātiwai, and that the contrary position adopted by Te Kapotai is unreasonable, misinformed and obstructive;
  - b. Te Kapotai has had every opportunity to participate in the NTB's Deed of Mandate process;
  - c. The inclusion of Te Kapotai in the Deed of Mandate does not create significant and irreversible prejudice for the claimants; and
  - d. There is no rational or compelling reason for the Tribunal to grant the urgent hearing as sought.
197. The Te Kapotai claimants strongly reject these assertions.<sup>371</sup>

---

<sup>363</sup> Wai 2544, #3.1.57 at [6].

<sup>364</sup> At [7].

<sup>365</sup> At [8].

<sup>366</sup> At [9].

<sup>367</sup> At [10].

<sup>368</sup> At [11].

<sup>369</sup> At [12].

<sup>370</sup> At [17].

198. The claimants submit that the Crown and the NTB are attempting to manipulate and redefine the contemporary and historical identity of Te Kapotai in order to manufacture a tribal entity for the purposes of settlement. The Crown and the NTB have attributed various titles to this new group such as ‘Te Kapotai o Ngātiwai’, ‘Te Kapotai / Ngātiwai’, ‘Te Kapotai of Ngātiwai’ and ‘Te Kapotai, a shared hapū of Ngātiwai’.<sup>372</sup>
199. Where the relationship between Te Kapotai and Ngātiwai was one of historical association, intermarriage and shared whakapapa, the Deed of Mandate now represents that Te Kapotai is a Ngātiwai hapū, and is under the dominance and leadership of Ngātiwai.<sup>373</sup>
200. The claimants note that Te Kapotai’s position on settlement is as follows:<sup>374</sup>
- a. Te Kapotai do not support the NTB, or any other entity to whom they have given their mandate, to represent their hapū in settlement discussions with the Crown;
  - b. Te Kapotai want to complete Stage Two of the Wai 1040 Te Paparahi o Te Raki Inquiry; and
  - c. Te Kapotai will decide for themselves who will negotiate and settle their historical Treaty claims.
201. The claimants submit that the Crown has erred in its recognition of the NTB’s Deed of Mandate given that the Crown was aware that:<sup>375</sup>
- a. Te Kapotai has consistently opposed their inclusion in the Deed of Mandate;
  - b. Te Kapotai maintains that it is not a hapū of Ngātiwai;
  - c. Te Kapotai maintains and practices hapū-based decision making based on tikanga, and has exercised that tikanga in opposition to the NTB Deed of mandate; and
  - d. The NTB cannot demonstrate under tikanga nor Crown policy a mandate to include Te Kapotai in its Deed of Mandate.
202. In terms of the relationship between Te Kapotai and Ngātiwai, and the Crown assertion that it is not for the Crown to determine whether Te Kapotai is a hapū of Ngātiwai, the claimants submit that the Crown cannot sustain this argument. They submit that the Crown has played a ‘decisive role’ in initiating this dispute.<sup>376</sup>

---

<sup>371</sup> At [18] – [19].

<sup>372</sup> At [25].

<sup>373</sup> At [26].

<sup>374</sup> At [28].

<sup>375</sup> At [35].

<sup>376</sup> At [46].

203. A significant issue for the claimants is that the Crown's decision allows the manipulation of their identity and whakapapa, which is now represented in the NTB's Deed of Mandate.<sup>377</sup>
204. The claimants assert that there is a fundamental difference between acknowledging an association through whakapapa and intermarriage and claiming another tribe as your own. They submit that intermarriage does not give Ngātiwai, or any other entity, the right to claim Te Kapotai as their own.<sup>378</sup>
205. The claimants allege that the Crown and the NTB are manipulating and redefining the historical and contemporary identity of Te Kapotai to create a LNG for settlement purposes.<sup>379</sup>
206. The claimants note that the Ngāpuhi Mandate Tribunal found that there were minimum standards that the Crown must adhere to when recognising a mandate, which include:<sup>380</sup>
- a. Ensuring it is dealing with the right Māori group or groups;
  - b. Recognising that the structure of the mandated entity must allow for hapū interests to be tested and heard; and
  - c. Actively protecting the rangatiratanga and tikanga of those hapū who are opposed to their claims being negotiated by the mandate entity.
207. In terms of the Crown's assertion that there is no significant or irreversible prejudice, the claimants submit that the Crown minimises their claim when it says that reference to Te Kapotai as a shared hapū does not cause prejudice.<sup>381</sup>
208. The claimants submit that it is not clear from the Deed of Mandate that Te Kapotai is a shared hapū.<sup>382</sup> The Crown reference to Te Kapotai as a shared hapū in the Deed of Mandate is therefore incorrect.<sup>383</sup>
209. The claimants submit that the prejudice they are suffering is significant and irreversible, and includes the following:<sup>384</sup>
- a. Te Kapotai's mana, tikanga and rangatiratanga has been and will continue to be undermined by the negotiation process;
  - b. Te Kapotai's claims will be settled without hapū consent;
  - c. The mandating and negotiation process is causing significant damage to inter-tribal and intra-tribal relationships; and

---

<sup>377</sup> At [49].

<sup>378</sup> At [54].

<sup>379</sup> At [55].

<sup>380</sup> At [60].

<sup>381</sup> At [71].

<sup>382</sup> At [72].

<sup>383</sup> At [74].

<sup>384</sup> At [76] – [103].

- d. Te Kapotai do not have the capacity or resourcing to continue to oppose the NTB's Deed of Mandate.
210. In terms of alternative remedies proposed by the Crown, the claimants make the following submissions:
- a. The claimants are offended by the Crown's invitation to have further discussions about Te Kapotai's whakapapa links to Ngātiwai and submit that they themselves know Te Kapotai's whakapapa;<sup>385</sup> and
  - b. Given that the Crown has already recognised the NTB's Deed of Mandate, the claimants are in a more vulnerable and marginalised position, and will not be on an equal level with the Crown and the NTB.<sup>386</sup>
211. In terms of the Crown submission that the claimants are not representative of Te Kapotai, and do not speak for those members of Te Kapotai who support the mandate, the claimants make the following submissions:
- a. It is not for the Crown to dictate how Te Kapotai governs itself;<sup>387</sup>
  - b. Te Kapotai's representative structure is based on Te Kapotai tikanga;<sup>388</sup> and
  - c. In refusing to acknowledge and give effect to the collective opposition of Te Kapotai to the NTB's Deed of Mandate, the Crown has misapplied tikanga Māori.<sup>389</sup>
212. The claimants submit that it is appropriate for the Tribunal to inquire into this alleged misapplication of tikanga Māori.<sup>390</sup>

**Wai 2549 – the Ngātiwai Trust Board Deed of Mandate (Mahanga and others) claim**<sup>391</sup>

213. This claim concerns the Crown's recognition of the NTB's Deed of mandate to negotiate the settlement of Ngātiwai's outstanding historical Treaty of Waitangi claims, including the claims of Te Waiariki, Ngāti Kororā and Ngāti Taka Pari hapū. Specifically, the claimants object to the inclusion of the following Wai numbers:
- a. Wai 620, Wai 1411, Wai 1412, Wai 1413, Wai 1414, Wai 1415, Wai 1416 and Wai 2239.
214. This claim was accompanied by the affidavits of Pereri Mahanga<sup>392</sup> and Ngaire Henare.<sup>393</sup>

---

<sup>385</sup> At [105] – [106].

<sup>386</sup> At [112].

<sup>387</sup> At [118].

<sup>388</sup> At [122].

<sup>389</sup> At [124].

<sup>390</sup> At [131].

<sup>391</sup> Wai 2549, #3.1.1.



215. The claimants assert that they are not a hapū of Ngātiwai, and that their three hapū maintain a defined mana whenua which is exclusive, autonomous, and independent of Ngātiwai.<sup>394</sup>
216. The claimants assert that the inclusion of the claims listed above has been wrong on two counts:<sup>395</sup>
- a. It is contrary to the genealogical, geographical and geopolitical facts of history in that the claimants are not Ngātiwai; and
  - b. The claimants for those claims did not consent to their inclusion in the NTB's Deed of Mandate.
217. The claimants assert that they have suffered and will continue to suffer the following significant and irreversible prejudice:<sup>396</sup>
- a. The Crown's disregard of the hapū rangatiratanga of Te Waiariki, Ngāti Kororā and Ngāti Taka Pari hapū;
  - b. The Crown's attempt to achieve, through the Ngātiwai mandate, what it was unable to achieve through the Ngāpuhi mandate;
  - c. The Crown being a party to the re-writing of the whakapapa of Te Waiariki, Ngāti Kororā and Ngāti Taka Pari hapū;
  - d. The potential loss of the ability to seek binding recommendations from the Tribunal with regards to the Glenbervie Forest; and
  - e. The deterioration of relationships between the claimants' hapū and Ngātiwai.
218. The claimants note that they have no other remedies available to them, including the dispute resolution procedure outlined in the Deed of Mandate. The claimants assert that the procedures set out in the Deed of Mandate do not apply to them, as they are not Ngātiwai.<sup>397</sup>

*Crown response to the Wai 2549 application for urgency*<sup>398</sup>

219. The Crown submits that the Wai 2549 claimants do not, in any way, challenge the process by which the Crown reached its decision to recognise the NTB's Deed of Mandate. Instead, the Crown submits that the claimants challenge the outcome.<sup>399</sup>

---

<sup>392</sup> Wai 2549, #A1.

<sup>393</sup> Wai 2549, #A2.

<sup>394</sup> Wai 2549, #3.1.1 at [3].

<sup>395</sup> At [7].

<sup>396</sup> At [11].

<sup>397</sup> At [11c].

<sup>398</sup> Wai 2544, #3.1.28 at [70] – [89].

<sup>399</sup> At [71].

220. The Crown submits that, although the claimants assert that they represent all of Te Waiariki, Ngāti Kororā and Ngāti Taka Pari, they have not provided evidence showing that they hold a mandate with respect to the settlement of treaty claims.<sup>400</sup>
221. The Crown highlights the evidence of claimant Pereri Mahanga,<sup>401</sup> where he says that, as chair of a hapū trust, he was given the mandate to advance those claims through the Tribunal. According to Mr Mahanga, this mandate was reaffirmed at an AGM in August 2015.<sup>402</sup>
222. The Crown says that, in reviewing the minutes of that meeting, there is no mention of the NTB mandate. The final resolution does state that no other iwi will speak on their behalf. However, there is no evidence that the trust has in any way advertised its intention to represent all members of Te Waiariki, Ngāti Kororā and Ngāti Taka Pari, or to speak on behalf of Te Waiariki, Ngāti Kororā and Ngāti Taka Pari in opposition to the NTB mandate.<sup>403</sup>
223. The Crown also notes that the claimants have repeatedly refused to meet with OTS to discuss their concerns.<sup>404</sup>
- a. On 13 August 2014, OTS wrote to Mr Mahanga inviting all members of Te Waiariki, Ngāti Kororā and Ngāti Taka Pari to a hui to discuss the draft Deed of Mandate. The letter stated that OTS would also like to invite the NTB to participate in the discussions.<sup>405</sup>
  - b. Mr Mahanga says that through this letter the Crown seemed to be facilitating and fostering disharmony. However, the Crown does not accept that this is so.<sup>406</sup>
  - c. On 19 August 2014, Mr Mahanga's solicitors replied to OTS's letter, requiring all future communication to be through their firm, and stating that there was no desire to meet with NTB as part of any engagement with the Crown.<sup>407</sup>
  - d. On 21 August 2014, OTS replied by email, and strongly encouraged the claimants to consider meeting with OTS to discuss their concerns directly.<sup>408</sup>
  - e. The Crown notes that the claimants made a submissions on the Deed of Mandate.<sup>409</sup>
  - f. On 23 October 2014, OTS wrote to the claimants' solicitor, and proposed a meeting between the claimants and the NTB.<sup>410</sup> On 31 October 2014 the claimants' solicitor replied, and declined to meet.<sup>411</sup>

---

<sup>400</sup> At [73].

<sup>401</sup> Wai 2549, #A1.

<sup>402</sup> Wai 2544, #3.1.28 at [74].

<sup>403</sup> At [75].

<sup>404</sup> At [76].

<sup>405</sup> At [77].

<sup>406</sup> At [78].

<sup>407</sup> At [79].

<sup>408</sup> At [80].

<sup>409</sup> At [81].

- g. On 10 December 2014, OTS wrote to the claimants' solicitor inviting the claimants to meet with OTS, and saying that OTS still intended to meet with other submitters of Te Waiariki, Ngāti Kororā and Ngāti Taka Pari.<sup>412</sup>
- h. On 23 December 2014, the claimants' solicitor replied saying it was not treaty compliant for the Crown to meet with individual members of Te Waiariki, Ngāti Kororā and Ngāti Taka Pari without posing questions to the hapū.<sup>413</sup>
- i. On 19 February 2015, OTS again wrote to the claimants' solicitors inviting the claimants to a hui on 15 March 2015 at Ngunguru marae. The minutes of that hui show that Mr Mahanga did in fact attend that meeting.<sup>414</sup>

Ngātiwai Trust Board specific response to the Wai 2549 application for urgency<sup>415</sup>

224. The NTB does not accept that the Crown's recognition of the Deed of Mandate will result in prejudice to these claimants, given the clear historical basis for regarding Te Waiariki, Ngāti Kororā and Ngāti Taka Pari as shared hapū of Ngātiwai. The Deed of Mandate makes it clear that claims of shared hapū are only included to the extent that they are Ngātiwai claims. The non-Ngātiwai interests of these claimants are unaffected by the Deed of Mandate.<sup>416</sup>

225. In addition, the divergent views expressed by these claimants, and those in the related Wai 2550, call into question the mandates of both groups with respect of the hapū they claim to represent. In contrast, the NTB has provided evidence that significant numbers of members of each hapū consider themselves to be Ngātiwai hapū.<sup>417</sup>

Claimants' reply submissions for Wai 2549<sup>418</sup>

226. On 18 February 2016 the Tribunal received the reply submissions for Wai 2549.

227. The claimants make the following submissions:

- a. Within the rohe of Te Waiariki, Ngāti Kororā and Ngāti Taka Pari there are no Ngātiwai interests. Furthermore, marrying into Te Waiariki, Ngāti Kororā and Ngāti Taka Pari does not change the derivation of customary rights in terms of ancestral rights and rights of possession;<sup>419</sup>
- b. They claimants assert that they are representative of Te Waiariki, Ngāti Kororā and Ngāti Taka Pari. The claimants also assert that there is no evidence that Te

---

<sup>410</sup> At [82].

<sup>411</sup> At [83].

<sup>412</sup> At [84].

<sup>413</sup> At [85].

<sup>414</sup> At [87].

<sup>415</sup> Wai 2544, #3.1.30 at [68] – [69].

<sup>416</sup> At [68].

<sup>417</sup> At [69].

<sup>418</sup> Wai 2544, #3.1.48.

<sup>419</sup> At [19.1b].

Waiariki, Ngāti Kororā and Ngāti Taka Pari have consented to being included in the Deed of Mandate,<sup>420</sup> and

- c. The Crown failed to meet with the claimants or their hapū within the safety of their own surroundings, and ignored their desire to be removed from the Deed of Mandate.<sup>421</sup>

228. In terms of significant and irreversible prejudice relating to hapū rights, the claimants make the following submissions:<sup>422</sup>

- a. They will lose the inherent rights of their hapū; and
- b. They will lose customary proprietary rights.

229. The claimants submit that these rights are mutually exclusive, and are significant. The claimants also note that the potential remedial right under section 8HB of the Treaty of Waitangi Act to the Glenbervie Forest is financially large.<sup>423</sup>

230. They claimants also submit that they have been and will be significantly and irreversibly prejudiced by the following:<sup>424</sup>

- a. Having the corporate and collective nature of their hapū questioned and delegitimised;
- b. The Minister rejecting an invitation to meet with hapū;
- c. Ignoring the claimants' request to have their hapū removed from the Deed of Mandate;
- d. Ignoring the identity and autonomy of the claimants and their hapū; and
- e. Causing inter-tribal conflicts.

231. In terms of the Crown's assertion that alternative remedies are available, the claimants make the following submissions:<sup>425</sup>

- a. The claimants believe that it will be futile to engage more with the NTB;
- b. The claimants find it bizarre for the Crown to suggest that they can participate in the process as an alternative remedy, particularly when they believe that the process itself will ultimately result in the removal of their rights;
- c. There are flaws in the dispute resolution and withdrawal processes; and

---

<sup>420</sup> At [19.1c].

<sup>421</sup> At [19.2].

<sup>422</sup> At [19.3].

<sup>423</sup> At [19.3c].

<sup>424</sup> At [19.3f].

<sup>425</sup> At [24].

- d. Participating in the ratification process is, in the claimants' view, contrary to hapū rangatiratanga.

**Wai 2550 – the Ngātiwai Trust Board Deed of Mandate (Collier and Mahanga) claim**<sup>426</sup>

232. This claim concerns the Crown's recognition of the NTB's Deed of Mandate to negotiate the settlement of Ngātiwai's outstanding Treaty of Waitangi claims, including the settlement of Wai 620. This claim was accompanied by the affidavits of Arthur Mahanga<sup>427</sup> and Ruiha Collier.<sup>428</sup>
233. The claimants, who whakapapa to Te Waiariki and Ngāti Kororā hapū, assert that these hapū are not Ngātiwai hapū. Rather, the claimants assert that these hapū are hapū of Ngāpuhi.<sup>429</sup>
234. The claimants submit that they have suffered and will continue to suffer significant and irreversible prejudice because of the Crown's failure to consult and adequately engage with the claimants, and the Crown's failure to remove Wai 620 from the NTB Deed of Mandate.<sup>430</sup>

**Crown response to the Wai 2550 application for urgency**<sup>431</sup>

235. On 15 January 2016, the Crown filed its response to the Wai 2550 application for urgency. This was accompanied by the second affidavit of Emily Owen.<sup>432</sup>
236. At the outset, the Crown notes its reliance on the submissions in response to the Wai 2544 application for urgency. The Crown also responds to several specific issues raised by the Wai 2550 claimants.<sup>433</sup>
237. The Crown makes four broad submissions in response to the Wai 2550 application for urgency:
- a. They Crown adequately engaged with the claimants,<sup>434</sup>
  - b. The Wai 2550 claimants do not represent Te Waiariki or Ngāti Kororā hapū,<sup>435</sup>
  - c. It is not for the Crown or for the Tribunal to resolve competing views of whakapapa,<sup>436</sup> and

---

<sup>426</sup> Wai 2550, #3.1.1.

<sup>427</sup> Wai 2550, #A1.

<sup>428</sup> Wai 2550, #A2.

<sup>429</sup> Wai 2550, #3.1.1 at [12a].

<sup>430</sup> At [4].

<sup>431</sup> Wai 2544, #3.1.26.

<sup>432</sup> Wai 2544, #A23.

<sup>433</sup> Wai 2544, #3.1.26 at [4].

<sup>434</sup> At [4.1].

<sup>435</sup> At [4.2].

<sup>436</sup> At [4.3].

- d. There is no prejudice to Te Waiariki or Ngāti Kororā hapū, as their inclusion in a Ngātiwai settlement is without prejudice to their inclusion in a Ngāpuhi settlement.<sup>437</sup>

238. In terms of engagement with the claimants, the Crown noted the following examples of engagement with the claimant, Ms Collier:

- a. On 9 August 2013 OTS wrote to Ms Collier encouraging her to consider making a submission on the draft mandate strategy. The letter identified that the NTB sought a mandate to negotiate a settlement of the Wai 620 claim.<sup>438</sup> At that time, the draft mandate strategy listed Ngāti Kororā as a Ngātiwai hapū.<sup>439</sup>
- b. Ms Collier made a submission dated 9 August 2013 opposing the Ngātiwai mandate strategy.<sup>440</sup> Ms Collier also added her name to a petition dated 16 August 2013 opposing the NTB mandate.<sup>441</sup>
- c. During August and September 2013 voting was held on the NTB proposal. From a total of 772 votes, 636 were in favour of the mandate.<sup>442</sup>
- d. On 5 December 2013, OTS officials met with a number of claimants, including Ms Collier, concerning the NTB mandate. Ms Collier expressed her view that the Crown's large natural grouping policy was flawed. The claimants expressed concern over the lack of input into the decision making of the NTB. The claimants also expressed concern about the whakapapa links the NTB was claiming.<sup>443</sup>
- e. By 8 July 2014 the NTB had prepared a deed of mandate which included Te Waiariki and Ngāti Kororā as hapū of Ngātiwai. The Deed of Mandate noted that these hapū were included in the claimant definitions of other large natural groups, and so the NTB would only negotiate the settlement of these claims insofar as they relate to Ngātiwai.<sup>444</sup>
- f. From July to September 2014 OTS sought submissions on the NTB Deed of Mandate.<sup>445</sup> On 20 August 2014, Ms Collier made a submission in which she opposed the inclusion of Te Waiariki within the NTB mandate.<sup>446</sup> On 18 October 2014 Ms Collier attended a hui with OTS and the NTB to discuss the NTB mandate.<sup>447</sup> On 6 November 2014 OTS wrote to Ms Collier as a follow up to that

---

<sup>437</sup> At [4.4].

<sup>438</sup> At [5].

<sup>439</sup> At [6].

<sup>440</sup> At [7].

<sup>441</sup> At [8].

<sup>442</sup> At [9].

<sup>443</sup> At [10].

<sup>444</sup> At [11].

<sup>445</sup> At [12].

<sup>446</sup> At [13].

<sup>447</sup> At [14].

hui.<sup>448</sup> On 15 March 2015 OTS met with submitters from the Te Waiariki cluster, including Ms Collier.<sup>449</sup>

- g. On 7 August 2015, OTS wrote to Ms Collier referring to the March 2015 hui. The letter noted differing views expressed in that hui regarding the status of Te Waiariki, with some people stating that Te Waiariki was an iwi in its own right, some stating that Te Waiariki is a hapū of Ngāpuhi, and some stating that Te Waiariki is a hapū of Ngātiwai.<sup>450</sup> The letter encouraged Ms Collier to contact the NTB to address how the interests of Te Waiariki and Ngāti Kororā would be addressed throughout negotiations.<sup>451</sup>

239. In terms of the claimants not being representative of Te Waiariki and Ngāti Kororā, the Crown makes the following submissions:

- a. Ms Collier and Mr Mahanga are clear that they do not bring this application on behalf of all the named claimants for Wai 620.<sup>452</sup>
- b. There is no evidence in the record that Ms Collier and Mr Mahanga represent Te Waiariki or Ngāti Kororā in any capacity, or that they command broad support within those groups.<sup>453</sup>
- c. There is a range of views within Te Waiariki and Ngāti Kororā as to the connection these groups have with Ngātiwai.<sup>454</sup>

Ngātiwai Trust Board response to the Wai 2550 application for urgency<sup>455</sup>

240. On 15 January 2016 the NTB filed its response to the Wai 2550 application for urgency.<sup>456</sup> This was accompanied by the second affidavit of Tania McPherson<sup>457</sup> and the second affidavit of Kristan MacDonald.<sup>458</sup>

241. The NTB opposes the application for urgency on the basis that the claimants cannot demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies.<sup>459</sup>

242. The NTB also believes that the following matters are relevant to the Tribunal's consideration of the application for urgency:

- a. Whakapapa and historical evidence do not support the claimants' contention that Te Waiariki and Ngāti Kororā are hapū of Ngāpuhi alone, rather than shared hapū with links to both Ngāpuhi and Ngātiwai;<sup>460</sup>

---

<sup>448</sup> At [15].

<sup>449</sup> At [16].

<sup>450</sup> At [18].

<sup>451</sup> At [19].

<sup>452</sup> At [22].

<sup>453</sup> At [23].

<sup>454</sup> At [24].

<sup>455</sup> Wai 2544, #3.1.27.

<sup>456</sup> Wai 2544, #3.1.27.

<sup>457</sup> Wai 2544, #A25.

<sup>458</sup> Wai 2544, #A24.

<sup>459</sup> Wai 2544, #3.1.27 at [2].

- b. The claimants have not provided any evidence that they have been mandated by their hapū;<sup>461</sup>
- c. The NTB engaged with the claimants in good faith, and provided the claimants with numerous opportunities for them to present their views;<sup>462</sup> and
- d. The Deed of Mandate sets out mechanisms to ensure that the interests of Te Waiariki, Ngāti Kororā and other shared hapū are protected.<sup>463</sup>

243. The NTB reiterates their submission that Te Waiariki and Ngāti Kororā are shared hapū. This shows that the prejudice asserted by the claimants of having hapū claims settled by an iwi to which they have no relationship does not apply.<sup>464</sup>

244. The NTB submits that the position taken by the claimants shows that there are a range of views within Te Waiariki and Ngāti Kororā in respect of representation matters.<sup>465</sup> They submit that such matters are not issues into which the Tribunal should inquire. Furthermore, they note that the claimants have not provided evidence that they represent all, or even a substantial portion, of Te Waiariki and Ngāti Kororā.<sup>466</sup>

245. In terms of engagement, the NTB submits that throughout the mandating process the claimants had a number of opportunities to express their views on the NTB's proposals.<sup>467</sup> The NTB reiterates that this is not a case of the claimants being locked out of the process, or being ignored.<sup>468</sup>

246. Finally, the NTB notes that in regards to claims from shared hapū, the NTB only has a mandate to negotiate the settlement of those claims insofar as they are derived from Ngātiwai whakapapa.<sup>469</sup>

#### Claimants' reply submissions for Wai 2550<sup>470</sup>

247. On 4 February 2016 counsel for Wai 2550 filed a memorandum with the Tribunal seeking a filing extension for filing submissions in reply. Counsel noted that legal aid had not been granted for the application, and sought leave to file submissions once legal aid had been granted.

248. The Tribunal has not received any further updates from counsel for the Wai 2550 claimants.

---

<sup>460</sup> At [4a].

<sup>461</sup> At [4b].

<sup>462</sup> At [4c].

<sup>463</sup> At [4d].

<sup>464</sup> At [11].

<sup>465</sup> At [12].

<sup>466</sup> At [13].

<sup>467</sup> At [15].

<sup>468</sup> At [16].

<sup>469</sup> At [17].

<sup>470</sup> Wai 2544, #3.1.35.



**Wai 2557 – the Ngātiwai Trust Board Deed of Mandate (Reti) claim**<sup>471</sup>

249. This claim concerns the Crown’s recognition of the NTB’s Deed of Mandate to negotiate the settlement of Ngātiwai’s outstanding Treaty of Waitangi claims. This claim was accompanied by the affidavit of Elvis Reti.<sup>472</sup>

250. The claimant alleges that the Crown has breached the principles of the Treaty of Waitangi by failing to actively protect his taonga and other interests. The claimant alleges that he is suffering significant and irreversible prejudice as a result of the Crown’s recognition of the NTB’s Deed of Mandate.

**Crown response to the Wai 2557 application for urgency**<sup>473</sup>

251. On 1 April 2016, the Crown filed its response to the Wai 2557 application for urgency. This was accompanied by the fourth affidavit of Emily Owen.<sup>474</sup>

252. The Crown opposes the application for the following reasons:<sup>475</sup>

- a. The Crown adequately engaged with the claimant, and did not ignore his submissions;<sup>476</sup>
- b. There is adequate representation and accountability in the deed of mandate;<sup>477</sup>
- c. There is an abundance of historical research on the Wai 1040 Te Paparahi o Te Raki record of inquiry that concerns Ngātiwai, and which could be used for the purposes of an historical settlement with Ngātiwai;<sup>478</sup>
- d. A Ngātiwai settlement is not imminent;<sup>479</sup>
- e. There are several alternative remedies which the claimant can pursue, including those outlined in the Crown’s previous responses;<sup>480</sup> and
- f. The claimant has not demonstrated that he has any support behind his request to halt negotiations between the Crown and the NTB.<sup>481</sup>

**Ngātiwai Trust Board response to the Wai 2557 application for urgency**<sup>482</sup>

253. On 6 April 2016, the NTB filed its response to the Wai 2557 application for urgency. This was accompanied by the affidavit of Gary Reti<sup>483</sup> and the joint affidavit of Merepeka Henley and Henry Murphy.<sup>484</sup>

---

<sup>471</sup> Wai 2557, #3.1.1.

<sup>472</sup> Wai 2557, #A1.

<sup>473</sup> Wai 2544, #3.1.74.

<sup>474</sup> Wai 2544, #A55.

<sup>475</sup> Wai 2544, #3.1.74.

<sup>476</sup> At [4.1].

<sup>477</sup> At [4.2].

<sup>478</sup> At [4.3].

<sup>479</sup> At [4.4].

<sup>480</sup> At [4.5].

<sup>481</sup> At [4.6].

<sup>482</sup> Wai 2544, #3.1.75.

254. The NTB opposes this application for urgency, and submits that the claimant has not met the criteria for granting an urgent hearing.<sup>485</sup>
255. In terms of representation and accountability under the deed of mandate, the NTB submits that the claimant has not provided any details relating to either representation or accountability.<sup>486</sup>
256. In terms of a lack of historical research to support negotiations, the NTB states that there is a large amount of research which has already been undertaken into the Ngātiwai claims.<sup>487</sup>
257. In terms of parallel process, the NTB reiterates its position that a parallel process will best serve the interests of Ngātiwai.<sup>488</sup>
258. Finally, the NTB submits that the claimant does not have widespread support, and have filed the affidavit of the claimant's older brother – Gary Reti – to show a general lack of support for the application for urgency.<sup>489</sup>

### **Submission of the Crown responding generally to the Ngātiwai Urgency Applications**

#### *Response to the Wai 156, Wai 745, Wai 2337, Wai 2545, Wai 2546, Wai 2548, and Wai 2549 applications for urgency*<sup>490</sup>

259. On 27 January 2016 the Crown filed its response to the Wai 156, Wai 745, Wai 2337, Wai 2545, Wai 2546, Wai 2548, and Wai 2549 applications for urgency. This was accompanied by the third affidavit of Emily Owen.<sup>491</sup>
260. The Crown again notes its reliance on the responses to the Wai 2544 and 2550 applications for urgency, namely that:<sup>492</sup>
- a. There is no demonstrable prejudice to the various claimants;<sup>493</sup>
  - b. There are alternative remedies available;<sup>494</sup>
  - c. The NTB has the support of Ngātiwai;<sup>495</sup> and
  - d. It is not for the Crown to determine whakapapa issues.<sup>496</sup>

---

<sup>483</sup> Wai 2544, #A56.

<sup>484</sup> Wai 2544, #A57.

<sup>485</sup> Wai 2544, #3.1.75 at [2].

<sup>486</sup> At [3].

<sup>487</sup> At [6].

<sup>488</sup> At [10].

<sup>489</sup> At [12] – [13].

<sup>490</sup> Wai 2544, #3.1.28.

<sup>491</sup> Wai 2544, #A26.

<sup>492</sup> Wai 2544, #3.1.28.

<sup>493</sup> At [4.1].

<sup>494</sup> At [4.2].

<sup>495</sup> At [4.3].

261. The Crown then responds to specific issues raised by each of the applications for urgency.

### **Submission of the Ngātiwai Trust Board responding generally to the Ngātiwai Urgency Applications**

#### *Response to the Wai 156, Wai 745, Wai 2337, Wai 2545, Wai 2546, Wai 2548, and Wai 2549 applications for urgency*<sup>497</sup>

262. On 27 January 2016 the NTB filed its response to the Wai 156, Wai 745, Wai 2337, Wai 2545, Wai 2546, Wai 2548 and Wai 2549 applications for urgency. This was accompanied by the third affidavit of Kristan MacDonald,<sup>498</sup> the third affidavit of Tania McPherson,<sup>499</sup> and the affidavits of Pepuere Pene,<sup>500</sup> Te Rahingahinga Reti,<sup>501</sup> Rihi Ngāroimata Kathleen Pita,<sup>502</sup> and Nicola MacDonald.<sup>503</sup>

263. In setting out its submission in response, the NTB first addresses issues which are common in the above applications. These issues are:

- a. NTB's consultation with claimants;
- b. Whether certain hapū are Ngātiwai hapū;
- c. Overlapping areas of interest;
- d. Parallel processes with the Wai 1040 Te Paparahi o Te Raki Inquiry;
- e. Representation by the NTB;
- f. The structure of the NTB;
- g. The NTB's election processes; and
- h. Whether engagement and accountability processes under the Deed of Mandate are adequate.

264. In terms of consultation, the NTB submits that while it is inevitable in a process such as this that some individuals and groups will experience frustrations at some point, that does not mean that the process as a whole was inadequate.<sup>504</sup> The NTB notes that both TPK officials and the independent observer contracted by the NTB found that the consultation process was appropriate.<sup>505</sup> The NTB submits that no claimants suffered

---

<sup>496</sup> At [4.4]

<sup>497</sup> Wai 2544, #3.1.30.

<sup>498</sup> Wai 2544, #A27.

<sup>499</sup> Wai 2544, #A28.

<sup>500</sup> Wai 2544, #A32.

<sup>501</sup> Wai 2544, #A30.

<sup>502</sup> Wai 2544, #A29.

<sup>503</sup> Wai 2544, #A31.

<sup>504</sup> Wai 2544, #3.1.30 at [9].

<sup>505</sup> At [9c] – [9d].

prejudice as a result of the manner in which the consultation process was conducted.<sup>506</sup>

265. In terms of whether or not certain hapū are Ngātiwai hapū, the NTB looks specifically at Te Whakapiko, Te Kapotai, Te Waiariki, Ngāti Kororā and Ngāti Taka Pari.<sup>507</sup> Although the NTB acknowledges that all constituent hapū have their own unique origins and identities, it submits that there is a legitimate historical and whakapapa basis for its position that each of these hapū are, at least in part, hapū of Ngātiwai.<sup>508</sup>
266. In any case, the NTB agrees that it is not for the Crown to determine issues relating to whakapapa and identity. However, the NTB submits that the Crown has been provided with sufficient evidence to accept that the Deed of Mandate appropriately records some hapū as being shared hapū of Ngātiwai and other iwi.<sup>509</sup>
267. The NTB does not believe that the inclusion of these shared hapū in the Deed of Mandate prejudices those hapū. Furthermore, the NTB submits that its intent is to avoid any prejudice to Ngātiwai members of those hapū who feel their interests might be neglected if not included within a Ngātiwai settlement.<sup>510</sup>
268. In terms of overlapping areas of interest, the NTB notes that the map contained in the Deed of Mandate notes that the Ngātiwai area of interest does not delineate exclusive iwi boundaries. Furthermore, the NTB will only settle those aspects of claims located within the Ngātiwai area of interest insofar as they relate to Ngātiwai interests.<sup>511</sup>
269. The NTB submits that having an iwi with overlapping interests enter the negotiations process does not constitute a prejudice for any claimant or group.<sup>512</sup>
270. In terms of participation in the Wai 1040 Te Paparahi o Te Raki Inquiry, the NTB noted that some claimants wished to remain as participants in that inquiry, namely the claimants for Wai 156, Wai 745, Wai 2545 and Wai 2546, as well as some of the interested parties.<sup>513</sup>
271. The NTB states that its decision to move into direct negotiations was not made lightly. However, the NTB felt it would be in the best interests of Ngātiwai to proceed to negotiations without waiting for a Tribunal report.<sup>514</sup> The NTB also states that, at section 54 of the Deed of Mandate, it has been prepared to support a parallel process which would allow the claimants to continue to access funding to support the presentation of their claims to the Tribunal.<sup>515</sup>
272. The NTB notes that most, if not all, of the claimants for Wai 156, Wai 745, Wai 2545 and Wai 2546 have already appeared in the Wai 1040 inquiry, or are scheduled to do

---

<sup>506</sup> At [10].

<sup>507</sup> At [11].

<sup>508</sup> At [12] – [13].

<sup>509</sup> At [15].

<sup>510</sup> At [17].

<sup>511</sup> At [20].

<sup>512</sup> At [22].

<sup>513</sup> At [23].

<sup>514</sup> At [24].

<sup>515</sup> At [26].

so.<sup>516</sup> Furthermore, OTS has confirmed to the NTB that it is prepared to enter negotiations on the basis that the Tribunal's jurisdiction to report on Ngātiwai claims is preserved. However, the NTB also accepts that settlement legislation will ultimately remove the Tribunal's ability to make binding recommendations.<sup>517</sup>

273. Finally, the NTB notes that it is premature to say the claimants are prejudiced simply by the Crown's recognition of the NTB's Deed of Mandate. Rather, the NTB's submission is that real prejudice would have resulted if the Crown had refused to entertain any direct negotiations until the Wai 1040 inquiry is complete.<sup>518</sup>
274. In terms of representation, and the desire of several claimants to be represented in negotiations by a body that is not the NTB, the NTB looks at the Crown's policy of negotiating only with large natural groupings (LNG). The NTB notes that this policy has been refined over more than a decade, and has been scrutinised by the Tribunal on a number of occasions. The NTB submits that the LNG policy is the best option for Ngātiwai.<sup>519</sup>
275. The NTB notes the flexible application of this policy in the past with other Ngātiwai hapū, and in particular the Crown's recognition of Ngāti Rehua, Ngātiwai ki Aotea and Ngāti Manuhiri as LNG's. With some reservations, the NTB supported the opportunities those hapū were presented to advance and resolve their claims in the context of the Tamaki Makaurau Collective.<sup>520</sup> Beyond those cases, however, the NTB took the view that further settlement at the level of hapū or whānau would not be accepted by the Crown, and would not be in the best interests of Ngātiwai as a whole. The NTB is therefore unapologetic in driving for unity of the remainder of Ngātiwai in terms of settlement.<sup>521</sup>
276. In terms of the structure of the NTB and the assertion that the NTB does not represent hapū, the NTB notes that its current structure, which is based on marae, was chosen many years ago. The NTB submits that the structure has proven to be robust, and is fit for purpose.<sup>522</sup>
277. The NTB acknowledges that additional efforts are appropriate in order to ensure that hapū perspectives are heard within the negotiations process. Also, the NTB notes that its current structure may not be what is required to advance Ngātiwai post-settlement.<sup>523</sup>
278. That said, the NTB notes that it will staunchly resist any suggestion that either the Crown or the Tribunal are entitled to inquire into the manner in which Ngātiwai has chosen to govern itself.<sup>524</sup> Additionally, the NTB notes that claimants are entitled to

---

<sup>516</sup> At [27].

<sup>517</sup> At [28].

<sup>518</sup> At [29].

<sup>519</sup> At [32].

<sup>520</sup> At [33].

<sup>521</sup> At [34].

<sup>522</sup> At [38].

<sup>523</sup> At [39].

<sup>524</sup> At [40].

register with the NTB as members of Ngātiwai, and are therefore able to participate in the mandating process.<sup>525</sup>

279. In terms of the election processes, the NTB has previously acknowledged that the trust deed requirement that all nominees for election must be endorsed by the Chair of the marae is problematic.<sup>526</sup> However, its position is that it is not for the Crown or the Tribunal to inquire into the manner in which Ngātiwai has chosen to govern itself.<sup>527</sup>
280. In terms of the adequacy of engagement and accountability processes under the Deed of Mandate, the NTB again notes that it has been a robust and effective representative entity for Ngātiwai for several decades.<sup>528</sup> The NTB's submission is that the claimants will not be prejudiced by the Crown's recognition of its Deed of Mandate. Furthermore, the NTB submits that it is not for the Crown or the Tribunal to inquire into the manner in which Ngātiwai proposes to engage with iwi members in the negotiations process.<sup>529</sup>

### **Claimant submissions replying generally to the Crown and Ngātiwai Trust Board**

281. As noted above, on 14 December 2015 I directed the claimants for Wai 2550 to file submissions and evidence in reply to those of the Crown and the NTB by 5 February 2016.<sup>530</sup>
282. On 19 January 2016 the Chairperson directed the claimants for Wai 156, Wai 745, Wai 2181, Wai 2337, Wai 2544, Wai 2545, Wai 2546, Wai 2548 and Wai 2549, as well as any interested parties, to file submissions and evidence in reply to those of the Crown and the NTB by 17 February 2016.<sup>531</sup>
283. On 17 February 2016 I granted a further filing extension via email from the Registrar for the filing of submissions in reply from the various claimants. Parties were directed to file reply submissions by 18 February 2016.

### **Discussion**

284. I should say at this point, while it may appear that I have a view as to the ultimate merits of the claims, my view is not relevant except to the extent that I must be satisfied that the claims must have, at least, the prospect of success. I am merely concerned with the assertion that the Tribunal should be diverted from its planned schedule and channel its limited resources to an urgent hearing of these claims.
285. Clearly the threshold must be high and the circumstances be exceptional. The *Guide to Practice and Procedure* at para 2.5(1) says:

---

<sup>525</sup> at [41].

<sup>526</sup> at [43].

<sup>527</sup> at [44].

<sup>528</sup> at [46].

<sup>529</sup> at [47].

<sup>530</sup> Wai 2544, #2.5.2.

<sup>531</sup> Wai 2544, #2.5.3.

**(1) Criteria for applications seeking urgent Tribunal consideration**

In deciding whether to grant urgent consideration to a claim or claims, the Tribunal must set criteria for determining the proper deployment of its resources to research, hear, and report on all the claims before it. The Tribunal will grant an urgent hearing only in exceptional cases and only once it is satisfied that adequate grounds for according priority have been made out. Such hearings will inevitably delay programmed hearings already in train, and the claims of those seeking priority must be balanced against the numerous claims involved in inquiries in hearing and in preparation. Deferral of an existing hearing is often the practical effect of a Tribunal decision to grant an urgent hearing.

286. There then follows the Tribunal's guide to the factors this Tribunal is likely to regard as pivotal. The *Guide to Practice and Procedure* is not intended to fetter the Tribunal in its decision as to whether or not to grant urgency, it is designed to assist claimants to focus on the usual elements that will be determinative. It is not a matter of ticking the boxes, however because other factors may well come into play and different weight might have to be given to different factors.
287. Because my function is confined to the urgency issue it is not appropriate that I delve too deeply into the detail of the claims. I must look at the evidence in a broad way and in the end do what I consider to be right. In this matter there is a huge amount of material contained in many affidavits with a large number of attachments.
288. It cannot go unstated that the issues involved are very close to those considered in the *Ngāpuhi Mandate Inquiry Report*. In her letter of transmittal to the ministers concerned Judge Reeves said:<sup>532</sup>
- Their other allegations were variations upon a central theme – that is, that the Crown had breached the principles of the Treaty of Waitangi by failing to protect actively the ability of hapū to exercise their rangatiratanga in determining when and how they would settle their claims.
289. That there is again a similar assertion pivotal to the claim before me is unsurprising. Ngātiwai and Ngāpuhi are immediate neighbours with close whakapapa and historical connections. The preliminaries to settlement are going on at the same time. The issues seem to reflect the dynamics in the northern part of Te Tai Tokerau.
290. There are a series of claims which diverge or depart from the central theme. They seem to be concerned more with relationships within kin groups, within marae administration, or in some cases, personal disputes, rather than matters of such moment as would lead the Tribunal to grant urgency.
291. It is clear there is an element of distrust of the NTB, and in some cases the differences have become intensely personal. The NTB has recognised there are difficulties. An example is the requirement in the Deed of Mandate that nominees for election must be endorsed by the Chairperson of the appropriate marae, who may not be acting properly. It should not be overlooked, however that most marae are governed by the

---

<sup>532</sup> *Ngāpuhi Mandate Inquiry Report*, p ix – x.

Maori Reservation Regulations 1994, beneficiaries may have recourse to the Maori Land Court<sup>533</sup> and also note that the Marae Chairperson only holds that position until the trustees appoint a new Chairperson. There is also a dispute as to what form a document was in when it was signed and what was subsequently added. This has become deeply personal with allegations of defamation, fraud etc. In the end this dispute, and the others scattered throughout the pleadings and evidence, are simply distractions from what really matters on these applications.

292. What is central and telling for this application is that mandate is said to be granted on the Ngātiwai iwi register on the basis of 'one person one vote', and it cannot be ascertained which, or if any hapū have given their mandate to the NTB.

293. A number of deponents in their affidavits take strong exception to the failure of the Crown to deal with hapū. Patu Hohepa regards the Crown's actions as:<sup>534</sup>

a fundamental breach of the promise of tino rangatiratanga to our hapu and our tupuna, who were signatories to Te Tiriti o Waitangi.

294. Ani Pitman, speaking for a different kin group, said:<sup>535</sup>

10. The issue before the Tribunal relates to the actions and omissions of the NTB and the Crown. It is about how an entity has attempted to subsume our mana and hapu rangatiratanga as Patuharakeke by purporting to represent our interests *without* engaging with us appropriately, securing our mandate or ascertaining our interests. The NTB has not achieved their mandate by behaving in a manner that is transparent, accountable, *meaningful* and *respectful* to us.

11. Our hapu rangatiratanga – our identity and mana as Patuharakeke – has always been of utmost importance to us. In order for Patuharakeke to assert our rangatiratanga as hapu and ensure that it is respected meaningfully we have been forced to make this application for an urgent inquiry into NTB's mandate that seeks to settle our claims.

12. Patuharakeke has the right to determine our own destiny without being forced into a position that is not or is not likely to be beneficial to us or that has not involved us. The NTB Deed of Mandate ("NTBDOM") will essentially extinguish our rights to have our grievances prosecuted.

295. There are a whole series of affidavits which take the point, and it is neatly summarised in the second affidavit of Willow-Jean Prime at [82] – [83].<sup>536</sup>

82. At paragraph 18, Ms Owen notes that there were 636 votes in favour of the resolution, with 131 votes against, and 5 blank voting papers

<sup>533</sup> Maori Reserve Regulations 1994, regulation 21.

<sup>534</sup> Wai 2544, #A49, at [17].

<sup>535</sup> Wai 2544, #A10(b), at [10] – [12].

<sup>536</sup> Wai 2544, #A42, at [82] – [83].



returned. There was a total participation rate of 28.2%, being 772 votes returned from 2,735 eligible voters.

83. I want to know how many of those 636 votes in favour of the Ngatiwai Trust Board Deed of Mandate were from Te Kapotai?

296. This level of opposition from hapū has been evident for some time, and lists of the people opposing have been available to the Crown and NTB at least since August 2013.<sup>537</sup>

297. The NTB commissioned Fathom Consulting Group to review submissions made on the Deed of Mandate, and in its report of May 2015 it reported the following:<sup>538</sup>

NTB's structure is currently based on marae. As a result, NTB has relatively good information about registered member's affiliations with marae but information about Ngātiwai hapū membership is poor. The Deed of Mandate lists 14 Ngātiwai hapū but, based on the submissions received, only three hapū have an internal leadership structure and claim to hold a representative mandate for their hapū. (noting that no evidence of mandate was provided), the three hapū groups – Te Kapotai, Te Waiariki (and associated hapū Ngāti Takapari and Ngāti Korora) and Patuharakeke have each indicated that they wish to settle separately from Ngātiwai. ...

Together these factors create challenges for improving hapū representation in the direct negotiation process. The Deed of Mandate nevertheless does provide for hapu involvement in the supporting structures.

298. I apprehend that the central proposition for most claimants is that the confirmation and guarantee contained in Article 2 of Te Tiriti was to the rangatira, the hapū, and to all of 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.

299. It is suggested that the claimants are a small but vocal minority. Certainly the voting was approximately six to one in favour of mandate. I have already referred to the list of signatures in August 2013. They totalled approximately 80 and were against mandate. In February of this year 525 signatures were gained in a petition upon these terms:<sup>539</sup>

We the undersigned OPPOSE Crown recognition of the Ngatiwai Trust Board (NTB) mandate on the following grounds:

- (a) There has been insufficient engagement from both the Crown and the Ngatiwai Trust Board during the mandating process;
- (b) The NTB mandate does not recognise hapu rangatiratanga;
- (c) The NTB mandate structure is not representative of the Ngatiwai people;
- (d) The NTB fundamentally misapplies Tikanga; and

<sup>537</sup> Wai 2544, #A34(a).

<sup>538</sup> Wai 2544, #A2(a) p 395 at [37] – [39].

<sup>539</sup> Wai 2544, #A34(a) at p 93 – 196.

- (e) We support whanau and hapu claimants who have filed for an Urgent Hearing with the Waitangi Tribunal on the recognition of the NTB Mandate

Certainly a number of the 80 are included in the 525 and they cannot simply be added together.

300. However, in these circumstances it would be difficult indeed for me to find that the present applications are simply an expression of dissatisfaction from a small and vocal group of dissidents.<sup>540</sup>
301. Both the Crown and the NTB have asserted there are a series of alternative remedies, that in the circumstances, it would be reasonable for the claimants to exercise. These are referred to within this decision at para 21(b) and para 31 and I will not repeat them here.
302. The alternative remedies are not really alternatives because they propose that the claimants consider themselves bound by the deed of mandate and use the structures in the deed to achieve their ends. There is an understandable unwillingness to proceed in that way because the claimants say their hapū have never given a mandate and it would be inconsistent for them to operate under the terms of the deed.
303. I recognise immediately that the NTB themselves recognise there is a tension within the organisation and they intend to attempt to address this.
304. I note that clause 26 of the Deed of Mandate reads:

**26. Inclusion of Hapū and Marae Representatives**

The NTB will enable and provide for all Ngātiwai Hapū and Marae to provide advice to the NTB on their involvement in the negotiations and settlement process.

**Set up and Structure:** NTB will invite Hapū and Marae representatives to discuss their inclusion in the settlement process and how best this can be achieved.

**Purpose:** To develop positive working relationships, work through issues and find agreeable solutions.

**Accountability:** Provide advice to the NTB rather than report to it and assist the NTB to communicate with whanau members to ensure accurate information is fed back to all members.

305. It seems clear to me that this clause provides for advice being given by hapū and discussions taking place with hapū, to develop positive working relations and to work through issues, but it is founded on a proposition that hapū have in some oblique way given their mandate to NTB. I also note para 53 which deals with disputes procedure. Leaving aside the proposition that this doesn't relate to hapū that have not given their

---

<sup>540</sup> A full discussion of the "numbers matter" issue is contained in the *East Coast Settlement Report 2010*.

mandate, it is clear the claimants and NTB are in a complete deadlock over the issue and it won't be solved in this way.

306. The mandate amendment and removal process is contained at clause 57 of the Deed of Mandate. I set that out in detail:

**57 Steps for amending or withdrawing the mandate**

1. **Documenting concerns and meeting to resolve concerns:** A letter must be written by the claimant community representatives to the Chair of the mandated body identifying the nature and extent of their concerns and also seeking a meeting within a reasonable time frame to discuss these matters. The letter must be co-signed by at least 100 adult registered members on the NTB tribal register (aged 18 years and over).
2. **Mandate Amendment/Withdrawal Process to be followed:** If the meeting between the claimant community representatives and the Chair of the mandated body does not resolve the concerns, then the claimant community may organise a series of publicly notified hui. The publicly notified hui should follow the same process and procedures that conferred the mandate including:
  - A public notice/panui must outline the kaupapa of the notified hui;
  - The public notice must provide 21 days' notice of the hui in national and regional print media;
  - Nine hui must be held both nationwide and within rohe of Area of Interest;
  - A consistent presentation must outline the background to the concerns and the parties involved;
  - A detailed paper must be provided (similar to this one) outlining any alternative proposals or amendments;
  - The resolution(s) to put the claimant community must be consistent at each hui;
  - An independent returning officer must be employed to oversee the voting process and notify results; and
  - An observer from Te Puni Kokiri must be invited to observe and record proceedings.

307. In relation to sub-clause 1, it doesn't seem clear to me who the claimant community in a particular case is, who the representatives are, and how a difference of opinion between people on the ground and their representatives could be accommodated. What is clear is that the expression "claimant community" can hardly be said to refer to hapū, and probably refers to marae. It cannot simply be said that the letter co-signed by 100 adult registered members on the NTB register will do the trick. Sub-clause 2 makes it very clear that it is the claimant community that must organise a series of publically notified hui with 9 hui being held nationwide and within the rohe or area of interest. The process cannot be said to be simple or user friendly. It is near to

unworkable, and appears entirely inappropriate when a hapū simply says that they are not part of that structure.

308. I notice that a similar issue was discussed in the *Ngāpuhi Mandate Inquiry Report* where the Tribunal said:<sup>541</sup>

There is no workable withdrawal mechanism when the clear ability to withdraw would, we consider, give hapū currently opposing the Tūhoronuku IMA in confidence to become involved, knowing they are not trapped if they lose faith in their mandated representatives.

309. The issues of delay and prejudice, and the irreversibility of that prejudice, are somewhat intertwined. If the process continues to travel down the path to settlement outlined in the affidavits of Emily Vivian Owen, it may well get to the point where the parties have expended immense effort only to find that the proposed settlement fails in some way and in particular, on the central issue before me. On the other hand, as settlement approached, claimants could find themselves having to meet the argument that the prejudice caused to them would be outweighed by the prejudice potential in the delay of an imminent settlement. The issue of hapū rangatiratanga has to be addressed at some point.
310. If there is prejudice, as there well may be to the hapū concerned, that prejudice will grow as the process goes ahead to the extent that a reversal will become increasingly difficult.
311. I consider it is better the problem be addressed at this stage. There is clearly considerable support for the claims. The matter of hapū rangatiratanga is an important issue, and the claimants may be able to take a level of comfort from the *Ngāpuhi Mandate Inquiry Report*. To carry on now may create a situation that will be increasingly difficult to vary or unpick.
312. It may be there is time and a willingness to negotiate, but the evidence does not disclose any enthusiasm for compromise. I note that none of the parties have suggested mediation, and I have not exercised my power to refer the matter for mediation for that very reason. The Tribunal hearing the substantive claims will of course have the power to do so if appropriate.

## Decision

313. Urgency is granted to the part of the claims that relate to what I have referred to as the central theme, but on conditions. I should be precise as to exactly how the grant is formulated so the parties and Tribunal are absolutely clear what the urgent hearing is dealing with. I have some hesitation in setting out the issue without consultation with the parties' counsel, and for that reason, if they wish to be heard on the formulation of the matter to be heard urgently, they must file submissions with the Tribunal on or before **9 May 2016**. I will then consider and finalise this decision. So that the parties

---

<sup>541</sup> *Ngāpuhi Mandate Inquiry Report*, at p 94.

are absolutely clear, I will only receive submissions on the formulation of the central theme.

314. To that extent, and subject to receiving those submissions, the matter to be heard is:

- a. Are the claimants themselves, or any group of Maori of which they are a member prejudicially affected or likely to be prejudicially affected by a policy or practice, act or omission of the Crown that is inconsistent with the principles of the Treaty?
- b. The policy, practice, act or omission alleged is the Crown's recognition of a mandate held by the NTB in relation to the hapū referred to in the NTB's Deed of Mandate without the support and consent of those hapū.

315. The conditions of the grant of urgency are:

- a. That all written materials filed on the applications for urgency are admitted and form part of the record of inquiry for the urgent hearing; and
- b. That any further briefs of evidence, affidavits or evidence in any form are to be filed and served in the usual way **within 40 calendar days of the date of this decision.**

316. If these conditions are not met I reserve to myself the right to vary or withdraw the grant of urgency.

317. Accordingly I have granted urgency on what I consider to be the central and pivotal issue. I decline to grant urgency on any other parts of the claims.

The Registrar is to send this direction to all those on the notification list for Wai 2544, the Ngātiwai Trust Board Deed of Mandate claim.

**DATED** at  this  day of  2016

  
Judge P J Savage  
Deputy Chairperson

**WAITANGI TRIBUNAL**